

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY LYNN GALLO,

Defendant-Appellant.

UNPUBLISHED
October 20, 2000

No. 220743
Kent Circuit Court
LC Nos. 98-010814-FC
98-010815-FC

Before: Fitzgerald, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Defendant was charged in lower court no. 98-010814 with assault with intent to rob while armed, MCL 750.89; MSA 28.284, and conspiracy to rob while armed, MCL 750.157a; MSA 28.354(1). In lower court no. 98-010815 defendant was charged with armed robbery, MCL 750.529; MSA 28.797, and conspiracy to rob while armed, MCL 750.157a; MSA 28.354(1). The cases were joined for trial in accordance with MCR 6.120(B). Following a jury trial, defendant was convicted as charged and was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to a concurrent prison term of twelve to thirty years for each conviction. Defendant appeals as of right. We affirm, but remand to the trial court for the limited purpose of correcting the presentence report.

I

Defendant argues that the evidence was insufficient to support the conspiracy convictions because the only testimony supporting a conspiracy was the uncorroborated, untrustworthy, and conflicting testimony of his two accomplices. In the alternative, defendant argues that the testimony, even if found to be credible, is still insufficient.¹

¹ We note that defendant also appears to argue that his accomplices committed perjury. We decline to address this argument because defendant did not raise the issue of perjury in his statement of questions
(continued...)

Initially, we find defendant's arguments about the credibility of the accomplice testimony to be without merit. Even when reviewing an appeal based on the sufficiency of evidence, this Court must not interfere with the role of the jury to decide the weight and credibility to be given to testimony. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989).

In reviewing a sufficiency of the evidence claim, this Court views the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). This Court recognizes a conspiracy as a:

mutual agreement or understanding, express or implied, between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means. Being a specific-intent crime, conspiracy requires both the intent to combine with others and the intent to accomplish the illegal objective. The essence of a conspiracy is the agreement itself. Nevertheless, direct proof of agreement is not required, nor is proof of a formal agreement necessary. It is sufficient that the circumstances, acts, and conduct of the parties establish an agreement. A conspiracy may be proven by circumstantial evidence or may be based on an inference. [*People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991).]

Viewed in a light most favorable to the prosecutor, the evidence revealed that defendant conspired with Galecki and Semczak, two juvenile runaways, to rob American Bread Company and the Amoco gas station. Semczak testified that defendant had instructed them on how to commit robberies by putting a paper bag over a hand to make it look like a gun. Defendant told Semczak and Galecki to go into the businesses and demand money while he waited outside.

Defendant persuaded Semczak to commit the first robbery. Defendant and Semczak went to five or six different stores before Semczak tried to rob American Bread Company. While Semczak went inside to commit the robbery, defendant waited outside. Semczak testified that defendant told him to meet him back at the apartment if he got any money. However, defendant instructed Semczak to give him the money outside the store before returning to the apartment.

After the unsuccessful American Bread Company robbery, defendant convinced Galecki to help him rob the Amoco gas station. Galecki testified to a similar plan. Galecki stated that when they arrived at the gas station he changed his mind about committing the robbery. He stated that defendant threatened him and cut his wrist with a broken bottle. Galecki testified that he went inside the Amoco gas station with a paper bag on his hand while defendant waited outside. Galecki ran out of the gas

(...continued)

presented. MCR 7.212(C)(5); see also, e.g., *Phinney v Perlmutter*, 222 Mich App 513, 564; 564 NW2d 532 (1997).

station and met defendant down the street, where Galecki gave defendant the money. Galecki then continued running to the apartment, where he met up with defendant.

This testimony was sufficient to allow a rational trier of fact to conclude that defendant agreed with Semczak to rob American Bread Company and defendant and Galecki agreed to rob the Amoco gas station. Therefore, we reject defendant's argument that the evidence was insufficient to support the conspiracy convictions.

