STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v CHRISTOPHER DANIEL SCHNORR, Defendant-Appellant.	UNPUBLISHED April 29, 2004 No. 242306 Macomb Circuit Court LC No. 01-002892-FC

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529. He was sentenced as a fourth habitual offender, MCL 769.12, to a term of imprisonment of thirty to forty-five years. He appeals as of right. We affirm.

I. Facts

Defendant's conviction arises from the robbery of a pizza carry-out restaurant in St. Clair Shores on April 28, 2001. Lisa Jeffers identified herself as the co-manager of the restaurant on duty at the time of the robbery. Jeffers testified that business was slow that night, so she sent the rest of the employees home at 9:00 or 10:00 p.m., leaving herself alone. According to Jeffers, at approximately 11:30 p.m., a man wearing a baseball cap came in, showed a gun, and demanded all the money. Jeffers handed over all the money from the cash register, but the robber "was very agitated and wanted more," causing Jeffers to start opening a safe, during which the intruder said, "Faster, bitch, I'll kill you right here." Jeffers testified that she opened the safe, giving the assailant access to some rolled coins and a bank bag. According to Jeffers, defendant took the money and "walked out." Jeffers later identified defendant in court as the robber.[1]

II. Identification Testimony

[1] Defendant was originally charged with armed robbery and possession of a firearm during the commission of a felony, MCL 750.227b, but the jury found him not guilty of felony-firearm and guilty of only armed robbery.

Defendant argues that the trial court erred in allowing Jeffers to identify him in court as her assailant. We disagree.

The trial court convened an evidentiary hearing to decide the identification issues. A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous; clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J., joined by Mallett, J.), 318 (Boyle, J., joined by Riley, J., joining Griffin, J., in pertinent part); 505 NW2d 528 (1993); *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001).

The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive as to render the identification irreparably unreliable. *Kurylczyk*, *supra* at 311-312, 318; *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001); *People v Davis*, 146 Mich App 537, 548; 381 NW2d 759 (1985). If a witness is exposed to an impermissibly suggestive pretrial lineup or showup, that witness' in-court identification of the defendant will not be allowed unless the prosecutor shows by clear and convincing evidence that the in-court identification has a sufficiently independent basis to purge the taint of the improper identification. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977). "The need to establish an independent basis for an in-court identification arises [only] where the pretrial identification is tainted by improper procedure or is unduly suggestive." *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995) (citations omitted).

In *People v Franklin Anderson*, 389 Mich 155; 205 NW2d 461 (1973), our Supreme Court stated that, where the suspect was in police custody at the time, "[i]f there was no counsel at the pretrial identification . . . , the trial court must hold an evidentiary hearing out of the presence of the jury at which the people must show by clear and convincing evidence that the in-court identification had a basis independent of the prior identification procedure." *Id.* at 169, citing *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). "It is the fact of custody that requires implementation of the *Franklin Anderson* rule, not the place of or reason for the custody." *People v James Lee Anderson*, 391 Mich 419, 422; 216 NW2d 780 (1974).[2]

"The right to counsel at pretrial photo lineups attaches when the accused is in custody, readily available, or the focus of investigation." *People v Wyngaard*, 151 Mich App 107, 112; 390 NW2d 694 (1986). In this case, with knowledge that defendant was incarcerated under the auspices of the Clinton Township Police pursuant to a separate armed robbery investigation, and apparently without affording defendant or his attorney any opportunity to be present, the police presented Jeffers with a photographic lineup that included defendant's image, from which Jeffers selected no suspect. Although the trial court did not rule on the propriety of that procedure on the record, the court did, in the course of deciding to allow Jeffers' identification testimony,

[2] But see *People v Wyngaard*, 151 Mich App 107, 113; 390 NW2d 694 (1986) (where the suspect is incarcerated in a different county, unbeknownst to authorities conducting an unrelated investigation, the latter authorities might proceed without ascertaining the suspect's incarceration or otherwise respecting the procedures appropriate for that status).

make factual findings as needed for determining whether Jeffers had a basis for identifying defendant untainted by that disfavored procedure. See *Gray*, *supra*; *Kachar*, *supra*; *Barclay*, *supra*.

After taking evidence and arguments, the trial court stated that Jeffers was consistent in her identification of defendant, and continued as follows:

> Her identification at the lineup . . . was not based on something that was unduly suggestive. She indicated that they're trained to look them straight. Look at them. Look at them in the face. She looked at him as soon as he opened the door and he walked towards her. It's well lit. [Jeffers has] great eyesight.

At the hearing, Jeffers testified that when the robber entered the store, she took a good look at him, in accordance with her training to look into the customer's eyes, adding that when the intruder approached the counter the two were about two feet apart. Jeffers further described the lighting as "[v]ery bright fluorescent." Asked about her vision, Jeffers boasted that it was "[r]eally good, 20/20," adding, "I work in optical."

