

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD PAUL GUOAN,

Defendant-Appellant.

UNPUBLISHED

March 13, 1998

No. 190530

Gladwin Circuit Court

LC No. 94-005496 FC

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of solicitation of murder, MCL 750.157b; MSA 28.354(2), and sentenced to concurrent terms of twenty to forty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court abused its discretion in admitting evidence of defendant's prior acts in violation of MRE 404(b). Specifically, at trial, the prosecution offered evidence of incidents wherein defendant (1) aimed a rifle at a truck in which he may have thought his ex-wife was riding; (2) assaulted his ex-wife; (3) was convicted for stalking his ex-wife, and; (4) violated his probation. This evidence was offered to prove defendant's intent and motive for soliciting the murders of his ex-wife and her boyfriend, and to show that defendant's actions were consistent with a larger scheme. The trial court found that the probative value of the evidence was not outweighed by the danger of unfair prejudice and that the evidence tended to show defendant's intent, motive and scheme.

In order for prior bad acts evidence to be admissible, the evidence must (1) be relevant to an issue other than propensity; (2) be relevant to an issue of fact or consequence at trial; and (3) satisfy the MRE 403 balancing test. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In this case, the prosecutor offered evidence of the prior bad acts for proper purposes. Defense counsel proffered a diminished capacity defense claiming that defendant was obsessed with his ex-wife and that he was incapable of formulating specific intent. By utilizing this defense, intent and motive were placed in issue. Accordingly, evidence of the rifle incident, the assault and the stalking were relevant to show defendant's capability to formulate specific intent and to show

that his motive for soliciting the murders was animus toward his ex-wife. Evidence relating to the probation violation, however, was not evidence of an “act” and therefore should have been analyzed for relevancy under MRE 401. In *VanderVliet*, the Supreme Court held that evidence offered for the purpose of showing an accusation against the defendant and to show his state of mind was admissible under MRE 402. *VanderVliet*, *supra* at 82. Evidence that relates directly to a material issue, as opposed to the “‘exceptions’ contained in MRE 404(b), in which relevance rests on a circumstantial inference from the other act to the fact in issue,” is not precluded by MRE 404(b). *People v Hall*, 433 Mich 573, 583; 447 NW2d 580 (1989). In this case, although defendant’s probationary status was not an act, it was directly relevant to explain that defendant was upset with his ex-wife for filing stalking charges against him and that defendant wanted the murders to occur while he was incarcerated, thereby providing him with an alibi. Despite the trial court’s ruling under MRE 404(b), this Court will not reverse the lower court where the right result was reached for wrong reasons. *People v Lambert*, 174 Mich App 610, 616; 436 NW2d 699 (1989).

Next, defendant alleges that he was denied the effective assistance of counsel when his attorney failed (1) to file pretrial discovery motions; (2) to assert an entrapment defense; (3) to oppose the introduction of the prior bad acts evidence, and; (4) to object to testimony that violated defendant’s privilege regarding communications with his probation officer. In order to prove ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must overcome the strong presumption that the challenged action was sound trial strategy by showing that counsel’s alleged error deprived the defendant of a substantial defense that would have affected the outcome of the proceeding. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

With respect to counsel’s alleged failure to file pretrial discovery motions in this case, we note that defendant does not identify the motions that should have been brought or any facts that might have been established. Thus, defendant has failed to show that, but for counsel’s alleged error, the outcome of defendant’s trial would have been different. With respect to counsel’s alleged failure to assert the defense of entrapment, our review of the record does not reveal that defendant could have proffered a successful entrapment defense under either test set forth in *People v Fabiano*, 192 Mich App 523, 526; 482 NW2d 467 (1992). Thus, we cannot conclude that defense counsel’s performance fell below an objective standard of reasonableness. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). In addition, failure to oppose the prior bad acts evidence was not deficient trial performance. Defense counsel opposed the rifle incident because it was the most detrimental to the proffered diminished capacity defense. Evidence of the other prior bad acts, however, supported the diminished capacity defense. Thus, defendant cannot rebut the presumption that defense counsel’s actions were trial strategy. Finally, counsel’s failure to oppose testimony given by defendant’s probation officer in violation of the probation officer-probationer privilege was not prejudicial to the outcome of the trial because of the overwhelming testimony provided by other witnesses at trial regarding defendant’s obsession with his ex-wife and his strong animus against her because of their divorce.

Last, defendant contends that the reasonable doubt instruction given by the trial court, CJI2d 3.2(1), (2) and (3), failed to properly convey to the jury the concept of reasonable doubt. Because no objection was made to this instruction below, we will not review this issue absent manifest injustice. *People v Kuchar*, 225 Mich App 74, 78; 569 NW2d 920 (1997). Our review reveals no manifest injustice because the instructions, as a whole, adequately conveyed the concept of reasonable doubt. *Id.* See also *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991).

Affirmed.

/s/ Gary R. McDonald

/s/ Peter D. O'Connell

/s/ Michael R. Smolenski