STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 11, 2014
v	No. 313523 Midland Circuit Court
BRIAN DAVID DASHIELL, Defendant-Appellant.	LC No. 12-005072-FH

Before: BOONSTRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of felonious assault, MCL 750.82, felon in possession of a firearm (felony-firearm), MCL 750.227b, reckless use of a firearm, MCL 752.863a, and possession of a firearm while under the influence, MCL 750.237. Defendant was sentenced to serve 2 years for felony-firearm, and 18 months to 4 years on each of the other counts, with those sentences to run concurrently to each other and consecutive to the felony-firearm sentence. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant and the victim, a friend of defendant's, were drinking alcohol and dancing at defendant's home with a woman they had met at a bar that evening. At some point, defendant invited the woman into his bedroom, and she agreed to join him there. The victim testified that he became somewhat jealous, and decided to "ruin" defendant's night by kicking in defendant's bedroom door. After the victim kicked open the door, defendant emerged, and an argument ensued. Defendant demanded that the victim leave his home. When the victim did not leave, defendant, according to his own testimony, retrieved a pistol from his bedroom and pointed it at the victim's temple, repeating his command to leave. The victim walked out of the house, with defendant following him with the gun. While the victim was getting in his vehicle, defendant fired the gun into his front yard. The victim then drove away and contacted the police.

II. ADMISSION OF EVIDENCE OF DEFENDANT'S MILITARY CONVICTION AND COURT-MARTIAL

Defendant first argues that the trial court reversibly erred when it admitted evidence of a prior assault conviction defendant had received resulting in a military court-martial. This Court reviews a trial court's decision to admit or deny evidence for an abuse of discretion. *People v*

Layher, 464 Mich 756, 761; 631 NW2d 281 (2001). An abuse of discretion occurs where the trial court chooses an outcome falling outside a "principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

During cross-examination, the prosecution asked defendant about an incident during his military service that resulted in a court-martial. Defense counsel objected, arguing that the evidence did not meet the test for other acts evidence under MRE 404(b), and that it was not admissible for proper impeachment purposes under MRE 608 or 609. The prosecution argued that the evidence was admissible because it would show that defendant had pleaded guilty "to being involved in an altercation with an individual while he was in the military using . . . a knife . . . as well as striking and choking the other individual." According to the prosecution, this evidence showed that defendant "could have defended himself with a knife or another object," and that "he can, if necessary . . . use less deadly means in order to defend himself and has in the past." The prosecution also argued that because defendant had introduced his military service at trial, the evidence was admissible to show that his "military record . . . was not stellar and pristine." Defense counsel responded that the evidence was more prejudicial than probative, but the court held, after expressing the view that MRE 404(b) was inapplicable, that "[i]f it's a straight 403, 401 issue, I find that it is not unduly prejudicial." The court therefore admitted the evidence.

Although the trial court did not engage in an MRE 404(b) analysis in this case, we hold that it should have done so. Because the evidence at issue was of other acts committed at another time, the court should have considered the issues of relevance and prejudice within the framework of MRE 404(b). "At its essence, MRE 404(b) is a rule of inclusion, allowing relevant other acts evidence as long as it is not being admitted solely to demonstrate criminal propensity." *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002). The Michigan Supreme Court laid out the process for considering other acts evidence under MRE 404(b):

> First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403. [*People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000) (citation omitted).]

Thus, when the prosecution seeks to admit evidence of other crimes,[1] the evidence is admissible when (1) it is offered to show something other than character or propensity, MRE 404(b)(1); (2)

[1] MRE 404(b)(2) requires the prosecution to provide a criminal defendant "reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown" of its intent to offer other acts evidence. Pretrial notice was not given in this case, nor did the trial court find that pretrial notice was excused for good cause; instead, as stated above, the trial court

it is relevant under MRE 402; and (3) the probative value is not substantially outweighed by unfair prejudice, MRE 403. *Id*.; see also *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). Upon request, the trial court must instruct the jury that the evidence should be considered only for the proper purpose for which it was admitted. *VanderVliet*, 444 Mich at 74-75.

The first part of the *Vandervliet* test is that the evidence must be offered for a proper purpose. Under MRE 404(b)(1), a proper purpose does not include character or propensity, but may include "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material." In the instant case, the prosecution argued that the evidence was admissible, in response to defendant's testimony that he felt threatened by the complainant, to show that defendant could have used "less deadly" means to defend himself and that he had done so in the past. However, the prosecution did not offer the evidence as "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material." MRE 404(b). Further, in the incident for which defendant was court-martialed, according to plaintiff, defendant used the knife on the other individual, hit and choked the person, and was the aggressor in the conflict. By contrast, in the instant case, all of the witnesses agreed that the complainant initiated the conflict when he kicked in defendant's bedroom door. Thus, the prosecution established neither a "proper purpose" for admitting the evidence nor that the evidence was "material" to the circumstances of the current charges.

