

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC SMITH,

Defendant-Appellant.

UNPUBLISHED

October 10, 2006

No. 262379

Wayne Circuit Court

LC No. 04-012130-02

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), four counts of assault with intent to commit murder, MCL 750.83, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant to life in prison for the murder conviction, 25 to 50 years in prison for the assault convictions, two years in prison for the felony-firearm conviction, and one to five years in prison for the felon-in-possession conviction. We affirm.

I. MRE 404(b) Evidence

Defendant argues that the trial court abused its discretion in admitting evidence of two prior incidents during Rail Shelman's direct examination. We disagree. The decision to admit certain other acts evidence under MRE 404(b) "is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

A prosecutor may not introduce evidence of other crimes, wrongs, or acts in order to prove a defendant's character or propensity for criminal behavior. MRE 404(b). However, the evidence may be admissible to prove motive, opportunity, intent, preparation, scheme, or plan. MRE 404(b)(1). We must consider the following factors: 1) whether the prosecutor offered the evidence for something other than a character or propensity theory; 2) whether the evidence is relevant under MRE 402; 3) whether the probative value of the evidence is substantially outweighed by unfair prejudice under MRE 403; and 4) whether a limiting instruction was requested and provided under MRE 105. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

A. Prior Eye Contact

Defendant's argument regarding making eye contact with Shelman at a gas station is misplaced. Even if looking at someone strangely and creating worry or nervousness constitutes a crime, wrong, or act, "MRE 404(b) permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct." *People v Watson*, 245 Mich App 572, 576; 629 NW2d 411 (2001), quoting *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). Defendant has failed to identify any impermissible inference between his character and the conduct of looking at someone strangely. Therefore, the trial court did not abuse its discretion in admitting the challenged evidence.

B. Prior Shooting

Shelman also testified that defendant fired gunshots at a car in which Shelman was a passenger on a previous occasion. The trial court did not require the prosecutor to provide a basis for the admission of this evidence during Shelman's testimony when defendant objected, but after defendant moved for a mistrial, the prosecutor asserted that the evidence demonstrated motive. Rather, this evidence demonstrates intent because that incident is very similar to the shooting in the instant case. Both involve Shelman riding in one car and defendant riding in another car while firing gunshots at the car in which Shelman was a passenger. Therefore, the evidence that defendant fired a gun at Shelman under similar circumstances demonstrated that defendant intended to fire a gun at Shelman in the instant case.

All elements of a criminal offense are "in issue" when a defendant pleads not guilty. *Crawford, supra* at 389. Evidence of the prior shooting constitutes similar misconduct, which "is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Knox, supra* at 510, quoting *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). However, relevant evidence must be related to a fact that is of consequence to the action. *Id.* at 57. Because the evidence of the prior shooting makes it more likely that defendant possessed a gun and fired gunshots at Shelman than it would be without the evidence, it was relevant. MRE 401; MRE 402.

The probative value of the evidence was not outweighed by the danger of unfair prejudice under MRE 403. Unfair prejudice occurs "when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). Thomas Brown testified that he saw defendant and Andre Haliburton fire multiple gunshots into Anthony Harris's car because Haliburton wanted to "go get these people on Dresden." Cedric Davis testified that defendant talked about killing "[t]he guys on Dresden" and referenced the shooting in a rap song. Davis had seen defendant with a 40-caliber handgun, and Brown believed that defendant had used a 40-caliber handgun, which was consistent with five shell casings recovered from the scene. Defendant showed Ellen Conley a gun the morning after the shooting. As is discussed above, the evidence supplies intent for the shooting because it explains why defendant would shoot at this group of people.

Defense counsel requested a limiting instruction regarding the prior shooting incident with Shelman, and the trial court instructed the jurors that if they believed the evidence, they

might only consider it “as it tends to show that the Defendant may have had a reason to commit the crime that he is on trial for.” Because the evidence was offered under a motive theory and fulfilled an intent purpose, it was relevant and more probative than prejudicial, and the trial court provided a limiting instruction, the trial court did not abuse its discretion in admitting it.

II. Prosecutorial Misconduct

Defendant contends that the prosecutor committed misconduct when she suggested that defendant was a member of a gang and repeatedly referred to his association with the “Runyon boys.” We disagree. Because defendant objected on different grounds during Antwon Munlin’s cross-examination and failed to object during the prosecutor’s opening statement or closing argument, this issue has not been properly preserved for appellate review. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002); *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). We therefore review these claims for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999); *Ackerman*, *supra* at 448.

