

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 19, 2015

v

TAMAINE LAMANUAL FOSTER,
Defendant-Appellant.

No. 320136
Kent Circuit Court
LC No. 13-002995-FC

Before: BECKERING, P.J., and MARKEY and SHAPIRO, JJ.

PER CURIAM.

Defendant, Tamaine Lamanual Foster, appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b); armed robbery, MCL 750.529; being a felon in possession of a firearm, MCL 750.224f; possession of a firearm during the commission of a felony, MCL 750.227b; and three counts of assault with intent to do great bodily harm less than murder, MCL 750.84. We affirm.

I. FACTS

This case arises out of an armed robbery that occurred on the night of December 29, 2013, at a residence in Grand Rapids, Michigan. The prosecution presented evidence at trial to establish that during the evening, defendant, Isaiah Latham, Craig Hureskin, Patrick Grover, Jeffrey Slaughter, and Tory Overstreet contacted Jason Cherry, who was known to sell marijuana, about purchasing the drug from him. According to Latham and Grover, the plan was to approach Cherry under the guise of purchasing marijuana and to rob him. Latham, who testified at trial pursuant to a plea deal, testified that he and Overstreet had .380-caliber handguns, defendant had a .25-caliber handgun, and Slaughter had an AK-47 rifle. Grover did not participate in the execution of the robbery, allegedly because he refused to use a firearm.

On the night of the shooting, Cherry, Kevin Harris, George Woods, and Jashawn Tatum were in the basement of a home that belonged Cherry's parents. Cherry lived at the home with his parents and sold drugs from the basement. After receiving a telephone call from defendant and his cohorts, Cherry agreed to sell marijuana to them, but he became nervous. At sometime between 9:00 p.m. and 11:00 p.m. that evening, defendant walked into the basement with Slaughter, Overstreet, and Latham. According to Harris, defendant walked with a distinct limp that was recognizable. Harris testified that defendant walked into the basement first, then began to back out, only to turn around again and walk into the basement, this time with a bandana over

his face. In his other hand, defendant held a handgun, and he began shooting. Defendant's cohorts joined in the shooting and stole marijuana and cash from a table in the basement. Harris was struck in the leg, Woods was struck in the back, and Tatum suffered gunshot wounds to his right shoulder, the side of his face, and the back of his head. Cherry was struck five times and died from the gunshot wounds he suffered. Police officers recovered shell casings from a .25-caliber handgun, a .380-caliber handgun, as well as casings from a round that could have been fired from an AK-47. They also recovered a .25-caliber bullet from Cherry's body and from Harris' leg.

The prosecution presented evidence at trial that defendant, Hureskin, Slaughter, and Latham were part of a rap group called "Please Believe It" or "PBI." Over defendant's objection, the prosecution presented a YouTube video of defendant rapping with PBI. Defendant wore a bandana over his face during parts of the video, as did others in the video. Defendant rapped about being "strapped"—carrying a firearm—and about people getting "merked," which a witness testified was a slang term for "murdered."

In addition to the video, the prosecution presented evidence, over defendant's objection, regarding defendant's involvement in incidents that occurred on November 16, 2012, and December 8, 2012. In the November 16, 2012 incident, Eddie Moore testified that defendant, Hureskin, and other men approached him, and Eddie thought defendant was going to rob him because he was wearing expensive glasses and an expensive watch. Because he feared being robbed, Eddie attacked defendant. While Eddie was tussling with defendant, a man whose identity was unknown to Eddie began shooting a .380-caliber firearm at Eddie, hitting him in the back. Eddie believed that defendant was not the person who shot him. Defendant then got into an automobile with the man who shot at Eddie. Regarding the December 8, 2012 incident, Eddie and his wife, Cassandra Moore, were in Eddie's vehicle when another vehicle came around the corner and began shooting at them. Eddie testified that defendant was the shooter. Laboratory testing performed on evidence collected from the shootings showed that the same .380-caliber firearm that was used in the November 16, 2012 and December 8, 2012 incidents was also used in the December 29, 2012 shooting out of which defendant's convictions arose.

