

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 19, 2013

v

JOSEPH ALAN BIGELOW,
Defendant-Appellant.

No. 306435
Wayne Circuit Court
LC No. 11-002504-FC

Before: CAVANAGH, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions for first-degree felony murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to life in prison without parole and two years in prison, respectively. For the reasons set forth below, we affirm.

I. CORPUS DELICTI

Defendant argues that the corpus delicti rule prohibits admission of his confession unless a preponderance of evidence, independent of his statement, establishes that he committed or attempted to commit a robbery. According to defendant, because the prosecution presented no evidence, aside from defendant's inculpatory statement, that he committed, or attempted to commit, a robbery, there was insufficient evidence to sustain his conviction for first-degree felony murder.

The corpus delicti rule requires that a preponderance of direct or circumstantial evidence, independent of a defendant's inculpatory statements, establish the occurrence of a specific injury and criminal agency as the source of the injury, before such statements may be admitted as evidence. *People v King*, 271 Mich App 235, 239; 721 NW2d 271 (2006). "[T]he corpus delicti rule is satisfied in prosecutions of first-degree felony murder . . . by showing that a death has occurred and that the death resulted from a criminal agency. *People v Hughey*, 186 Mich App 585, 589; 464 NW2d 914 (1990). The prosecution is not required to independently establish the predicate offense of the felony-murder that elevated the homicide to first-degree murder. *Id.* at 588. Once it is established that a crime occurred, the defendant's statement may be introduced to establish the degree of guilt. *King*, 271 Mich App at 241.

Here, the prosecution presented testimony from an eyewitness who was with defendant during the incident and saw defendant shoot the victim, Dwight Osborne. The prosecution also presented footage from a security camera that showed a man chasing Osborne and shooting him in an intersection. Moreover, the medical examiner's report stated that Osborne died as a result of a gunshot wound to the back of the neck and that the manner of his death was a homicide. This is sufficient to show by a preponderance of evidence that a death occurred and that the death resulted from criminal agency. As a result, defendant's confession was admissible at trial to prove the degree of his guilt. *King*, 271 Mich App at 241 ("It is well established that a defendant's statement may be admitted to establish . . . whether a criminal homicide was a first-degree felony murder, a first-degree premeditated murder, a second-degree murder, or manslaughter."). Defendant's confession to Michael Vago and Kimberly James that he robbed a man on Dix Road and shot him when he fought back, in conjunction with the additional evidence of the shooting presented at trial, were sufficient to enable a rational jury to find that defendant killed Osborne in the course of committing, or attempting to commit, a robbery.

II. OTHER ACTS EVIDENCE

Defendant avers that the trial court erred in admitting evidence that he committed another fatal shooting six days after the charged offense. As discussed, the decision to admit evidence will be reversed on appeal only when there has been a clear abuse of discretion, which occurs when a court chooses an outcome that is outside the range of reasonable and principled outcomes. See *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009); *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). Preliminary questions of law, however, are subject to de novo review. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). Even if properly preserved, error in the admission of other acts evidence does not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Defendant bears the burden of establishing that, more probably than not, a miscarriage of justice occurred. *Id.*

To be admissible under MRE 404(b), generally other acts evidence must (1) be offered for a proper purpose, (2) be relevant, and (3) not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Sabin*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). Here, the trial court admitted the evidence at issue solely for the purpose of showing defendant's identity as the shooter. If other acts evidence is introduced to establish defendant's identity as the perpetrator, there must be a high degree of similarity in the manner in which the charged offense and another uncharged act were committed. *People v Golochowicz*, 413 Mich 298, 325; 319 NW2d 518 (1982). "[M]uch more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts." *Id.* at 310-311, citing McCormick, Evidence (2d ed), § 190, p 449 (brackets omitted). When introduced to establish identity, evidence should be admitted only if the crime charged and the other crimes are "marked with special circumstances so uncommon, peculiar and distinctive as to lead compellingly to the conclusion that all were the handiwork of the defendant because all bore his or her distinctive style or 'touch'." *Golochowicz*, 413 Mich at 325.