“The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted).” *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Abraham*, *supra* at 272-273. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

It is well recognized that “the First Amendment protects an individual’s right to join groups and associate with others holding similar beliefs.” *Dawson v Delaware*, 503 US 159, 163; 112 S Ct 1093; 117 L Ed 2d 309 (1992). However, evidence showing that the defendant and a witness were members in the same gang is sufficiently probative of the witness’s possible bias toward the defendant to warrant its admission. *United States v Abel*, 469 US 45, 49; 105 S Ct 465; 83 L Ed 2d 450 (1984).

Black’s Law Dictionary (8th ed) defines the term “gang” as “[a] group of persons who go about together or act in concert, esp. for antisocial or criminal purposes.” Defendant grossly mischaracterizes the prosecutor’s remarks during her opening statement and closing argument. Throughout the trial, the prosecutor never once used the word “gang” or made any references to gang activity or “rival gangs.” The prosecutor merely stated that the Runyon boys were a group of people who did not get along with a group of people known as the Dresden boys. Dresden and Runyon are streets located six blocks apart in Detroit. There was no evidence that the people in Harris’s car had any weapons, retaliated against defendant in any way, or associated with one another for criminal purposes.

Munlin, who produced defendant’s rap CD recording, claimed to be part of the Runyon boys with defendant. However, Munlin had never heard of Harris and had never seen defendant with Haliburton. If the Runyon boys were a gang and Harris was member of a rival gang, it follows that Munlin would presumably know who Harris was. Similarly, if Munlin, Haliburton,

and defendant were all members of the same gang, it follows that Munlin would probably have seen defendant and Haliburton together. Therefore, the evidence does not support defendant's argument that the prosecutor's remarks constituted an innuendo or implication that defendant was a member of a gang. The prosecutor's references to the Runyon boys did not constitute misconduct and did not prejudice defendant.

Further, no error requiring reversal will be found if the prejudicial effect of the prosecutor's improper conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The trial court twice instructed the jury that the attorneys' statements and arguments are not evidence, and jurors are presumed to follow the trial court's instructions. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

III. Hearsay

Defendant claims that the trial court improperly admitted Brown's police statement. We disagree. The decision whether to admit evidence will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, the decision whether to admit evidence often involves a preliminary question of law, which is reviewed de novo. *Id.* A question regarding the admissibility of evidence under a particular rule of evidence is a question of law that we review de novo. *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004). To the extent that defendant alleges prosecutorial misconduct, this issue is unpreserved and will be reviewed for plain error affecting substantial rights. *Carines, supra* at 762-763; *Ackerman, supra* at 448; *Rodriguez, supra* at 30.

MRE 801(c) provides that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." During Brown's direct examination, the prosecutor questioned him about his plea agreement and refreshed his memory regarding the date he turned himself in to the police. Brown testified that he told the police that defendant and Haliburton were with him at the time of the shooting. Contrary to defendant's argument, Brown never testified that he told the police that defendant was one of the shooters. Therefore, defendant's argument is misplaced, and we will proceed under the assumption that defendant is challenging Brown's testimony that he told the police that defendant and Haliburton were with him on the night of the shooting.

Although defendant does not specifically articulate his argument, he appears to argue that the prosecutor improperly impeached Brown with his prior statement to the police. This argument is also misplaced. The prosecutor did not impeach Brown; rather, she used his police statement to refresh his memory about the date that he turned himself in to the police. Further, defendant misrepresents the record when he asserts that Brown's police statement was entered into evidence. Defense counsel's hearsay objection at trial belies this assertion: "that would be referring to a hearsay document that's not in evidence[.]"

Although not addressed by either party on appeal, MRE 801(d)(1)(C) applies. MRE 801(d)(1)(C) provides that, if a declarant testifies at trial and is subject to cross-examination about the statement, his statement identifying a person after perceiving him is not hearsay. *People v Malone*, 445 Mich 369, 371; 518 NW2d 418 (1994). Brown was subject to cross-examination when he testified at trial that he told the police that defendant and Haliburton were

with him on the night of the shooting. Because Brown identified defendant and Haliburton after perceiving them, this statement is not hearsay and was properly admitted at trial.

Even if Brown's testimony regarding his statement to the police is hearsay, its admission was harmless. Earlier in his direct examination, Brown testified that he was in the car with defendant and Haliburton, and the prosecutor asked him who started the shooting. Brown replied, "I don't know who started shooting, but I seen [sic] both of them shoot." Because Brown had already testified about his direct observation regarding the substance of the challenged statement, any error in its admission was harmless. *People v Sykes*, 229 Mich App 254, 265; 582 NW2d 197 (1998).

Defendant also asserts that the prosecutor improperly argued impeachment evidence as substantive proof of guilt. However, Brown's police statement was used to refresh his memory regarding the date he turned himself in to the police; it was not used for impeachment. Moreover, defendant does not provide any transcript references to support this assertion. An appellant may not simply announce a position or assert an error and leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Further, even if the prosecutor relied on Brown's police statement, any error would be harmless because Brown testified at trial about his direct observation regarding the substance of his police statement.

