

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON ALEXANDER GIBSON,

Defendant-Appellant.

UNPUBLISHED
December 5, 2013

No. 304181
Wayne Circuit Court
LC No. 10-006003-FC

Before: FORT HOOD, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Defendant was convicted of 17 counts related to a break-in at a duplex in Detroit and an ensuing shootout with police that resulted in the shooting death of a police officer and injuries to five other officers. A jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), first-degree murder of a peace officer, MCL 750.316(1)(c), assaulting or resisting a police officer causing death, MCL 750.81d(4), four counts of assault with intent to commit murder, MCL 750.83, four counts of assaulting or resisting a police officer causing a serious impairment of a body function, MCL 750.81d(3), assaulting or resisting a police officer causing a bodily injury requiring medical attention, MCL 750.81d(2), second-degree home invasion, MCL 750.110a(3), felon in possession of a firearm, MCL 750.224f, delivery or manufacture of marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, second offense, MCL 750.227b(1). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to life imprisonment for each murder conviction, and to concurrent prison terms of 62-1/2 to 100 years for each assault with intent to commit murder conviction, 18 to 40 years for each assaulting or resisting a police officer (causing serious impairment) conviction, 8 to 26 years for the assaulting or resisting a police officer (causing death) conviction, 58 months to 15 years for the assaulting or resisting a police officer (causing injury requiring medical attention) conviction, 18 to 40 years for the home invasion conviction, 6 to 18 years for the felon-in-possession conviction, and 58 months to 15 years for the delivery or manufacture of marijuana conviction, all to be served consecutively to a five-year term of imprisonment for the felony-firearm (second offense) conviction. Defendant appeals as of right. We remand for correction of the judgment of sentence to reflect one conviction and one sentence for first-degree murder, supported by three different theories, and to correct a clerical error in the judgment of sentence to reflect a sentence of 26 to 80 years for the assaulting, obstructing, or resisting a police officer

causing death conviction in accordance with the trial court's pronouncement at sentencing,¹ but affirm in all other respects.

Defendant's convictions arise from a break-in at a duplex in Detroit on May 3, 2010, which led to a shootout with several responding Detroit police officers. A neighbor called the police during the early morning hours after hearing suspicious noises and observing movement inside the home next door. The prosecution's theory at trial was that defendant broke into the home and was preparing marijuana there for distribution. The police recovered two gallon-sized plastic bags containing marijuana from inside the house, and a small quantity of marijuana fell from defendant's clothing when he was being treated for a gunshot wound.

Officer Brian Huff responded to the scene and, aided with his flashlight, prepared to enter the house from the front porch. Several witnesses heard Huff loudly announce "police" before he opened the front door. As soon as Huff entered, three gunshots were fired from the inside, two of which struck Huff in the head, causing his death. Huff's gun was still in its holster after he was shot. Defendant was the only person found at the house at the time of the shooting. Immediately after Huff was struck by gunfire, defendant ran through the front door and continued to fire his gun, striking or endangering five other officers. Defendant unsuccessfully tried to jump a fence before officers took him into custody.

Defendant was convicted of first-degree premeditated murder, first-degree felony murder,² first-degree murder of a peace officer, and assaulting, resisting, or obstructing a police officer (causing death) in connection with Huff's shooting death. Defendant was convicted of one count each of assault with intent to commit murder, and assaulting, resisting, or obstructing a police officer (causing serious impairment of a body function) in connection with nonfatal gunshot injuries to Officers Kasper Harrison, Steve Schram, and John Dunlap. He was also convicted of an additional count of assaulting, resisting, or obstructing a police officer (causing serious impairment of a body function) in connection with the nonfatal shooting of Officer Joseph D'Angelo. Lastly, he was convicted of assault with intent to commit murder and assaulting, resisting, or obstructing a police officer (causing injury) for injuries to Officer Brian Glover, who injured his knee and shoulder in the incident.

Defendant did not call any witnesses at trial. The defense maintained that the prosecution failed to prove the charged offenses beyond a reasonable doubt, including whether defendant or someone else was the shooter.

¹ The trial court stated on the record at sentencing that it was imposing a prison term of 26 to 80 years for this conviction. Indeed, defendant acknowledges in his brief on appeal that he received a sentence of 26 to 80 years on this count. We note, however, that the judgment of sentence incorrectly states a sentence of 8 to 26 years for this count. The trial court shall correct this clerical error on remand.