Jeffers recounted viewing black and white photographs for the police one or two months after the incident, and two corporeal lineups of six members each after that. Jeffers selected no image from those presented at the photographic lineup, and defendant points to no evidence that Jeffers received any suggestive coaching on that occasion. However, according to Jeffers, from the two corporeal lineups she identified her robber, telling a police detective, "that guy looks familiar," and "that's the guy that robbed me." Jeffers confirmed that the person she identified was defendant.

Defendant makes much of the fact that this witness initially suggested that her assailant was perhaps five feet, five inches tall, and weighed approximately 150 pounds, but according to defendant's measurements, he in fact stands approximately five feet, eleven inches tall, and weighs 180 pounds. At the *Wade* hearing, Jeffers explained that she herself was five feet, two inches tall, that she thought the robber "was just taller than me," and confessed that she had given [p]robably the wrong height and the wrong weight" because she was "a terrible . . . guessimater." These discrepancies are not fatal to Jeffers' identification testimony. Not only are they not great in measure, but the witness plausibly explained them. Her initial descriptions that do not fit defendant perfectly concerned the weight to afford her identification testimony, not its admissibility.

The evidence presented at the *Wade* hearing, considered as a whole, supports the trial court's conclusions that there was no suggestive taint at the challenged photographic identification proceeding, and Jeffers otherwise had a solid basis for offering testimony identifying defendant as her robber.

III. Jury Instruction

Defendant argues that the trial court erred in declining to instruct the jury specially on the four factors involved with eyewitness identification recognized in *Franklin Anderson*, *supra* at 172. Specifically, defense counsel suggested before trial that the trial court announce that it had taken judicial notice that (1) the police and prosecutors routinely, and often necessarily, resort to

eyewitness identification, (2) it is "scientifically and judicially recognized . . . that there are serious limitations on the reliability of eyewitness identification," (3) "police and prosecution procedures often (and frequently unintentionally) mislead eyewitnesses into misidentification," and (4) it is historically and legally established that "a significant number of innocent people have been convicted of crimes they did not commit and the real criminal was left at large." See *id.*

Defendant presented an expert at trial who testified to the imperfections that inhere in eyewitness identification, and on appeal presents several texts and other authorities that underscore the undeniable point that there have been many wrongful convictions based on eyewitness identifications, several of which are known to have resulted in death sentences in recent times.

We are mindful that eyewitness identification has not proved to be infallible, but defendant cites no authority standing for the proposition that a trial court must specially disparage eyewitness identification when instructing a jury. It has been long held that the accounts of a single eyewitness can suffice to persuade a jury of a defendant's guilt beyond a reasonable doubt. See *People v Newby*, 66 Mich App 400, 405; 239 NW2d 387 (1976); *People v Jelks*, 33 Mich App 425, 432; 190 NW2d 291 (1971). Defendant's evidence and arguments bear on the weight to be afforded eyewitness identification, but do not establish that such identification is inherently inadequate as a matter of fact or law.

Further, the instructions the trial court actually provided sufficiently covered the uncertainties of eyewitness identification:

> One of the issues in this case is the identification of the defendant as the person who committed the crime. The prosecutor must prove, beyond a reasonable doubt, that the crime was committed and that the defendant was the person who committed it. In deciding how dependable an identification is, think about such things as how good a chance the witness had to see the offender at the time. How long the witness was watching. Whether . . . the witness had seen or known the offender before. How far away the witness was. Whether the area was well lighted and the witness' state of mind at the time.
>
> Also, think about the circumstances at the time of the identification. Such as how much time has passed since the crime? How sure . . . the witness was about the identification? And the Witness' state of mind during the identification.
>
> You may also consider any times that the witness failed to identify the defendant or made an identification or gave a description that . . . did not agree with . . . his or her identification of the defendant during the trial. You should examine the witness' identification testimony carefully. You may consider whether other evidence supports the identification, because then it may be more reliable. However, you may use the identification testimony alone to convict the defendant, as long as you believe the testimony and find that it proves, beyond a reasonable doubt, that the defendant was the person who committed the crime.

For these reasons, we reject defendant's claim of error.

IV. "Other Acts" Evidence

Defendant argues that the trial court erred in allowing the prosecutor to introduce evidence of an earlier armed robbery. We disagree. The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995).

The evidence in question concerned an armed robbery that took place eighteen days earlier at a family restaurant several blocks from the pizza establishment robbed in this case. On the prosecutor's motion, the trial court allowed two victims from the earlier robbery to testify concerning similarities between that crime and the instant one for purposes of proving defendant's identity as the culprit in the latter.