II. DISCLOSURE OF LATHAM'S PLEA DEAL

Defendant first argues on appeal that his due process rights were violated because Latham's plea agreement was not sufficiently disclosed to the jury, thereby preventing the jury from fully assessing the credibility of Latham's testimony. Because defendant failed to raise a timely objection to any alleged deficiencies in the disclosure of Latham's plea deal at trial, our review is for outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Before Latham's direct examination, the prosecution called as a witness John Purlee, a detective with the Grand Rapids Police Department. Purlee testified that Latham pleaded guilty to second-degree murder, armed robbery, and felony-firearm for his involvement in the shooting at Cherry's house. As part of a plea deal, Latham agreed to testify against any codefendants, including defendant in the instant case. Latham's testimony was offered in exchange for an agreement "that his sentence would begin at 20 years on the homicide, 2 years on the felony[-]firearm, with a tail—with the end number to be set by a judge." On cross-examination, defense

counsel asked Purlee whether, if Latham testified against any other of his codefendants, his deal “could get better[?]” Purlee answered in the affirmative.

At the outset of Latham’s direct examination, the prosecution elicited testimony that Latham had been charged with eight counts in connection with the shooting at Cherry’s house, including felony murder, and that he was offered a plea deal by the prosecution in exchange for his testimony against, among others, defendant. Latham understood that the deal ensured that he would receive a sentence of no worse than 20 years on the homicide offense and 2 years on the felony-firearm offense. On cross-examination, Latham testified that he had potentially faced a sentence of life imprisonment on the first-degree murder charge, and that he now had a sentence for a “specific number of years” that could “get better” if he testified against any other codefendants.

Defendant contends that he should have been provided, before trial, “with exact information of the parameters of Latham’s plea deal.” He argues that Latham’s plea deal was “vague” and was “constitutionally infirm because it did not provide Defendant or the jury with enough information.” He does so despite acknowledging that he does not know whether Latham’s plea deal improved as a result of Latham testifying against anyone else involved in this matter.

Where “evidence of any understanding or agreement as to a future prosecution” is relevant to the credibility of a witness, the prosecution’s failure to disclose to the jury such an understanding or agreement may violate a defendant’s right to due process such that a new trial is required. *Giglio v United States*, 405 US 150, 154-155; 92 S Ct 763; 31 L Ed 104 (1972). The duty to disclose such an agreement is rooted in the prosecution’s duties under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). See also *People v Bosca*, __ Mich App __; __ NW2d __ (Docket No. 317633, issued March 26, 2015), slip op at 14-15. However, due process does not “require ‘disclosure’ of future possibilities for the jury’s speculation.” *Id.* at 15 (citation and quotation omitted).

We find defendant’s argument to be meritless. Purlee and Latham testified concerning the exact details of Latham’s plea deal, i.e., that he agreed to testify in exchange for a sentence of 20 years on the homicide offense, plus two years for felony-firearm, and that the deal *could* improve if Latham testified against multiple individuals. Given this testimony, the jury was fully aware of Latham’s incentive to testify. Therefore, as required under due process, the jury was informed that Latham was testifying against defendant in exchange for a plea deal and was informed of the details of the deal as it existed at the time of Latham’s testimony. See *Giglio*, 405 US at 154-155.

Although Latham testified that his plea deal could “get better,” there is no indication on the record—and defendant provides no evidence—that a better deal actually existed at the time Latham testified. Nor does defendant posit what more could have been disclosed regarding Latham’s plea deal at the time of trial. Nor could he, as the entirety of Latham’s plea deal, as it existed at the time of trial, was disclosed to the jury. The prosecution was not required to disclose something that did not exist. See *Bosca*, __ Mich App __, slip op at 15. As such, we decline to find plain error, let alone plain error requiring reversal.