IV. Witness Intimidation By A Third Party

Defendant argues that the trial court abused its discretion in admitting evidence that defendant's cousin assaulted Davis by starting a fistfight and firing a gunshot at him the weekend before he testified. We disagree.

Evidence of a defendant's threat against a witness is generally admissible to show the defendant's consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996); *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). In *People v Clark*, 124 Mich App 410, 412-413; 335 NW2d 53 (1983), this Court held that evidence that a third party threatened a witness was admissible for the limited purpose of explaining a prior inconsistent statement. However, admission of evidence that a third party offered a witness a bribe to alter his testimony may be prejudicial if credibility is at issue and the jury may infer that the defendant was responsible for the bribe. *People v Culver*, 280 Mich 223, 226; 273 NW 455 (1937).

In the instant case, the prosecutor offered the evidence of the assault to explain Davis's reluctance to testify. There was no evidence connecting defendant to the assault, and familial relationship alone does not achieve this purpose. There was no evidence that defendant's cousin assaulted Davis at defendant's request, or that defendant approved or expected his cousin to assault Davis on his behalf. Therefore, the evidence was not more prejudicial than probative. MRE 403.

Further, a cautionary jury instruction will protect a defendant from any prejudice created by the admission of a third-party threat. *Clark, supra* at 412-413. The trial court instructed the jury that it may not consider the evidence as evidence of defendant's guilt, and jurors are

presumed to follow the trial court's instructions. *Matuszak, supra* at 58. Therefore, the trial court did not abuse its discretion in admitting the evidence that defendant's cousin assaulted Davis.

V. Newly Discovered Evidence And Defendant's Motion For A New Trial

Defendant argues that Brown's affidavit constitutes newly discovered evidence that warrants a new trial. We disagree. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). The question whether a statement is against the declarant's penal interest is a question of law that we review de novo. *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996).

Defendant did not discover that Brown claimed to have given false testimony until Brown prepared his affidavit. Therefore, the evidence was newly discovered. Because it was the first assertion that Brown gave false testimony, it was not cumulative. During Brown's cross-examination, defense counsel attacked his credibility. Therefore, defendant could not have discovered or produced evidence that Brown was lying at trial.

To warrant a new trial, the newly discovered evidence must be admissible. *People v Darden*, 230 Mich App 597, 606; 585 NW2d 27 (1998). When a declarant is unavailable, MRE 804(b)(3) provides an exception to the hearsay rule contained in MRE 801 if the statement subjects the declarant to criminal liability. When Brown asserted his Fifth Amendment right against self-incrimination, he became unavailable within the meaning of MRE 804. *People v Meredith*, 459 Mich 62, 65-66; 586 NW2d 538 (1998). Because Brown averred that he had given false testimony at defendant's trial, his statements subjected him to criminal liability for perjury. Therefore, defendant is required to show corroborating circumstances that clearly indicate the trustworthiness of Brown's affidavit. MRE 804(b)(3); *People v Bowman*, 254 Mich App 142, 148; 656 NW2d 835 (2002).

Defendant has not identified any evidence that affirmatively or directly corroborates Brown's affidavit. He merely asserts that Brown's plea agreement provided him with a motive to lie, that he and Brown were not incarcerated at the same facility, and that he did not solicit the affidavit that Brown drafted. However, the evidence introduced at trial was inconsistent with Brown's affidavit. Harris and Carl and Anthony Laster all testified that they saw three people in the car from which the gunshots were fired, contrary to Brown's affidavit. Carl and Anthony Laster observed gunshots being fired from both windows on the passenger side of the car. Brown believed that defendant had used a 40-caliber handgun, which was consistent with five shell casings recovered from the scene. Davis heard defendant brag about shooting some guys on Dresden, and he had seen defendant with a 40-caliber handgun.

At trial, Brown denied that he had lied in his police statement, and his trial testimony—that he drove the car while defendant and Haliburton shot at Harris's car—was consistent with his police statement. It therefore follows that any conversation with Haliburton about whether anyone would believe that Haliburton was the only shooter would have occurred before Brown made his police statement. However, Brown approached the police before he learned that he was being investigated for the shooting. Therefore, it is highly unlikely that Haliburton "directed" Brown to provide false testimony because of concerns about whether the jury would believe that

Haliburton was the only shooter. Further, Brown's affidavit contains no mention of his police statement; he refers exclusively to his trial testimony and the jury. Accordingly, defendant has failed to show corroborating circumstances that clearly indicate the trustworthiness of Brown's affidavit, and the affidavit was properly excluded. Therefore, the trial court did not abuse its discretion in denying defendant's request to admit Brown's affidavit or in denying defendant's motion for a new trial.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael J. Talbot