

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES PRESTON WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

February 8, 2000

No. 212138

Washtenaw Circuit Court

LC Nos. 97-009328-FH;

97-009329-FH

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions, in separate cases, of two counts of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to two to twenty years in prison for each conviction, the sentences to run concurrently with each other. We affirm.

Defendant first argues that evidence of prior bad acts, specifically Trooper Cox's testimony regarding defendant's presence in a car with another person who was involved with narcotics and Cox's testimony regarding other prior observations of defendant, was improperly admitted and that the trial court erred in its denial of defendant's motion for a mistrial based on the admission of this evidence. We disagree.

To preserve an evidentiary issue for appeal, a party must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). Defendant did not object to Trooper Cox's testimony regarding defendant's presence in a car with another person involved with narcotics and did not address this testimony during his motion for a mistrial. The issue of Cox's testimony regarding defendant's presence in a car is therefore not preserved for appeal. *Id.* However, defendant did object to Cox's testimony regarding his prior observations of defendant and subsequently moved for a mistrial based on this testimony. Defendant has thus preserved the issue of Cox's testimony regarding the prior observations. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995).

“A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.” *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). This Court reviews the trial court’s decision regarding a motion for mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). A trial court’s decision to admit evidence is likewise reviewed for an abuse of discretion and, by definition, a decision on a close evidentiary issue cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Evidence is relevant and generally admissible if it tends to make the existence of a fact that is of consequence to the action more or less probable than it would be otherwise. MRE 401; *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person, or to show that a person acted in conformity with the other acts. MRE 404(b)(1); *People v VanderVliet*, 444 Mich 52, 63-64; 508 NW2d 114 (1993), mod on other grounds 445 Mich 1205 (1994). The *VanderVliet* decision established that evidence of other crimes, wrongs, or acts should be examined in the following manner:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*Id.* at 55.]

Finally, *VanderVliet* added the requirement that the prosecution must provide reasonable notice in advance of trial, or during trial, if the court excuses pretrial notice on good cause shown, of the nature of any other acts evidence it intends to introduce at trial and the rationale for admission. *Id.* at 89; MRE 404(b)(2); see also *VanderVliet*, 445 Mich 1205.

Here, the trial court did not abuse its discretion by admitting evidence of Trooper Cox’s prior observations of defendant, and the trial court properly denied defendant’s motion for a mistrial.¹ This evidence was used to support the trooper’s identification of defendant and not to prove that defendant acted in conformity with these prior acts. Proof of identity is one of the specifically designated proper purposes for which other acts evidence may be presented. MRE 404(b)(1). The prosecution elicited testimony regarding prior observations with defendant only on redirect examination, in an attempt to rehabilitate Cox’s identification of defendant after defense counsel focused entirely on the issue of identification during cross-examination. The testimony of the trooper regarding these prior two observations was relevant for identification purposes as it established that Cox had more than two opportunities to view defendant.² The evidence was therefore relevant and admissible because it was presented for a proper purpose, identification, that was a disputed issue at trial.

The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Defense counsel made it clear in his closing argument that identity was the only issue in this trial. Therefore, testimony that was relevant to the trooper’s ability to identify defendant was highly probative in this matter. Moreover, because this evidence was directly related to identification, the sole issue in the trial, the evidence was not unfairly prejudicial. *People v Oswald*

(*After Remand*), 188 Mich App 1, 8; 469 NW2d 306 (1991). Finally, although defendant did not request a limiting instruction, *VanderVliet, supra* at 75, the trial court instructed the prosecutor not to draw any inferences from this testimony and the prosecutor did not.

Defendant also argues that he was not given proper notice of the prosecutor's intent to use evidence of other acts, as required by MRE 404(b)(2). We disagree. The prosecutor provided defendant with reasonable notice of her intention to present evidence of the trooper's prior observations by providing reports regarding these events to defendant the morning of the day before trial, immediately after the trial prosecutor discovered these events. Because the prosecutor presented this information to defendant before trial, she was not required to demonstrate good cause for late notice. MRE 404(b)(2). Additionally, we note that defendant was presumptively aware of these two prior observations because Trooper Cox was questioned about them by defense counsel at the preliminary examination. We therefore find that the prosecution provided proper notice.

Based on the importance of identity evidence in this matter, we do not find the admission of the other acts evidence to be an abuse of discretion. The trial court's denial of defendant's motion for mistrial was proper because there was no irregularity that was unfairly prejudicial to defendant or impaired his right to a fair trial. *Haywood, supra* at 228.

Defendant's second issue on appeal is that his trial attorney failed to provide him with effective assistance of counsel because his trial attorney did not object to the admission of testimony concerning the photographic lineup. We disagree. Because defendant failed to preserve this issue for our review by moving for a new trial or an evidentiary hearing in the trial court, our review is limited to errors by counsel evident in the existing record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). To overcome this presumption, defendant must demonstrate that counsel's performance was objectively unreasonable and that defendant was prejudiced by counsel's defective performance. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Where a defendant is not in custody, there is no right to counsel at the lineup stage of the investigation. *People v Kurylczuk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Our Supreme Court in *Kurylczuk* declined to extend the right to counsel to cases where the defendant is the focus of the investigation because, at the early stage of an investigation, it is impossible to know whether a photographic lineup will build a case against a defendant or extinguish a case against an innocent bystander. *Id.*

While defendant was the focus of the investigation, he was not in custody at the time of the photographic lineup. Because defendant was not in custody, he was not entitled to counsel for the photographic lineup. *Id.* A motion by defense counsel for exclusion of this evidence would have been meritless. Counsel is not required to argue frivolous or meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Therefore, defense counsel was not ineffective in failing to argue a motion to exclude the photographic lineup identification.

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Donald S. Owens

¹ The prosecutor argues, in part, that Trooper Cox's testimony did not involve other acts evidence since it only amounted to statements of prior identification. While we agree that statements of prior identification alone do not ordinarily constitute other acts evidence, in this case Trooper Cox's testimony implied that the prior identifications occurred during previous drug purchases involving Cox and other unnamed parties, perhaps including defendant.

² Although the trooper testified that the first contact with defendant occurred after the trooper called "to set up a purchase," the testimony did not go into any detail regarding other drug purchases. Instead, the trooper merely stated that on the first occasion he observed defendant walking to a gas station from a distance of about twenty feet, and that on the second occasion he was face-to-face with defendant.