III. EVIDENTIARY ISSUES

Next, defendant argues that the trial court erred by admitting the YouTube video¹ and testimony regarding the November 16, 2012 and December 8, 2012 incidents. We review the trial court's decisions regarding the admissibility of evidence for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). "However, where decisions regarding the admission of evidence involve preliminary questions of law such as whether a rule of evidence or statute precludes admissibility, our review is de novo." *Id.* "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) (citation and quotation marks omitted).

A. THE NOVEMBER 16, 2012 AND DECEMBER 8, 2012 INCIDENTS

We first consider, and reject, defendant's contention that the trial court erred by admitting evidence of the November 16, 2012 and the December 8, 2012 incidents involving Eddie. He argues that the trial court erred by admitting the evidence under MRE 404(b).

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible." 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. However, evidence of crimes, wrongs, or acts "is inadmissible to prove a propensity to commit such acts." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). But, evidence of other crimes, wrongs, or acts may be admissible for other purposes under MRE 404(b)(1). *Id.*

Contrary to defendant's assertions, the incidents involving Eddie were admissible without regard to MRE 404(b). See *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989). "Evidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense." *Id.* In both of the incidents involving Moore, defendant either used and possessed or was with someone who used and possessed a .380-caliber handgun. The prosecution presented evidence that the .380-caliber projectiles from the November 16, 2012, December 8, 2012, and December 29, 2012 incidents—all of which involved defendant in some way—were fired from the same gun, thereby connecting defendant with a weapon used in the incident at issue. Although the prosecution's theory at trial was that defendant did not use the .380-caliber

¹ Defendant's brief on appeal references "You[T]ube *videos*," implying that there were multiple YouTube videos admitted into evidence. Such an assertion is mistaken. The record reveals only one YouTube video was offered and admitted at trial. Although there were other videos admitted into evidence at trial, defendant's brief only raises arguments about the YouTube video described herein.

handgun in the instant offenses, evidence of the incidents involving Eddie were nonetheless relevant to establish defendant's connection to the handgun, thereby connecting him to the instant offenses. See *People v Murphy (On Remand)*, 282 Mich App 571, 580; 766 NW2d 303 (2009) (explaining that "the appropriate test is not whether sufficient evidence existed to convict defendant of constructively possessing the []gun, but whether the circumstances surrounding the gun's discovery tended to establish defendant's connection to it."). Evidence of the incidents involving Eddie tended to prove defendant's identity as one of the assailants by showing his connection to a firearm used in all three incidents. See *Hall*, 433 Mich at 580-581; *Murphy (On Remand)*, 282 Mich App at 580-581.

Furthermore, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403 because evidence of the two prior incidents was highly probative to prove defendant's identity as one of the perpetrators of the crimes at issue. *Murphy (On Remand)*, 282 Mich App at 583. Although the evidence was damaging to defendant's case, that alone was not enough to warrant exclusion under MRE 403; indeed, evidence should only be excluded when the danger of *unfair prejudice* substantially outweighs the probative value of the evidence. *Id.* We do not believe that the evidence was unfairly prejudicial. Moreover, the record reveals that the prosecution never appealed to the jury to make an inference about defendant's character; rather, the prosecutor argued that the evidence was relevant to show defendant's connection to the .380-caliber handgun and that this connection made it likely that he was at Cherry's house on the evening of the shootings. See *Murphy (On Remand)*, 282 Mich App at 583. In sum, we find that the trial court did not abuse its discretion when it admitted this evidence. See *Layher*, 464 Mich at 761.²

B. YOUTUBE VIDEO

Defendant next argues that the trial court erred by admitting the YouTube video of him rapping with PBI. The majority of the rap is performed by someone using the pseudonym "Vic the Villain"; it was established at trial that this individual was not one of the men alleged to have participated in the robbery and shooting at Cherry's house. Defendant, along with Latham, Hureskin, and Slaughter, appear in the video, as do numerous unknown individuals. At times, defendant's face and the faces of his alleged accomplices were covered by bandanas that were alleged to have been similar to the ones used in the shooting and robbery at issue. The gist of the song, which is entitled "Getting Doe," is about money, cars, guns, using drugs, shooting individuals, and sexual encounters. The song makes no mention of armed robbery. Defendant is either rapping in the background or dancing in the background for most of the song. However, towards the end of the song, he begins to rap on his own. He raps about being "strapped up" with a "45" and raps about people being "merked" or murdered. No weapons appear in the video. The trial transcripts indicate that the video was uploaded to YouTube in May of 2012.