Further, to be admissible under MRE 404(b), or otherwise, evidence must be relevant under MRE 402. *Vandervliet*, 444 Mich at 74. MRE 401 defines relevant evidence as "evidence having 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." In order to prove that defendant had committed felonious assault, plaintiff was required to show (1) an assault, (2) with a dangerous weapon, (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. MCL 750.82(1); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). An "assault" is "either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978). Defendant admitted that he used a gun in the incident; the dangerous weapon element thus was satisfied. Plaintiff further needed to prove that the victim was placed in reasonable apprehension of an immediate battery, and that defendant intended to place the victim in such a state of such apprehension. However, the proffered evidence relating to defendant's court-martial had no tendency to make either circumstance more or less probable than it would otherwise have been. Plaintiff presented no evidence that the victim was aware of defendant's past conduct. Mere evidence that defendant had assaulted another individual in the past did not make it more likely that the victim in this case had reason to apprehend a battery, or that defendant intended to induce such an apprehension. This evidence was therefore irrelevant to the felonious assault charge; it was also irrelevant to the three firearm charges.

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found that MRE 404(b) was inapplicable. Because we find in any event that the offered evidence was inadmissible under MRE 404(b), we need not address whether there was good cause to excuse the lack of pretrial notice in this case.

If the trial court determines that offered evidence is relevant, the trial court must then determine whether the probative value of the evidence was substantially outweighed by its potential prejudicial effect under MRE 403. The trial court specifically held that the evidence was admissible notwithstanding MRE 403. However, the relevance of the evidence was, at best, minimal given the facts of the case and defendant's admissions, whereas the possible prejudice from placing before the jury evidence of a military court-martial for assaultive behavior with a deadly weapon was significant. Therefore, even assuming arguendo that some minimal relevance for the admission of this evidence existed, there was still a danger that such marginally probative evidence would have been given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

We hold that the evidence of defendant's court-martial and the underlying assault did not meet the *Vandervliet* test of admissibility, and was therefore inadmissible under MRE 404(b). However, the prosecution additionally argues that evidence of defendant's court-martial was appropriately admissible as rebuttal evidence in response to defendant's testimony that he felt threatened by the victim. We do not find this argument persuasive. Evidence that would have been inadmissible on direct examination may sometimes be admitted "to contradict, repel, explain, or disprove evidence produced by the other party." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996) (quotation marks and citations omitted). Here, the prosecution claimed that evidence of defendant's court-martial was relevant to show that defendant could have used "less deadly" means to defend himself and that he had done so in the past. However, the prosecution did not present any evidence that a knife was "less deadly" than a gun. Further and more important, defendant was the aggressor in the case for which he was court-martialed; defendant's conduct in that incident was thus irrelevant to the issue of whether defendant could have defended himself other than by using a gun. Rebuttal evidence must be relevant to the evidence that it is offered to rebut. *Nolte v Port Huron Sch Dist Bd of Ed*, 152 Mich App 637, 645; 394 NW2d 54 (1986), citing *Edwards v Common Council of the Village of Three Rivers*, 102 Mich 153; 60 NW 454 (1894).

We thus hold that the trial court erred in admitting evidence of defendant's military conviction and court-martial. Nonetheless, we find that error to be harmless in this case. Defendant's own testimony established that he held a loaded gun to the victim's temple and that he followed the complainant out of his house while carrying the gun. There was also testimony from both the victim and defendant that defendant discharged the gun in his front yard before the victim drove away. This testimony was sufficient for a reasonable jury to find beyond a reasonable doubt that defendant had committed the offense of felonious assault. Therefore, the court's error in admitting the other acts evidence was harmless. See MRE 103(a); see also *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004), aff'd 473 Mich 399; 702 NW2d 530 (2005) ("A preserved nonconstitutional evidentiary error will not merit reversal unless it involves a substantial right, and, on review of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome-determinative.)

III. SENTENCING

Defendant argues that none of his prior convictions were felony convictions because they were adjudicated by a military court-martial and the military does not classify offenses as misdemeanors or felonies. Therefore, he contends that the trial court erred by considering his

military convictions for purposes of scoring PRV 2, MCL 777.52 (prior low severity felony convictions), and OV 13, MCL 777.43 (continuing pattern of criminal behavior), and that he is entitled to resentencing. We disagree.

According to his PSIR, defendant was convicted by plea in a military court-martial of one count of drunk driving, three counts of felonious assault, and two counts of obstructing justice (through attempting to intimidate the victim of his assault). Defendant is correct that the Uniform Code of Military Justice (UCMJ) does not classify offenses as misdemeanors or felonies. See 10 USC §§ 877-934. However, as the prosecution notes, the offenses of felonious assault and obstructing justice through intimidation of a witness are classified as felonies under Michigan law. See MCL 750.82; MCL 750.505 ("Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years . . . ."); *People v Vallance*, 216 Mich App 415, 419; 548 NW2d 718 (1996) ("Intimidation of a witness in judicial proceedings is an indictable offense at common law, associated with the concept of obstructing justice."). "[T]he facts of the out-of-state crime, rather than the words or title of the out-of-state statute under which the conviction arose, are determinative." See *People v Quintanilla*, 225 Mich App 477, 479; 571 NW2d 228 (1997) (considering whether out-of-state conviction can be used for enhancement under habitual offender statutes). "Courts-martial are lawful tribunals." *Losinger v Dep't of Corrections*, 329 Mich 47, 49; 44 NW2d 864 (1950). The UCMJ provides a system to protect the constitutional guarantees of a defendant, such as he would have in a civilian criminal trial. See *Burns v Wilson*, 346 US 137, 142; 73 S Ct 1045; 97 LEd2d 1508 (1953). Thus, we hold that defendant is not entitled to resentencing on the grounds that the trial court incorrectly relied on his military convictions in determining defendant's minimum sentencing range.

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ /E. Thomas Fitzgerald