² The underlying felonies for the felony-murder conviction were larceny, breaking and entering, and home invasion.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence at trial was insufficient to support his convictions of first-degree premeditated murder, first-degree felony murder, first-degree murder of a peace officer, assaulting, obstructing, or resisting a peace officer causing death, and second-degree home invasion. We disagree.

“In determining whether the prosecution presented sufficient evidence to sustain a conviction, this Court must construe the evidence in the light most favorable to the prosecution and consider whether a rational trier of fact could have determined that all the elements of the crime were proven beyond a reasonable doubt.” *People v Schaw*, 288 Mich App 231, 233; 791 NW2d 743 (2010). Circumstantial evidence and any reasonable inferences that can be drawn from the evidence may be sufficient to prove the elements of a crime. *People v Abraham*, 234 Mich App 640, 656-657; 599 NW2d 736 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v John Williams, Jr*, 268 Mich App 416, 419; 707 NW2d 624 (2005). “This Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.” *Id.*

Defendant contends that there was insufficient evidence of premeditation to support his conviction of first-degree premeditated murder. A conviction of first-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Andre Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011). Premeditation and deliberation requires sufficient time to allow the defendant to take a second look. *Id.* Premeditation and deliberation can be inferred from the surrounding circumstances, but the inferences cannot be speculative and they must have support in the record. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). Factors that may be considered include (1) any relationship between the defendant and the victim; (2) the defendant’s actions before and after the crime; and (3) the circumstances of the killing, including the weapon used and the location of the wounds inflicted. *Id.* at 300.

In this case, the evidence indicated that several police officers responded to the duplex in response to a report of a possible intruder. The group included plain clothes officers, but also officers in marked police vehicles with flashing lights, and officers in police uniform with flashlights. The evidence supported an inference that defendant was aware that several police officers had arrived to investigate his presence inside the duplex. Several witnesses testified that Officer Huff, who was in full uniform, loudly identified himself as a police officer before he attempted to enter the house. Immediately after Officer Huff was shot, defendant emerged from the house while continuing to fire his weapon at other officers. The surrounding circumstances permitted the jury to infer that defendant had the opportunity to observe the police presence outside the house, realized that he was trapped inside the duplex, and formulated a plan to avoid capture by shooting at the police officers to facilitate an escape. The evidence permitted the jury to find that defendant had enough time to reflect on his actions before shooting Officer Huff twice in the head, and thus was sufficient to prove that defendant intended to kill Officer Huff with premeditation and deliberation.

Next, defendant alleges that the prosecution failed to present sufficient evidence of an underlying felony to support his conviction for felony murder. We again disagree. In *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000), our Supreme Court explained:

“The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute, including (arson)].” [Citation and internal quotations omitted.]

The felony-murder count was based on the prosecution’s theory that defendant killed Officer Huff during the commission, or attempted commission, of a larceny, breaking and entering, or home invasion. Larceny consists of

(1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner. [*People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999).]

The elements of an attempt include:

“(1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation.” Mere preparation is distinguished from an attempt in that the former consists of making arrangements or taking steps necessary for the commission of a crime, while the attempt itself consists of some direct movement toward commission of the crime that would lead immediately to the completion of the crime. [*People v Mearl Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993) (citations omitted).]

Although the occupant of the duplex in which defendant was found at the time of the offense did not identify any property that was taken, he testified that he discovered that the kitchen drawers had been opened and “stuff” dropped on the floor, which was not the condition of his kitchen when he left. This testimony was sufficient to allow the jury to find that defendant at least attempted to commit a larceny by searching the kitchen and ransacking the drawers, looking for something to steal.

We also reject defendant’s argument that the evidence was insufficient to prove that his presence inside the duplex was not permissive, thereby precluding the jury from finding that he committed the crimes of either breaking and entering or second-degree home invasion. “Second-degree home invasion requires proof that the defendant entered a dwelling by breaking or without the permission of any person in ownership or lawful possession or control of the dwelling and did so with the intent to commit a felony, larceny, or assault therein or committed a felony, larceny, or assault while entering, present in, or existing the dwelling.” *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013); MCL 750.110a.