Defendant objected to the admission of the YouTube video before trial. The prosecutor argued that the video was relevant because it showed defendant and his alleged accomplices

² Given our conclusion that the evidence was admissible, we reject defendant's accompanying claim that the admission of the evidence involving Eddie deprived him of due process.

covering their faces with bandanas in a manner that was similar to the manner in which they were covered during the charged offenses. The trial court admitted the video, explaining, in light of defendant's objections, "it may demonstrate a musical rendition by the defendant and his confederates of the intent of which they planned and enacted the offenses which are the subject of the current trial." During his opening statement, the prosecutor mentioned the rap video, stating that "[o]ne of their favorite raps . . . is to rap about how they like to get their money and their jewelry, and you will see how they like to do it because in the videos they're rapping about murder, they're rapping about armed robberies" In closing argument and rebuttal, the prosecutor again mentioned the video, stating that the video showed the motive and intent of those—including defendant, who were involved in the robbery and shooting at Cherry's house:

Most musicians rap about something that's personal to them, whether it's a personal love story, whether it's things they've done in their lives. That's what they sing about, at least the one's [sic] that write their own lyrics. What are these guys singing and rapping about? What they do [sic] on December 29th. And yes, this predates it, but that's their motive, that's their intent. That's why we showed the video.

Defendant argues that the video was irrelevant and unfairly prejudicial. We agree. In evaluating this issue, we note that the bulk of defendant's argument consists of his contention that the videos were inadmissible under MRE 401 and 403. In evaluating this issue, we consider the evidence under MRE 401 and 403 because it involves defendant's statements, not acts, and conclude that defendant is correct. Thus, we do not consider the video within the context of MRE 404(b).³ See *People v Goddard*, 429 Mich 505, 514-515; 418 NW2d 881 (1988) (evaluating a defendant's statements under MRE 401 and MRE 403 only). Instead, the statements, at least the ones in the video made by defendant, fall into the hearsay exception for statements of a party opponent, see MRE 801(d)(2), "the admissibility analysis involves instead first determining whether the statement was relevant, and second whether" the probative value is substantially outweighed by the danger of unfair prejudice. *Id.* at 515, citing MRE 401 and 403. We begin by examining the specific facts of this case. See *United States v Long*, 774 F3d 653, 665 (CA 10, 2014) (explaining that the admissibility of song lyrics and other artistic works "is a recurring one in the courts, with the ruling turning on the specific facts of the case.").

"Evidence is relevant when it has a tendency to make a material fact more or less probable." *People v Benton*, 294 Mich App 191, 198; 817 NW2d 599 (2011) (citation and quotation omitted). See also MRE 401. Here, while the evidence may have been probative to

³ We note that some jurisdictions deal with similar issues under rules of evidence that are similar to MRE 404(b), see, e.g., *State v Skinner*, 218 NJ 496; 95 A3d 236 (2014), while some jurisdictions do so under theories of general relevancy and whether that relevancy is substantially outweighed by the danger of unfair prejudice, i.e., rules of evidence that are similar to MRE 401 and 403, see, e.g., *Joyne v State*, 797 A2d 673, 677 (Del 2002) ("Writing a rap song is not a bad act."). While these cases are not binding on this Court, we may look to them as persuasive authority. See *People v Jackson*, 292 Mich App 583, 595 n 3; 808 NW2d 541 (2011).

