

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILIP CRAIG THOMPSON,

Defendant-Appellant.

UNPUBLISHED

February 22, 2007

No. 262054

Jackson Circuit Court

LC No. 03-000128-FC

Before: Whitbeck, C.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), assault with intent to rob while armed, MCL 750.89, assault with intent to commit murder, MCL 750.83, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant appeals as of right. We affirm but vacate the assault with intent to rob while armed conviction.

This prosecution stems from the shooting death of Trevor Chambers. Chambers and Joel Cropper were confronted by defendant and Sean Taylor while the victims were at an outdoor payphone. During the course of an attempted robbery, Chambers was shot and killed. Cropper was also shot in the back as he fled the scene. Cropper recovered and at trial identified defendant as the shooter. Defense counsel stated in his opening statement that the central issue in the case was identity and argued that Cropper's identification of defendant was mistaken.

Defendant first argues on appeal that the trial court abused its discretion by allowing testimony by Taylor and Nequita Jackson that defendant brandished a gun during an argument before the shooting in issue. We disagree.

Michigan Rule of Evidence 404(b) governs the admissibility of evidence of "other crimes, wrongs, or acts." MRE 404(b); *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). "Evidence of extrinsic crimes, wrongs, or acts of an individual generally is inadmissible in a criminal prosecution to prove that the defendant possessed a propensity to commit such acts." *People v Hall*, 433 Mich 573, 579; 447 NW2d 580 (1989). The purpose of this rule is to prevent a conviction based on defendant's history of misconduct, rather than the facts of the instant case. *Starr, supra* at 495. However, such evidence is not universally excluded. Other acts evidence may be admitted where: (1) the evidence is offered for some purpose other than under a character-to-conduct theory, or a propensity theory, (2) the evidence is relevant to a fact

of consequence at the trial, and (3) the trial court determines under MRE 403 that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *Hall, supra* at 579-580. A proper purpose is one other than showing the defendant's propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The prosecutor has the burden of showing the evidence is relevant. *Knox, supra* at 509. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by a jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

Taylor testified that on the day of the murder, he and defendant went over to Jackson's home, which was about a five-minute walk from the crime scene. According to Taylor, a woman name Sarah came into Jackson's bedroom and pressured defendant for some money. Defendant "got mad, pulled out this little pistol and pointed it at" Sarah. Taylor and defendant then left and walked until they came upon Chambers and Cropper at the payphone. Similarly, Jackson testified that Sarah came into her room and told defendant to leave. Jackson said that she, defendant, and Sarah then went into the kitchen, where defendant pulled a gun from his pants and pointed it at Sarah and then defendant and Taylor left.

At the close of proofs, the court instructed the jury that this evidence could "only be considered as evidence of [d]efendant's identity as the perpetrator of the crimes charged and/or as evidence that he had the opportunity to commit the crimes charged." These are proper purposes for admission of the evidence. Further, the evidence was relevant to the issue of identity because it tended to make it more probable that defendant was the person who shot and killed Chambers. While the details of Jackson's and Taylor's stories vary, their testimony established that defendant was armed with a gun shortly before the shooting at a location within a few minutes walking distance of the murder scene. Taylor also testified that when he and defendant left Jackson's house, they immediately walked to the area of the shooting and confronted the victims. This evidence supports Cropper's identification and shows that defendant had the opportunity to commit the crimes charged.

As for balancing under MRE 403, the probative value of the evidence on the issues of identify and opportunity was not substantially outweighed by the danger of unfair prejudice. While the possibility for prejudice existed, it cannot be characterized as "unfair" given Taylor's testimony that he and defendant walked immediately to the scene after leaving Jackson's home.

Finally, a proper limiting instruction was given to the jury. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, the trial court did not abuse its discretion in admitting this evidence. *People v Sabin (After Remand)*, 463 Mich 43, 65-67; 614 NW2d 888 (2000).

Defendant also argues that the prosecutor committed misconduct by knowingly introducing false testimony by Taylor into the trial proceedings. Certainly, prosecutors have a constitutional obligation to report to the defendant and to the trial court whenever a government witness lies under oath. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). "Michigan courts have also recognized that the prosecutor may not knowingly use false testimony to obtain a conviction, . . . and that a prosecutor has a duty to correct false evidence." *Id.* at 277 (citations omitted). Absent proof that the prosecutor knew that trial testimony was

false, however, reversal is not warranted. *People v Herndon*, 246 Mich App 371, 417-418; 633 NW2d 376 (2001).

Here, we find no basis in the record for concluding that any testimony about which defendant complains was actually false. Outside the presence of the jury, the court questioned Taylor as to whether he was aware of the consequences of his testimony—namely, that it could be used against him on appeal from his own criminal convictions arising out of the same incident. The prosecutor interjected that defense counsel had been made aware that she had agreed not to use Taylor’s testimony against him in that appeal. Thereafter, the court instructed the prosecutor not to mention that agreement before the jury, but informed defense counsel that he could raise it during cross-examination if he wished, observing that doing so could be a “double-edged sword” for the defense. Defense counsel did not raise the prosecutor’s agreement during his cross-examination of Taylor.

Defendant asserts that because the jury was not informed that the prosecutor had agreed not to use Taylor’s testimony against him during his appeal, the jury was deliberately misled to believe that Taylor was “coming clean” during his testimony “for no other reason than to see justice done.” This assertion is predicated on the assumption that it is common knowledge that what a person says can be used against him in a judicial proceeding. Thus, defendant implies, the jury was misled into crediting Taylor’s testimony more highly than they would have had they known that he faced no potential ramifications for the substance, or accuracy, of that testimony.

Defendant’s claim of error lacks merit. First, it is not necessarily true that the average juror would make any connection between Taylor’s testimony against defendant and the possible impact of that testimony on Taylor’s own appeal. Assuming that most laypersons know that what a person says can be used against him at trial, it does not necessarily follow that these same persons would know how such evidence can be used in the appellate process. Further, the jurors were not informed that Taylor’s case was on appeal.¹ Second, Taylor did not offer any false testimony regarding whether the prosecutor made any deal with him with respect to his appeal. See *People v Woods*, 416 Mich 581, 602; 331 NW2d 707 (1982). And third, defense counsel was given permission to cross-examine Taylor about his deal with the prosecutor but, apparently for reasons of trial strategy, chose not to do so. Accordingly, defendant fails to support his claim of prosecutorial misconduct.

Finally, defendant’s convictions for both felony murder and the predicate felony of assault with intent to rob while armed violate the double jeopardy protections afforded by the Fifth Amendment. *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). The proper remedy is to vacate the conviction and sentence for the underlying felony. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996). Accordingly, we vacate defendant’s conviction and sentence for assault with intent to rob while armed.

¹ *People v Taylor*, unpublished opinion per curiam of the Court of Appeals, issued February 10, 2005 (Docket No. 251148).

We affirm defendant's convictions and sentences except that for assault with intent to rob while armed, which we vacate.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Bill Schuette