

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
September 11, 2014

v

ANDREW LEE URSERY,  
Defendant-Appellant.

No. 316367  
Wayne Circuit Court  
LC No. 12-011506-FC

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

JOHNNY LERUE DAVIS, JR.,  
Defendant-Appellant.

No. 316645  
Wayne Circuit Court  
LC No. 12-011506-FC

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Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

In this consolidated appeal, defendants Andrew Lee Ursery and Johnny Lerue Davis, Jr. appeal as of right their convictions for second-degree murder, MCL 750.317, two counts of assault with intent to murder, MCL 750.83, discharging a firearm in or at a building, MCL 750.234b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Ursery was sentenced to 516 to 800 months' imprisonment for second-degree murder, 180 to 360 months' imprisonment for each of the two counts of assault with intent to murder, 24 to 48 months' imprisonment for discharging a firearm in or at a building, and two years' imprisonment for felony-firearm. Davis was sentenced to 360 to 600 months' imprisonment for second-degree murder, 180 to 360 months' imprisonment for each of the two counts of assault with intent to murder, 24 to 48 months' imprisonment for discharging a firearm in or at a building, and two years' imprisonment for felony-firearm. We affirm.

This appeal arises from the death of Chanel Weddington and gunshot wounds Damond Williams and Billy Parker sustained outside of an after-hours club known as "The Place," in the city of Ecorse, during the early morning hours of October 7, 2012. Diamond Pitts brought defendants, Patrice Jackson ("Patrice"), and a man identified at trial only as "Davonte" to The Place, and parked on the grass in a field across the street from the club. Defendants went to the club because they had a "beef" with people there. According to the testimony at trial, defendants had earlier stated that they had guns, and Ursery had shown a silver gun to the group. Regardless, a security guard and the club owner's husband (Patrick Wheeler) both testified that everyone is patted down when they enter and turned away if weapons are found.

Later, the security guard and Wheeler observed an altercation on the dance floor involving both women and men, including defendants. The security guard testified that defendants were escorted outside for five minutes, and then allowed to reenter. Wheeler also testified that, when the same men got into another argument, he closed the club and escorted patrons outside. At that time, the security guard heard people saying that the men involved in the fight were about to start shooting. Shaquetta King saw her cousin, Parker, throw a punch at Davonte, and she also saw Joseph Elias standing in the street with his shirt off and a gun in his hand. The security guard testified that he saw defendants walk across the street toward the field. King testified that Davonte also walked there.

As two patrons, Raphael Reed and Vick Bullard, were leaving and walking to their car parked on a street slightly south of the field, Reed saw Davis and Ursery standing near a white car in the field. Reed testified that, as he started to put his key in his car door, he dropped it, bent over to pick it up, and, at the same time, heard gunshots. Reed recalled that he took cover by a truck, but looked toward the field ten feet away. Reed testified that he saw Davis and Ursery, who he had known before, along with another man, shooting toward the front door of the club. Reed testified that he also saw Ursery fire toward a man running down Francis Street.

Williams testified that he was talking to Weddington outside on the sidewalk in front of the club when he was shot in the stomach. Williams did not see who shot him, but stated that the gunshots came from the field across the street from the club and he saw the flashes from the muzzles of two guns. Williams testified that he watched Weddington suffer the fatal shot to her chest while she was standing right next to him with her back toward the field.

Parker testified that patrons were exiting the club when he arrived at the scene and that he had walked to the middle of 12th Street when the shooting began. Although he ducked behind a car, he was shot in the stomach and hip. Parker testified that he saw more than one shooter, but could not identify them.

Roy Miller, a River Rouge police officer, estimated that 40 gunshots were fired. Dean Molner, a Detective Sergeant with the Michigan State Police Department and a firearms and tool marks expert, identified four different groups of casings found, and concluded that there was a possible maximum of four guns used to fire the bullets, but it was also possible that less than four

weapons were used. Bullet fragments were recovered in front of The Place and in a car parked in front of the club, and bullet holes were observed in three vacant homes down the street.

## II

On appeal, both Ursery and Davis contend that the prosecution failed to present legally sufficient evidence to support their convictions. We disagree.

