

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMION J. NELMARK,

Defendant-Appellant.

UNPUBLISHED

May 23, 1997

No. 191402

Kent Circuit Court

LC No. 95-001864

Before: Griffin, P.J., and Doctoroff and Markman, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery in violation of MCL 750.529; MSA 28.797. He was sentenced to ten to twenty years in prison and now appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial because of three instances of alleged prosecutorial misconduct. However, defendant failed to object to the alleged errors at trial, and thus we will not reverse unless the errors caused prejudice so great that it could not have been cured by an appropriate instruction. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). We find that no such prejudice occurred in this case. Defendant complains that the prosecutor improperly referred to threats received by the victim in which she was warned not to testify against defendant. However, the prosecution sufficiently connected the threats to defendant, and thus the jury was permitted to consider the evidence. *People v Lytal*, 119 Mich App 562, 576-577; 326 NW2d 559 (1982). Next, we find no error in the prosecutor's argument that defendant's alleged accomplice was not worthy of belief. Such argument was not improper. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Last, defendant contends that the prosecutor improperly suggested that the government had special knowledge about defendant's guilt. However, these arguments were made in rebuttal to an issue raised by defendant, and did not constitute any impermissible argument. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

Next, defendant argues that the trial court abused its discretion in admitting certain evidence pursuant to MRE 404(b) because, even if it was relevant to the issue of his identity, its probative value

was substantially outweighed by the danger of unfair prejudice to him. The evidence of which defendant complains was the testimony of a witness who positively identified defendant as one of the individuals who the witness had noticed outside the grocery store where the witness was employed. The testimony indicated that defendant and two of his associates were behaving suspiciously outside the grocery store wearing blue bandannas. This behavior was noticed in the early morning hours, several days before the occurrence of the robbery at issue in this case.

Here, the evidence of the grocery store incident was very similar in place and time with the armed robbery at issue in this case. The similarities in the incidents tended to show that defendant, who was present during the first incident, was one of the individuals involved in the second, similar incident. Thus, pursuant to MRE 404(b), the testimony regarding the grocery store incident was admissible on the issue of defendant's identity, especially where defendant made his identity a genuinely controverted matter with his alibi defense. See, e.g., *People v Lee*, 434 Mich 59; 450 NW2d 883 (1990). Both incidents involved two to three young men wearing blue bandannas over their faces in the early morning hours of the same week at business establishments in the same general neighborhood. Therefore, the trial court did not abuse its discretion in finding that the probative value of this testimony outweighed any prejudicial effect.

However, defendant also argues that the prosecutor improperly used the admissible evidence in her closing and rebuttal arguments. A prosecutor is permitted to comment upon and suggest reasonable inferences from the evidence presented. However, where evidence of a defendant's other wrongful acts has been admitted for a limited purpose under MRE 404(b), the prosecutor may deprive the defendant of a fair trial in arguing that the jury should consider the evidence as substantive evidence of the defendant's guilt. *People v Quinn*, 194 Mich App 250, 253; 486 NW2d 139 (1992).

On appeal, defendant highlights three statements which he contends improperly addressed defendant's propensity to commit a robbery. Indeed, two of the three prejudicial remarks were made during rebuttal, when defense counsel had no opportunity to respond. These statements exceeded the trial court's pretrial direction to the attorneys that the grocery store incident was admissible only to show that defendant was "dressed in a similar way." Although we find that the prosecutor's statements may have been improper, we find the error, if any, to be harmless.

A constitutional error is harmless if it had no effect on the verdict and was not so offensive to the maintenance of a sound judicial system that it can never be regarded as harmless. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 536; ___ NW2d ___ (1996). In this case, the trial court's instructions to the jury prevented any harm that the prosecutor's statements may have otherwise caused. The trial court initially instructed the jury that the attorneys' statements and arguments were not evidence. More importantly, the court also gave the jury a thorough instruction that it should not consider the grocery store incident as evidence of defendant's character because defendant was only charged with the robbery at the convenience store. Therefore, no manifest injustice occurred, and defendant was not denied a fair trial.

Third, defendant argues that if this Court finds that defendant was prejudiced by defense counsel failing to object to the previously alleged instances of prosecutorial misconduct, then it should also find that these omissions denied defendant the effective assistance of counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because our analysis of defendant's first argument uncovered no prosecutorial misconduct, defense counsel's failure to object to the three alleged errors was not objectively unreasonable or prejudicial to defendant. Moreover, defense counsel's failure to object to the fourth alleged instance of prosecutorial misconduct (improper comments about the identification evidence admitted under MRE 404(b)) may have merely been trial strategy for which this Court will not substitute its judgment. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Finally, defendant alleges error regarding the calculation of the sentencing guidelines. He argues that the sentencing court erred in scoring twenty-five points for Offense Variable 2, physical attack or injury, based on terrorism. However, as recently clarified by our Supreme Court, the sentencing guidelines do not have the force of law, and no cognizable claim for relief can be based on a sentencing judge's discretionary interpretation of the unchallenged facts. *People v Mitchell*, 454 Mich 145, 176; ___ NW2d ___ (1997).

[A]pplication of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate.

Appellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied. Guidelines are tools to aid the trial court in appellate courts' inquiry into the question whether the sentence is disproportionate and, hence, an abuse of the trial court's discretion. [*Id.* at 177-178.]

In this case, the trial judge scored the guideline based on the finding that defendant placed the gun against the victim when performing the robbery. Although the trial court mistakenly stated that the gun was placed against defendant's neck, when the record indicated that the gun was placed against defendant's ribcage, we find no material difference in the placement of the gun against the victim's body. The factual predicate upon which the sentence was imposed was supported by the evidence and was not materially false. See *Id.* Defendant does not claim that the sentence was disproportionate. Accordingly, defendant has failed to state a cognizable claim for relief from his sentence. *Id.*

Affirmed.

/s/ Richard Allen Griffin
/s/ Martin M. Doctoroff
/s/ Stephen J. Markman