STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARIAN G. BROWN,

Defendant-Appellant.

UNPUBLISHED
January 27, 2004

No. 240826
Wayne Circuit Court
LC No. 01-006444-01

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. He was sentenced as a fourth-habitual offender, MCL 769.12, to a prison term of seventeen to forty years for the assault conviction, and a consecutive five-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Underlying Facts

Defendant's convictions arise from allegations that, on May 14, 2001, at approximately 12:30 p.m., defendant and an unidentified accomplice attempted to rob a First Federal of Michigan bank in Detroit. Stacey Lewis testified that she was working as the drive-thru window teller when a two-door, silver/gray Buick Regal with front-end damage and a red driver's side door pulled up to the window. The driver pointed a silver handgun toward the drive-thru drawer. The driver's head moved, but Lewis could not hear what he was saying because his mouth was covered. Lewis described the driver as a black man with a medium complexion, wearing a black baseball cap and a black scarf covering his mouth. Another person was in the car, but Lewis' attention was focused on the driver, whom she identified as defendant. After Lewis saw the gun, she backed away from the window and alerted her co-workers.

Chrisanthia Myler, another bank teller, testified that she was behind Lewis observing the lobby tellers when the Buick approached the window. She heard Lewis say that she was being robbed, and saw the driver push a note toward the window. Myler saw the driver by using a mirror, and described him as a dark-skinned black man with a thick arm. She said that the man was not wearing a hat, and that she assumed he was wearing a ski mask, which made him look dark. As the Buick drove off, Lewis returned to the window and wrote down the license plate number UTC 393, and called the police.

Detroit Police Officers Paul Raphel Shaw and Carolyn Nichols responded to the report of the attempted robbery. The description Officer Shaw compiled of the first suspect was a black man wearing a ski mask and gloves and carrying a nickel-plated automatic handgun. The second suspect was described as a black man wearing a black ski mask and gloves. According to Officer Shaw, Lewis said that the man was wearing a ski mask and did not mention a cap.

Officer Nichols prepared Lewis' written statement. The statement indicated that the driver was a thin-faced black man with a medium complexion, wearing a baseball cap and a mask that covered his face and mouth. According to Officer Nichols, Lewis never stated that the driver was wearing a ski mask. At trial, Lewis denied telling the police that the driver was wearing a ski mask. In Lewis' statement, the car was described as a silver or gray two-door Buick Regal with front-end damage. Officer Nichols remembered that Lewis also told her that the car had a red door, but that information was not included in the written statement. According to the statement, the gun was black.

On May 15, 2001, the day after the attempted bank robbery, Officer Annie Ray-Donald and Sergeant Michelle Loftus stopped at Ray-Donald's apartment. They were dressed in plain clothes and driving an unmarked car. As Officer Ray-Donald got out of her car, she saw an older gray Buick with a red driver's side door, containing two black men, drive quickly into the lot. As she walked toward her apartment, she saw the passenger of the car get out and run across the parking lot to an older blue Ford pickup truck. The officers went into the apartment and, when they left five minutes later, both saw the two men, who were previously in the Buick, rapidly leaving the parking lot in the blue pickup truck.

Shortly thereafter, the officers noticed police cars and a commotion at a Comerica bank, located approximately one-half mile from Officer Ray-Donald's apartment. The officers listened to the police radio in their car, and learned that an older Buick with a red door had been involved in a robbery at that bank. The officers then went into the bank, and told an officer what they had observed in Officer Ray-Donald's parking lot. Officer Ray-Donald indicated that the driver was wearing a gray hooded sweatshirt, and the passenger was wearing a light-colored plaid shirt and blue jeans. Sergeant Lofton described the driver as a black man with a medium complexion, wearing a gray hooded sweatshirt, and described the passenger as a black man with a medium complexion, wearing a light plaid shirt.

Officers Derrick Griffin and Christopher Hicks were driving in an unmarked patrol car when they heard a report about an older pickup truck and its connection to a bank robbery. Officer Griffin saw a truck fitting the description, and saw a passenger exit the truck at an intersection. The officers followed the truck until it turned into a vacant lot. The officers activated their police lights, and the driver left the truck and fled on foot. The officers then chased the driver, whom Officer Griffin identified as defendant. Defendant stepped out of his boots and continued to run, and both officers lost sight of him in an alley and returned to their patrol car. Officer Hicks radioed other officers about the chase, describing the suspect as a black man wearing a dark shirt and beige pants. Neither officer saw anyone wearing a gray hooded sweatshirt.

