

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN M. BROWN,

Defendant-Appellant.

UNPUBLISHED

December 21, 2001

No. 221972

Wayne Circuit Court

LC No. 98-013292

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

PER CURIAM.

Defendant appeals as of right his jury trial conviction of carrying a concealed weapon, MCL 750.227. Defendant was sentenced to one-year probation. We affirm.

Prior to trial, defendant brought a motion to suppress evidence that he presented false identification to arresting officers. That motion was denied. During its case in chief, the prosecution elicited testimony from police officers regarding defendant's use of an alias at the time of his arrest. The arresting officers testified that defendant's car was stopped for failure to use headlights. The police asked defendant for his driver's license. One officer testified that he observed a bulge in defendant's waistband when defendant leaned forward to retrieve his identification. Defendant was ordered out of the car. According to police testimony, upon exiting the car, defendant attempted to flee. Defendant was detained and handcuffed. The police discovered a handgun in the waistband of defendant's pants. Defendant provided the officers a driver's license containing a false name and claimed he was from Alabama.

Defendant testified at trial to a different version of the events. He claimed that on the evening in question, he was driving a car that he borrowed from a friend. Defendant admitted that upon being stopped by the police, he gave the police a driver's license that contained an alias.¹ Defendant denied attempting to flee. According to defendant, after providing the police with the false identification, the police searched the car and found a gun somewhere on the

¹ Defendant explained that he used the alias because he feared his life was in danger after the death of an associate.

passenger side of the car. Defendant claimed he had no knowledge that the gun was in the borrowed car.

I

On appeal, defendant first argues that the trial court erred in admitting evidence that he used an alias at the time of his arrest. We review a trial court's decision to admit evidence for a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, and the exercise of passion or bias. *People v Babcock*, 244 Mich App 64, 76; 624 NW2d 479 (2000).

We conclude that the disputed evidence was properly admitted to rebut the defense theory that defendant was unaware the gun was in the car. The trial court incorrectly relied on MRE 608 and MRE 609 as the basis for admission given that those rules are limited to evidence admitted on cross-examination. The challenged evidence in this case was elicited during the prosecution's case in chief. However, the evidence that defendant used an alias was proper under MRE 404(b), which provides:

(b) Other Crimes, Wrongs, or Acts.

(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.

(2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

The defense theory in this case was that defendant did not know the gun was in the car he borrowed. Thus, the primary issue at trial was whether defendant, in fact, had knowledge of the gun.² The prosecution's proposed use of the evidence, to show that defendant was concealing facts from the officers, was proper under MRE 404(b). The prosecution did not offer the false

² To support a conviction for carrying a weapon in a vehicle, the prosecution must show: (1) the presence of a weapon in a vehicle operated or occupied by the defendant; (2) that the defendant knew or was aware of its presence; and (3) that the defendant was "carrying" the weapon. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999).

identification evidence as evidence of defendant's character or to show action in conformity therewith. Rather, the evidence was offered to prove the knowledge element of the charged crime. See *People v Hawkins*, 245 Mich App 439, 448; 628 NW2d 105 (2001), citing *People v Sabin (On Remand)*, 463 Mich 43, 56-59; 614 NW2d 888 (2000), for the proposition that MRE 404(b) is a rule of inclusion and courts should use a flexible approach to ruling on the admission of bad acts evidence.

We conclude that defendant's use of the alias was probative of his knowledge of the gun and his absence of mistake in concealing the weapon. Defendant's presentation of false identification suggests that he was attempting to conceal facts from the police officers, including the fact that he possessed the gun. Such evidence was material to this case and any prejudice to defendant resulting from its admission did not outweigh its probative value. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).³ Under these circumstances, we cannot say that the trial court's decision to admit the disputed evidence was so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, and the exercise of passion or bias. *Babcock, supra*.⁴

To the extent that error occurred based on the prosecution's failure to provide notice as specified under MRE 404(b)(2), such error was harmless.

MCR 2.613(A) provides:

An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to

³ Furthermore, this Court has held that a defendant's use of an alias is "highly probative" of credibility. *People v Dietrich*, 87 Mich App 116, 138-139; 274 NW2d 472 (1978), rev'd in part on other grounds, 412 Mich 904; 315 NW2d 123 (1982). See *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997) (holding that the defendant's use of an alias at the time of his arrest was relevant in regard to his credibility) and *People v Pace*, 98 Mich App 714, 718; 296 NW2d 345 (1980); but see *People v Thompson*, 101 Mich App 609, 613; 300 NW2d 645 (1981) (holding that it is improper for a prosecutor to question a defendant regarding his use of an alias on some past, unspecified occasion).

⁴ Our conclusion is not altered by the fact that the purpose for which the alias evidence was proper under MRE 404(b) does not coincide with the police officers' account of the events leading to defendant's arrest. Police officers claimed that the gun was removed from defendant's person prior to defendant presenting the false identification. Significantly, however, defendant claimed that he presented the false identification prior to the officers' discovery of the gun. Given defendant's version of the events, the prosecution was within its right to rebut defendant's theory with evidence that defendant, in fact, had knowledge of the gun. As discussed, evidence that defendant presented false identification is probative of whether defendant was concealing facts to the police officers, including his possession of the gun.

take this action appears to the court inconsistent with substantial justice. [See MCL 769.26.]

The effect of the error is assessed in light of the strength and weight of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999); *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). The error is presumed to be harmless and the defendant bears the burden of showing that the error resulted in a miscarriage of justice. *Lukity*, *supra* at 495.

As stated by this Court in *Hawkins*,

the essential value and underlying aims of MRE 404(b)(2) are (1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record. [*Hawkins*, *supra* at 454-455 (footnote omitted).]

Here, although the prosecution did not formally comply with the notice requirement of MRE 404(b)(2), defendant was on notice prior to trial that the prosecution intended to introduce the disputed evidence. Defendant brought a pretrial motion to exclude evidence of defendant's use of the alias under MRE 404(b). The prosecution argued the evidence was relevant to defendant's credibility. The issue was presented to the court prior to trial in a manner that facilitated a thoughtful ruling on the issues, and the trial court ruled that the evidence was admissible. Under these circumstances, the essential value and underlying aims of the notice requirement were met. *Hawkins*, *supra*.

Moreover, it is not more probable than not that had the evidence regarding defendant's use of false identification not been admitted, the outcome of the trial would have been different. There was substantial evidence of defendant's guilt. The arresting officers testified that a bulge was observed in defendant's waistband. There was evidence that defendant attempted to flee after exiting the car and had to be physically detained by officers. Further, officers testified that the gun was found on defendant's person. Given such evidence, defendant has not met his burden of showing that admission of the evidence without proper notice under MRE 404(b)(2) resulted in a miscarriage of justice. *Lukity*, *supra*.

II

Defendant next argues that the prosecutor improperly vouched for the credibility of the police officers' testimony, vouched for the guilt of defendant, and denigrated the defense. We disagree. Allegations of prosecutorial misconduct are reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; ___ NW2d ___ (2001). When reviewing allegations of prosecutorial misconduct, this Court examines the alleged misconduct in context to determine whether it denied the defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Prosecutorial comments must be read as a whole and evaluated in light of

defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant claims that during closing argument, the prosecutor improperly vouched for the credibility of the police officers, told the jury defendant was lying, and denigrated the defense. A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Knapp*, 244 Mich App 361; 624 NW2d 227 (2001). A prosecutor may not express his personal opinion about the defendant's guilt. *Bahoda, supra* at 282-283. A prosecutor may, however, argue from the facts that the defendant or another witness is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In this case, the prosecutor did not indicate that he had special knowledge that witnesses testified truthfully or that defendant was lying. He did not argue that the case was correctly brought based on his standing or the policemen's standing. The prosecutor merely argued, based on the facts of the case, that defendant lied - which he admittedly did when he gave a false name to the police officers. The prosecutor argued that, in contrast to defendant's admitted lie, there was no evidence that the police officers had lied. The prosecutor specified to the jury: "You judge their credibility. And the Judge is going to give you an instruction on credibility, okay?" While the prosecutor did state, "I don't believe that to be true. I believe these two officers - ," the isolated use of the first person in closing argument does not offer a basis for reversal where the arguments are otherwise based on the evidence. See *People v Hoffman*, 205 Mich App 1, 21-22; 518 NW2d 817 (1994). Under the circumstances of this case, we conclude that the prosecutor's statements regarding defendant's and the officers' credibility were argued from the facts and did not represent an expression of personal opinion. Furthermore, we note that the trial court instructed the jury that statements of the lawyers are not evidence to be used in determining defendant's guilt or innocence. Jurors are presumed to follow the instructions that are given. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000).

Defendant also claims that the prosecutor improperly denigrated and ridiculed the defense when he stated:

In criminal law, there's only two defenses. You can take this with you and watch it during your shows and put it to the test, and read it in the paper and still put it to the test. One defense is: "You've got the wrong man," an I.D. case: "I didn't do it." The second defense is: "Yeah, I did it, but I have an excuse."

Well, in this particular situation, it's almost as if they want us to use both. He's not disputing the fact that the gun was in the car, he's just disputing the fact that the defendant didn't know about it, so you've got the wrong man: "Yeah, I had it, but I didn't know about it, it's someone else's gun."

Defendant did not object to this particular portion of the prosecution's argument and, therefore, our review is for plain error that affected defendant's substantial rights. *Pfaffle, supra*; see MRE 103(a)(1).

The prosecutor properly argued a reasonable inference from the evidence that defendant disputed his knowledge of the gun's presence because he was driving a borrowed car. This

comment did not denigrate the defense, suggest that defense counsel was trying to mislead the jury, or attempt to shift the burden of proof. Thus, we cannot say that plain error occurred.

III

Defendant also argues that the trial court abused its discretion in limiting defendant's closing argument to twenty minutes, while allowing the prosecution a total of twenty-five minutes for closing argument and rebuttal. We disagree. The imposition of time limits on closing arguments is reviewed for an abuse of discretion. *Warden v Fenton Lanes, Inc*, 197 Mich App 618, 625; 495 NW2d 849 (1992); *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987); see MCR 6.414(E) and MCR 2.507(F). The trial court did not abuse its discretion or show partiality in allowing the prosecution five additional minutes because defendant had adequate time to make his argument, the prosecution's twenty-five minutes applied to both the closing argument and rebuttal, and the prosecution had the burden of proof.

IV

Defendant next argues that the trial court erred in admitting certain testimony from Detective Timothy Bar. Again, we disagree.

Defendant challenges Detective Bar's testimony that he did not submit the gun that was found at the scene to the crime lab for fingerprint analysis because the report of the arresting officers stated that the gun was taken from defendant. Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing offered in evidence to prove the truth of the matter asserted. MRE 801. Here, the disputed testimony was offered to show the reason the gun never underwent fingerprint analysis, not to prove the truth of the matters asserted in the arresting officers' report. Detective Bar's reason for not sending the gun for analysis was relevant given defense counsel's suggestion during opening statements that the absence of fingerprint evidence supported defendant's innocence. Under these circumstances, we cannot say that the trial court abused its discretion in admitting the disputed portion of Detective Bar's testimony.⁵

V

Having determined that each of the foregoing arguments lacks merit, we reject defendant's final claim that the totality of the trial court's errors denied him a fair trial. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999).

⁵ We note that defendant could have requested that the trial court restrict the disputed portion of Detective Bar's testimony to its proper scope and instruct the jury accordingly. MRE 105. However, defendant did not do so.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Harold Hood

/s/ Brian K. Zahra