II

Defendant contends that the charges stemming from the Amoco gas station robbery should have been tried separately from the charges arising from the attempted robbery of American Bread Company. This Court will review a trial judge's decision on a motion for a joint trial for an abuse of discretion. *People v Campbell*, 121 Mich App 374, 377; 328 NW2d 419 (1982).

MCR 6.120(B), the court rule governing joinder and severance, provides:

(B) On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on

(1) the same conduct, or

(2) a series of connected acts or acts constituting part of a single scheme or plan.

This Court explained the terms "same conduct" and "series of connected acts or acts constituting part of a single scheme or plan" in *People v Daughenbaugh*, 193 Mich App 506, 509-510; 484 NW2d 690, modified on other grounds 441 Mich 867 (1992):

"same conduct" refers to multiple offenses "as where a defendant causes more than one death by reckless operation of a vehicle." "A series of acts connected together" refers to multiple offenses committed "to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery." "A series of acts . . . constituting parts of a single scheme or plan" refers to a situation "where a cashier made a series of false entries and reports to the commissioner of banking, all of which were designed to conceal his thefts of money from the bank."

Defendant argues that the cases were not related.² We disagree and find that the cases were related as required by MCR 6.120(B) because they were part of a single scheme or plan. The

² Defendant also argues that the joinder of the charges encouraged conviction of defendant because of the sheer number of the charges. However, the trial court stated during jury instructions that "[t]he fact that the defendant is charged with a crime and is on trial is not evidence. Likewise, the fact that he's charged with more than one offense is not evidence." Generally, juries are presumed to have followed instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, this argument has no merit.

testimony of both Semczak and Galecki established this plan. In particular, the robbery of the Amoco gas station and the attempted robbery of American Bread Company occurred on the same day only hours apart. The methods utilized by defendant as well as by Semczak and Galecki were identical. Galecki and Semczak were told to put a paper bag over their hands and pretend that they had a gun. They were told to go into the businesses alone and to demand money from the clerks. Defendant was to wait outside while the robbery occurred. If Galecki or Semczak acquired any money, they were to meet defendant at a close by predetermined location and give him the money. Then, Galecki and Semczak were to return to the apartment. Thus, these cases were certainly related and appropriately joined for trial.³

III

Defendant asserts that he was denied the effective assistance of counsel by his counsel's failure to object to testimony from defendant's girlfriend, Patricia Johnson, that defendant was arrested for threatening her and damaging property in her apartment. Because defendant did not bring a motion for an evidentiary hearing in the trial court regarding his claim, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). To establish that the defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, this Court must find that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To find prejudice, a court must conclude that there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. *Id.* at 312.

Defendant contends that the evidence was not admissible under MRE 404(B)(1), which provides that:

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

³ Defendant claims that the trial court inappropriately engaged in an MRE 404(b) analysis when deciding if the cases should be joined for trial. We disagree. A careful review of the record reveals that the trial court mentioned MRE 404(b) as an aside. The trial court was explaining to defendant that, even if the cases were tried separately, the same evidence would be admissible in both cases under MRE 404(b) to show lack of mistake, intent, and pattern of conduct. The trial court was correct. See *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). Thus, the trial court did not engage in an inappropriate analysis.

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.

When engaging in an MRE 404(b) analysis, this Court must conclude:

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. [*People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998).]

Here, there is no indication that Johnson's testimony was offered for a proper purpose. Nonetheless, we conclude that defendant has failed to demonstrate that he was prejudiced by this testimony. During defense counsel's cross-examination of Johnson, serious questions were raised about her credibility. Further, defendant's trial counsel effectively demonstrated that defendant was not arrested as a result of the incident. In addition, overwhelming evidence of defendant's guilt was presented.

IV

Defendant maintains he was denied a fair trial as a result of improper statements during the prosecutor's closing argument. Specifically, defendant first complains that the prosecutor presented an improper "civic duty" argument when he asked the jury not to let the defendant "skate" or "walk." Civic duty arguments "are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence of the charges and because they encourage the juror to suspend their own powers of judgment." *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). Here, however, the comment was relatively innocuous for a civic-duty argument, particularly where the evidence against defendant was strong.