Officer Don Dent heard the radio report, observed the truck in the grass, and ultimately saw a shoeless man wearing a black shirt and tan pants run in front of his car. Officer Dent described the man as defendant. Officer Dent chased defendant over fences and through yards.

Officer Nelson Ruiz and his partner, who had also heard the radio report, were near the scene when they saw an officer chasing defendant. Officer Ruiz joined the chase, caught defendant, and handcuffed him with the assistance of Officer Charo Turner.

On May 16, Lewis identified defendant in a lineup. Lewis, as well as Officers Ray-Donald and Lofton, identified the Buick. The license plate number of the Buick was UTC 393. The Buick had been reported as stolen, but the Ford pickup truck was registered to defendant. No usable fingerprints were located in either vehicle.

II. Voir Dire

Defendant first argues that the trial court erred when it denied defense counsel's request to conduct voir dire and then conducted voir dire in a cursory manner, failing "to touch upon any issues specific to his case." As a preliminary matter, we note that, although defense counsel asked to conduct voir dire, he did not challenge the manner in which the trial court conducted voir dire or the adequacy of voir dire. Therefore, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights, i.e., affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A defendant tried by a jury has a right to a fair and impartial jury. "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). A defendant does not have the right to have counsel conduct voir dire or to any other specific procedure for voir dire. *Id.* at 619. There are no "hard and fast rules" regarding what constitutes acceptable voir dire; rather, the trial court is granted wide discretion in the manner employed to achieve an impartial jury. *Id.* at 623. When the trial court, rather than the attorneys, conducts voir dire, the court is required "to conduct a thorough and conscientious voir dire designed to elicit enough information for the court to make its own assessment of bias." *Id.* "[T]he court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised." *Id.* at 619.

Here, defendant has failed to show plain error regarding the manner in which the trial court conducted voir dire. The trial court's voir dire provided defendant with a reasonable opportunity to ascertain whether any of the potential jurors were subject to peremptory challenge or challenge for cause, and also provided the trial court with sufficient information to make an independent assessment of bias and to guard against potential bias. The court covered the salient concepts of the presumption of innocence, burden of proof, and reasonable doubt, and elicited relevant information regarding the prospective jurors' backgrounds. Additionally, although the trial court denied defense counsel's request that he conduct voir dire, the court stated that the attorneys could submit any specific questions they wanted the court to ask the prospective jurors. Defense counsel did not avail himself of this option. Even on appeal, defendant has not identified any relevant question that the trial court failed to give.

In any event, defendant was not entitled to have questions tailored precisely as he would have liked. Defendant was entitled only to a thorough and conscientious voir dire that would allow him to intelligently exercise his challenges to the prospective jurors. *Tyburski*, *supra* at 623. The record discloses that this was done. As a result of the court's voir dire, defendant used eight of his twelve peremptory challenges, and, at the close of voir dire, indicated that he was

"satisfied" with the impaneled jury. In sum, the manner in which the trial court conducted voir dire elicited sufficient information to provide defendant with a reasonable opportunity to ascertain whether any of the prospective jurors were not impartial. Therefore, reversal is not warranted on this basis.

III. Trial Court's Conduct

Defendant next claims that the trial court's conduct denied him a fair and impartial trial. As support for this claim, defendant asserts that the trial court refused to hold an evidentiary hearing, improperly restricted defense counsel's opening statement, and made comments that demonstrated its impatience when defense counsel attempted to raise an issue with the jury instructions. Because defendant did not challenge the trial court's conduct below, this Court reviews this unpreserved claim for plain error affecting his substantial rights. *Carines, supra*.

A. Evidentiary Hearing

We reject defendant's claim that he is entitled to a new trial because the trial court "pressur[ed] counsel to forgo hearing an evidentiary issue," and did not address the matter. The record reflects that, during the month before trial, the prosecutor filed a notice of intent to introduce certain evidence under MRE 404(b). On the second day of trial, defense counsel asked the court to hold an evidentiary hearing on the admissibility of the proposed MRE 404(b) evidence. In response, the trial court gave defense counsel the option of proceeding with trial and objecting to the evidence, or having the case transferred to another judge for further pretrial proceedings.[1] Defense counsel elected to proceed with trial. Because defense counsel effectively withdrew his request for an evidentiary hearing, any challenge in this regard was waived. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Consequently, the waiver "extinguished" any error. *Id.* at 219-220.

