STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT FLOYD CLARK,

Defendant-Appellant.

UNPUBLISHED
January 15, 2008

No. 272982
Grand Traverse Circuit Court
LC No. 05-009802-FH

Before: Kelly, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of unlawfully driving away an automobile (UDAA), MCL 750.413. He was sentenced as a fourth habitual offender, MCL 769.12, to 44 to 66 months' imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises out of the theft of Trisha Schopieray's 1990 Buick LeSabre from her residence in Traverse City on April 20, 2005. Her car was parked in her driveway when she went to bed at 11:00 p.m. the night before, but was gone when she awoke to go to work at 4:00 a.m. Later that day, police officers found the car parked in Grand Rapids in front of a house known for drug activity. Defendant was sitting in the driver's seat, smoking a cigarette, when he spotted several police cars passing him. Officer Adam Baylis saw defendant get out of the vehicle and walk up the driveway of the house, but then he disappeared from sight. He was apprehended a few blocks away. He admitted sitting in the driver's seat of the car, but told police officers that he did not know that the car was stolen. At trial, the prosecutor introduced evidence that defendant lived only two blocks from the victim in Traverse City. Defendant testified that he traveled from Traverse City to Grand Rapids with an acquaintance, Shawn Sprague, who picked him up in the vehicle. He denied knowing that the car was stolen.

Defendant first argues that the evidence was insufficient to support his conviction. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). We defer to the jury's findings, and we will "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The elements of an offense may be proven

by reasonable inferences derived from circumstantial evidence. *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

The prosecutor presented sufficient evidence to support defendant's conviction. "The essential elements of UDAA are (1) possession of a vehicle, (2) driving the vehicle away, (3) that the act is done wilfully, and (4) the possession and driving away must be done without authority or permission." *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993), aff'd 446 Mich 435 (1994). The evidence indicated that defendant took the vehicle from Schopieray's residence and drove it to Grand Rapids. Defendant lived approximately two blocks from Schopieray's home, and she testified that she did not give him permission to drive her car. When police officers located the car, defendant was seated in the driver's seat. Defendant maintained that Sprague picked him up in the vehicle, but Sprague denied it and denied any association with defendant for more than one year. Defendant also claimed that Sprague and "John" were inside the house, but Officer Baylis knocked on the door of the house and received no response. Defendant's actions after the incident also incriminated him. He admitted that he got out of the vehicle after he saw three police officers pass the car. When he was apprehended a few blocks away, he was sweating, breathing heavily, and acting nervous. To reach the area where he was apprehended, defendant had to travel through at least two backyards. Accordingly, the evidence was sufficient for a reasonable person to conclude that defendant had knowingly taken the car without permission and driven it to Grand Rapids.

Defendant next argues that his conviction was contrary to the great weight of the evidence. We disagree. "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Here, the evidence did not preponderate against the jury's verdict. Defendant offered only his explanation of events as evidence, and whether he or Sprague lacked credibility was for the jury to determine. *Id*. at 219. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for a new trial. See *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

Defendant next argues that the trial court improperly admitted other acts evidence regarding his criminal history. We disagree. "The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). The prosecutor introduced evidence that in June of 2000, defendant took a vehicle from a car dealership where he worked and returned it a week later after driving it to Flint to purchase drugs. He explained the delay by claiming that two other individuals stole the car from him. The prosecution also introduced evidence that in November 2002 defendant took a car with its keys in it from a woman in Tustin and drove it up to Traverse City. When he was stopped for speeding, defendant claimed that he was looking for the individual who had let him borrow the car. As in the case at bar, defendant provided two different names for the person or people who left the car with him. The prosecutor sought to admit the other-acts evidence to prove absence of mistake or accident. These are among the reasons expressly listed in MRE 404(b)(1) as "other purposes" for which evidence of other acts may be introduced. Although the prosecutor and trial court erroneously used the term of art "mistake" colloquially (i.e., defendant claimed that his friend drove him to Grand Rapids, so his arrest was all just some kind of mistake or misunderstanding) the result

would have been the same if the trial court had applied the exceptions for plan, system, intent, motive, and knowledge. MRE 404(b)(1). The record indicates that these were the exceptions actually reviewed by the trial court. Therefore, reversal is not required merely because the trial court misidentified the applicable exception. MRE 103.

Regarding the applicability of the exceptions for plan, system, intent, motive, and knowledge, the evidence tended to indicate several similarities in defendant's criminal approach to acquiring automobiles. The evidence demonstrated that defendant had lost his driver's license before any of the incidents. To obtain transportation, he had previously made two other late-night raids for easily accessible cars and driven them to distant cities. On at least the first occasion, defendant drove the car to the distant city to procure illegal drugs, which tended to explain his motivation for taking Schopieray's car. Defendant's explanations for the disappearance of the vehicles and the fabrication of his conflicting identification of the real culprits also contained several similarities to his statements to police in this case. Because this evidence demonstrated defendant's criminal plan, system, intent, motive, and knowledge in the present case, the trial court did not abuse its discretion by allowing the prosecutor to introduce the evidence of defendant's previous offenses. See *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000).