This Court reviews a claim of insufficient evidence de novo, “viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Furthermore, “[t]his Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.” *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Defendants were both convicted of second-degree murder, two counts of assault with intent to murder, discharging a firearm at an occupied structure, and felony-firearm. Second-degree murder consists of the following elements: “ ‘(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.’ ” *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001), quoting *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). Assault with intent to commit murder is a specific intent crime, the elements of which are “ ‘(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.’ ” *People v Abraham*, 234 Mich App 640, 658; 599 NW2d 736 (1999), quoting *People v Lugo*, 214 Mich App 699, 710; 542 NW2 921 (1995) (footnote omitted). Pursuant to MCL 750.234b, discharging a firearm at an occupied structure is defined as follows:

(1) Except as provided in subsection (3) or (4), an individual who intentionally discharges a firearm at a facility that he or she knows or has reason to believe is a dwelling or an occupied structure is guilty of a felony, punishable by imprisonment for not more than 4 years, or a fine of not more than \$2,000.00, or both.

(5) As used in this section:

(b) “Occupied structure” means a facility in which 1 or more individuals are present.

The elements of felony-firearm are: (1) the defendant possessed a firearm, (2) during the commission of, or attempt to commit, a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Identity is always an essential element in a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976); *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

Defendants first argue that the evidence was insufficient to prove that they were the perpetrators of the crimes. However, there was evidence presented that defendants went to the

club because they had a “beef” with people there, that both defendants had guns earlier that morning and were involved in an altercation inside the club, and that right before the shooting, they were seen walking toward the field where the shots were fired. Moreover, they were identified by an eyewitness as the shooters. Given that Reed knew defendants before the shooting and saw them shooting from a close distance, and in viewing all of the evidence in a light most favorable to the prosecution, sufficient evidence was presented to prove that defendants were the perpetrators of the crimes for which they were convicted. *Meshell*, 265 Mich App at 619.<sup>1</sup>

Ursery also contends that there was insufficient evidence to support his conviction of discharging a firearm in or at a building because the structures that sustained bullet holes were vacant residences. Pursuant MCL 750.234b(1) and (5)(b), to be found guilty of discharging a firearm at an occupied structure, a defendant must intentionally discharge a firearm at a facility he or she knows or has reason to believe is a facility in which one or more individuals are present. Although the term “at” is not defined in the statute, this Court may consult the dictionary definition. *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). In using the word “at” to indicate a direction, *Random House Webster’s College Dictionary* (1997) defines the word “at” as “toward.”

Viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find that Ursery fired a gun multiple times toward a building occupied by numerous patrons. Evidence was presented that Ursery was inside the club before the shooting occurred. As most of the patrons exited the club when it was closing, Reed testified that he saw Ursery fire a handgun from the field directly across the street from the club in the direction of the front of the club. Weddington and Williams were both standing on the sidewalk in front of the club when they were shot. The fact that bullet holes were found in other vacant homes down the street from the club does not negate the evidence that Ursery, after having been inside the club with other patrons, fired gunshots toward the club while people were exiting the building. Accordingly, sufficient evidence was presented that Ursery intentionally discharged a firearm at a structure he knew or had reason to believe was occupied by more than one person.

### III

Defendants next contend that the trial court erred in allowing the admission of photographs depicting items memorializing Weddington. For the reasons set forth below, we conclude that the admission of the photographs did not deny defendants a fair trial.

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object on the record and specify the same ground for objection that it asserts on appeal.

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<sup>1</sup> Although Davis questions the reliability of Reed, who Davis claims was incredible and biased because of his relationship with the victims and inconsistencies in his testimony, this Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses. *Kanaan*, 278 Mich App at 619.

MRE 103(a)(1); *Aldrich*, 246 Mich App at 113. Defendants' challenges on the basis that the probative value of the photograph is substantially outweighed by the prejudicial effect are preserved; however, Ursery's contention that the photographs of the memorial were not relevant is unpreserved.

"A decision whether to admit photographs is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). "A preserved error in the admission of evidence does not warrant reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013) (quotation marks and citation omitted). In reviewing an unpreserved evidentiary issue, a defendant has the burden to show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008).

Generally, all relevant evidence is admissible, and irrelevant evidence is inadmissible. MRE 402. 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; see also *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012). Evidence, although relevant, may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. "All evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (quotation marks omitted). "Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions." *People v Eddington*, 387 Mich 551, 562; 198 NW2d 297 (1972). "However, if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors." *Id.* at 562-563. Photographs may be used to corroborate a witness's testimony, and are not excludable merely because a witness can orally testify concerning the information contained in the photographs. *Mills*, 450 Mich at 76.

Ursery argues that the photographs of the memorials were not relevant and both defendants argue the probative value of the photographs was substantially outweighed by their prejudicial effect.

Over defendants' objections, the trial court allowed the admission of a photograph of a poster tied to the fence in front of the club that depicted signatures and messages from acquaintances of Weddington. At trial, the police officer who took the photograph testified that this specific picture was taken to identify any possible people that may need to be interviewed for the purpose of identifying the shooters. Although the poster was relevant to show the

investigative tools the police may have used to find witnesses, and the prosecution emphasized that the police had a difficult time getting witnesses to cooperate, relying on Crime Stoppers and anonymous tips to track down defendants, any probative value of this photograph was minimal compared to the prejudicial effect of showing a poster that depicts messages from friends and family of the murder victim. The admission of this photograph was not substantially necessary or instructive to show material facts or conditions, such as the lighting conditions or the location where witnesses or perpetrators were situated at the time of the incident. Therefore, the trial court erred in allowing the admission of the close-up photograph of the poster memorializing Weddington.

Notwithstanding the error in admitting this photograph, its admission into evidence was not outcome-determinative given the overwhelming evidence presented that defendants were the shooters. Defendants' contentions that they were denied a fair trial by the admission of this photograph fail.

The trial court did not err in allowing the admission of separate photographs of the building, which also contained items memorializing Weddington. The lighting outside of the building and the location of the fence and sidewalk in relation to the field across the street were important issues at trial. These photographs of the building were relevant to show the vantage points of the witnesses, who saw gunfire, and Reed, who identified defendants as the shooters. Again, so long as the probative value outweighs any prejudicial effect, photographs that are admissible for a proper purpose, such as to prove where the victims and shooters were located and the lighting conditions at the time of the shooting, should not be excluded even if they contain other evidence that may tend to arouse the passion of the jury. *Eddington*, 387 Mich at 562-563.

Davis also contends that the admission of photographs of Weddington's autopsy were unnecessary and unduly prejudicial. We disagree.

In this case, the probative value of the autopsy photographs was not substantially outweighed by the danger of unfair prejudice. The photographs were accurate representations of Weddington's injuries and were not admitted to arouse sympathy from the jury. The photographs depicted the entrance and exit wounds, which were relevant to the position of Weddington's body when she was shot and the direction the bullets came from. The prosecution was attempting to prove that the shots were fired from the field while Weddington had her back to the shooters. Although Davis suggests that the trial court should have excluded the photographs as unnecessary in light of the body diagram already depicting the entrance and exit wounds, caselaw is clear that photographs may be used to corroborate a witness' testimony, and that photographs are not excludable merely because a witness can orally testify about the information contained in the photographs. *Mills*, 450 Mich at 76. Because these photographs were used to corroborate witness testimony, and were not so gruesome or shocking to excite passion from the jury, *Eddington*, 387 Mich at 562-563, the trial court did not err in admitting them at trial.

Davis next contends that other-acts evidence, including whether Davis had previous contact with the police and whether he carried guns in the past, was improperly introduced at trial. We disagree.

Davis preserved an objection to testimony that he had previous contact with the police on the basis of relevancy and scope; however, he did not properly preserve an objection under MRE 404(b). Further, Davis preserved an objection to testimony that he carried guns in the past on the basis of relevancy; however, again, he failed to properly preserve an objection under MRE 404(b). Therefore, Davis's allegations of error against the trial court for admitting other-acts evidence are unpreserved and reviewed for plain error affecting his substantial rights. *Cross*, 281 Mich App at 738.