B. Opening Statement

Defendant also argues that the trial court "limit[ed] [his] ability to present a defense by refusing to allow defense counsel to make an effective opening statement." An opening statement should be designed to inform the jury what the party proposes to show. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). It is well established that the trial court has a duty to control trial proceedings in the courtroom, and has wide powers of discretion in fulfilling that duty. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995); MCL 768.29; MCR 6.414(A). A legitimate exercise of the trial court's responsibility to control the proceedings extends to imposing reasonable limits on opening statements. MRE 6.414(B). But a court's conduct may not pierce the veil of judicial impartiality, and, if it does so, the defendant's conviction must be reversed. *Paquette, supra* at 340. The appropriate test is whether the court's comments or conduct were of such a nature as to unduly influence the jury and thereby deprive the defendant of his right to a fair and impartial trial. *Id*.

[1] This case was transferred to the trial judge to conduct the trial, because the original assigned judge was "in other trials." At the time of the transfer, the case was considered "trial ready."

Here, during defense counsel's discussion of the presumption of innocence and burden of proof, the trial court interjected and briefly advised counsel to focus on "what [he] expect[s] the facts to show." Contrary to defendant's claim, the trial court's instruction to defense counsel that he limit his opening statement to a presentation of the facts, rather than engage in argument was not improper. MRE 6.414(B). Moreover, the record indicates that defense counsel was not precluded from continuing his opening statement. In fact, following the brief interruption, defense counsel, without interference, fully explained his theory that the identification of defendant as the perpetrator was questionable, that the testimony of the police officers would not show that defendant possessed the car used in the offense, and that the evidence would only support a verdict of not guilty. As such, contrary to defendant's claim, the trial court's conduct was not improper, nor did it thwart defense counsel from making a full and fair statement of his case. Accordingly, defendant has not demonstrated plain error.

C. Impatience

Defendant next argues that, because of the trial court's eagerness to complete the trial, it expressed impatience with defense counsel. A defendant has a right to be represented by an attorney who is treated with the consideration due an officer of the court. While a trial court's criticism of counsel may be grounds for reversal, the appropriate test is whether the court's participation denied the defendant a fair and impartial trial by unduly influencing the jury. *People v Anderson*, 166 Mich App 455, 461-462; 421 NW2d 200 (1988).

In this case, although the trial court expressed impatience with defense counsel for not timely submitting a proposed jury instruction, the court's comments occurred outside the presence of the jury. Defendant also claims, without citation to the record, that the court "acted impatiently with objections during trial." But defendant has failed to provide any record citations to support this claim. See MCR 7.212(C)(7). "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (citation omitted). Thus, we find no error.

IV. Other Acts Evidence

Defendant also claims that the trial court erred by allowing evidence concerning the circumstances surrounding his arrest on May 15, 2001. Again, because defendant failed to timely object to the evidence below, we review this unpreserved evidentiary claim for plain error affecting defendant's substantial rights. *Carines*, *supra*.

The admissibility of evidence of a defendant's other crimes, wrongs, or acts is governed by MRE 404(b). Evidence is admissible under MRE 404(b) if it is offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, is relevant to an issue or fact of consequence at trial, and is sufficiently probative to outweigh the danger of unfair prejudice, under MRE 403.[2] *People v Starr*, 457 Mich 490, 496-497; 577

[2] Evidence is relevant if it has any tendency to make the existence of a fact that is of (continued…)

NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In application, the admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *VanderVliet*, *supra* at 75.

We find that defendant has failed to demonstrate plain error because it is not apparent that the challenged evidence could not have been received successfully and correctly under MRE 404(b). The record demonstrates that the evidence regarding the circumstances surrounding defendant's arrest on May 15th was probative of his identity as the perpetrator of the attempted bank robbery on May 14th. Particularly, the challenged evidence showed that, on the day after the attempted robbery, defendant possessed the Buick used in the offense, abandoned it in a parking lot, and left in a different vehicle. The evidence was logically relevant to show defendant's identity as the perpetrator of the attempted bank robbery. Indeed, identification was the chief contested issue in this case, and evidence showing that defendant possessed the Buick on May 15th had a tendency to make it more likely that he was the person who attempted to rob the bank on May 14th. MRE 401. Simply put, the theories for which the evidence was admissible were legitimate, material, and contested grounds on which to offer the evidence.

