S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRADLEY WAYNE ESCOTT,

Defendant-Appellant.

UNPUBLISHED
June 23, 2011

No. 297206
Monroe Circuit Court
LC No. 09-037639-FC

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of assault with intent to murder, MCL 750.83, for which he was sentenced to 7 to 40 years in prison. We affirm.

Defendant first argues that the trial court erred by denying his requests to provide jury instructions relating to the lesser offenses of intentionally pointing a firearm without malice, CJI2d 11.23, discharge of firearm while intentionally aimed without malice, CJI2d 11.24, reckless or wanton use of a firearm, CJI2d 11.26, firearm discharge, CJI2d 11.37, and assault with a dangerous weapon, CJI2d 17.9. We disagree. A claim of instructional error involving a question of law is reviewed de novo, while a trial court's determination that a jury instruction applies to the facts of a case is reviewed for an abuse of discretion. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). A trial court has abused its discretion only when its decision falls outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

The trial court did not err by denying defendant's request to instruct the jury on several cognate lesser offenses. MCL 768.32 permits the trial court to instruct the jury on necessarily included lesser offenses only, not cognate offenses. *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010); see also *People v Cornell*, 466 Mich 335, 357-358; 646 NW2d 127 (2002), overruled in part on other grounds *People v Mendoza*, 468 Mich 527 (2003). The trial court may not instruct the jury on cognate offenses. *Cornell*, 466 Mich at 353-359. Necessarily included lesser offenses are distinguishable from cognate offenses. A necessarily included lesser offense is one that has elements completely subsumed in the greater offense; hence it would be impossible to commit the greater offense without first having committed the lesser offense. *Wilder*, 485 Mich at 41. "In other words, if a lesser offense is a necessarily included offense, the evidence at trial will always support the lesser offense if it supports the greater." *People v Alter*,

255 Mich App 194, 199; 659 NW2d 667 (2003). In contrast, a cognate offense is not an inferior or lesser offense within the meaning of MCL 768.32. *Wilder*, 485 Mich at 41. A cognate offense is one that shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater offense. *Id*.

Defendant was charged with assault with intent to murder, MCL 750.83. To convict a defendant of assault with intent to murder, the prosecutor must prove the following three elements: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). The trial court correctly denied defendant's request because the requested instructions pertained to cognate offenses only, and not to necessarily included lesser offenses of the charged crime. A person can commit the charged offense of assault with intent to murder without the use of a firearm or dangerous weapon. See MCL 750.83. In contrast, the offenses of intentionally pointing a *firearm* without malice, MCL 750.233, discharge of *firearm* while intentionally aimed without malice, MCL 720.234, reckless or a wanton use of a *firearm*, MCL 752.863a, intentional discharge of a *firearm*, MCL 750.234b, and assault with a *dangerous weapon*, MCL 750.82, all require the use of a firearm or other dangerous weapon. Accordingly, all these offenses are cognate offenses because each includes at least one element not found in the greater offense of assault with intent to murder. *Wilder*, 485 Mich at 41. The trial court properly declined to instruct the jury on these cognate offenses.

Defendant next argues that the trial court abused its discretion by admitting into evidence a prior statement in which he threatened his wife, Bobbi Lowe-Escott. Again, we disagree. To preserve an evidentiary issue for review, a party must make a timely objection and specify the same grounds for objection as the party seeks to assert on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). In this case, although defendant timely objected, he failed to specify the same ground for objection that he now asserts on appeal. Consequently, his claim is unpreserved. We review unpreserved evidentiary claims for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

We hold that the trial court properly admitted the evidence because defendant's threats were admissible as statements of a party-opponent. See MRE 801(d)(2). Defendant claims that Bobbi's testimony violated MRE 404(b), which prohibits the introduction of evidence concerning a defendant's other acts if such evidence is offered to prove the defendant's character or propensity to commit the offense. However, Bobbi's testimony described defendant's prior *statements*, and MRE 404(b) is therefore not applicable because "[a] statement of general intent is not a prior act for purposes of MRE 404(b)." *People v Goddard*, 429 Mich 505, 514-515; 418 NW2d 881 (1988). Instead, defendant's threats constituted statements of a party-opponent. MRE 801(d)(2). Therefore, the admissibility of defendant's prior threat "is determined by the statement's relevancy and by whether its probative value is outweighed by its possible prejudicial effect." *People v Milton*, 186 Mich App 574, 576; 465 NW2d 371 (1990).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Evidence of a defendant's intent to harm a victim "is of the utmost relevance" in a criminal case. *People v Amos*, 453 Mich 885; 552 NW2d 917 (1996).

As noted earlier, to prove defendant was guilty of assault with intent to murder, the prosecution was required to prove actual intent to kill. *McRunels*, 237 Mich App at 181. Defendant's prior threat was highly probative of his intent to kill Bobbi. Defendant's theory of the case was that he was angry, grabbed a shotgun to shoot Bobbi's dog, and accidentally shot the gun towards the front door where Bobbi was standing. At trial, defendant maintained that he did not intend to shoot at or kill Bobbi. The prosecutor asserted that the evidence of defendant's prior threat was relevant to rebut defendant's claim that the shooting was accidental and to show that defendant had a motive or intent to kill Bobbi. We conclude that the evidence that defendant had become angry and threatened to kill Bobbi on a previous occasion was relevant to prove defendant's intent and to prove that the firearm discharge was not accidental. MRE 401.

Moreover, the probative value of the challenged evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. See *People v Orr*, 275 Mich App 587, 592; 739 NW2d 385 (2007) (noting that "evidence of prior assaults of a victim is probative of the issue of intent in a later-charged murder of the same victim and, therefore, is not unduly prejudicial"). As explained previously, defendant's threat was highly relevant to the issue of intent. Although the evidence was adverse to defendant's position, its probative value was not substantially outweighed by the danger of unfair prejudice. While all evidence presented by the prosecution is presumably prejudicial to some extent, the relevant inquiry under MRE 403 is whether the evidence is *unfairly* prejudicial. *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994). We conclude that the significant probative value of the evidence outweighed any danger of unfair prejudice to defendant. We perceive no plain error in the admission of the evidence concerning defendant's prior threatening statement.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Henry William Saad