STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 13, 2013
v	No. 309027 Wayne Circuit Court
D'ANGELO J. OWENS, Defendant-Appellant.	LC No. 11-007407-FC

Before: BOONSTRA, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit great bodily harm less than murder, MCL 750.84(1)(a), armed robbery, MCL 750.529, carjacking, MCL 750.529a, and possession of a firearm during a felony (felony firearm), MCL 750.227b. He was sentenced to 84 to 120 months' imprisonment for assault with intent to commit great bodily harm less than murder, 120 months to 30 years for armed robbery, 180 months to 30 years for carjacking, and two years for felony firearm. We affirm defendant's convictions but remand for entry of an amended judgment of sentence because the trial court erred in imposing a minimum sentence for assault with intent to commit great bodily harm less than murder, MCL 750.84, that was more than two-thirds of the statutory maximum. See MCL 769.34(2)(b).

I. BASIC FACTS AND PROCEDURE

This appeal arises out of defendant's assault on eighty-one-year-old Moses Baldwin on June 13, 2011, when defendant threatened Baldwin with a blue steel revolver and told him to get out of his car. Baldwin complied and backed away from the car, throwing some bills on the sidewalk after defendant demanded money. Before defendant could escape with the car, Baldwin shot at him and defendant returned fire, hitting Baldwin in the shoulder. Officers recovered Baldwin's car later that day, and Baldwin gave a description of defendant to the police.

Prior to trial, the prosecution sought to introduce "other acts" evidence in order to establish a pattern in defendant's behavior. The trial court allowed the introduction of that evidence in part. Specifically, defendant and an accomplice had robbed James Slaughter at gunpoint at a gas station on June 5, 2011. After Slaughter briefly resisted, defendant and his accomplice stole Slaughter's gray 2005 Chevy Impala and left. On June 6, 2011, defendant and

an accomplice approached Michael Wright inside his food delivery truck, and they told him to lie down or they would shoot him. Wright charged the men and was shot, whereupon defendant and his accomplice fled. The Chevy Impala that defendant stole from Slaughter was used in the attack on Wright, and officers recovered the vehicle, where they found a black revolver. Defendant could not be excluded from DNA tests on the revolver.

The jury found defendant guilty of assault with intent to do great bodily harm less than murder, armed robbery, carjacking, and possessing a firearm in the commission of a felony. The trial court sentenced defendant to 84 to 120 months for assault with intent to commit great bodily harm less than murder, 120 months to 30 years for armed robbery, 180 months to 30 years for carjacking, and two years for possession of a firearm during a felony.

II. *BATSON* CHALLENGE

Defendant argues first that the trial court erred when it found no intentional racial discrimination by the prosecution in the use of peremptory challenges. This Court reviews the trial court's factual findings for clear error and issues of law de novo. *People v Knight*, 473 Mich 324, 348; 701 NW2d 715, cert den sub nom *Rice v Michigan*, 546 US 1043; 126 S Ct 759; 163 L Ed 2d 590 (2005). The determination whether defendant established a prima facie case of discrimination is a mixed question of fact and law, the question whether the prosecution offered a race-neutral explanation is reviewed de novo as an issue of law, and the decision whether the defendant ultimately established discrimination is a question of fact reviewed for clear error. *Id*. at 341-344.

A defendant may establish a prima facie case of discrimination by establishing that he is a member of a cognizable racial group and the prosecutor removed venire members of the defendant's racial group through peremptory challenges. *Batson v Kentucky*, 476 US 79, 96; 106 S Ct 1712; 90 L Ed 2d 69 (1986). The trial court is required to consider all relevant circumstances, including a pattern of striking members of that racial group or comments made during jury questioning. *Id*. at 96-97. Defendant argues in this case that the trial court erroneously held that a pattern was required; however, the court indicated only that it found a lack of pattern relevant.

When a prima facie showing is made, the prosecution is required to "articulate a neutral explanation related to the particular case to be tried." *Id*. at 98. The race-neutral reason need not be persuasive or plausible. *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). The trial court must then determine if the defendant has established purposeful discrimination. *Batson*, 476 US at 98. The plausibility of the race-neutral reason is relevant in determining whether it was mere pretext. *Purkett*, 514 US at 768. Deference is given to the trial court because it was in a better position to see the prosecutor's demeanor as well as that of the venire members who were excused. *Hernandez v New York*, 500 US 352, 365; 111 S Ct 1859; 114 L Ed 2d 395 (1991).

Here, the prosecution provided facially race-neutral reasons for using the peremptory challenges—perceived bias against police officers based on a venire member's comments, concern about honesty where one potential juror apparently was pursuing legal action against an x-ray technician for injury, and a venire member who acted disinterested in the proceedings. The

prosecution's reasons were sufficiently plausible for the trial court to have found no intentional discrimination.[1] This factual finding was not clearly erroneous.

III. OTHER ACTS EVIDENCE

Defendant next challenges the trial court's decision to allow evidence of other criminal acts, allegedly committed by defendant a week before the charged offenses. This Court reviews for an abuse of discretion a trial court's decision whether to admit evidence, *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002), including admission of evidence under MRE 404(b), *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Underlying issues of law are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

"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, the evidence is admissible when (1) it is offered to show something other than character or propensity, MRE 404(b)(1); (2) 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). Under MRE 404(b)(1), evidence of other acts may be admissible for purposes other than to show character and propensity, including to prove "motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident[.]" MRE 404(b)(1).