Defendant's argument is premised on the legal owner of the property being Wayne County because of foreclosure proceedings. As indicated, however, home invasion can occur when property is entered without the permission of any person in lawful possession or control of the dwelling. The testimony established that at the time of this offense, Wayne County had not taken steps to enforce the foreclosure judgment by evicting either the former owner, Dwayne Little, or his tenant, Lawrence Bolling. According to the testimony of the Wayne County Deputy Treasurer, until formal eviction proceedings were completed, both Little and his tenant were still in lawful possession of the property. Little and Bolling both testified that they did not give defendant permission to enter the premises. Testimony also indicated that Wayne County had not granted defendant permission to enter or occupy the premises. The testimony also indicated that, on the night of the offense, a neighbor was awakened by a loud banging or kicking noise, and the police testimony indicated that the front door of the house appeared to have already been kicked open when they arrived. This evidence permitted the jury to infer that defendant forcibly entered the property by kicking the front door and that his presence was not permissive. Although defendant also suggests that the property was abandoned, the evidence showed that it was in lawful possession of someone other than defendant. Accordingly, the evidence was sufficient to enable the jury to find that defendant committed a murder in the course of committing a home invasion or breaking and entering of the premises.

Defendant also argues that the evidence was insufficient to support his conviction of first-degree murder based on the victim being a police officer. MCL 750.316(1)(c) provides that a person is guilty of first-degree murder if the person murders a peace officer "while the peace officer . . . is lawfully engaged in the performance of any of his or her duties as a peace officer . . . , knowing that the peace officer . . . is a peace officer . . . engaged in the performance of his or her duty as a peace officer." See also *People v Clark*, 243 Mich App 424, 427; 622 NW2d 344 (2000). Therefore, a necessary element of this offense is "that the defendant knew the victim was a peace officer . . . performing lawful duties at the time of the murder." *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001).

Defendant asserts that the evidence was insufficient to prove that he was aware that Officer Huff was a police officer at the time of the shooting. As previously discussed, the evidence supported an inference that defendant was aware that several police officers had arrived to investigate his presence inside the duplex. Further, several witnesses testified that before Huff attempted to enter the home, he loudly yelled "Police." Defendant's conduct immediately after Huff was shot also supports a conclusion that defendant was aware of the police presence, and that the shooting occurred as part of a planned attempt to avoid capture by the police. Thus, the evidence was sufficient to enable the jury to find that defendant murdered Huff, a peace officer, while knowing that he was a police officer engaged in the performance of his police duties.

Defendant similarly contends that the evidence did not support his conviction for assaulting, obstructing, or resisting a peace officer, causing death, MCL 750.81d(4), because the evidence was insufficient to prove that he "ha[d] reason to know" that Officer Huff was a police officer performing his duties. As used in the statute, "has reason to know" "requires the fact-finder to engage in an analysis to determine whether the facts and circumstances of the case indicate that when resisting, defendant had 'reasonable cause to believe' the person he was assaulting was performing his or her duties." *People v Corr*, 287 Mich App 499, 504; 788 NW2d 860 (2010), quoting *People v Nichols*, 262 Mich App 408, 414; 686 NW2d 502 (2004).

As previously discussed, the evidence was sufficient to allow the jury to find that defendant had reasonable cause to believe that Huff was a police officer performing his investigative duties at the time defendant fatally shot Huff. Thus, the evidence was sufficient to support defendant's conviction for assaulting, obstructing, or resisting a peace officer, causing death.

Defendant lastly asserts that the evidence was insufficient to convict him of second-degree home invasion because the property had been foreclosed upon by Wayne County. As previously discussed, however, home invasion can be committed when a person forcibly enters a dwelling without the permission of any person in ownership *or* lawful possession *or* control of the dwelling. *Dunigan*, 299 Mich App at 582; MCL 750.110a(3). Here, the jury heard evidence that neither the prior lawful owner of the duplex, who was still in possession of the premises, nor that prior owner's tenant, who was still occupying the premises, nor Wayne County, who had acquired the property through foreclosure, had given defendant permission to enter the premises. In addition, the evidence supported an inference that defendant forcibly entered the premises by kicking in the front door. The evidence was sufficient to allow the jury to find that defendant was guilty of home invasion.