Additionally, defendant has failed to persuasively argue that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, under MRE 403. While the acts described in the testimony were serious and incriminating, such characteristics were inherent in the underlying crime for which defendant was accused. The danger that MRE 404(b)(1) seeks to avoid is that of *unfair* prejudice, not prejudice that stems only from the nature of the crime itself. See *Starr*, *supra* at 499. Accordingly, this issue does not warrant reversal.

V. Effective Assistance of Counsel

Defendant also claims that he was denied the effective assistance of counsel because defense counsel failed to timely file a pretrial motion to prevent the admission of "other acts" evidence relating to defendant's actions on May 15, 2001. Because defendant failed to make a testimonial record concerning this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

(…continued)

consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. But even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

While we agree that defense counsel's failure to timely challenge the admission of the MRE 404(b) evidence could be deemed questionable,[3] defendant has failed to demonstrate that he was prejudiced by defense counsel's inaction. Initially, we note that the trial court did ultimately address the admissibility of the evidence. Furthermore, as discussed in part IV, *supra*, the evidence was admissible under MRE 404(b), and, therefore, any objection would have been futile. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Accordingly, because defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different, he is not entitled to a new trial on this basis. *LeBlanc*, *supra*.

VI. Jury Instructions

Defendant next argues that the trial court committed error requiring reversal when it denied his request to give a modified version of CJI2d 4.11.[4] "The determination whether a jury

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[3] The prosecutor filed a notice of intent to introduce certain evidence under MRE 404(b) on December 15, 2001. Defense counsel first sought to challenge the proposed evidence on the second day of trial, January 16, 2002. After withdrawing his request for an evidentiary hearing, he failed to timely object to the evidence during trial.

[4] CJI2d 4.11, which instructs the jury concerning the proper use of uncharged misconduct evidence, provides:

> (1) You have heard evidence that was introduced to show that the defendant committed [a crime / crimes / improper acts] for which [he / she] is not on trial.
>
> (2) If you believe this evidence, you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show:
>
> [*Choose one or more from (a) through (g)*:]
>
> (a) That the defendant had a reason to commit the crime;
>
> (b) That the defendant specifically meant to _____;
>
> (c) That the defendant knew what the things found in [his / her] possession were;
>
> (d) That the defendant acted purposefully -- that is, not by accident or mistake, or because [he / she] misjudged the situation;
>
> (e) That the defendant used a plan, system, or characteristic scheme that [he / she] has used before or since;
>
> (f) Who committed the crime that the defendant is charged with.
>
> (g) [*State other proper purpose for which evidence is offered*.]

(continued…)

instruction is applicable to the facts of the case lies within the sound discretion of the trial court." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). The failure to give a requested instruction is error requiring reversal only if the requested instruction is substantially correct, was not substantially covered in the charge given to the jury, and concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995).

At trial, defense counsel declined the trial court's offer to give CJI2d 4.11. The standard instruction distinguishes between the charged offenses and the other acts described at trial and puts into perspective the proper ways in which the jury may consider the other acts evidence. Defense counsel requested that the court give the following instruction:

> You have heard testimony that a bank was robbed on May 15, 200[1] and that a particular described car was involved in that robbery. This evidence was admitted only to explain the police officers' conduct on May 15th. You must not consider this evidence for any other purpose. All the evidence must convince you beyond a reasonable doubt that Mr. Brown committed the alleged crime or you must find him not guilty.

We agree with the trial court's conclusion that giving defendant's proposed instruction would have improperly limited the permissible purposes for which the jury could consider the evidence. Specifically, the jury was not limited to considering the evidence to evaluate the officers' actions on May 15, 2001. The jury could also properly consider the evidence as it related to the identity of the perpetrator of the charged offense. In other words, the evidence that defendant possessed the Buick on May 15th could be used to show that he also possessed it during the attempted bank robbery on May 14th. Given the language of defendant's proposed instruction, a jury could have inferred that it could not consider this evidence in determining defendant's guilt of the instant offense. In sum, because defendant's proposed instruction was not substantially accurate, the trial court did not err by failing to give it.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly

(…continued)

> (3) You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that [he / she] is likely to commit crimes. You must not convict the defendant here because you think [he / she] is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime, or you must find [him / her] not guilty.