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[1] We note briefly that our decision is not dependent on the trial court's observation that African-American jurors remained on the jury, or that the prosecution used other peremptory challenges on Caucasian members of the venire panel. A racially-balanced jury, standing alone, does not cure discriminatory use of peremptory challenges. See *Rice v White*, 660 F3d 242, 254-260 (CA 6, 2011), cert den 132 S Ct 2751; 183 L Ed 2d 630 (2012). Here, the trial court did not find the prosecutor's reasons insufficient or find any *Batson* problem cured by the balanced jury. The trial court found only that it was less likely that the prosecutor used the peremptory challenges based on race because she did not use available challenges on other African Americans.

The prosecution concedes on appeal that the trial court should not have allowed this evidence for the reasons it cited, i.e., to prove larcenous intent or a common plan of "teaming up," because larcenous intent was not at issue and there was no evidence of a second perpetrator in the charged crime. Further, there was no suggestion that the carjacking occurred by accident or mistake; therefore, the evidence could not have been admitted under the rationale that it would prove the absence of accident or mistake. *People v Sabin*, 463 Mich 43, 69; 614 NW2d 888 (2000). To be probative of a common plan, the acts must have common features beyond the commission of the same crime. *Id*. at 65-66.

This Court is not limited in its review to the reasons cited at trial. See *People v Mardlin*, 487 Mich 609, 616 n 8; 790 NW2d 607 (2010); *Sabin*, 463 Mich at 59 n 6. In *Sabin*, 463 Mich at 59 n 6, the Supreme Court found that the trial court had admitted the evidence under the proper theory and, therefore, it was irrelevant that the prosecutor did not expressly argue that it was probative for "plan, scheme, or system." However, the trial court's ultimate finding of a common scheme or plan was sufficiently broad to encompass multiple theories, and this Court is not limited to the prosecution's trial court arguments, see *Mardlin*, 487 Mich at 616 n 8.

The prosecution posits that the Slaughter and Wright crimes occurred within a couple miles of the charged offense, and the prosecution argues further that evidence of the Slaughter crime is admissible because it established that defendant used a revolver (which was found to contain DNA consistent with his) to commit crimes, even though that particular revolver was taken by the police before the current crime was committed. The prosecution also argues that evidence of the Wright crime was admissible because it showed that defendant was inclined to shoot at his carjacking victims when they resisted. This evidence also had probative value to prove defendant's intent in firing the weapon. It contradicted any suggestion that defendant accidentally discharged his gun out of fear of being shot or shot only to protect his own life. Although self-defense was not legally available to defendant, see *People v Maclin*, 101 Mich App 593, 596-597; 300 NW2d 642 (1980), defense counsel raised this issue at trial.

This probative value was not substantially outweighed by the risk of unfair prejudice, MRE 403.[2] In *Crawford*, 458 Mich at 398, the Court explained that MRE 403 excludes marginally probative evidence to which the jury may give undue weight, a common danger when allowing other acts evidence. All evidence is essentially offered to "prejudice" the other party; however, evidence is unfairly prejudicial if it injects extraneous considerations, like bias, sympathy, anger, or shock. *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797, reh den sub nom *People v Wallace*, 447 Mich 1202 (1994); *People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011). We conclude that this evidence, being relevant to defendant's common

[2] We note that the trial court referred to a "balancing test" but did not expressly hold that the probative value was not substantially outweighed by unfair prejudice or otherwise cite MRE 403. This error was harmless in light of the fact that the evidence was in fact not unfairly prejudicial. MCR 2.613(A); *Lukity*, 460 Mich at 497.

plan and intent, was not merely marginally probative; nor did it inject extraneous considerations or otherwise prejudice defendant.

Further, the limiting instruction provided by the trial court minimized the risk of unfair prejudice. See *People v Martzke*, 251 Mich App 282, 295; 651 NW2d 490 (2002). The jury was instructed to only consider the other acts evidence to show that defendant acted purposefully and not by accident or mistake, or that defendant used a plan, system, or characteristic scheme that he used before or since; the jury could not use the evidence to show that defendant was a bad person or likely to commit crimes. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Finally, assuming *arguendo* that the evidence should not have been admitted, the error was harmless, because the victim in the charged case positively identified defendant and, therefore, the jury likely would have convicted him regardless. MCR 2.613(A); *Lukity*, 460 Mich at 497. Thus, the trial court did not err in admitting the other acts evidence.

IV. SENTENCING

Defendant's final argument is that that the trial court erred in imposing his minimum sentence for the assault conviction. This Court reviews de novo issues of law regarding sentencing, including statutory interpretation. *People v Anderson*, 298 Mich App 178, 181; 825 NW2d 678 (2012).

Under MCL 769.34(2)(b), the trial court may not impose a minimum sentence that is more than two-thirds of the statutory maximum. The statutory maximum for assault with intent to do great bodily harm less than murder is ten years. MCL 750.84. Two-thirds of ten years is 80 months. The trial court in the present case imposed a minimum sentence of 84 months, which is plain error. The prosecution concedes this on appeal. Therefore, we remand for entry of an amended judgment of sentence, correcting the minimum sentence for assault with intent to commit great bodily harm to 80 months. See *People v Feliciano*, 485 Mich 1122; 780 NW2d 254 (2010) ("When a court imposes an indeterminate sentence that violates this rule, and the maximum sentence is otherwise valid, it is the minimum sentence that must be adjusted because this is the portion of the sentence that is unlawful."); *People v Thomas*, 447 Mich 390; 523 NW2d 215 (1994).

We affirm defendant's convictions but remand for entry of an amended judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Christopher M. Murray