

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROUMMEL JEROME INGRAM,

Defendant-Appellant.

UNPUBLISHED
December 4, 2007

No. 273086
Oakland Circuit Court
LC No. 2005-203497-FC

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 285 months to 40 years for the armed robbery conviction, 80 to 120 months for the assault with intent to do great bodily harm conviction, and two to four years for the felonious assault conviction, to be served consecutive to three concurrent two-year terms of imprisonment for the felony-firearm convictions. Because the trial court did not abuse its discretion in allowing the admission of other bad acts evidence, defendant is not entitled to resentencing, and defendant was not denied the effective assistance of counsel, we affirm.

Defendant's convictions arise out of the July 5, 2005, robbery of the Mug & Jug Wine Shop in Farmington Hills. Co-defendant Shannon McGriff entered the store with defendant while another co-defendant, Kim Thomas, waited in a vehicle at the rear of the store. During the robbery, defendant beat a store employee, Matthew Al-Sheikh, with a gun and threatened to shoot Al-Sheikh if he did not open a safe. Defendant and McGriff took money from a cash register and drawer, but left without opening the safe. Defendant shot Al-Sheikh in the chest before he and McGriff fled out the back door. Defense counsel conceded at trial that defendant committed the armed robbery and the charged felonious assault, but argued that defendant was not guilty of the charged greater offense of assault with intent to commit murder because Al-Sheikh was shot when the gun accidentally discharged. The jury acquitted defendant of assault with intent to commit murder, but found him guilty of the lesser offense of assault with intent to do great bodily harm less than murder.

On appeal, defendant first argues that the trial court erred in permitting the prosecutor to introduce evidence that he committed other robberies on June 14 and July 1, 2005, in St. Clair

Shores, for the purpose of proving his identity as a perpetrator of the robbery at the Mug & Jug Wine Shop.

Initially, defendant is mistaken in his contention that the evidence was admitted to prove identity. The only purposes for which the trial court allowed the evidence were to establish defendant's intent and common scheme or plan in doing an act. Consistent with this ruling, the jury was instructed at trial that the evidence could only be considered to determine if defendant acted purposefully or to show that defendant used a plan, system, or characteristic scheme. In general, jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Examined in this context, defendant has not established that the trial court abused its discretion in allowing the evidence of the other robberies. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). To admit other acts evidence under MRE 404(b), the evidence must be offered for a proper purpose and must be relevant under MRE 402, as enforced by MRE 104(b). *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Further, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *Id.* at 509.

Under MRE 401, evidence is relevant if it is "material (related to a fact that is of consequence to the action) and has probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence)." *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). The degree of similarity between uncharged and charged acts that will justify admission of the evidence depends on the purpose of the evidence. *Id.* at 65; see also *People v Hine*, 467 Mich 242, 251-253; 650 NW2d 659 (2002).

Where proof that the charged act occurred is the object of the evidence, and the prosecutor desires to infer the charged act from a plan or scheme, there must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan. *Hine, supra* at 251; *Sabin, supra* at 65. "The evidence of uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense." *Hine, supra* at 253.

Here, the pertinent charge for purposes of reviewing the trial court's decision is the assault with intent to commit murder charge, because the material issue for which the prosecutor offered the evidence was to rebut defendant's claim of an accidental shooting. An actual intent to kill is required to establish assault with intent to commit murder. *People v Taylor*, 422 Mich 554, 567; 375 NW2d 1 (1985). "An actor's intent may be inferred from all of the facts and circumstances." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). Relevant factors are "the nature of the defendant's acts constituting the assault, the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made." *Roberts v People*, 19 Mich 401, 416 (1870); see also *People v Brown*, 267 Mich App 141, 149 n 5; 703 NW2d 230 (2005).

Whether defendant was engaged in intended conduct when he shot the victim at the Mug & Jug Wine Store was probative of his intent. And whether defendant engaged in similar

conduct during the few weeks preceding the shooting was probative of whether he was acting pursuant to a plan, as well as the type of experience that he brought into the charged robbery. Evidence that defendant had prior experience in confronting individuals with a gun to commit a robbery before the shooting might negate an otherwise reasonable assumption that he was an inexperienced robber whose gun discharged accidentally while he was mishandling it, causing him to flee out the back door.

Therefore, the trial court did not abuse its discretion in finding that the evidence was relevant to defendant's intent and common scheme or plan in doing an act. Further, the trial court did not abuse its discretion in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403.

Even if the trial court abused its discretion in allowing the evidence, however, reversal would not be warranted because it does not affirmatively appear that it is more probable than not that the error was outcome determinative. *Lukity, supra* at 495-496. The only contested charge at trial was whether defendant assaulted the victim with the intent to commit murder. The jury had the victim's testimony, the evidence from a surveillance camera, and defendant's statements to the police to evaluate whether defendant acted intentionally or accidentally when the gun discharged. Further, defense counsel attempted to use the other acts evidence to support the defense theory that the charged shooting was accidental, by pointing out that defendant did not shoot the earlier robbery victim despite his threat to do so. Defense counsel argued that there were a lot of similarities between the prior June 14 robbery and the charged robbery, but that defendant probably did not have the same control over the gun when committing the charged offense. Considered against this backdrop, and in light of the fact that the jury acquitted defendant of assault with intent to commit murder, it is not more probable than not that the admission of the other acts evidence affected the outcome to defendant's detriment. Thus, any error was harmless.

Next, defendant seeks resentencing on the ground that the trial court's scoring of the sentencing guidelines offense variables was improperly based on facts not found by the jury beyond a reasonable doubt, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant concedes that he did not object to the scoring of the guidelines on this basis at sentencing, but further argues that defense counsel was ineffective for failing to raise this *Blakely* issue at sentencing. We find no merit to these issues. As defendant concedes, our Supreme Court has expressly held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). See also *People v McCuller*, 479 Mich 672, 695; ___ NW2d ___ (2007). Therefore, defense counsel was not ineffective for failing to make a futile objection on this basis. *People v Rodgers*, 248 Mich App 702, 713-715; 645 NW2d 294 (2001).

In his standard 4 brief¹, defendant claims that counsel was further ineffective because he effectively pled defendant guilty to the armed robbery charge, without defendant's consent. This

¹ See Administrative Order No. 2004-6, Standard 4 (permitting a defendant to file a brief in propria persona).

Court's review is limited to errors apparent from the record because defendant did not present this claim to the trial court. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004); *People v Rodgers, supra*, at 713-714. Defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for that deficient performance, the result of the proceeding would have been different. *Matuszak, supra*, 263 Mich App at 57-58; *Rodgers, supra*, 248 Mich App at 714. "[D]efendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Matuszak, supra* at 58.

Here, defendant incorrectly asserts that record evidence of his consent was necessary for counsel to pursue a strategy of conceding his guilt to the armed robbery charge. Although an attorney is required to consult with his client with respect to important decisions, such as overarching defense strategy, it is not necessary that counsel obtain the defendant's consent to every tactical decision. *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565 (2004). Counsel's concession that a defendant committed various acts is not the functional equivalent of a guilty plea such as to require the defendant's affirmative, explicit acceptance of the trial strategy. *Id.* at 187-188.

Here, the record discloses that defendant was made aware of the substantial evidence against him and still wished to proceed to trial, accepting the risk of the evidence's impact. Thereafter, counsel conceded defendant's guilt of the robbery in his opening statement. Defendant did not respond to this opening statement and later stated his approval of a request for instructions on lesser offenses to the assault with intent to commit murder charge, acknowledging that his request was made specifically because it was consistent with the theory of defense that the issue wasn't whether defendant was responsible for Mr. Al-Sheikh having been hit with the bullet, but what defendant's intention was at the time that occurred. Defendant also stated at sentencing that, "I know that I must be punished for what I've done. That's [why] I did confess to what I've done. Told everything as it happened. And it was – the only reason I did not confess attempted murder is because I didn't intend to kill or even shoot anyone."

The foregoing record indicates that the requisite consultation regarding trial strategy occurred. And while defense counsel was not required to obtain defendant's express acceptance of the trial strategy, it can be concluded that defendant acquiesced in it. The material question, therefore, is whether defendant can overcome the presumption that defense counsel's strategy was sound. *Matuszak, supra* at 58. Defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Rodgers, supra*, 248 Mich App at 714.

Considering the strong evidence that pointed to defendant's guilt of the armed robbery charge, as well as the felonious assault charge, it can be concluded that defense counsel's strategy of admitting defendant's guilt on those charges to improve defendant's chances for an acquittal on the assault with intent to commit murder charge was not unsound. Therefore, defendant has not met his burden of showing deficient performance. But even if one were to assume that counsel's performance was deficient, defendant's claim of ineffective assistance cannot succeed because he was not prejudiced by the concession. Defendant suggests in his Standard 4 brief that the jury should have been instructed on a lesser offense to armed robbery and that the evidence that the robbers wore masks raised a factual issue regarding his guilt. But defendant has failed to identify any lesser offense that was supported by the evidence. Further, defendant's written confession to committing the armed robbery was part of the evidence

admitted at trial. Defendant has not shown any reasonable probability that the result of the trial would have been different without the concession.

Affirmed.

/s/ Deborah A. Servitto

/s/ David H. Sawyer

/s/ Christopher M. Murray