The trial court abused its discretion in admitting the other acts evidence for the purpose of showing defendant's identity. Only in a very general sense are the two incidents in this case

similar: defendant, unprovoked, shot another person in the back of the head. Yet, the incidents differ in significant respects: while the charged offense was committed in the presence of a companion, defendant was alone during the second offense; while in the charged offense, defendant was walking on a public street and shot a stranger, during the second offense, defendant shot a person whom he knew inside the person's vehicle; finally, the charged offense did not involve a drug transaction, and the second offense did. The two incidents are merely part of the same general category of crime and do not exhibit a signature style by a single perpetrator. Because the evidence does not "lead compellingly to the conclusion that [both] were the handiwork of . . . defendant because [both] bore his . . . distinctive style or 'touch'," the trial court abused its discretion in admitting the evidence for the purpose of showing identity. *Id.*

The prosecution, recognizing that "identity" was a questionable basis for which to admit the evidence, argues that the trial court's error does not require reversal because the evidence is admissible under an alternative theory. The prosecution contends that the details of the second shooting corroborate defendant's own statements to Vago and James regarding the shooting. From this, the prosecution argues that if defendant was telling the truth about the second shooting, it is more likely he was telling the truth about his involvement in the armed robbery on Dix Road. The problem with this theory of admissibility, however, is that it overlooks the fact that defendant's statement regarding the second shooting is, itself, other acts evidence. See MRE 404(b) ("*Evidence of other crimes, wrongs, or acts is not admissible . . .*") (emphasis added). The prosecution cannot use other acts evidence to support the admissibility of other acts evidence. Instead, the question is whether *all* the other acts evidence—the details of the incident, defendant's admission regarding the incident, and facts learned through the police investigation—are admissible under some noncharacter theory. The prosecution's theory of "corroboration" merely shows that, in each instance, defendant made inculpatory statements regarding the incidents. The prosecution fails to show how this fact is relevant to any issues of consequence at trial.¹

Although the trial court erred in admitting the other acts evidence, the error does not require reversal of defendant's conviction because we are not persuaded that the error, more probably than not, undermined the reliability of the verdict. Michigan's harmless error rule is codified in MCL 769.26, which provides:

No judgment or verdict shall be set aside or reversed . . . in any criminal case, on the ground of . . . the improper admission . . . of evidence, . . . unless in the

¹ We are well aware that in defendant's companion case, *People v Bigelow*, unpublished opinion per curiam of the Court of Appeals, issued [____ __, 2013] (Docket No. 305758) (unpub op at __) this Court ruled that the trial court did not abuse its discretion in admitting evidence of the February 4, 2011, shooting for the purpose of showing defendant's intent. However, it was a close evidentiary call that, in this Court's view, did not constitute an abuse of discretion. Because the trial court's assessment of relevance in that case was close, but not an abuse of discretion, we decline to affirm the trial court's decision in this case on the alternative basis of showing defendant's "intent."

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.

“In examining whether a miscarriage of justice occurred, the relevant inquiry is the effect the error had or reasonably may be taken to have had upon the jury’s decision.” *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010) (internal quotations omitted). Put differently, an evidentiary error is not grounds for 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 Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999), quoting MCL 769.26. In assessing whether an error is “outcome determinative,” this Court “focus[es] on the nature of the error in light of the weight and strength of the untainted evidence[,]” to determine if it “undermined the reliability of the verdict.” *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002). Defendant bears the burden of establishing that it is more probable than not that the trial court’s error was not harmless. *Lukity*, 460 Mich at 495.

While defendant is correct that the prosecution’s use of the evidence was neither isolated nor infrequent, there was also strong evidence of defendant’s guilt. While MCL 769.26 does not require actual innocence, *People v Mateo*, 453 Mich 203, 211; 551 NW2d 891 (1996), when the error is slight in comparison to the strength of the prosecution’s remaining evidence, reversal is not merited, see *id.* at 215 (stating that reversal is only required if the error was prejudicial). At trial, the prosecution presented five witnesses whose testimonies, to varying degrees, established defendant’s guilt. First and foremost, Manuel Cavillo testified that he was with defendant at the time of the shooting and observed him shoot Osborne. The prosecution also presented evidence that defendant admitted to shooting Osborne. Both James and Vago testified that defendant told them he shot a man on Dix road during an attempted robbery. Testimony of other witnesses only bolstered defendant’s admission and Cavillo’s version of events. Sergeant Joseph Lavis testified that security camera footage showed Osborne fleeing from another man and, as he crossed the street, was gunned down from behind. Seconds later, another person is shown catching up with the shooter and the two men run from the scene. Furthermore, Javier Saavedra testified that he saw the victim’s body in the street, pulled over, and saw two men fleeing the scene after one said, “Run, run, run.”