II. EVIDENCE OF OTHER BAD ACTS

Defendant next argues that the trial court violated his right to due process by admitting evidence of two prior incidents of police contact under MRE 404(b)(1). We disagree.

Defendant urges this Court to follow the three-step review process applied by federal courts when reviewing evidentiary decisions under FRE 404(b), which is similar to MRE 404(b). In *United States v Latouf*, 132 F3d 320, 328 (CA 6, 1997), the court stated that a trial court's factual determination that a prior act occurred is reviewed for clear error, that the court's legal determination whether the proffered evidence was admissible for a proper purpose is reviewed *de novo*, and that the court's determination whether the evidence is more probative than prejudicial is reviewed for an abuse of discretion. In this case, however, the trial court was not required to make any factual findings regarding defendant's prior conduct because defendant never contested that he committed the prior acts. The remaining standards identified in *Latouf* are consistent with our Supreme Court's pronouncement that evidentiary decisions are generally reviewed for an abuse of discretion, but that any preliminary questions of law are review *de novo*. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003)

MRE 404(b)(1) prohibits evidence of a defendant's "other crimes, wrongs, or acts" when offered "to prove the character of a person in order to show action in conformity therewith," but permits such evidence when offered for other purposes, "such as proof of motive, . . . intent, . . . scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material[.]" The logic behind this rule is that a jury should not convict a defendant because it believes the defendant is a bad person. *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998). Thus, evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if the evidence is (1) offered for a proper purpose, *i.e.*, one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The trial court, upon request, may provide the jury with a cautionary

instruction on the limited purpose of any evidence admitted under MRE 404(b). *VanderVliet*, 444 Mich at 75.

The prosecution has the initial burden of establishing the relevance of the proposed evidence to an exception to the general exclusionary rule of MRE 404(b)(1). *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). “Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence.” *Id.*, quoting *Crawford*, 458 Mich at 387; MRE 401. Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000). Unfair prejudice does not mean any prejudice, but refers to “the tendency of the proposed evidence to adversely affect the objecting party’s position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury’s bias, sympathy, anger, or shock.” *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994), quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984).

Defendant has not shown that the trial court erred in admitting the evidence of his prior involvement with the police under MRE 404(b)(1). Defendant was charged with several counts of assaulting, resisting, or obstructing a police officer, knowing that the person was performing his or her duties as a police officer. Part of the defense theory at trial was that defendant was not aware that the persons outside the duplex house were police officers. The other acts evidence was probative of defendant’s familiarity with how the police operate from the prior incidents and of how defendant would react when confronted by police officers. The evidence was relevant to the issues of defendant’s knowledge and intent, to show a scheme, plan, or system for evading arrest by physically resisting police efforts to take him into custody, and, as the trial court observed, to rebut any claim “of mistake on the part of the defendant in knowing who he’s dealing with.”

Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The prior incidents were not as serious as the charged offenses. In addition, defendant was also charged in this case with being a felon in possession of a firearm. Therefore, the jury was already aware that defendant had a prior criminal history. The trial court instructed the jury several times on the limited, permissible use of the prior acts evidence. Considering these factors, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Thus, the trial court did not err in admitting the evidence under MRE 404(b)(1).

III. CAUTIONARY INSTRUCTION

Next, defendant argues that the trial court’s cautionary jury instruction regarding the limited permissible purposes of the other acts evidence was improper. Defendant contends that the trial court improperly deviated from CJI2d 4.11, the standard cautionary jury instruction regarding other acts evidence, and gave a cautionary instruction that was biased in favor of the prosecution and usurped the jury’s fact-finding role. We disagree. This Court reviews a claim of instructional error involving a question of law de novo, but reviews a trial court’s determination that a jury instruction applies to the facts of the case for an abuse of discretion. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

Trial judges are permitted to modify a standard jury instruction when presented with a clearer or more accurate instruction. *People v Richardson*, 490 Mich 115, 120; 803 NW2d 302 (2011). Further, this Court has recognized that a cautionary instruction regarding the limited purposes of other acts evidence may be “carefully crafted” to advise the jurors “that they are to consider the other acts evidence only as indicative of the reasons for which the evidence is proffered.” *People v Martzke*, 251 Mich App 282, 295; 651 NW2d 490 (2002).

