

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMY MICHAEL LOFTIS,

Defendant-Appellant.

UNPUBLISHED

April 13, 2006

No. 258817

Wayne Circuit Court

LC No. 04-005801-01

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317,¹ assault with intent to commit great bodily harm less than murder, MCL 750.84, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 25 to 50 years for the murder conviction, five to ten years for the assault conviction, two to five years for the felon in possession conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Underlying Facts

On April 12, 2004, at about midnight, Isabella Woods, Jim Woods, Charles Ulrich, and Robert Fritz were “doing drugs” at the Woods’s house in Detroit. Ulrich indicated that defendant, who is Fritz’s nephew, came to the front door and began talking with Fritz. According to Fritz, defendant came to the “dope house” because he was concerned. Defendant asked Fritz if he could use the bathroom, but Fritz pushed defendant toward the front door, persuading him to leave. Ulrich indicated that when defendant saw him, he asked, “Aren’t you that motherf**ker that was f**king with me?” Ulrich could see that defendant had his hands in his pockets, said he had “no problems,” and walked away.² Seconds after turning and walking

¹ Defendant was originally charged with first-degree murder, MCL 750.316.

² Ulrich explained that in January or February 2004, defendant and Fritz had an altercation at Woods’s house, and defendant threatened to come back and kill everyone. He also indicated that, about a month before that incident, defendant had an altercation with Isabella. Ulrich indicated that he had never “messed with” defendant.

away, Ulrich heard a gunshot coming from defendant's vicinity, and saw glass, and a flash of light by him. As Ulrich crouched down, he heard another gunshot, which struck him in the lower back. Isabella was also shot, and died as a result of two gunshot wounds. Julius Green, who was sitting outside in a truck across from the house, testified that he saw defendant shooting "back through the screen door, right through the house." Green, who did not know defendant, explained that defendant was the only person shooting.

The defense denied any wrongdoing. At trial, Fritz denied that defendant brandished or fired a gun, and maintained that he and defendant ran to their cars when they heard gunshots. Fritz indicated that an individual standing by the front door fired the shots. Fritz was impeached with his statement to the police in which he indicated that, as he and defendant were leaving, defendant turned toward the house, and Fritz saw a flash coming from defendant's hand as he heard gunshots. Defendant presented two defense witnesses, his aunts, who claimed that defendant was at a family gathering on April 12, 2004, until 12:30 a.m., and was wearing different clothing from that described by other witnesses.

II. Prior Threats

We reject defendant's claim that he was denied a fair trial by the admission of his "previous threats against people in the house." Defendant contends that the evidence constituted improper "other crimes and bad acts," prohibited by MRE 404(b), and was inadmissible hearsay because the statements did not fall under MRE 803(3), or MRE 801(d)(2)(A). Because defendant did not object to the admission of this evidence below, this Court reviews this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A. MRE 404(b)

At trial, Ulrich testified that, before this incident, defendant came to the Woods's house in January or February 2004, and, upon leaving, stated, "I'm going to come back and kill all you motherf**kers." This testimony involves defendant's alleged statement, as opposed to an act. "[A] prior statement does not constitute a prior bad act coming under MRE 404(b) because it is just that, a prior statement and not a prior bad act." *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989), citing *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1988). Consequently, defendant has failed to demonstrate plain error, and, thus, reversal is not warranted on this basis. *Carines, supra*.

B. Inadmissible Hearsay

Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801, MRE 802, and *People v Ivers*, 459 Mich 320, 331; 587 NW2d 10 (1998) (Boyle, J. concurring). MRE 801(d)(2) provides that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is (A) the party's own statement . . ." Because defendant's statement constituted an admission of a party opponent, it was admissible under MRE 801(d)(2). *People v Kowalak*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996).

We reject defendant's assertion that the statement was irrelevant and unduly prejudicial because it was made two or three months before the shooting. 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. But even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

Defendant was charged with first-degree premeditated murder, which requires the prosecution to prove that the defendant intentionally killed the decedent, and that the killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Prior threats are indicia of premeditation, *People v Lewis*, 95 Mich App 513, 515; 291 NW2d 100 (1980), and evidence of a defendant's intent to harm a victim "is of the utmost relevance," *People v Amos*, 453 Mich 885; 552 NW2d 917 (1996). Also, the extent to which the passage of time may reduce the probative value of evidence is an issue of weight, not admissibility. See, e.g., *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999). In sum, there was a legitimate, material, and contested issue on which to offer the evidence. MRE 401. Furthermore, the probative value of the evidence was not substantially outweighed by its prejudicial effect.³ MRE 403. Defendant is not entitled to a new trial on the basis of this unpreserved issue.