MRE 404(b)(1) establishes that evidence of other acts is not admissible to prove a person's character in order to show behavior consistent with those other wrongs, but provides that such conduct may be admissible for other purposes, "such as proof of . . . scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ." Evidence of other acts is thus admissible if it is offered for a proper purpose, if it is relevant, and if its probative value is not substantially outweighed by unfair prejudice. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998), citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). See also MRE 401 to 403. A proper purpose is one other than establishing the defendant's character to show his or her propensity to commit the offense. *VanderVliet, supra* at 74.

Defendant points out that before admitting evidence of an "other" act, the trial court must find that the defendant actually committed the earlier crime, see *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), and argues that the trial court in this case lacked a sufficient basis for so concluding. However, because defendant was in fact found guilty of that earlier crime, we deem it unnecessary to concern ourselves with defendant's factual challenge in this regard for purposes of this appeal.

Defendant otherwise points to numerous differences between the two crimes, and argues that the two crimes were not sufficiently similar to render the methodology attendant to the first probative of his responsibility for the second. We disagree. The trial court recited as follows:

> In our case, the defendant, of course, used a handgun. . . . The defendant, in each situation, . . . wasn't satisfied with the money from the register. Demanded more in each time. . . . In each situation, he used foul language as a part of his demand. He was extremely threatening in each situation. Threatened to kill each victim. . . . A baseball cap was pulled down to his eyes in both robberies. Brownish hair was described in both robberies and he was identified in both robberies.

To these observations, we add that both establishments were restaurants, located in the same general area, and that the two were both robbed at night and within three weeks of each other.

An abuse of discretion occurs only where a court's action is "so violative of fact and logic as to constitute perversity of will or defiance of judgment . . . ." *People v Laws*, 218 Mich

App 447, 456; 554 NW2d 586 (1996) (internal quotation marks and citation omitted). In this case, the parade of similarities between the earlier robbery and the instant one support the trial court's decision to allow evidence of the former for the purpose of proving defendant's identity as the perpetrator of the latter. See *People v Ho*, 231 Mich App 178, 185-187; 585 NW2d 357 (1998).

Accordingly, the trial court did not err in concluding that the evidence of the earlier robbery was highly probative of the question of defendant's role in the instant one, and the court avoided any unfair prejudice by instructing the jury as follows:

> You have heard evidence that was introduced to show that the defendant committed a crime for which he is not on trial. If you believe this evidence, you must be very careful only to consider it for certain purposes. You may only think about whether the evidence to show that defendant used a plan, scheme, or characteristic scheme that he was used before or since, or who committed the crime that the defendant is charge with. 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 is likely to commit crimes. You must not convict the defendant because you think he is guilty of the 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 not guilty.

"It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998).

For these reasons, we reject this claim of error.

V. Alibi Defense

Defendant filed notice of his intention to present an alibi defense, and maintained at trial that he was at a bar with his brother and others at the time of the crime. On appeal, defendant argues that the trial court erroneously ruled that if he presented his brother as a witness, that witness could be impeached with his prior convictions. Defendant additionally argues that the prosecutor improperly made capital of the brother's nonappearance. We find no merit to either argument.

A. Defendant's Brother

Defendant listed his brother as a witness for purposes of presenting his alibi defense. On the third day of trial, the prosecutor expressed an intention to cross-examine that witness, if called, with that witness' prior convictions – apparently two instances of breaking and entering with intent to commit larceny, and one instance of larceny by false pretenses. Defense counsel impliedly conceded that use of the false pretenses conviction was proper for this purpose, but argued that the breaking and entering convictions were more prejudicial than probative. The trial court stated that it "will allow the impeachment of [defendant's brother] of his false pretenses charge, as well as his breaking and entering charge with intent to commit larceny." In response to this ruling, defense counsel elected not to call defendant's brother.

A trial court's evidentiary decisions are reviewed for an abuse of discretion. See *Bahoda*, *supra*. Defendant does not challenge the trial court's ruling that defendant's brother's convictions bore on that witness' credibility, but instead simply asserts that, because of the court's ruling, he "was forced or compelled to testify as his only way of presenting the alibi defense, despite his counsel's suggestion . . . that it would probably be better if he did not take the stand." However, witness credibility is always at issue, and may be attacked on cross-examination. MRE 611(b). Defendant cites no authority for the proposition that an alibi witness is exempt from that truth-testing device. The trial court did not err in subjecting defendant's alibi witness to the same cross-examination to which any other witness would be exposed, and defendant was not denied a fair trial simply because he was obliged to take this into account while weighing the pros and cons of calling that witness or testifying himself.

B. The Prosecutor's Questions and Comments

When defendant took the stand, and testified that during the time in question he was at a bar with his brother and other, unnamed, acquaintances, the prosecutor asked defendant, "[w]here's your brother," and "[i]s he going to come in and testify?". Defense counsel objected, and the trial court excused the jury and said, "to ask him why he's not producing his brother, no. It can't happen."

