

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADRIAN GATSON,

Defendant-Appellant.

UNPUBLISHED

September 28, 2001

No. 223538

Macomb Circuit Court

LC No. 99-001818-FC

Before: K. F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.29, first-degree criminal sexual conduct, MCL 750.520b(1)(e), and carjacking, MCL 750.529a. Defendant was sentenced to concurrent terms of twenty-five to fifty years for each conviction and appeals as of right. We affirm defendant's convictions, but remand for resentencing.

Defendant was found guilty of sexually assaulting a SMART bus driver, robbing her of \$12, and commandeering her bus while brandishing a knife. His defense at trial was that he engaged in consensual sex with the driver, who was a former coworker. Defendant denied robbing the victim, driving the bus, or displaying a knife. At trial, a taxicab driver testified that he had contact with defendant approximately eleven hours before the SMART incident. Specifically, the taxicab driver testified that after the ride, defendant passed him a pink slip of paper, representing that the paper was \$100. When the taxicab driver objected, defendant put a knife to his neck and robbed him of \$45. The pink slip of paper was a prescription written in defendant's name. This prior bad act testimony was admitted over objection by defense counsel. When questioned by the prosecutor, defendant testified that the victim and taxicab driver were liars.

Defendant first argues that the trial court abused its discretion by admitting evidence of the prior bad act. We disagree. Our review of the trial court's decision regarding admission of evidence is for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). The prosecutor offered this evidence pursuant to MRE 404(b) to show defendant's "modus operandi" of utilizing a knife pressed against the neck of a transportation employee to steal money from the victims. The proper test for evaluating the admission of "modus operandi" evidence is found in *People v Golochowicz*, 413 Mich 298, 308-309; 319 NW2d 518 (1992). *People v Smith*, 243 Mich App 657, 671; 625 NW2d 46 (2000). The test enunciated in *Golochowicz* has four parts:

(1) there must be substantial evidence that the defendant actually perpetrated the bad act sought to be introduced; (2) there must be some special quality or circumstance of the bad act tending to prove the defendant's identity or the motive, intent, absence of mistake or accident, scheme, plan or system in doing the act and, in light of the slightly different language of MRE 404(b) we add, opportunity, preparation and knowledge; (3) one or more of these factors must be material to the determination of the defendant's guilt of the charged offense; and (4) the probative value of the evidence sought to be introduced must not be substantially outweighed by the danger of unfair prejudice. [*Golochowicz, supra* at 309; footnote omitted.]

We conclude that the evidence was admissible under the *Golochowicz* test. First, there was substantial evidence that defendant committed the prior armed robbery. The cab driver identified defendant in court as the man who robbed him and described the knife defendant used. The cab driver also gave the police the piece of paper that defendant tried to pass as a \$100 bill. This piece of paper was actually a medical prescription with defendant's name on it. Defendant acknowledged taking money from the cab driver. Second, there was a special quality about the earlier conduct that tended to prove defendant's scheme, plan, or system in committing the instant offenses. In each instance, the sexual assault victim and the cab driver each gave identical descriptions of the knife used by defendant and each stated that the knife was held to the throat. Although defendant committed the additional offenses of criminal sexual conduct and carjacking, he used the same weapon to effectuate his crimes in both incidents. Third, the use of the weapon was material to the determination of defendant's guilt in the charged offenses. Defendant claimed that the sexual intercourse was consensual and denied taking money from the sexual assault victim or driving the bus. The cab driver's testimony, that defendant robbed him at knifepoint and his description of the knife, tended to show that the victim's testimony about the events on the bus was the credible version, establishing defendant's guilt of the charged offenses. Finally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Accordingly, we cannot conclude that the trial court abused its discretion in admitting the evidence. *Sabin, supra*.

Defendant next argues that he was denied a fair trial because the prosecutor asked him to comment on the credibility of witnesses. We disagree. While it is improper for the prosecutor to ask the defendant to comment on the credibility of prosecution witnesses, the inquiry is subject to a harmless error analysis. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). In *Buckey*, the Supreme Court concluded that any error was harmless even when it was *conceded* that the prosecutor's strategy was to discredit the defendant by inviting him to label the prosecution witnesses as liars. In the present case, the sexual assault victim and the cab driver were total strangers, yet described the same robbery scenario involving the same weapon. It appears that the prosecution strategy did not seek to discredit defendant with his characterization of the victims as liars. Rather, the prosecutor sought an explanation regarding why two strangers would fabricate identical versions of a robbery committed by the same person, defendant. Accordingly, we cannot conclude that defendant was harmed by the inquiry. *Buckey, supra*.

Defendant next argues that reversal is required because the trial court instructed the jury on the issue of flight in the absence of evidence to support the instruction. We disagree. Jury instructions are reviewed in their entirety to determine whether the trial court committed error

requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). A trial court need not give requested instructions that the facts do not warrant. *Id.* Flight has applied to actions including fleeing from the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Fear of apprehension is a factor for consideration when examining the issue of flight. *People v Cutchall*, 200 Mich App 396, 401-405; 504 NW2d 666 (1993). The issue of flight presents a determination for the jury. See *People v Taylor*, 195 Mich App 57, 63; 489 NW2d 99 (1992). The trial court should instruct that evidence of flight may be considered as evidence of guilt, but may also be consistent with the defendant's theory of the case, such as evidence of fear. *Id.* In the present case, defendant had reason to fear apprehension as he was a former coworker of the sexual assault victim and could be identified as her assailant. Additionally, defendant, in providing the pink paper to the cab driver, revealed his identity. Furthermore, after completing the sexual assault of the victim, defendant left the scene and found hospitalization for four days for depression. However, defendant testified that he engaged in sexual consensual intercourse with the victim and opted not to return to the bus depot with her to clean out his locker, then sought treatment for depression. Thus, defendant was able to argue an innocent purpose for his departure from the scene and unavailability following the incident on the bus. Based on these facts, we cannot conclude that it was error requiring reversal to allow the jury to determine whether flight was an issue in the case. *Piper, supra*.

Defendant next argues that the trial court abused its discretion in sentencing defendant when the substantial and compelling reasons cited for departure from the guidelines were incorporated into the guideline calculations. We remand for resentencing. If the principle of proportionality applied to this sentencing, we would conclude that the sentence was proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). However, in *People v Babcock*, 244 Mich App 64, 78- 79; 624 NW2d 479 (2000), the majority opinion disavowed *Milbourn* and concluded that, under the new legislative sentencing guidelines, "[f]actors that are considered in scoring the guidelines cannot be used a second time to justify a sentencing departure." Review of the record reveals that the trial court's substantial and compelling reasons for the departure were included within the guideline factors and thus cannot be utilized a second time for a departure. *Id.* However, MCL 769.34(b) provides that the trial court may nonetheless depart based on an offense or offender characteristic if the court finds from the facts contained in the court record that the characteristic has been given inadequate or disproportionate weight. Accordingly, we remand to the trial court for a determination regarding whether the factors cited for departure were given inadequate or disproportionate weight.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Harold Hood

/s/ Brian K. Zahra