MRE 404(b) governs other-acts evidence, and provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

We conclude from our review of the record that Davis waived any alleged error concerning the admission of evidence that he had previous contact with Sergeant Dasumo Mitchell, because Davis's counsel first elicited this information. Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003). Davis's counsel specifically asked Sergeant Mitchell if he found a photograph of Davis in a way other than looking under the name "Johnny Davis" on Facebook. It was this question that prompted Sergeant Mitchell's response that he had previous contact with Davis, and the prosecution's follow-up questions on redirect examination eliciting testimony that, from tips and his previous contact with Davis, Sergeant Mitchell looked Davis up under a different name on Facebook.<sup>2</sup> Even if Davis's argument was not waived, we would conclude the testimony was not offered to prove Davis's character, MRE 404(b), but rather demonstrated how he was identified as a suspect and the basis for the identification, MRE 611(c).

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<sup>2</sup> Although the prosecutor also asked whether the previous contact with police was violent in nature, the question was withdrawn after Davis's counsel's objected. Consequently, with respect to whether this previous contact was violent, MRE 404(b) is not implicated because no evidence was admitted on this point. Moreover, the question itself was not prejudicial because jurors are presumed to follow the trial court's instructions that the lawyer's questions to witnesses are not evidence. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003); see also *People v Clayton*, 236 Mich 692, 695; 211 NW 42 (1926) (unanswered question put to a jury did not constitute reversible error).

The prosecutor's initial questions regarding whether Davis had carried guns in the past were not offered to prove Davis's character, MRE 404(b), but rather that Davis had access to guns at the time of the shooting. The prosecutor's subsequent questions whether Pitts had seen Davis firing a gun at Pitts's cousin's house were merely an attempt to impeach Pitts's testimony that she never saw Davis carry a gun under MRE 608(b).<sup>3</sup> The testimony was not offered to prove Davis's character under MRE 404(b).

Even if the jury was improperly permitted to consider MRE 404(b) evidence that Davis had prior contact with the police and had carried guns in the past, the alleged errors in the admission of evidence were harmless in light of the overwhelming evidence against defendants. MCL 769.26 ("No judgment or verdict shall be set aside or reversed . . . on the ground of . . . the improper admission . . . of evidence . . . unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.").

Davis also argues the prosecutor committed error by eliciting the challenged testimony to prove his character under MRE 404(b). But again, Davis has not established the challenged testimony was offered to prove his character under MRE 404(b), and in any event, a curative instruction could have alleviated the effect of any prosecutor error. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Finally, Davis argues his defense counsel was ineffective by failing to object to the challenged testimony on MRE 404(b) grounds. To establish ineffective assistance of counsel, a defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) "that there is a reasonable probability that the outcome of the trial would have been different but for counsel's performance." *People v Roscoe*, 303 Mich App 633, 643-644; 846 NW2d 402 (2014). Effective assistance of counsel is presumed and a defendant claiming ineffective assistance is required to overcome a strong presumption that sound trial strategy motivated counsel's conduct. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Davis cannot overcome the strong presumption of strategy here because, although his counsel failed to make a futile objection to the challenged questioning on MRE 404(b) grounds, he repeatedly objected to the prosecutor's questioning on several other grounds. *Unger*, 278 Mich App at 242, quoting *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995) ("there are times when it is better not to object and draw attention to an improper comment."); see *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) (counsel is not ineffective for failing to make to a futile objection).

Affirmed.

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<sup>3</sup> Because Pitts never answered the prosecutor's additional question whether Davis "pops off a couple of rounds" when he gets mad, there is no improper MRE 404(b) evidence for us to consider on this point. Again, the prosecutor's question itself was not prejudicial in light of the instruction to the jury that the lawyer's questions to witnesses are not evidence. *Abraham*, 256 Mich App at 279; see also *Clayton*, 236 Mich at 695.

/s/ Joel P. Hoekstra  
/s/ Kurtis T. Wilder  
/s/ Karen M. Fort Hood