Defense counsel seized the opportunity to ask if he might call defendant's brother without the latter's being subject to impeachment through his earlier convictions after all, on the ground that the prosecutor "opened the door." The trial court asked, rhetorically, why opening the door would "permit you to now call him without being impeached." When the jury returned, the court stated, "I'm going to permit the prosecutor to continue, but I do want to remind you, . . . the defendant has no obligation to produce any evidence."

Upon resuming cross-examination, the prosecutor asked, "your brother could collaborate [sic] what you're saying, correct?" and elicited that the brother apparently never went to the bar and gathered patrons who could join him in vouching for defendant's whereabouts during a time when the latter was accused of participating in a crime elsewhere. At the beginning of the next day's proceedings, defense counsel asked for a mistrial, which the court denied.

Defendant further argues that the prosecutor compounded the prejudice by stating, in closing argument, "[d]o you reasonably believe that [defendant] was at the [b]ar that night and it's just a bad break that no one can collaborate [sic] that?" and in rebuttal, "he has no collaboration [sic] for the story he told you."[3]

This Court reviews a lower court's decision on a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *Id.* (citations omitted). There was no irregularity in this instance.

[3] These specific prosecutorial remarks drew no defense objections, thus leaving the prosecutorial-misconduct aspect of this issue unpreserved.

The trial court properly instructed the jury that defendant was presumed innocent, and that defendant had no obligation to present evidence. The court further admonished the jury to decide the case solely on the basis of the evidence, and that the statements and questions of the attorneys are not evidence.

However, "[i]t is well established that where the defendant presents evidence of an alibi, the prosecutor may comment on the weakness of the alibi defense by pointing out the lack of corroboration testimony . . . ." *People v Ovegian*, 106 Mich App 279, 382; 307 NW2d 472 (1981). More recently, our Supreme Court reiterated that "where a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Accordingly, "the prosecutor may comment on the weakness of defendant's alibi, and may observe that the evidence against the defendant is 'uncontroverted' or 'undisputed,' even if defendant is the only one who could have contradicted the evidence, or has failed to call corroborating witnesses . . . ." *Id.* (citations omitted).

In other words, defendant, having chosen to testify and offer an alibi defense, thereby opened the door to the full adversarial testing of that defense, including by bringing to the jury's attention that there was no corroborating testimony. The trial court thus properly limited the prosecutor's inquiries concerning defendant's brother to whether that person could have corroborated defendant's story, and properly declined to intervene when the prosecutor commented on the lack of such corroboration.

VI. Cumulative Error

Defendant suggests that if no single claim of error itself warrants reversal, such relief is nonetheless required in the face of the cumulative effect of all such errors. See *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). Because we conclude that defendant has failed to show any prejudicial error, defendant's argument concerning cumulative error is unavailing. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

VII. Habitual Offender Status

Defendant argues that the trial court erred in allowing the prosecutor to amend the habitual offender notice to correct an error in one of the originally listed prior convictions. We disagree. This Court generally reviews a trial court's decision to permit a prosecutor to amend a criminal information for an abuse of discretion. MCL 767.76. However, questions of law are reviewed de novo. *People v Melotik*, 221 Mich App 190, 198; 561 NW2d 453 (1997).

The original habitual offender notice, filed October 12, 2001, specifies three prior felonies, and states that defendant accordingly stands "subject to the penalties provided by MCL 769.12." At sentencing, defense counsel pointed out that one of these appeared with the date of sentencing on a parole violation, not that of conviction of its underlying offense, and argued that the prosecutor should not be permitted to make adjustments on the eve of sentencing. See MCL 769.13(1).

Although there is no dispute that defendant's record included seven prior felony convictions, defendant nonetheless argues that the imperfect listing of one of the three prior felonies cited for purposes of habitual-fourth sentencing reduces his eligibility for such enhancement from habitual-fourth to habitual-third. This argument is without merit.

The purpose of habitual offender notice is to "provide a defendant with notice, at an early stage of the proceedings, of the potential consequences should the defendant be convicted of the underlying offense." *People v Manning*, 163 Mich App 641, 644; 415 NW2d 1 (1987). Accordingly, a prosecutor may not amend the habitual offender notice after the time provided by MCL 769.13(1) to change the habitual offender level to a higher degree, but may do so "to correct a technical defect where the amendment does not otherwise increase the potential sentence consequences." *People v Hornsby*, 251 Mich App 462, 472; 650 NW2d 700 (2002). See also *People v Ellis*, 224 Mich App 752, 757 n 2; 569 NW2d 917 (1997); *Manning*, *supra* at 644-645.

Because the original habitual offender notice specified habitual-fourth status, and because the prosecutor's oral amendment did not change that, the trial court did not err in proceeding with sentencing on the basis of the corrected information. Defendant was properly sentenced as a fourth habitual offender.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood