

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT JARMEL ANDERSON,

Defendant-Appellant.

UNPUBLISHED

May 5, 2005

No. 252308

Wayne Circuit Court

LC No. 03-007705-01

Before: Whitbeck, C.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant Robert Anderson appeals as of right his jury convictions of two counts of assault with intent to commit murder¹ and possession of a firearm during the commission of a felony.² The trial court sentenced Anderson to 33½ to 50 years in prison for the assault with intent to commit murder convictions and two years in prison for the felony-firearms conviction. We affirm.

I. Basic Facts And Procedural History

Anderson's convictions arise out of a shooting incident that occurred in Detroit on May 10, 2003. That day, Antoine Beck was driving his mother, Dawna Avery Beck, down Grand River Avenue between I-96 and Wyoming when Dawna Beck was struck in the cheek by a bullet. Both Dawna and Antoine Beck heard gunshots, but did not see the shooter. Dawna and Antoine Beck drove to a nearby police precinct, where EMS was called.

The second shooting victim was Andre Johnson, a tow truck driver. On May 10, 2003, Johnson was driving a tow truck to pick up his personal vehicle from Hollywood Sam's Auto Parts, which is located on Grand River Avenue between Ilene and Griggs. Johnson stated that after loading his car onto the truck, he was standing in front of the shop talking with Melvin Howard, who had worked on his car. Johnson testified that as he opened the driver's side of his tow truck, he heard two gunshots, then saw Anderson running toward him while continuing to

¹ MCL 750.83.

² MCL 750.227b.

fire at him. Johnson attempted to run away, but was shot in his leg, hip, and back before falling to the ground. Johnson stated that he recalled then seeing Anderson get into a blue four-door Intrepid and drive away. Johnson called 911 and identified Anderson as the shooter.

Johnson explained that he recognized Anderson from an altercation they had outside a bar on January 2, 2003, after he saw Anderson “snatching and grabbing” his date, Latoya Brand. Johnson stated that he had pulled his tow truck around to where Anderson and Brand were standing and began to exchange words with Anderson, who was with four friends. Johnson recalled that Anderson spit at his truck, jumped on the truck, and swung open the passenger side door. Johnson responded by removing a sawed-off shotgun from underneath the driver’s seat and shooting it into the air outside the driver’s side window. Johnson testified that he then fired the gun in the air a second time because he believed that Anderson and his friends had begun surrounding the truck. As a result of the incident, Johnson pleaded guilty to felony-firearm and was free on bond awaiting his sentencing when he was shot.

Regarding the May 10 shooting, Melvin Howard testified that he recalled hearing several gunshots when he and Johnson were standing near the tow truck. Howard stated that Johnson ran toward him holding his chest and stomach area and fell to the ground behind the truck where Howard was standing. Howard testified that Johnson attempted to tell him the identity of the shooter, but that he could not understand Johnson. Howard claimed that Johnson then started to run in the direction of the auto shop, when the shooter shot at Johnson several more times. Howard’s best description of the shooter was that he was a black male. Howard recalled that Johnson fell to the sidewalk in front of the auto shop. Howard said that he called 911 from his cell phone and handed the phone to Johnson so he could identify the shooter to police. Sharon Hood testified that she was comforting Johnson in front of the auto shop shortly after he had been shot, and heard Johnson identify Anderson as the shooter.

Detroit Police Officer Alfred Thomas testified that he was working in the 10th Precinct on May 10, 2003, when Dawna Beck arrived in distress because she had been shot. Officer Thomas spoke with the Becks and examined their vehicle, then went to the hospital to interview Johnson. Officer Thomas testified that Johnson identified Anderson as the shooter during this interview. Officer Thomas stated that he believed Johnson was shot while near the same cross streets Dawna and Antoine Beck were traveling when Dawna Beck was shot. Officer Thomas further testified that he knew that Anderson frequented a residence located two blocks from Hollywood Sam’s. Officers Cyril Davis and Greg Tourville also investigated the shooting, and each testified that Johnson told them, separately, that Anderson was the shooter. Anderson was arrested in June 2003 after a police investigator saw him enter a Dodge Intrepid.

Anderson’s sister, Patricia Anderson, and an investigator located a witness named Mark Jordan and convinced him to testify at trial. Jordan testified that he was riding in the front of a bus traveling near Hollywood Sam’s on Grand River when he heard gunshots. Jordan recalled seeing a man with a rifle running in the street. Jordan described the shooter as a “little stocky dude.” Jordan testified that Anderson was not the shooter.

Patricia Anderson testified that she and her brother were still in Florida on May 10, 2003 after having attended their grandfather’s funeral in Pensacola on May 9, 2003. Patricia Anderson testified that she and her brother left Southfield, Michigan, on the evening of May 8 and drove 15 to 16 hours in a rental car to Florida, where they arrived on Friday, the morning of the funeral.

Defense counsel introduced as evidence a “funeral itinerary” and a photograph allegedly showing Anderson at his grandfather’s gravesite on the day of the funeral. Patricia Anderson recalled the she and Anderson did not drive back to Michigan until “Tuesday or Wednesday of that next week,” which would have been May 13 or 14, 2003.