In this case, the trial court’s modifications to the standard jury instructions were intended to conform the instructions to the limited purposes for which the other acts evidence was admissible. Contrary to what defendant argues, the trial court’s instructions did not usurp the jury’s fact-finding role. The court instructed the jury that if it believed the other acts evidence, it “may only think whether this evidence tends to show any of the [various listed purposes].” The court specified the various purposes for which the evidence was offered, but its introductory instructions made it clear that it was up to the jury to decide whether to believe the other acts evidence and to evaluate whether that evidence was probative of the various purposes for which it was offered. The court’s instructions did not convey that the jury was required to believe any of the evidence or, if it believed the evidence, that it was required to find that the evidence was actually probative of the various purposes and conduct mentioned in the instruction. The instructions made it clear that these determinations were for the jury to decide. Accordingly, there was no error.

IV. DOUBLE JEOPARDY – FIRST-DEGREE MURDER

Defendant argues that his three convictions and three life sentences for first-degree murder violate his double jeopardy rights. We agree. Defendant was convicted of three counts of first-degree murder for the death of a single victim under three separate theories, premeditated murder, felony murder, and murder of a peace officer. See MCL 750.316(1)(a), (b), and (c). Defendant correctly argues that multiple convictions of first-degree murder arising from the death of a single victim violate double-jeopardy protections. *People v Orlewicz*, 293 Mich App 96, 112; 809 NW2d 194 (2011). Accordingly, we remand for modification of the judgment of sentence to specify a single conviction and single life sentence for first-degree murder, supported by three different theories. *Id.*

V. DOUBLE JEOPARDY – ASSAULTING, OBSTRUCTING, OR RESISTING A POLICE OFFICER

Defendant argues (1) that his conviction and sentence for assaulting, resisting, or obstructing Officer Huff, causing his death, violates the double jeopardy protection against multiple punishments for the same offense where he was also convicted of first-degree murder for Huff’s shooting death, and (2) that his various convictions for assaulting, resisting, or obstructing other officers causing either bodily injury or serious impairment violate the double jeopardy protection against multiple punishments for the same offense where he was also convicted of assault with intent to commit murder for the shooting assaults against those officers. We disagree.

The Double Jeopardy Clause protects against multiple punishments for the same offense, US Const, Am V; Const 1963, art 1, § 15. *People v Matuszak*, 263 Mich App 42, 49; 687 NW2d

342 (2004). In *People v Bobby Smith*, 478 Mich 292, 295-296; 733 NW2d 351 (2007), our Supreme Court held that such a double jeopardy challenge under the Michigan Constitution is to be decided by applying the federal *Blockburger*³ test. The federal test replaces the state test previously adopted in *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984). This Court has summarized the current test as follows:

Both the United States and the Michigan constitutions protect a defendant from being placed twice in jeopardy, or subject to multiple punishments, for the same offense. “Judicial examination of the scope of double jeopardy protection under both constitutions is confined to a determination of legislative intent.” And the validity of multiple punishments under the Michigan Constitution is determined under the federal *Blockburger* [*v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932)] “same elements” standard. If the Legislature clearly intended to impose multiple punishments, the imposition of multiple sentences is permissible regardless of whether the offenses have the same elements, but if the Legislature has not clearly expressed its intent, multiple offenses may be punished if each offense has an element that the other does not. In other words, the test “emphasizes the elements of the two crimes.” “If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . .” [*People v McGee*, 280 Mich App 680, 682-683; 761 NW2d 743 (2008) (footnotes omitted).]

Defendant was convicted of assaulting, resisting, or obstructing a police officer causing either bodily injury, serious impairment of a body function, or death, contrary to MCL 750.81d(2), (3), and (4). Subsection (5) of this statute provides:

This section does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating this section.

Because subsection (5) clearly reflects the Legislature’s intent to allow for multiple punishments for conduct that violates either subsections (2), (3), or (4) and another criminal statute, the imposition of multiple sentences for both first-degree murder and assaulting, resisting, or obstructing a police officer causing death, and for assault with intent to commit murder and assaulting, resisting, or obstructing a police officer causing either bodily injury or serious impairment is permissible, regardless of whether these offenses have the same elements. *McGee*, 280 Mich App at 682-683. Accordingly, there is no double jeopardy violation.

³ *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).

Affirmed with regard to defendant's convictions, but remanded for correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Henry William Saad

/s/ Stephen L. Borrello