Although the trial court’s error was not isolated, the untainted evidence tending to establish defendant’s guilt was strong. In determining whether the error was harmless, we look to the relationship between the other acts evidence and the untainted evidence. See *Mateo*, 453 Mich at 215 (“That inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.”). In this regard, the Court’s opinion in *Krueger* is instructive. In *Krueger*, the trial court erred in removing the defendant from the courtroom while the complainant in the case testified. *Krueger*, 466 Mich at 54. In examining whether this error was harmless, the Court first assessed the strength of the prosecution’s evidence and determined that the “evidence of [the] defendant’s guilt presented a close question.” *Id.* The Court then stated, “Not only do these facts suggest that the proofs were not overwhelming in this case, they illustrate that an effective cross-examination of the complainant was vital to the defense.” *Id.* at 55. The error in depriving the defendant his right to effectively cross-examine the witnesses against him was consequential because the prosecution’s case would not have been as strong had the defendant been able “to convey urgent lines of inquiry to his lawyer.” *Id.* In other words, because it was a close evidentiary question and the strength of the prosecution’s

case was a function of the error at issue (the defendant's inability to cross-examine the lead witness), the Court found that, more probably than not, the error undermined the reliability of the verdict. *Id.* at 56.

In contrast to *Krueger*, here, the issue of defendant's guilt regarding the charged offense did not present a close evidentiary question. And, importantly, the strength of the prosecution's evidence pertaining to the charged offense was not dependant on the other acts evidence. Even without the other acts evidence, the prosecution's undisputed evidence of the charged offense included an eyewitness who was with defendant when he committed the murder, security camera footage depicting the shooting, an admission by defendant that he committed the shooting, and various other witnesses whose testimony corroborated these pieces of evidence. Unlike in *Krueger*, where the defendant's ability to effectively cross-examine the complainant may have diminished or impeached the other untainted evidence presented by the prosecution, here, exclusion of the other acts evidence would not have diminished the strength of the untainted evidence.

The conclusion that the trial court's error was harmless finds additional support in *Mateo*, in which the Supreme Court recounted the rationale for the harmless error standard:

[T]he harmless-error statute analyzed in [*Kotteakos v United States*, 328 US 750; 66 S Ct 1239; 90 L Ed 1557 (1946)], as well as state laws such as those enacted and currently in force in Michigan, were aimed at curbing 'the general course of appellate review in American criminal causes' to reverse decisions because of the occurrence of inconsequential, technical errors. [*Mateo*, 453 Mich at 216, quoting *Kotteakos*, 328 US at 759.]

Regarding errors in the admission of evidence, the Court stated:

As for some types of error, such as the erroneous admission or exclusion of evidence, overwhelming evidence of guilt will ordinarily lead to the conclusion that the error was harmless. It would take evidence of an extraordinary quality to conclude that its erroneous admission or exclusion may have contributed to the verdict where the government had before the jury other evidence that could clearly and positively establish guilt. [*Mateo*, 453 Mich at 214, quoting 3 LaFave & Israel, *Criminal Procedure*, § 26.6(b), p 269.]

As previously noted, in light of the nature and strength of the untainted evidence, the other acts evidence did not have the "extraordinary quality" necessary to undermine the reliability of the verdict. *Id.* Although the trial court erred in admitting the other acts evidence, because it does not affirmatively appear, more probably than not, that the error was outcome determinative, the court's error does not require reversal of defendant's convictions.

III. SUBSTITUTION OF COUNSEL

Defendant argues that trial court erred when it failed to adequately inquire into the breakdown in the relationship between defendant and his counsel and abused its discretion by not appointing new counsel. A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d

120 (2001). “Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic.” *Id.*

Here, the record reveals that defendant failed to provide a basis for his request for new counsel. As a result, defendant did not meet his burden of establishing “good cause” for new counsel. See *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991) (stating that a defendant’s request must be supported by a showing of good cause). On appeal, defendant states that irreconcilable differences arose and that the trial court abused its discretion in failing to adequately inquire into this issue. The record does not support this contention. The trial court gave defendant an opportunity to explain why he wanted new counsel and defendant chose not to elaborate. There is no evidence on the record to support defendant’s generalized claim that irreconcilable differences arose between defendant and his attorney. Because defendant failed to provide a basis warranting new counsel, the trial court did not abuse its discretion in denying his request for substitute counsel. See *Traylor*, 245 Mich App at 464.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Douglas B. Shapiro