STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 10, 2012
v	No. 303429 Oakland Circuit Court
ROMAN ALCANTAR-MUNOZ, Defendant-Appellant.	LC No. 2010-233609-FC

Before: DONOFRIO, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to murder, MCL 750.83, and appeals as of right. We affirm because there was no violation of MRE 404(b) and defendant received effective assistance of counsel.

On May 23, 2010 shortly before 1:00 a.m., defendant was at Sabor Latino, a nightclub. Christy Lee Bale and Kirill Koval were working security. Defendant and another man got in a fight and were escorted out of the bar. Bale and Koval stood by the door of the bar and watched defendant as he got in the driver's seat of his van and changed his shirt. Defendant then pulled out a gun, drove the van out of the parking spot and was screaming incoherently. He sideswiped two parked cars before coming to a stop and firing three to four shots in the direction of Bale and Koval. Defendant drove away but was eventually arrested.

Defendant first raises challenges of improper evidence under MRE 404(b), specifically challenging some of the prosecutor's statements in closing arguments and Bale's testimony that defendant previously threw a beer bottle at Bale's boss's car. The issue is not preserved. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992) (citations omitted). This issue is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). MRE 404(b)(1) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b) "limits the use of logically relevant evidence *only* when" the evidence provides an inference regarding defendant's character from "defendant's prior misdeeds" and the purpose of the evidence is to show that defendant acted "in conformity therewith." *People v VanderVliet*, 444 Mich 52, 63-64; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994) (quotation omitted).

The prosecutor asked Bale, "[H]ave you ever been familiar with any vehicle [defendant] had been driving?" Bale responded by stating: "[h]e had a van previous, a little minivan. There was an incident where he was drunk and he threw a beer bottle at my boss' car. It was totally prior to all that but that's the only - -." The reference to the prior incident was unresponsive to the prosecutor's proper question and "[a]n unresponsive answer to a proper question is not usually error." *People v Measles*, 59 Mich App 641, 643; 230 NW2d 10 (1975) (citation omitted). The prosecutor clearly did not offer the now challenged evidence to show anything, much less propensity. Regardless, the testimony related to defendant's identity and how Bale knew that defendant was the person who shot on the night in question. It was proper MRE 404(b) evidence. Identity is listed under MRE 404(b) as a proper purpose for evidence of other acts and identity was logically relevant. Further, the evidence was not precluded by MRE 403, which provides that evidence should be excluded if its probative value is "substantially outweighed" by the danger of unfair prejudice. This was not a situation where the marginal probative value of a piece of evidence was outweighed by the danger of unfair prejudice. Any prejudice was further diffused because the prosecutor never followed up on the unresponsive testimony or argued it before the jury and, moreover, the throwing of beer bottles is very dissimilar from the incident for which defendant was charged. There was no plain error and defendant also has not established that Bale's testimony, even if it constituted a plain error, affected the outcome of the trial. *Carines*, 460 Mich at 763-764. Reversal is not required. *Id.*

Defendant also argues that some of the prosecutor's comments in closing argument violated MRE 404(b). However, MRE 404(b) applies to "[e]vidence of other crimes, wrongs, or acts." The statements of a prosecutor during closing argument are not evidence, as the trial court instructed the jury in this case. Additionally, the prosecutor's argument did not contain improper evidence of other specific acts under MRE 404(b). The prosecutor's comments did not violate MRE 404(b), and no plain error requiring reversal exists. *Carines,* 460 Mich at 763-764.

Next, defendant argues that he was denied effective assistance of counsel. This issue was not preserved and review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish a claim of ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (citations omitted). To show prejudice, defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 302-303 (quotation omitted). "[D]efense counsel is not required to make frivolous or meritless motions or objections." *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001) (citations omitted).

