STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP BASKINS,

Defendant-Appellant.

UNPUBLISHED
August 12, 1997

No. 189608
Recorder's Court
LC No. 94-003865

Before: Markey, P.J., and Jansen and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to consecutive terms of twenty to forty years for the assault with intent to rob while armed conviction, and two years for the felony-firearm conviction. He appeals as of right and we affirm.

This case arises out of an attempted carjacking that occurred on March 23, 1994, in the City of Detroit at 9:30 p.m. Defendant and two accomplices were driving in a stolen Mercury Cougar and pulled in front of a car parked in a parking lot. The car was occupied by an on-duty, undercover Detroit police officer, Reginald Crawford. Crawford was using a public pay telephone at the time, when defendant exited the Cougar, walked up to Crawford's car, and put a handgun to Crawford's head. Defendant told Crawford to "give up the car, this is a jacking," and that he would blow Crawford's head off. A second man with a rifle tried to open the passenger side door of Crawford's car.

Crawford got out of his car, pulled out his gun, and began firing. As defendant was running away, he was hit by a bullet in his leg and fell to the ground. Crawford also fired shots at the man who attempted to open the passenger side door, but he was able to flee on foot. The third accomplice exited the Cougar and was also able to escape on foot. Crawford fired a total of ten shots. It was disputed at trial whether defendant actually fired any shots at Crawford. According to one witness, one of the accomplices fired three shots. Crawford testified that he believed that defendant had shot at him

when he moved behind the phone booth for protection. Crawford, however, admitted that he did not see who actually shot the gun, but the phone booth was hit with a bullet. Defendant's gun was recovered by police officers and there were three spent casings and three live bullets in the gun.

Defendant was originally charged with assault with intent to commit murder, assault with intent to rob while armed, and felony-firearm. He was acquitted of the assault with intent to commit murder charge and convicted of the other two charges. On appeal, defendant raises two issues. He claims that the trial court abused its discretion in permitting testimony concerning a carjacking that defendant committed approximately five hours before the instant crimes, and that the trial court erred in denying defendant's requested instruction on attempted armed robbery. We do not find either issue to require reversal.

I

Defendant first argues that the trial court abused its discretion in permitting the prosecutor to admit evidence of prior bad acts. Specifically, the trial court permitted the prosecutor to introduce evidence that defendant committed a carjacking on the same day as the present offenses. Debbie Baldwin testified, over defendant's objection, that she was at a gas station when defendant walked up to her, held a gun at her neck, and ordered her out of her car. Defendant then drove away in her Mercury Cougar. This incident occurred approximately five hours before the instant offenses.[1] The Mercury Cougar was later used by defendant and his accomplices in attempting to steal Crawford's car.

All relevant evidence is admissible, except as otherwise provided. MRE 402. Evidence of other crimes is not admissible to prove the character of the person in order to show action in conformity therewith; however, it may be admissible for other proper purposes such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when such is material. MRE 404(b)(1). Other acts evidence is admissible when (1) it is offered for a proper purpose under MRE 404(b), (2) it is relevant under MRE 402, (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, and (4) the trial court may, upon request, give a limiting instruction to the jury. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).

The trial court did not abuse its discretion in admitting the other acts evidence. The evidence was offered for a proper purpose under MRE 404(b) because it was introduced to prove defendant's intent. That is, the evidence was introduced to prove defendant's intent to rob the car from Crawford. Further, the evidence was relevant under MRE 402 because defendant's intent with respect to both assault charges was a material element at trial. Next, we do not find that the probative value of the evidence was substantially outweighed by any unfair prejudice. Defendant has made no showing of prejudice beyond the general claim that evidence of the prior act could persuade the jury to convict for that act. In fact, defendant's contention in this regard is diminished by the fact that the trial court instructed the jury that it did not have to decide whether defendant was guilty of the prior act and that the purpose of admitting evidence of the prior act was to establish defendant's intent.

Accordingly, the trial court did not abuse its discretion in admitting the other acts evidence.

II

Defendant next argues that the trial court erred in refusing to instruct the jury on his requested instruction of attempted armed robbery.

Defendant relies on *People v Bryan*, 92 Mich App 208, 225; 284 NW2d 765 (1979), where this Court held that attempted armed robbery is a necessarily lesser included offense of assault with intent to rob while armed. Defendant's reliance on *Bryan* is misplaced inasmuch as it was clearly overruled by the Supreme Court's decision in *People v Adams*, 416 Mich 53; 330 NW2d 634 (1982). In *Adams*, the Supreme Court held that because the elements of an attempt are not duplicated in the completed offense, the trial court is not required to instruct the jury on attempt without regard to the evidence of the defense presented or argued. *Id.*, p 56. The Court specifically held that a trial court need not instruct on attempt unless there is evidence, or on jury view a lack of evidence, indicating that only an attempt was committed. *Id.*, p 59; see also *People v Jones*, 443 Mich 88, 103, n 21; 504 NW2d 158 (1993) (a trial court is not required to instruct on attempt in every case because an attempt is not a necessarily included offense of the substantive crime, but is, rather, a cognate offense).

Thus, we must consider whether there was evidence that only an attempted armed robbery was committed and thus an instruction was required on attempt as a cognate lesser offense.[2] *Adams, supra*, p 59. Crawford testified that defendant approached him as he was seated in his car, placed a gun within a couple of inches from his head, and told him to get out of the car. Another witness testified that defendant had a gun, "stuck it to the officer's face and asked him to get out." In his police statement, defendant stated that he was trying to steal a car, that he approached the driver's side window with a gun in his hand, and that he told the man to give up his car. At trial, defendant admitted that he was trying to steal a car. Defendant testified that he had a gun, but that he did not point the gun at Crawford, and that he did not fire the gun at Crawford.

In considering the evidence presented at trial, we cannot conclude that there was evidence that *only* an attempted armed robbery was committed. Defendant, by the testimony of two witnesses, clearly assaulted Crawford by placing his gun at Crawford's head. See, e.g., *People v Joeseype Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979) (a simple criminal assault is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery). Defendant's intent to steal the car was established by his own testimony. While defendant was correct in arguing before the jury that his attempt to steal the car was thwarted, his assault of the complainant was not. Therefore, the evidence in this case was not that only an attempted armed robbery was committed.

Accordingly, the trial court did not err in denying defendant's requested instruction on attempted armed robbery.

Affirmed.

/s/ Jane E. Markey
/s/ Kathleen Jansen

I concur in the result only.

/s/ Helene N. White

[1] Defendant was tried in a separate case with respect to his carjacking of Baldwin's car. He was convicted, following a bench trial, of armed robbery, unlawfully driving away an automobile, and felony-firearm.

[2] In *Adams*, the trial court refused to give the defendant's requested instructions on attempted armed robbery and attempted unarmed robbery where the defendant was charged with armed robbery. The Supreme Court concluded that the trial court did not so err because the evidence was not that only an attempt was committed. *Adams, supra*, pp 59-60.