Patricia Anderson admitted that she owned a dark blue Dodge Intrepid at that time and that she had a home on Birwood Street, just two blocks from Grand River. Patricia Anderson conceded that she and her brother were not together “all the time” while they were Florida. She could not produce any records, such as telephone records or credit card receipts, to establish that she and her brother were in Florida, although she did produce a rental car receipt matching the time period in question. Patricia Anderson testified that she could not persuade family members from Florida to testify at trial regarding Anderson’s presence in Florida on May 10, 2003.

Anderson’s cousin, Ronald Osborn, testified that he and his cousins drove a truck that followed the Andersons’ rental car to Florida. Osborn stated that he attended the burial and is seen standing next to Anderson in the photograph taken at the gravesite. Osborn testified that Anderson was in Florida on May 10, 2003. Osborn stated that he left Florida on Sunday, May 11, 2003, and that Anderson remained in Florida. Osborn said that he next saw Anderson the following Thursday. Osborn admitted that he was once convicted of giving a false statement to a police officer. Osborn also testified that Anderson owned a blue Intrepid and resided on Birwood Street, near Grand River.

The prosecution argued to the jury that Anderson was the shooter who purposely shot Johnson in response to their previous altercation and that his stray bullet struck Dawna Beck. Anderson argued that this was a case of mistaken identity and that he was in Florida when the shooting occurred. The jury found Anderson guilty of two counts of assault with intent to murder and one count of felony-firearm.

II. Other Acts Evidence

A. Standard Of Review

Anderson argues that the trial court erred by allowing “other acts” evidence to be introduced at trial. Anderson did not object at trial to the introduction of this evidence. Therefore, this issue is unpreserved,³ and our review is limited to plain error affecting defendant's substantial rights.⁴ Under the plain error standard, a defendant must establish that: (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the error affected substantial rights, that is, affected the outcome of the lower court proceedings.⁵ "Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually

³ See *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

⁴ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888 (2000).

⁵ *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence."⁶

B. Legal Standards

Anderson raises a mixed issue of failure to provide notice and improper introduction of other acts evidence. Evidence of other crimes, wrongs, or acts is inadmissible to show a defendant's character or propensity to commit a charged crime.⁷ In *People v VanderVliet*,⁸ the Supreme Court articulated the factors that must be present for other acts evidence to be admissible. First, the prosecutor must offer the evidence under something other than a character or propensity theory.⁹ Second, "the evidence must be relevant under MRE 402, as enforced through MRE 104(b)[.]"¹⁰ Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403.¹¹ The trial court may provide a limiting instruction under MRE 105 if one is requested.¹²

C. The Contested Evidence

Anderson contends that MRE 404(b)(1) barred the prosecution from introducing evidence of the January 2, 2003, altercation between him and Johnson. Anderson's argument is without merit. Evidence of other acts may be admissible if offered to prove "motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident"¹³ Based on the record, Anderson and Johnson had never had communications before their January 2, 2003, altercation. In this regard, the prosecution was not using Anderson's other acts, such as groping Johnson's girlfriend and spitting at Johnson, to show that he has a propensity to shoot people, and was therefore more likely to have shot Johnson. Rather, the prosecution used this evidence to explain why Anderson would shoot Johnson and how Johnson could identify Anderson as his shooter. Introduction of this evidence to establish a motive for the shooting and a link between Anderson and Johnson is therefore permitted under MRE 404(b)(1). The fact that the altercation occurred is relevant, and any unfair prejudice against Anderson is minimal.¹⁴ Thus, the evidence was admissible.

⁶ *Id.*

⁷ MRE 404(b)(1).

⁸ *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

⁹ *Id.* at 74.

¹⁰ *Id.* at 74.

¹¹ *Id.* at 74-75.

¹² *Id.* at 75.

¹³ MRE 404(b)(1); see also *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000).

¹⁴ MRE 403.

Anderson further claims that the prosecutor violated MRE 404(b)(2) by failing to provide notice that he intended to introduce the other-acts evidence regarding the January 2, 2003, altercation. However, where the evidence of a defendant's other acts was properly admitted, that defendant cannot establish that the prosecutor's failure to comply with MRE 404(b)(2) affected his substantial rights without a showing that the defendant would have taken action in response to the notice.¹⁵ In this case, the evidence was admissible and the record is devoid of any evidence that defense counsel would have taken action if the prosecutor had provided him notice. Furthermore, our review of the record indicates that defense counsel knew of the incident three months before trial, at Anderson's preliminary examination. Therefore, we conclude that the trial court did not commit plain error in allowing evidence of the January 2, 2003, altercation between Anderson and Johnson to be introduced at trial.

III. Ineffective Assistance Of Counsel

A. Standard Of Review

Anderson argues that he was denied the effective assistance of counsel. Challenges to the effectiveness of trial counsel present mixed questions of fact and constitutional law.¹⁶ We review the trial court's findings of fact for clear error and review de novo questions of constitutional law.¹⁷ Because Anderson failed to raise his ineffective assistance claim in a motion for a new trial or an evidentiary hearing, our review is limited to the existing record.¹⁸

B. Defense Counsel's Performance

Anderson argues that defense counsel was ineffective in three respects: (1) failing to adequately investigate and present his alibi defense; (2) failing to object to the prosecution's introduction of other-acts evidence; and (3) failing to adequately cross-examine witnesses and argue defendant's case during closing argument.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error or errors, the result of the proceedings would have been different.¹⁹ To show that counsel's performance was below an objective standard of

¹⁵ See *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004); *People v Hawkins*, 245 Mich App 439, 455-456; 628 NW2d 105 (2001).

¹⁶ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

¹⁷ *Id.*

¹⁸ *People v Ginther*, 390 Mich 436; 443; 212 NW2d 922 (1973); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

¹⁹ *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

reasonableness, a defendant must overcome "the strong presumption that his counsel's action constituted sound trial strategy under the circumstances."²⁰

Anderson first challenges defense counsel's alleged failure to interview and call witnesses who would have testified that he was in Florida at the time of the shooting. Failure to interview witnesses does not alone establish inadequate preparation.²¹ "Counsel's failure to call witnesses is presumed to be trial strategy[.]"²² Counsel's performance must be measured without the benefit of hindsight.²³

In this case, the absence of alibi testimony from other witnesses was not the result of defense counsel's failures or neglect. Initially, we note that the evidence on which Anderson primarily relies, affidavits signed by five witnesses who did not testify at trial, is not part of the lower court record and cannot be considered here. Appeals are heard on the original record²⁴ and the parties may not expand the record on appeal.²⁵

Turning to the existing record, defense counsel listed two of the witnesses on his Notice of Alibi Defense, and referred to another witness' anticipated testimony in his opening statement. He also used information acquired from one of these witnesses to impeach Johnson on the stand. The record further reveals that defense counsel adequately investigated potential witnesses. Defense counsel secured a court-appointed investigator to assist him in preparing for trial. The investigator worked with Patricia Anderson to locate and convince one witness, who saw the shooting while he was riding on a city bus, to testify at trial. Defense counsel also met with Patricia Anderson and with Osborn, Anderson's cousin, before they testified.

Further, defense counsel's alleged failures did not prejudice Anderson. The majority of the alibi witnesses were otherwise unavailable to testify because they could not afford to travel to Michigan. Another witness explained at the sentencing hearing that she could not testify because her pregnancy precluded her from leaving her bed. Defense counsel nevertheless managed to offer a variety of evidence of Anderson's alibi, including testimony from Patricia Anderson and Osborn that Anderson was in Florida on the day of the shooting, documents in support of this defense, and a photograph allegedly showing Anderson in Florida. Under these circumstances, Anderson cannot overcome "the strong presumption that his counsel's actions constituted sound trial strategy" to show that counsel's performance was deficient.²⁶

²⁰ *Id.* at 302.

²¹ *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

²² *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997).

²³ *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

²⁴ MCR 7.210(A)(1).

²⁵ *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

²⁶ *Toma, supra* at 302.

Anderson's second assignment of error is defense counsel's failure to object to the other-acts evidence regarding the altercation between him and Johnson. However, Anderson cannot show that defense counsel erred because, as discussed, the evidence was admissible under MRE 404(b)(1), and counsel is not required to make a meritless objection.²⁷

Anderson's final argument for ineffectiveness is that defense counsel insufficiently questioned the prosecution's witnesses and made damaging remarks during closing argument. There is nothing in the record to support the contention that defense counsel failed to adequately cross-examine witnesses. Counsel's decision not to cross-examine two witnesses who testified that they did not see the shooter did not damage Anderson's theory of "mistaken identity." Further, defense counsel attempted to impeach Johnson with his inconsistent statement to police regarding the January incident and Johnson's previous out-of-court statement that Anderson was not the shooter. He also forced Johnson to admit that he never saw a gun and only saw the shooter for "split second."

Defense counsel's closing argument emphasized Anderson's mistaken identity argument and alibi defense. Defense counsel argued that the description of the shooter given by two witnesses did not match Anderson, and he enumerated the evidence corroborating Anderson's alibi defense. He also challenged the prosecution's theory that Anderson may have returned to Michigan from Florida just to shoot Johnson as illogical and unsupported by the evidence.

Further, it is clear from the record that defense counsel's reference to the fact that certain alibi witnesses did not testify was an attempt to justify Anderson's ostensible failure to produce these witnesses and to convince the jury not to punish Anderson for their absence. There is no evidence in the record to support Anderson's assertion that defense counsel's comments implied his guilt or improperly shifted the burden of proof to defendant. In sum, Anderson has not shown that counsel's performance was below an objective standard of reasonableness, or that, even assuming counsel erred, the result of the proceeding would have been different.²⁸

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Donald S. Owens

²⁷ *Snider, supra* at 425.

²⁸ *Toma, supra* at 302-303.