

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM JOAQUIN DANIEL,

Defendant-Appellant.

UNPUBLISHED

June 29, 1999

No. 208983

Kent Circuit Court

LC No. 97-001382 FC

Before: Cavanagh, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of one count of armed robbery, MCL 750.529; MSA 28.797, one count of assault with intent to rob while armed, MCL 750.89; MSA 28.284, two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to concurrent terms of eighteen to forty years' imprisonment for each count of armed robbery and assault, to be served consecutively to the mandatory two-year term of imprisonment for the felony-firearm convictions. We affirm.

I

Defendant first contends that the court improperly admitted evidence of a prior bad act. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Evidence of prior bad acts is admissible under MRE 404(b) if it is offered for a proper purpose, if it is relevant, and if its probative value is not substantially outweighed by unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). The prosecution bears the initial burden of establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). Where the only relevance is to character or the defendant's

propensity to commit the crime, the evidence must be excluded. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998).

Defendant argues that the testimony of complainant Phelona Goree regarding an incident that occurred in December 1996 constituted inadmissible propensity evidence. Goree testified that in December 1996, she had seen defendant's girlfriend and two men running away from her house. One of the men was wearing a green coat. Although Goree could not identify defendant as one of the two men, in a telephone conversation the next day, defendant told her that the confrontation had not been directed at her; rather, defendant's actions had been aimed at her boyfriend.

The prosecutor explained that the evidence was offered to establish that Goree had previously seen defendant wearing a green coat and to provide a possible motive for the incident in the present case. After reviewing Goree's testimony, we conclude that the testimony was not admissible as evidence of a possible motive for the attack; the prosecutor's suggestion that the attack could have occurred because defendant bore a grudge against Goree or her boyfriend after the December 1996 incident is entirely speculative. However, evidence that Goree had seen defendant in a green jacket on a previous occasion was clearly relevant to the issue of identity. Eyewitnesses told the police that defendant was one of the assailants and had been wearing a green coat. In his opening statement, defense counsel claimed that defendant did not own "any such green coat." Thus, whether defendant possessed a green coat was a fact at issue. Because the evidence was offered for a proper purpose under MRE 404(b), the trial court did not abuse its discretion in admitting the evidence.¹

Defendant further contends that, even if the evidence were admitted for a purpose other than to show that defendant had a propensity to commit armed robbery, the probative value of the evidence was substantially outweighed by its prejudicial effect. However, evidence presented by the prosecutor is expected to be prejudicial, and MRE 403 prohibits only evidence that is unfairly so. *Crawford*, *supra* at 398. Here, defendant was not tried before a jury; the presentation of similar acts evidence in a nonjury trial does not carry with it the risk of prejudice presented by admission before a jury. *People v Gilbert*, 101 Mich App 459, 473; 300 NW2d 604 (1980). We are not persuaded that defendant was unfairly prejudiced by the admission of the evidence.

Even if the trial court had erred in admitting the testimony, we would conclude that the error was harmless. Immediately after the incident, Goree and an eyewitness, Katrina White, each told the police that defendant was one of the assailants. In addition, White testified that defendant contacted her after his arrest, stating that the attack had not been directed at her and asking her not to testify against him. Finally, the trial court found the testimony of defendant's alibi witnesses "evasive" and not credible. Thus, it is highly probable that the evidence did not contribute to the verdict. See *People v Gearns*, 457 Mich 170, 205 (Brickley, J.), 207 (Cavanagh, J.); 577 NW2d 422 (1998).

II

Defendant next contends that his conviction must be reversed because the trial court made an erroneous factual finding. This Court will not set aside the findings of fact by a trial court in a criminal

case unless they are shown to be clearly erroneous. *People v Anderson*, 112 Mich App 640, 648; 317 NW2d 205 (1981).

After reviewing the record, we agree that the trial court clearly erred in attributing the telephone conversation between defendant and Goree, in which defendant stated that his actions had been directed at her boyfriend, to the January 1997 incident at issue in this case. Goree's testimony unquestionably indicates that this conversation occurred the day after the December 1996 incident.

Nevertheless, we conclude that the error, whether due to an inadvertent misstatement or a misunderstanding of the evidence, was harmless. Goree and White both identified defendant as one of the assailants. In stating that it found their testimony credible, the trial court explained:

The testimony is clear they knew the defendant, they clearly identified him, they described him, they had opportunity to observe him, even though, I know both testified it was a tense time, and especially for Ms. Goree. But she was very clear in her testimony that the defendant was the one who was there.

When the court's remarks are read in context, it is clear that any impression that Goree testified that defendant contacted her after the incident was not the basis of its belief in her credibility but merely provided additional support for that belief. Moreover, the error had no bearing on the court's assessment of White's credibility. Considering the trial court's comments in their entirety, we conclude that the error does not require remand to the trial court for clarification of its findings of fact. See *People v Taylor*, 422 Mich 554, 569; 375 NW2d 1 (1985).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Joel P. Hoekstra

/s/ Hilda R. Gage

¹ Defendant also complains that the prosecution did not provide notice of its intent to introduce the evidence, as required by MRE 404(b)(2). However, by failing to object below, defendant has waived any claim of error. See *People v Ho*, 231 Mich App 178, 193; 585 NW2d 357 (1998).