

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

YOHANCE OLADELE KEHINDE BROCK,

Defendant-Appellant.

UNPUBLISHED

December 14, 1999

No. 210846

Eaton Circuit Court

LC No. 97-020212 FC

Before: Doctoroff, P.J., and O’Connell and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of armed robbery, MCL 750.529; MSA 28.797, felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent terms of imprisonment of four to ten years for the armed-robbery conviction and eighteen to forty-eight months for the felonious-assault conviction, to be served consecutively to the mandatory two-year term of imprisonment for the felony-firearm conviction. We affirm.

First, defendant argues that the trial court abused its discretion by admitting evidence under MRE 404(b) that defendant committed another armed robbery on the same night using similar tactics. We review the trial court’s determination whether evidence is admissible under MRE 404(b) for a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). MRE 404(b) governs the admissibility of other-acts evidence, and provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other 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 the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence of other acts is admissible if it is offered for a proper purpose under MRE 404(b), if it is relevant to an issue or fact of consequence at trial, and if the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Where the other-acts evidence is offered to prove identity through modus operandi, the evidence is logically relevant if (1) there is substantial evidence that the defendant actually committed the other act, (2) there is some special quality of the act that tends to prove the defendant's identity, (3) the evidence is material to the determination of the defendant's guilt, and (4) the probative value is not substantially outweighed by the danger of unfair prejudice. *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982); *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998).

In this case, the evidence was offered to demonstrate defendant's identity as the robber of the pizza store and was therefore offered for a proper purpose under MRE 404(b). Defendant challenges the relevance of the evidence that he also committed an armed robbery of a convenience store on the same night. Defendant argues that the two robberies were not sufficiently similar, such that the robbery of the convenience store did not have a special quality tending to prove defendant's identity as the robber of the pizza store. However, the prosecutor presented evidence that in both robberies, the robber wore face paint. The evidence also established other similarities between both robberies, such as proximity in location and time, similar descriptions given by eyewitnesses, the use of a small nickel-plated handgun, and instructions given to the victims to lie on the floor while the robber left. Additionally, two witnesses testified that defendant admitted to them that he committed both robberies. We conclude that the two robberies were sufficiently similar to demonstrate defendant's identity. Moreover, the probative value was not substantially outweighed by the danger of unfair prejudice because defendant presented an alibi defense, thus challenging his identity as the robber of the pizza store. The evidence of the other, similar robbery was thus highly probative of defendant's identity and served to refute his alibi defense. Therefore, the trial court did not abuse its discretion in admitting the other-acts evidence.

Next, defendant argues that the trial court erred by failing to instruct the jury on the possible unreliability of accomplice testimony. Defendant did not request such an instruction, nor did he object to the instructions given. Defendant may not claim instructional error where he failed to request the instruction at trial. *People v Gomez*, 229 Mich App 329, 332; 581 NW2d 289 (1998); MCL 768.29; MSA 28.1052. This unpreserved issue is forfeited unless defendant demonstrates plain error that was outcome determinative. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

Defendant contends that the trial court should have given an accomplice instruction sua sponte under *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974). In that case, our Supreme Court held that failing to sua sponte give an instruction regarding the dangers of accomplice testimony may constitute error requiring reversal in a "closely drawn" case. *Id.* However, this case was not "closely drawn" because the accomplice testimony was corroborated. This was not a case where it "came down to whom to believe, the defendant . . . or the accomplice." *Id.* at 238-239. Rather, in addition to the accomplice testimony, two of defendant's former roommates testified that he admitted to

them that he committed the robbery. Defendant has failed to demonstrate outcome-determinative plain error; therefore, this unpreserved issue is forfeited.

Next, defendant argues that the trial court erred by failing to grant his motion for a directed verdict on one armed-robbery count because the victim was not in possession or custody of the money taken. In reviewing the trial court's ruling on the motion for a directed verdict, we must view the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998). The essential elements of armed robbery are (1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) the defendant was armed with a weapon described in the statute. *People v Johnson*, 215 Mich App 658, 671; 547 NW2d 65 (1996).

Defendant was charged with two counts of armed robbery because two victims were involved—the manager of the pizza store and the pizza delivery man. Although defendant was convicted of armed robbery of the manager, he was acquitted of armed robbery of the delivery man and instead convicted of the lesser-included offense of felonious assault. The evidence presented up to the time the motion was made demonstrated that, before the robbery, the manager had separated the money into two piles, one of which was to be given to the delivery man as a commission for the use of his car. Defendant entered the store armed, pointed a gun at both the delivery man and the manager, and took both piles of money. This evidence was sufficient to allow the jury to conclude that each element of the crime had been proved beyond a reasonable doubt. Defendant argues that, because the delivery man did not have possession or custody of the money taken, the prosecutor did not prove a taking of property from his person or presence. However, actual ownership of the property taken is not required. *People v Jones*, 71 Mich App 270, 272; 246 NW2d 381 (1976). Rather, the prosecutor need only prove that the property was taken in the presence of the victim and that the victim's right to possession of the property was superior to the defendant's. *Id.* The delivery man had a superior right to possession of the commission money than did defendant, and defendant took the money in the presence of the delivery man. Therefore, the trial court did not err in denying defendant's motion for a directed verdict. Although the jury convicted defendant of a lesser offense in connection with the delivery man, this alone does not demonstrate that the trial court erred in allowing the greater charge to be submitted to the jury.

Finally, defendant argues that his convictions of both armed robbery of the manager and felonious assault of the delivery man violated the constitutional protection against double jeopardy. Specifically, defendant argues that the two convictions constituted an impermissible multiple punishment for the same offense. Defendant maintains that there was a single armed robbery, with a continuing felonious assault on the employees of the pizza store to facilitate that robbery.

The constitutional protection against double jeopardy prohibits multiple punishments or successive prosecutions for the same offense. *People v Duranseau*, 221 Mich App 204, 206; 561 NW2d 111 (1997). However, for crimes against persons, a separate interest of society is invaded with each victim. *People v Lovett*, 90 Mich App 169, 174; 283 NW2d 357 (1979). For example, where two persons are assaulted, the assailant may be charged with two assault crimes. *Id.*; *Lugo, supra* at

708. Similarly, a separate conviction is permissible for each victim of a robbery-related crime. *People v Adams*, 128 Mich App 25, 32; 339 NW2d 687 (1983). Because there were two victims in this case, no double-jeopardy violation occurred when defendant was convicted of a crime relating to each victim. Defendant could have been convicted of two counts of armed robbery, or two counts of felonious assault, with no double-jeopardy violation. His conviction of one count of armed robbery and one count of felonious assault, each for a separate victim, also does not violate his constitutional protection against double jeopardy.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Peter D. O'Connell

/s/ Kurtis T. Wilder