Defendant further argues that the prejudicial effect of the evidence outweighed its probative value. We disagree. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Here, the probative value of the other-acts evidence was relevant to rebut defendant's theory that he did not take the car, had no knowledge that it was stolen, and was merely a passenger in the vehicle. The evidence was not marginally probative of defendant's guilt, because it went straight to his specific intent to possess the car without authority and his knowledge that the car was stolen. Our review of the trial court's limiting instructions persuades us that they adequately limited the jury's review of this evidence and protected defendant's right to a fair trial. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Therefore, we conclude that the prejudicial effect of the evidence did not substantially outweigh its probative value.

Defendant next contends that the trial court erred by disallowing surrebuttal testimony to impeach Sprague's rebuttal testimony. We disagree. We review a trial court's decision whether to allow surrebuttal evidence for an abuse of discretion. See *People v Solak*, 146 Mich App 659, 675; 382 NW2d 495 (1985). Here, the trial court properly denied defendant's request to present the surrebuttal testimony of defendant's father regarding when Sprague purchased a boat from defendant. This matter was not sufficiently probative to warrant the presentation of surrebuttal evidence and did not have any bearing on the essence of Sprague's testimony, which was that he had not seen defendant within weeks of the car's disappearance, and he had not ridden with defendant to Grand Rapids. Although the testimony of defendant's father may have impeached Sprague about exactly how long it had been since defendant and Sprague last saw each other, Sprague nevertheless denied picking defendant up in the stolen car and traveling to Grand Rapids with him. Defendant had already contradicted Sprague's testimony about their ongoing familiarity around the date of the offense. Therefore, the trial court did not abuse its discretion by disallowing the additional evidence. *Solak*, *supra*.

Defendant next argues that the trial court erred by admitting evidence of defendant's previous conviction of UDAA for impeachment purposes under MRE 609. Although the trial court ruled that such evidence was admissible under MRE 609, the prosecutor presented the evidence substantively in his case-in-chief, and it was not admitted as impeachment evidence under MRE 609, but under MRE 404(b). Accordingly, defendant's argument lacks merit.

Defendant next contends that the trial court improperly admitted Officer Baylis's testimony that it would be difficult to find a silver key ring with keys on it in the area where defendant walked after leaving the car. Defendant argues that Officer Baylis's testimony was inadmissible expert testimony. However, the evidence was clearly admissible as a lay opinion under MRE 701, so defendant's argument lacks merit. Accordingly, we reject defendant's claims that the prosecutor committed misconduct by eliciting this testimony and the proper other-acts testimony, or by commenting on any of this evidence. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant next argues that the trial court erroneously instructed the jury regarding flight. We disagree. "Claims of instructional error are reviewed de novo on appeal." *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004). Defendant maintains that the evidence did not support the trial court's flight instruction. A flight instruction may be supported by evidence that the defendant took evasive action, such as "fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, [or] attempting to escape custody." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Here, the evidence showed that defendant got out of the car after seeing Officer Baylis drive by. He walked up the driveway of the house, disappeared, and was soon apprehended a few blocks away, shaken, sweating, and out of breath. To reach the area where he was arrested, he crossed through at least two backyards. This evidence that he abandoned the unlawfully taken car and fled the area was sufficient to support the flight instruction.

Defendant next argues that his judgment of sentence should be corrected to delete the reference to the crime of "joyriding," MCL 750.414, for which he was not convicted. However, the record indicates that the trial court has already amended defendant's judgment of sentence to accurately reflect defendant's conviction of UDAA only, so defendant is not entitled to further relief.

Defendant next argues that dismissed charges should not be included in his pre-sentence report (PSIR). Defendant did not raise this issue at sentencing and instead indicated that, with the exception of a matter not at issue on appeal, he had no corrections to make to the PSIR. Defendant has therefore waived appellate review of this issue, *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000), and he fails to persuade us that the references to the dismissed charges are either "inaccurate or irrelevant." MCL 771.14(6).

Because none of defendant's arguments support reversal or demonstrate a miscarriage of justice, the trial court did not abuse its discretion by denying his motion for a new trial. MCR 6.431(B); *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Similarly, we reject defendant's argument that he was denied the effective assistance of counsel because of trial counsel's failure to preserve issues in the trial court. Because none of his challenges warrant reversal, defendant fails to establish any prejudice from his trial attorney's performance. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell