

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARLON DENIELO EL,

Defendant-Appellant.

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UNPUBLISHED

April 27, 1999

No. 200495

Macomb Circuit Court

LC No. 96-000198 FC

Before: Bandstra, C.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of unarmed robbery, MCL 750.530; MSA 28.798, and unlawfully driving away an automobile [UDAA], MCL 750.413; MSA 28.645, both offenses having been committed against his ex-girlfriend, Vanessa Moore. The jury acquitted defendant of the higher charge of armed robbery, MCL 750.529; MSA 28.797, and charges of felony-firearm, MCL 750.227b; MSA 28.424(2), first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and carrying a concealed weapon, MCL 750.227; MSA 28.424. The trial court sentenced defendant, as a third habitual offender, MCL 769.11; MSA 28.1083, to concurrent terms of 60 to 360 months' imprisonment for the unarmed robbery and 12 to 60 months' imprisonment for the UDAA offense. We affirm.

I

First, defendant claims that the trial court abused its discretion by allowing the prosecutor to elicit testimony from the victim concerning prior assaults on her by defendant, which defendant contends constituted irrelevant, improper bad acts evidence where the danger of unfair prejudice substantially outweighed the probative value, if any, of the evidence. MRE 404(b). Defendant argues that the evidence of prior, similar assaults by defendant on the victim is inadmissible to show a propensity by defendant to commit such acts and its admission was not harmless because the jury was left with a "reverberating clang" that defendant was a repetitive assaulter. MRE 404(b)(1); *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993); *People v Engelman*, 434 Mich 204, 211; 453 NW2d 656 (1990); *US v Merriweather*, 78 F3d 1070, 1077 (CA 6, 1996). We disagree.

A trial court's decision to admit evidence regarding "other crimes, wrongs, or acts" is reversed only where there is a clear abuse of the trial court's discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Use of similar bad acts evidence is inadmissible where its purpose is solely to show that a defendant acted in the present case in conformity with his prior conduct, i.e., to show his propensity to commit the instant offense. MRE 404(b); *Starr, supra* at 494, 496; *VanderVliet, supra* at 63-65.

Evidence in this case was admissible in response to defendant's voluntary injection in both his opening statement and his cross-examination of the victim regarding information concerning prior assaultive incidents by defendant against the victim, *People v Yarger*, 193 Mich App 532, 538-539; 485 NW2d 119 (1992), and was admissible to refute defendant's allegations that the victim fabricated the charges against defendant, *Starr, supra* at 502. Defendant may not assign error on appeal to something his own counsel injected at trial. See *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). Where defense counsel opened the door to the admission of the evidence, the trial court did not abuse its discretion in admitting the evidence now complained of on appeal.

## II

Second, defendant contends that his right to due process was denied because the voir dire proceedings were not transcribed. We note that any delay in providing defendant with a copy of the transcript is attributable to defendant's delay in requesting transcription of the proceedings. Because a transcript of the proceedings has now been prepared and filed with the lower court, defendant's claim is moot. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

## III

Third, defendant argues that his right against double jeopardy was violated, presumably based on defendant's convictions for both unarmed robbery and UDAA. On a de novo review of this claim, *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995), we conclude that defendant's convictions for both unarmed robbery and UDAA do not violate double jeopardy. See *People v Hurst*, 205 Mich App 634, 638-639; 517 NW2d 858 (1994); *People v Murph*, 185 Mich App 476, 480-481; 463 NW2d 156 (1990), rev'd with respect to sentencing issue (On Rehearing), 190 Mich App 707; 476 NW2d 500 (1991).

## IV

Fourth, defendant claims that charging him with five crimes from a single event was unreasonable, enhancing the possibility of a compromise verdict, and constituted prosecutorial overcharging which denied him due process. Defendant's claim is without merit.

The test for prosecutorial overcharging is not whether the prosecutor's choice of charges was "unreasonable," as defendant seemingly suggests, or was "unfair" See *People v Barksdale*, 219 Mich App 484, 489; 556 NW2d 521 (1996). Courts have a narrow scope of review over the prosecuting attorney's charging decisions. *Id.* at 487. We review the prosecutor's charging decision under an

“abuse of power” standard, which is found only if the prosecutor’s charging decision is made for reasons that are unconstitutional, illegal or ultra vires. *Id.* at 487-488. In the absence of any claim or evidence of abuse of power in the prosecutor’s charging decision in this case, we will not question that decision. *Id.* at 489.

V

Finally, defendant asserts that he was deprived of due process by the trial court’s denial of defendant’s request pursuant to MCL 767.93(1); MSA 28.1023(193)(1) [the “Uniform Act”] to secure the attendance of Terry Jefferson, an inmate in North Carolina, to testify at trial for the defense. We review the trial court’s denial of defendant’s request under the Uniform Act for an abuse of discretion. *People v McFall*, 224 Mich App 403, 411; 569 NW2d 828 (1997). We conclude that the trial court did not abuse its discretion in denying defendant’s request to secure the attendance of the out-of-state witness for trial.

A defendant may invoke the Uniform Act, MCL 767.91 *et seq.*; MSA 28.1023(191) *et seq.*, to secure the attendance of an out-of-state witness at a criminal proceeding. A right to compulsory process requires a prima facie showing that the witness’ testimony would be both material and favorable to the defense. *McFall*, *supra* at 408. Unsupported statements, such as unsubstantiated representations of defense counsel, that the proposed witness is material or necessary are insufficient to establish a prima facie case of materiality. *Id.* at 410; *People v Williams*, 114 Mich App 186, 201-202; 318 NW2d 671 (1982). To meet the test for materiality, the party seeking the presence of an out-of-state witness pursuant to the Uniform Act should present evidence in the form of an affidavit of the witness or other competent evidence, such as a police report or court record. *Id.* See also *People v Loyer*, 169 Mich App 105, 115-116; 425 NW2d 714 (1988); *Williams*, *supra*.

Defendant did not present an affidavit by Jefferson, a police report, or a court record in support of his representation of the substance or materiality of Jefferson’s purported testimony. Jefferson knew nothing about the circumstances of the instant crime, and even if his testimony could bear on the victim’s credibility, that alone would not elevate Jefferson to the status of being a material witness for the purposes of the Uniform Act. See *Loyer*, *supra* at 115.

Where defense counsel presented only unsupported representations of Jefferson’s expected testimony, he did not establish a prima facie case of materiality and the trial court did not abuse its discretion in denying defendant’s request under the Uniform Act to secure Jefferson’s attendance at trial. *McFall*, *supra*; *Loyer*, *supra*; *Williams*, *supra*.

We affirm.

/s/ Richard A. Bandstra  
/s/ Jane E. Markey  
/s/ Michael J. Talbot