Defendant also alleges error in the prosecutor's statement to jurors during closing argument to "make defendant take responsibility" for his actions. Defendant failed to object to this statement at trial. Therefore, in order to avoid forfeiture of this issue on appeal, defendant must show: (1) that an error occurred; (2) that the error was plain, i.e. clear or obvious, and; (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). After a review of the record, we find no impropriety in the prosecutor's brief request that the jurors find defendant guilty and require him to accept the consequences of his illegal acts.

V

Defendant argues that the trial court's use of CJI2d 10.2, the standard jury instruction for conspiracy, improperly shifted the burden of proof to defendant. We disagree. The instruction informed the jury that it "may infer that there was an agreement from the circumstances such as how the members of the alleged conspiracy acted, but only if there is no other reasonable explanation for those

circumstances.” It did not instruct the jury that it was required to make the inference and find an agreement.⁴ See *People v Wilbert*, 105 Mich App 631, 638; 307 NW2d 388 (1981). Additionally, this instruction was given in conjunction with the other standard jury instructions on plaintiff’s burden of proof, the elements of the crimes charged, and the presumption of innocence. *People v Williams*, 37 Mich App 212, 214; 194 NW2d 531 (1971). Accordingly, we find defendant’s argument unpersuasive..

Defendant also complains that the CJI 2d 5.4, the standard jury instruction on accomplice credibility, is erroneous because it implies that defendant should be found guilty because his accomplices were found guilty. Defendant also argues that the jury instruction informs the jury that the accomplices that testified against defendant were to be considered as credible as any other witness. The trial court instructed the jury as follows:

You have heard two witnesses: Robert Semczak and Anthony Galecki, who have stated that they have previously been convicted of various juvenile offenses. You should judge each of these witnesses’ testimony the same as you judge the testimony of any other witness. You may consider their past criminal convictions along with all the other evidence when you decide whether you believe their testimony and how important you think their testimony is.

You’ve also heard testimony from a witness who was a police officer, Detective Nowicki. That testimony is to be judged by the same standards you use to evaluate the testimony of any other witness.

Both Robert Semczak and Anthony Galecki testified that they took part in the crimes that the defendant is charged with committing. In this instance, each of these men has already been convicted of the charges arising out of the commission of those offenses, and the evidence clearly shows that each of them is guilty of the offenses with which the defendant is charged. [Emphasis added.]

When the jury instructions are considered in their entirety, no logical interpretation of the instructions supports defendant’s contentions. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1993). The trial court instructed the jury that accomplice testimony should be viewed with caution, it explained the plea bargains accepted by the accomplices, and provided extensive instructions on the elements of the crimes with which defendant was charged. The trial court also instructed the jury

⁴ This case is factually distinguishable from *People v Wright*, 408 Mich 1; 289 1 (1980), on which defendant relies. In *Wright*, the jury was instructed that, “but in connection with all this, *unless the testimony satisfies you of something else*, you are warranted in holding a party responsible for the natural, the probable, and the legitimate consequences of his or her acts.” The Court held that this jury instruction was erroneous because it shifted the burden of proof to the defendant.

that the fact that defendant was charged with these crimes was not evidence of his guilt. Thus, defendant's argument that the instruction was erroneous is without merit.⁵

VI

Last, defendant contends, and the prosecutor concedes, that the trial court indicated that it would correct a mistake in the presentence investigation report but failed to do so. Therefore, we remand this case to the trial court for the limited purpose of correcting the PSIR.

Defendant's convictions and sentences are affirmed. The case is remanded to the trial court for the limited purpose of correcting the PSIR. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald

/s/ Harold Hood

/s/ Gary R. McDonald

⁵ Defendant also complains that the trial court erred when it failed to read back the testimony of a witness as requested by the jury. This Court declines to address this argument because defendant failed to raise it in his statement of questions presented. MCR 7.212(C)(5); see also, e.g., *Phinney*, *supra* at 564.