III. Prior Inconsistent Statement

Defendant also argues that he is entitled to a new trial because the prosecutor improperly introduced Fritz's statements to the police under the guise of impeachment, and impermissibly argued the statements as substantive evidence during closing argument. We disagree.

At trial, Fritz testified that as he and defendant were leaving the house, defendant turned "his head" back toward the house, that defendant "didn't turn [his body] around," and that he did not see a flash coming from defendant's hand. Fritz was impeached with his prior statement to the police in which he indicated that, upon leaving, defendant "turned around toward [sic] the door," and he saw a flash coming from defendant's hand as he heard two or three gunshots. At trial, Fritz indicated, inter alia, that the police wrote the statement, and denied his request for counsel. Fritz also denied later informing an officer that he would not testify against defendant. The prosecutor called an officer, who testified that Fritz phoned him, and stated that he would not attend any of the proceedings because he did not want to testify against his nephew.

Defendant objected to the police officer's testimony regarding Fritz's alleged intent not to testify and, therefore, this Court reviews the trial court's decision to admit that evidence for an

³ The challenged evidence was also relevant to the premeditation and deliberation elements of the originally charged offense. That defendant was acquitted of that offense indicates that the jury was not unduly influenced by the evidence.

abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). But because defendant did not object to the prosecutor impeaching Fritz with his prior statement regarding defendant's actions, we review that unpreserved claim for plain error affecting substantial rights. *Carines, supra*.

"The general rule is that evidence of a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends to directly inculcate the defendant." *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). Our Supreme Court created an exception to this general rule by prohibiting a prosecutor from using a statement that directly inculcates the defendant under the guise of impeachment absent other testimony from the witness making his credibility a relevant issue. *People v Stanaway*, 446 Mich 643, 693; 521 NW2d 557 (1994). The exception has been summarized as follows: "[I]mpeachment should be disallowed when (1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case." *Kilbourn, supra* at 683. This is a "very narrow" exception. *Id.*

Here, the statements used to impeach Fritz were directly relevant to the central issue in the case and, therefore, tended to inculcate defendant. However, Fritz also provided other testimony that made his credibility relevant. For example, Green, who identified defendant as the shooter, testified that he accompanied a friend to the house, and remained in the vehicle while the friend went inside to collect a debt. But Fritz testified that Green went inside the house on the day of the incident and smoked crack cocaine. Fritz also described what defendant was wearing, which was contrary to what other witnesses claimed defendant was wearing. Fritz also indicated that defendant had come to the house on another occasion, and that defendant never had any type of confrontation with anyone in the house. As previously indicated, Ulrich indicated that defendant previously had an altercation with Isabella, and that he had threatened to kill everyone in the house. On this record, the exception to the general rule does not apply.

Moreover, the trial court instructed the jury that a witness's prior statements were not to be used as substantive evidence, but only to assess credibility, and that the case should be decided on the basis of the properly admitted evidence. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Consequently, this claim does not warrant reversal.

We also reject defendant's claim that he is entitled to a new trial because of the prosecutor's conduct during closing argument. Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). But because defendant failed to object to the prosecutor's conduct below, we review his unpreserved claim for plain error affecting substantial rights. *Carines, supra*. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant makes a general claim that, during closing argument, the prosecutor impermissibly "added Fritz's statements into the mix." Defendant does not clearly argue what

portion of the argument was improper. But we note that the prosecutor was not prohibited from referencing the impeachment evidence in the context of arguing that Fritz was not credible. However, as noted by plaintiff, the prosecutor at one point did state:

[Fritz's] testimony that he gave, *the statement that he gave to the police* and the statement that he gave under oath, *you are to consider that as evidence*. [Emphasis added.]

Plaintiff concedes that the prosecutor's indication that Fritz's statement could be considered as substantive evidence was improper. But defendant did not object and, therefore, our review is limited to plain error affecting substantial rights. *Carines, supra*. We agree with plaintiff that, viewed in the context of the complete closing and rebuttal arguments, the prosecutor's remark did not affect defendant's substantial rights. The remark involved only a brief portion of the prosecutor's arguments and was not so inflammatory that defendant was prejudiced. Further, the prosecutor discussed the substantive evidence, including Green's identification of defendant as the shooter, and Ulrich's testimony regarding defendant attempting to gain entrance into the house, and that the gunshots originated from defendant's location.

Moreover, any prejudice that may have resulted could have been cured by a timely instruction. *Schutte, supra* at 721. Indeed, as previously indicated, the trial court instructed the jury that it could not consider a witness's earlier inconsistent statements to determine if the elements of the crimes were proven, and that the case should be decided on the basis of the evidence. The court also instructed the jury that the lawyers' comments are not evidence. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Consequently, reversal is not warranted on the basis of this unpreserved issue.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Patrick M. Meter