

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 21, 2013

v

THOMAS EUGENE HOLDEN,

Defendant-Appellant.

No. 308164
Wayne Circuit Court
LC No. 11-008368-FC

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

PER CURIAM.

Defendant was convicted by jury of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. We affirm.

Jerrell McCree testified that, on April 13, 2011, he was waiting for a ride outside of his father's house when defendant, his half-brother, approached him "ready to fight." After Jerrell stepped back, defendant threatened him saying, "When I catch you I'm beating your ass." Jerrell then went back into the house and his father, Dwight McCree, walked outside and exchanged words with defendant, Dwight's step-son. About ten minutes later, there was a knock on the door and Dwight walked to the door. Jerrell then heard about six shots fired outside the house. Next, he saw Dwight on the floor. Dwight said that he was hit on his shoulder and was bleeding. Jerrell testified that less than a week before this incident, he was driving defendant somewhere when a "heated argument" occurred and defendant "swung on me," hitting Jerrell in the face. Jerrell got out of the vehicle and ran to a gas station. Defendant chased him driving the vehicle. At the gas station, defendant got out of the vehicle, approached Jerrell, struck him, and then tried to drag him out of the gas station. Jerrell "pulled back and that was it." Jerrell had not seen defendant again until the day of this shooting.

Dwight testified that, on April 13, 2011, he was home when Jerrell came into the house and looked upset. Dwight looked out the front door and saw defendant. Defendant told Dwight he "was on my last leg and then he said he had one of those too." Dwight believed that defendant was referring to the fact that Dwight was "getting old" and that defendant also had a gun. Dwight had a gun in the house and defendant knew where the gun was located. Defendant told Dwight that he would be right back and left in his car. About ten minutes later, Dwight heard shots being fired outside and a window in his house breaking. Dwight got his shotgun, ran

to the front of the house, and began opening the front door. While he was opening the door, he then heard another shot, which penetrated the door and caused the door to open.

After the door opened, Dwight saw defendant on the front porch and he was holding a gun in his right hand. No one else was seen. Dwight fired a shot through the closed screen door hoping to scare defendant away. Dwight then moved to the right side of the door, and two more shots were fired into Dwight's house through a window on the side of the door where Dwight was standing. Those two shots struck Dwight in his upper right shoulder. He slid down the wall and then looked out the window and saw defendant drive off in his car. Dwight identified defendant as the shooter to the police. Dwight testified that he had had problems "off and on" with defendant; it was a "bad relationship." Detroit Police Officer Donald Covington testified that he responded to a shooting and arrived at the house to find bullet holes in the front door and window of the house, as well as a victim who had been shot in the shoulder. The victim was Dwight and he identified defendant as the shooter. Subsequently, criminal charges were filed against defendant and he was convicted as charged. This appeal followed.

Defendant argues that the improper admission of Jerrell's testimony regarding their altercation a week before this shooting deprived him of a fair trial. We disagree.

During the contested testimony, defendant raised a relevancy objection which was overruled. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009). On appeal, however, defendant argues for the first time that the testimony was improperly admitted under MRE 404(b). This unpreserved claim is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Bauder*, 269 Mich App 174, 177; 712 NW2d 506 (2005).

On appeal, the prosecution argues that Jerrell's testimony regarding his prior altercation with defendant was properly admitted under the res gestae exception to MRE 404(b) or, in the alternative, was admissible under MRE 404(b). Defendant argues that the res gestae exception did not apply to this irrelevant evidence, which was also prohibited by MRE 404(b). We agree with the prosecution.

Generally, the facts and circumstances surrounding the commission of a crime are properly admissible as part of the res gestae without regard to the requirements of MRE 404(b). *People v Delgado*, 404 Mich 76, 83-84; 273 NW2d 395 (1978); *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979). Evidence of these other acts may be admitted as part of the res gestae if the alleged acts are "so blended or connected with the [charged offense] that proof of one incidentally involves the other or explains the circumstances of the crime." *Delgado*, 404 Mich at 83 (quotation marks and citation omitted). As our Supreme Court stated in *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996), "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." That is, the jury is entitled to hear the "complete story." *Delgado*, 404 Mich at 83. Similarly, in *United States v Hardy*, 228 F3d 745 (CA 6, 2000), the United States Court of Appeals for the Sixth Circuit explained:

Proper background evidence has a causal, temporal or spatial connection with the charged offense. Typically, such evidence is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness's testimony, or completes the story of the charged offense. [*Id.* at 748.]

In this case, Jerrell's testimony regarding the violent nature of defendant's actions toward him less than a week before the shooting gave context to the events that occurred on the day of the shooting, explaining the background circumstances of this crime. See *Delgado*, 404 Mich at 83. The testimony explained why, when he saw Jerrell for the first time since that altercation, defendant approached Jerrell "ready to fight." The testimony also explained why Jerrell immediately retreated and appeared upset to his father, Dwight, who then went to the front door of his house to investigate the cause. The jury could infer from this evidence that a continuing and unresolved "family feud" led to defendant firing several gunshots at his mother and step-father's house. As our Supreme Court explained in *Delgado*, 404 Mich at 83:

It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence. [*Id.* at 83.]

There was no other evidence of record which would explain why defendant, without reason or provocation, would fire several gunshots at the house. And without Jerrell's contested testimony, the jury would have been deprived "an intelligible presentation of the full context in which the disputed events took place," i.e., the "complete story." See *Sholl*, 453 Mich at 741; *Delgado*, 404 Mich at 83. Accordingly, this *res gestae* evidence was properly admitted.

