

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN HAYES, a/k/a KENNETH BEVERLY,

Defendant-Appellant.

UNPUBLISHED

July 24, 2001

No. 221709

Wayne Circuit Court

Criminal Division

LC No. 98-009891

Before: White, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant was convicted by a jury of breaking and entering a building with the intent to commit a felony, MCL 750.110, and was sentenced to a term of six to ten years' imprisonment. He appeals as of right. We affirm.

Defendant argues that he was denied a fair trial because of the improper admission of evidence concerning his attempted escape from jail and his use of various aliases. Because defendant failed to timely and specifically object to the challenged evidence, we review this issue under the "plain error" rule. To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain and (3) the plain error affected substantial rights. The third requirement requires a showing of prejudice. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001).

MRE 404(b) governs admission of evidence of other crimes, wrongs or acts. It 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.

A prosecutor must give reasonable notice of his or her intent to introduce such evidence. MRE 404(b)(2).

Here, although the evidence of defendant's escape attempt revealed another wrong or act, this fact did not make it inadmissible under MRE 404(b). Because the evidence was relevant and admissible under MRE 401 as evidence of defendant's consciousness of guilt, *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001), MRE 404(b) does not mandate its exclusion. *People v Hall*, 433 Mich 573, 580, 583-584 (Boyle, J.), 588-589 (Brickley, J.); 447 NW2d 580 (1989); *People v Coleman*, 210 Mich App 1, 4-5; 532 NW2d 885 (1995); *People v Clark*, 124 Mich App 410, 414-415; 335 NW2d 53 (1983).

Nor is reversal required because the prosecutor commented on the evidence in summation. The prosecutor's remarks constituted proper commentary on the evidence and reasonable inferences therefrom. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). Moreover, even if portions of the remarks were improper, the court's instruction that the attorney's remarks are not evidence was sufficient to cure any prejudice, *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998); *People v DeLisle*, 202 Mich App 658, 671; 509 NW2d 885 (1993), and we are satisfied that the outcome is not affected.

While the evidence of defendant's use of aliases was inappropriate, *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997), defendant's substantial rights were not affected because the court ultimately precluded further reference to the use of aliases and the initial reference was brief and did not affect the outcome of the trial.

Next, defendant argues that he is entitled to a new trial because the court excused the prosecution from producing an endorsed, res gestae witness without conducting a due diligence hearing. We disagree.

The court's decision to allow the prosecution to delete a witness from its witness list is reviewed for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). Here, the court did not abuse its discretion because the prosecutor established good cause for striking the witness. *People v Lawton*, 196 Mich App 341, 356; 492 NW2d 810 (1992). Moreover, under these circumstances, the prosecutor was not required to show due diligence in attempting to secure the witness' presence. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991). Additionally, defendant has not shown prejudice.

Finally, defendant contends that resentencing is required because offense variable (OV) eight of the judicial sentencing guidelines was misscored. To prevail on this scoring claim, defendant must show that (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. *People v Cain*, 238 Mich App 95, 131; 605 NW2d 28 (1999).

A trial court may assess ten points for OV 8 if the offense is part of a pattern of criminal activities over a period of time from which the offender derives a substantial portion of his or her income. *Id.* The record indicates that defendant committed at least eight prior theft offenses, has

a history of abusing drugs, and was employed only sporadically. From these facts, the trial court reasonably could have inferred that defendant's latest offense was part of a pattern of criminal activities from which he derived a substantial portion of his income. *People v Haacke*, 217 Mich App 434, 436; 553 NW2d 15 (1996). Therefore, the factual predicate of the offense variable was supported. Accordingly, this claim fails.

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Henry William Saad