show that defendant associated with his cohorts and that they wore masks similar to the kind used in the commission of the instant offenses, it was not probative of defendant's intent and motive, as was argued by the prosecution at trial. Defendant's statements in the rap video did not reveal any details about the charged offenses. Nor did they share any characteristics about the charged offenses, aside from the fact that defendant's rap spoke generally about violent crimes and carrying a weapon. However, the weapon about which defendant rapped was a "45," or .45-caliber handgun; this was a different caliber weapon than the weapons that were alleged to have been used in the instant offenses. At most, the statements about carrying a firearm and people getting "merked" have a tangential relationship to the instant offenses that can hardly be characterized as relevant. Cf. *Long*, 774 F3d at 664-665 (holding that evidence of the defendant's photograph on a rap CD entitled "Cokeland" was admissible because it increased the likelihood that the cocaine found next to the CD belonged to defendant); *United States v Stuckey*, 253 Fed Appx 468, 482-483 (CA 6, 2007) (holding that the trial court did not err when admitting rap lyrics because the lyrics described killing "snitches," wrapping them in blankets, and dumping the bodies in the street, which was "precisely what the Government accused [the defendant] of doing . . . in this case."). Indeed, defendant's statements in the video were nothing more than general assertions about obtaining money, carrying weapons, and, in general, acting tough. The statements appear to be nothing more than "an exercise in machismo," not statements that were relevant to defendant's intent or motivation to commit the charged offenses. See *Goddard*, 429 Mich at 520.

Moreover, we note, for purposes of determining whether the video was probative of defendant's motive and intent on December 29, 2012, that the video was uploaded to YouTube in approximately May 2012. The connection between the statements of general intent in the YouTube video—which made no discernible reference to committing armed robberies—is thin, at best, given that the statements were made several months before the charged offenses and bore no discernible connection to the offenses. This flimsy connection is stretched even thinner in light of the testimony offered at trial, which is that defendant and his cohorts came up with the plan for the robbery *on the night of the robbery* because they were looking to obtain money to fund their impending New Year's Eve celebration. This testimony tends to negate any assertion that defendant formed the intent to commit the instant offenses back in May 2012.

Furthermore, to the extent the evidence had some probative value for the purpose of showing defendant's motive and intent, such marginal probative value was substantially outweighed by the danger of unfair prejudice to defendant. See MRE 403. The rap video was highly inflammatory. It was rife with profanity, misogynistic lyrics, drug references, and general references to violent and offensive behavior. And, defendant did not even rap for the entire song; an individual who was unrelated to the charged offenses performed most of the song, with defendant only rapping in the background or simply dancing to the music. Any marginal relevance was substantially outweighed by the danger of unfair prejudice. See MRE 403. See also *Goddard*, 429 Mich at 521.

However, although defendant has demonstrated that the YouTube video was inadmissible, he is not entitled to relief. "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." *Burns*, 494 Mich at 110 (citation and quotation marks omitted). Given the strength of the evidence presented against

defendant, we do not conclude that it was more probable than not that the error was outcome determinative. Grover and Latham testified that defendant was involved in planning the robbery of Cherry's house. Harris and Woods, two of the shooting victims, testified that they were familiar with defendant and that they saw him enter Cherry's basement. Harris, who recognized defendant's face and his distinct limp, testified that defendant was firing a handgun. In addition, Latham testified that defendant accompanied him to Cherry's house and that defendant shot at the occupants of the basement. In sum, two witnesses testified that defendant was involved in planning the robbery that preceded the shooting and three witnesses testified that they saw defendant in the home on the night of the shooting. In addition, the evidence concerning Eddie connected defendant to one of the firearms used in the shooting. In light of this evidence, defendant is not entitled to reversal. See *id.* See also *People v Lukity*, 460 Mich 484, 497; 596 NW2d 607 (1999).⁴

Affirmed.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Douglas B. Shapiro

⁴ Because we find that defendant is not entitled to relief, we reject his attendant claim that he was denied due process.