STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANDERSON,

Defendant-Appellant.

UNPUBLISHED
December 12, 1997

No. 190265
Muskegon Circuit Court
LC No. 94-036709

Before: White, P. J., and Cavanagh and Reilly, JJ

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant, a minor, as an adult to life imprisonment for the first-degree murder conviction and to two years' imprisonment for the felony-firearm conviction. Defendant appeals his convictions and sentences as of right. We affirm.

Defendant first argues that he is entitled to a reversal because the trial court did not properly voir dire the jury pool regarding the effect of pretrial publicity. We disagree. As a general rule, in order to challenge the voir dire of the jury on appeal, the defendant must have made a timely objection below. See *People v Wibley*, 108 Mich App 527, 535; 310 NW2d 449 (1981). In this case, defendant not only failed to object to the trial court's manner of conducting the voir dire of the jury but also expressed his satisfaction with the jury ultimately selected. Because the issue was not preserved, this Court will only review it upon a showing of actual prejudice. *Id.*

Defendant contends that reversal is required under *People v Tyburski*, 445 Mich 606; 518 NW2d 441 (1994), because the trial court in this case, like the trial court in *Tyburski*, conducted an inadequate voir dire respecting pretrial publicity. As an initial matter, we note that the facts of *Tyburski* were dissimilar to the facts of this case in several respects. In particular, the trial court in *Tyburski, supra* at 611, denied defense counsel's request to directly question the prospective jurors during voir dire. In this case, defense counsel was permitted to freely participate in the voir dire of the jury, thereby affording defendant an opportunity to expose any prejudice that may have resulted from pretrial

publicity. In any event, because defendant does not argue that the jury ultimately selected was prejudiced against him, his claim on appeal is without merit. *Wibley*, *supra* at 535.

Defendant next argues that the prosecution improperly injected evidence that defendant, in the three days preceding the crime charged, consumed drugs and alcohol, stole vehicles, and committed two incidents of breaking and entering. We disagree. Again, the issue is unpreserved. To preserve an evidentiary issue for appellate review, a party must make a timely objection at trial specifying the same ground as is asserted on appeal. MRE 103(a)(1); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). In this case, defendant failed to object to the testimony now challenged on appeal. Absent an objection, this Court may take notice of plain errors affecting substantial rights. MRE 103(d). Generally, a plain, unpreserved error may not be considered by this Court for the first time on appeal unless the error could have been decisive to the outcome. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

Evidence of prior bad acts is not admissible to prove the character of a person in order to show action in conformity therewith. MRE 404(b); *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). However, evidence of prior bad acts is admissible as res gestae evidence where the acts are "'so blended or connected with the (charged offense) that proof of one incidentally involves the other or explains the circumstances of the crime.'" *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). Thus, although there are substantial limits on the admissibility of bad acts evidence, "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). In this case, the evidence concerning defendant's prior bad acts was essential for the jury in understanding the full context in which the crime charged took place. Specifically, the evidence showed that during one breaking and entering, defendant stole the rifle used to kill the victim. During another breaking and entering, defendant stole a car used both while committing the crime and fleeing from the scene. Finally, the evidence respecting defendant's marijuana and alcohol use was admissible because the drug and alcohol use could have affected defendant's behavior during the events surrounding the crime charged. *Sholl*, *supra* at 741. Accordingly, we find no error in the admission of the evidence, and therefore, need not review this issue further. MRE 103(d); *Grant*, *supra* at 552-553.

As a related matter, defendant argues that his trial counsel ineffectively represented him because he failed to object to the admission of the prior bad acts evidence. However, because we have already determined that no error occurred respecting the admission of the bad acts evidence, defense counsel could not have been ineffective for failing to object to its admissibility. Defense counsel was not required to raise a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant next argues that the trial court erred in sentencing him as an adult. We disagree. Review of a trial court's decision to sentence a minor as an adult is a bifurcated one. *People v Launsburry*, 217 Mich App 358, 362; 551 NW2d 460 (1996). The trial court's factual findings are

reviewed under the clearly erroneous standard and the ultimate sentencing determination is then reviewed for an abuse of discretion. *Id*.

Specifically, defendant contends that the trial court erred in sentencing him as an adult because it (1) failed to make sufficient findings, (2) relied upon inaccurate information, and (3) did not recognize the prosecutor's burden of proof at the sentencing hearing. However, defendant fails to indicate when and where in the record the trial court committed these alleged errors. A defendant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990); *People v Heard*, 31 Mich App 439, 446-447; 188 NW2d 24 (1971), rev'd on other grounds 388 Mich 182 (1972). Therefore, we need not address this claim any further. Nevertheless, our review of the record reveals that the trial court did not abuse its discretion in sentencing defendant as an adult. *Launsburry*, *supra* at 362.

Defendant next argues that the trial court erred in excluding certain testimony of the defendant's ballistics expert We disagree. The decision to admit or deny expert testimony falls within the sound discretion of trial court and will not be reversed absent a clear abuse of that discretion. *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992).

First, defendant contends that the trial court erred in excluding the expert's opinion on whether a .30/06 bullet could have made the hole found in the vent window of the victim's automobile. Our review of the record reveals that the witness in fact answered defense counsel's question and that the trial court did not instruct the jury to disregard his answer. Accordingly, there was no error.

Second, defendant contends that the trial court erred in excluding the expert's proposed testimony regarding an experiment performed by the expert intended to assess the visibility provided by a rifle scope under circumstances purportedly similar to those under which the shooting occurred. The expert apparently conducted the experiment with a rifle scope that was similar but not identical to the scope used by defendant during the shooting. The purpose of the test was to determine what could be seen through the scope when pointed at an oncoming vehicle under light conditions similar to those of the actual shooting. The trial court excluded the proposed testimony because it found that the test conditions were not sufficiently similar to the conditions surrounding the offense to justify admitting the expert's testimony.

In determining the admissibility of an expert's test results, it is not necessary that test conditions be identical to the conditions at issue in the case. *Osner v Boughner*, 180 Mich App 248, 260; 446 NW2d 873 (1989). Rather, a reasonable or substantial similarity is sufficient. *Id*. Provided there is sufficient similarity to assist the jury, the lack of identity affects only the weight of the test results. *Id*. In this case, however, the trial court did not err in concluding that the conditions surrounding the expert's test did not have a "reasonable or substantial" similarity to the actual shooting sufficient to justify the admissibility of the expert's observations. Specifically, the expert conducted the test with a different scope of a different model, in a different location, without snow covering the ground, and on a clear night with no moon.[1] On the night of the shooting there was a great deal of snow on the ground and the expert admitted that snow covering could affect the results of the test. Therefore, we cannot conclude

that the trial court abused its discretion in excluding the expert's proposed testimony. *Wilson*, 194 Mich App 599, 602.

Finally, defendant argues that the prosecutor engaged in misconduct by vouching for the credibility of a witness, appealing to the sympathy of the jury, and injecting issues into trial which were broader than the guilt or innocence of defendant. Because defendant did not object at trial to these alleged instances of prosecutorial misconduct, our review is precluded unless an instruction could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Upon review of the record, we find either (1) that the prosecutor did not engage in the misconduct alleged or (2) that instructions could have cured the alleged errors. Therefore, we need not engage in further review of this issue.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly

[1] The amount of illumination from the moon on the night of the shooting was not known.