Defendant argues that defense counsel was ineffective for failing to object to the prosecutor's use of leading questions. MRE 611(d)(1) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." A leading question is "[a] question that suggests the answer to the person being interrogated." Black's Law Dictionary (9th ed). For the use of leading questions "to warrant reversal, it is necessary to show some prejudice or pattern of eliciting inadmissible testimony." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (quotation

omitted). Further, reversal is not required when the defendant is not prejudiced by the leading questions. *Id.*

First, defendant argues defense counsel was ineffective for not objecting that the following questions to Bale were leading questions:

> *Q.* Now, let's talk about that following July. Let's talk about July 20th, 11:30 in the morning. Do you recall where you were when you noticed something that kind of startled you?
>
> *A.* You mean at the bar?
>
> *Q.* No, I'm talking about in July now, some weeks after the shooting.
>
> *A.* I'm - - you - -
>
> *Q.* Did there come a point in time you believe you saw the Defendant again after the time of the shooting?
>
> *A.* I'm - - I'm sorry, yeah. It was - -
>
> *Q.* Hang on. Let me ask the question. So that's a yes?
>
> *A.* Yes. Yes.
>
> *Q.* On or about July 20th; it's a month or so afterwards?
>
> *A.* Yes, yes.

Most of these questions were not leading because although they call for a yes or no answer, they did not suggest the answer. The question "[s]o that's a yes?" was leading, but was merely asked to clarify Bale's previous response. These challenged questions were asked only to assist Bale in understanding the time frame about which the prosecutor was referring. There was no pattern of eliciting inadmissible testimony and the challenged questions did not prejudice defendant and, thus, any objection would have been meritless. *Watson*, 245 Mich App at 587. Counsel's conduct did not fall below an objective standard of reasonableness, and defendant cannot show they affected the outcome of the trial. Even if an objection had been made and sustained, the prosecutor could have rephrased the question and the same evidence would have been presented.

Defendant also argues that defense counsel was ineffective for not objecting to a series of questions the prosecutor asked Bale when he introduced an exhibit of an aerial photograph as leading. However, none of these questions were leading because, although they called for a yes or no response, the answers were not suggested. Any objection would have been meritless and counsel is not required to make meritless objections. *Knapp*, 244 Mich App at 386.

Next, defendant challenges the prosecutor's question to Koval asking, "were [you] present around close to 1:00 a.m. on that day in May when things got crazy and out of hand?"

This is not a leading question because although it calls for a yes or no response, the answer was not suggested. Any objection would have been meritless.

Also, defendant argues that counsel was ineffective when he did not object to the prosecutor's question to Koval, "Tell me what you recall seeing before gunshots were fired?" This is not a leading question because it does not suggest an answer. An objection would have been meritless, so defense counsel was not required to make one.

Defendant also argues that defense counsel was ineffective for failing to object to testimony that violated MRE 404(b). As discussed above, the challenged evidence and arguments did not violate MRE 404(b) and if defense counsel had objected, it would have been meritless.

Finally, defendant argues that defense counsel was ineffective because he failed to object to the prosecutor's comments in closing arguments that this incident was "like a drive-by gangland-style shooting"; that defendant "acted like the hoodlum that he's demonstrated himself to be"; that defendant "was violent." During closing arguments, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quotation omitted). "The prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to his theory of the case." *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989) (citation omitted.) In this case, the prosecutor's arguments were based on reasonable inferences from the evidence that defendant was in a van, screaming incoherently, and shot three or four times in the direction of the two men who escorted him out of the bar. *Id.* Counsel is not required to make meritless objections. *Knapp*, 244 Mich App at 386.

Even if defendant could establish that counsel's performance was objectively unreasonable in failing to object to the closing arguments, he cannot establish that but for counsel's conduct, the result of trial could have been different. *Toma*, 462 Mich at 302-303. Defense counsel countered the prosecutor's statements in his own closing argument. Further, the jury was instructed that the "[l]awyers' statements and arguments are not evidence." There is no error requiring reversal when "the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Watson*, 245 Mich App at 586 (citation omitted). In this case, any prejudice was cured by the instruction. And, as noted, the evidence against defendant was strong.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro