

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

FRANK LEO WOLANIN,

Defendant-Appellant.

UNPUBLISHED

September 13, 2002

No. 228761

Macomb Circuit Court

LC No. 98-003019-FC

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of bank robbery, MCL 750.531, and was sentenced to a prison term of twenty to forty years. He appeals as of right. We affirm.

A bank teller positively identified defendant as the man who came to her window and passed her a note that said, “These bullets can shoot through glass. Give me all your large bills.” The teller got a very good look at defendant. She gave him about \$3,000 from her drawer. The teller first identified defendant several months after the bank robbery in a line-up. At trial, the prosecution admitted photographs the teller identified as depicting defendant on the day of the bank robbery, and also admitted the bank’s surveillance tape. The teller testified that she was positive that defendant was the man who committed the robbery. The jury convicted defendant of bank robbery.

Defendant contends that the trial court erroneously denied his motion for mistrial that was based on prosecutorial misconduct. Claims of prosecutorial misconduct are reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). To preserve a claim of prosecutorial misconduct, the defendant must object to the alleged misconduct at trial. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). While defendant did not immediately object to the challenged questioning and answer by the witness, we consider the issue preserved because he raised the issue immediately afterwards.

In considering a claim of prosecutorial misconduct, the focus is on whether the prosecutor’s conduct denied the defendant a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 433-434; 597 NW2d 843 (1999). Questions of prosecutorial misconduct are decided on a case-by-case basis. *Id.* This Court must consider the pertinent portion of the record and evaluate the prosecutor’s remarks in context to determine if the conduct denied the defendant a fair and impartial trial. *Id.*

The trial court's decision to deny a motion for a mistrial is reviewed on appeal for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). The trial court should grant a mistrial only where there exists an irregularity that is prejudicial to the defendant's rights and impairs the defendant's ability to receive a fair trial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

Before trial, the prosecutor sought to admit evidence pertaining to another bank robbery for which defendant was convicted. There were several similarities between that robbery and the one leading to this prosecution, and the prosecution sought admission of the testimony of a police officer to show a scheme or plan and to establish defendant's intent and identity. The trial court denied the motion. However, at trial and on redirect examination of another police officer, the prosecutor elicited testimony from another police officer that the officer broadcast a description matching defendant during an investigation of another bank robbery and that he gained knowledge of the description from his investigation of the second bank robbery. The officer also testified that he had seen photographs taken from the surveillance tape of the present robbery during the "bank robbery investigations."

It is the admission of the police officer's testimony that formed the basis of defendant's motion for a mistrial and his claim of prosecutorial misconduct. He argues that the prosecutor improperly elicited testimony of other bad acts in violation of the trial court's pre-trial order and of MRE 404(b)(1), which provides:

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.

We agree that the police officer's challenged testimony constitutes evidence that falls within the scope of MRE 404(b)(1) because it tends to associate defendant with another crime. The prosecutor asserts that the testimony was admissible for another purpose. However, regardless of the admissibility of the evidence under MRE 404(b)(1), we find any error to be harmless. In light of the strong identification evidence introduced by the prosecutor, in particular the bank teller's unequivocal testimony, the photographs, and the surveillance tape, we cannot conclude that it is more probable than not that any error in the admission of the evidence was outcome determinative. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant also challenges statements made by the prosecutor during her closing and rebuttal arguments. Defendant did not object at trial to these remarks, and therefore our review is precluded unless a curative instruction could not have eliminated any prejudicial effects of the remarks or unless failure to review the issue would result in a miscarriage of justice. *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996). In her closing remarks, the prosecutor was merely commenting on evidence that was admitted, albeit erroneously, at trial. Defense counsel did not object to the remarks, and the trial court gave no specific curative instruction on the prosecutor's arguments; nonetheless, the trial court gave the standard instruction that the arguments of the attorneys were not evidence that the jury should consider. Because there was

sufficient properly admitted evidence for the jury to convict defendant of bank robbery, no miscarriage of justice will occur if this Court declines to further review this issue.

Finally, defendant challenges the trial court's denial of his request to admit into evidence a photograph of Thomas Thompson. Defendant argued that Thompson, who has a lengthy criminal history and lives near the site of the crime, so resembles defendant that the jury should have been permitted to view Thompson's photograph to determine whether the identification of defendant was a mistake. We disagree

Evidence that is not relevant is not admissible. MRE 402. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Defendant offered no evidence to connect Thompson to the bank robbery. The simple fact that Thompson has a criminal history and resembles defendant does not have the tendency to make the existence of any fact at issue in this prosecution more or less probable than it would be without the evidence. The trial court properly excluded the offered evidence as irrelevant.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Hilda R. Gage