However, even if the challenged evidence was not admissible as *res gestae* evidence, MRE 404(b) was not violated by its admission. MRE 404(b)(1) prohibits evidence of other crimes, wrongs, or acts "to prove the character of a person in order to show action in conformity therewith." The forbidden evidentiary hypotheses are: "a man who commits a crime probably has a defect in character; a man with such a defect of character is more likely . . . to have committed the act in question." *People v VanderVliet*, 444 Mich 52, 63; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), quoting *People v Engelman*, 434 Mich 204, 212-213; 453 NW2d 656 (1990). Thus, relevant other acts evidence is admissible unless the proponent's sole theory of relevance is to show the defendant's criminal propensity to prove that he committed the charged offenses. *VanderVliet*, 444 Mich at 63. Accordingly, MRE 404(b) is inclusionary rather than exclusionary. *Id.* at 64 (citation omitted). It "permits the judge to admit other acts evidence whenever it is relevant on a noncharacter theory." *Id.* at 65.

Other acts evidence is admissible if it is offered for a proper purpose, is relevant, and when its probative value substantially outweighs the potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *VanderVliet*, 444 Mich at 74-75. A proper purpose is one other than establishing the defendant's character to show his propensity to commit

the offense. *Id.* at 74. Relevant evidence is evidence that 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. “The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material.” *VanderVliet*, 444 Mich at 75. And the proffered evidence is unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001) (citation omitted).

In this case, the challenged evidence was offered for a proper purpose. As discussed above, the purpose of the testimony was to give context to the events that occurred on the day of the shooting. It tended to demonstrate that a continuing and unresolved “family feud” led to the shooting, and explained why defendant would fire several gunshots at the house where his mother and step-father lived. It was not offered to show defendant’s criminal propensity to prove that he committed the charged offenses. The challenged evidence was also relevant. Defendant’s defense was that he did not commit the charged crimes. Identity is always an essential element in a criminal case. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). The evidence tended to establish that, because of an on-going family dispute, defendant was the person who fired several gunshots at the house, two of which struck Dwight. And the contested testimony was not unfairly prejudicial. It was more than marginally probative and was unlikely to be given undue weight by the jury because the prior incident involved Jerrell, did not involve a gun or shooting, and the charged crimes were not committed against Jerrell.

However, even if the challenged evidence was not admissible under MRE 404(b) and was not subject to the *res gestae* exception defendant is not entitled to relief. The untainted record evidence included, in brief, that defendant implied to Dwight that he had a gun and “would be right back.” After several shots were fired outside his house, Dwight opened the front door and saw defendant standing on the porch holding a gun. Shortly thereafter, two more shots were fired through a window of Dwight’s house and, after being struck by bullets, Dwight looked out the window and saw defendant drive away in his car. In light of this untainted evidence, defendant has not established plain error affecting his substantial rights with regard to his MRE 404(b) claim, or that the erroneous admission of irrelevant evidence resulted in a miscarriage of justice. See MCL 769.26. Further, we reject defendant’s argument that the prosecutor’s failure to provide notice that MRE 404(b) evidence would be elicited at trial resulted in reversible plain error. See MRE 404(b)(2). Even if plain error was established, reversal is not warranted because defendant did not prove either that the plain, forfeited error resulted in the conviction of an actually innocent defendant or that such error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence. See *Carines*, 460 Mich at 763-764.

Defendant also argues that the prosecutor’s references during closing arguments to defendant being a “violent individual” denied him a fair and impartial trial. We disagree.

This Court reviews preserved claims of prosecutorial misconduct *de novo* to determine if the defendant was denied a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Such claims are decided on a case-by-case basis by examining the entire record and evaluating the prosecutor’s remarks in context. *Id.* (citation omitted).

During closing arguments, the prosecutor characterized defendant as “a violent individual” and stated: “Obviously, a family familiar relationship did not mean anything at that time.” Defense counsel objected to the argument and the trial court sustained the objection, as well as admonished the prosecutor to restrict comments to the evidence presented during the course of the trial. On appeal, the prosecutor admits that the argument was improper, but argues that the error was harmless. We agree. Any prejudice was dispelled by the trial court’s final instructions to the jury which included that they were only to consider the evidence and that the attorney’s statements and arguments were not evidence. See *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995); *People v Dobek*, 274 Mich App 58, 81; 732 NW2d 546 (2007). Further, after review of the entire case it does not affirmatively appear more probable than not that the error was outcome determinative. See *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008); *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

Finally, defendant argues that offense variable (OV) 6 was improperly scored at 50 points because the record evidence did not demonstrate a premeditated intent to kill. We disagree.

This Court reviews the trial court’s scoring of a sentencing guidelines variable for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). If the record contains any evidence in support of the decision, the decision is not clearly erroneous. *Id.* (citation omitted).

Pursuant to MCL 777.36(1)(a), OV 6 is scored at 50 points if, in relevant part, the offender had the premeditated intent to kill. Premeditation requires sufficient time to permit the defendant to take a “second look” and may be inferred from the circumstances surrounding the offense. *People v Coy*, 243 Mich App 283, 315; 620 NW2d 888 (2000). Factors that may be considered include the previous relationship between the defendant and the victim, as well as defendant’s actions before the crime and the circumstances of the crime itself, such as the weapon used and the wounds inflicted. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998).

In this case, the record evidence included that defendant implied to Dwight that he had a gun, said that Dwight was “on his last leg,” and that he “would be right back.” About ten minutes later, Dwight heard gunshots outside his house and a window breaking in his house. Several more gunshots were fired and Dwight was actually struck with two bullets. Dwight also testified that his relationship with defendant was “bad.” In light of the record evidence, the trial court’s scoring of OV 6 at 50 points was not clearly erroneous.

Affirmed.

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