STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2008
v	No. 277919 Macomb Circuit Court
JOSEPH HENDRIX, Defendant-Appellant.	LC No. 2007-000056-FC

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

A jury convicted defendant of felony murder, MCL 750.316(1)(b), carjacking, MCL 750.529a, and unlawfully driving away an automobile (UDAA), MCL 750.413. The trial court sentenced defendant to prison terms of life for the felony murder conviction, life for the carjacking conviction, and three to five years for the UDAA. Defendant appeals as of right. We affirm.

Defendant first contends the trial court erred in admitting statements he made to the police because he never validly waived his *Miranda*[1] rights. We disagree. Because defendant failed to preserve this issue, this Court reviews for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In arguing that defendant's waiver of his *Miranda* rights was invalid, defendant primarily relies on two police reports and a waiver of rights form that have been attached to his brief on appeal. None of these documents were introduced at trial. A party may not expand the record on appeal. *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000). Consequently, the submitted documents will not be considered in analyzing this or any other issue on appeal.

The evidence presented at trial established that on September 6, 2006, defendant was being transported to Shelby Township from Detroit. During the drive, defendant was advised of his rights, indicated that he understood his rights, and did not request an attorney. Defendant proceeded to make minimal comments to police officers. These comments were essentially limited to defendant stating that he was not sure how he came in to possession of the van and

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

that, as a result of a conversation with the Detroit police, he did not wish to say any more. The record then shows that on September 8, 2006, defendant was approached by Detective Terrence Hogan and again was read his rights. While defendant refused to sign a waiver of rights form, he indicated that he was willing to talk. He would not state how he came to possess the van, and repeatedly stated that he would be cleared of any guilt, that the Detroit Police knew the truth, and that he did not want to get into any more trouble. He also stated that at some point on the day in question he was at a 7-11 store in Sterling Heights from which he called his grandmother.

The trial court did not commit plain error in admitting the evidence of defendant's statements to the police as the evidence establishes that defendant was informed of his rights, indicated that he understood his rights, and indicated that he was willing to speak to the police. For a waiver of *Miranda* rights to be valid, the waiver must be voluntary, knowing and intelligent. *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). There is simply no evidence properly before this Court to establish that one of these requirements was lacking. In addition to the documents defendant attempts to submit on appeal, defendant implies that the evidence at trial established that he may have been under the influence of drugs on September 6, 2006, when he was arrested and first questioned. However, no evidence was presented that defendant was under the influence of drugs at any time that he was interacting with police. Furthermore, defendant asserts that the trial transcript demonstrates he requested an attorney upon being arrested. Upon reviewing the entire transcript closely, this Court has found no such evidence. Because the evidence demonstrates the waiver was voluntary, knowing, and intelligent, the trial court properly admitted defendant's statements.

Defendant next asserts the prosecution denied him a fair trial by misusing and misstating defendant's statements to police. We disagree. This Court reviews the unpreserved claims of alleged prosecutorial misconduct for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

In general, a prosecutor is granted great latitude in his closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). He "is free to argue the evidence and all reasonable inferences from the evidence as it relates to his theory of the case." *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). Typically, a prosecutor may not comment on a defendant's post-arrest silence. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). However, "[w]here a defendant makes statements to the police after being given *Miranda* warnings, the defendant has not remained silent, and the prosecutor may properly question and comment with regard to the defendant's failure to assert a defense subsequently claimed at trial." *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999).

Defendant asserts that the prosecutor improperly misconstrued testimony about defendant's collect phone call and improperly commented on defendant's post-arrest silence. In regard to the evidence regarding the phone call, defendant mischaracterizes the prosecution's use of that evidence. Defendant asserts that the prosecution implied that defendant attempted to utilize the call as an alibi. Rather, it appears that the purpose of the questions and comments on the phone call was simply to place defendant in the general area of the alleged crimes. During closing arguments, the prosecution did not emphasize when the phone call took place, but emphasized that defendant would not say where the 7-11 was located. The implication was that defendant did not want to reveal that he had been at a 7-11 close to the scene of the theft. As such, the prosecution did not misconstrue the evidence.

In regard to the commentary on defendant's failure to provide a defense while speaking with the police, we have already concluded that the evidence properly before this Court establishes that defendant waived his *Miranda* rights and willingly spoke to the police. Thus, the prosecution was permitted to introduce defendant's statements and comment on his inability to assert a defense that was subsequently asserted at trial. *Avant, supra.* At trial, defendant advanced the theory that he came into possession of the van after it was taken from the parking lot in Shelby Township. The prosecutor properly commented on the fact that defendant never provided any such indication while speaking to police. Furthermore, defendant cannot establish that he was prejudiced where there was overwhelming circumstantial evidence presented at trial in support of his conviction.

Defendant next asserts that he was denied the effective assistance of counsel. We disagree. Defendant's claim that he was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). While the trial court's factual findings are reviewed for clear error, the questions of constitutional law are reviewed de novo. *Id.* Because defendant failed to preserve this issue, this Court is limited to reviewing errors that are evident on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To prevail on a claim of ineffective assistance of counsel, defendant must establish that his attorney's assistance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that defense counsel's actions were sound trial strategy. *Id*. In order to demonstrate prejudice, defendant must establish that there is a reasonable probability that, but for the mistakes of his attorney, the result of the trial would have been different. *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). The United States Supreme Court has further stated that the proper inquiry is whether, as a result of counsel's performance, the outcome of the trial was fundamentally unfair, unreliable or prejudicial. *Lockhart v Fretwell*, 506 US 364, 369; 113 S Ct 838; 122 L Ed 2d 180 (1993).

Based on the evidence properly before this Court, defendant has failed to establish that his attorney's performance fell below on objective level of reasonableness. The evidence demonstrates that defendant voluntarily, knowingly and intelligently waived his rights after being informed of them on September 6, 2006. His subsequent statements to police could therefore be admitted at trial and the prosecution was permitted to comment on his failure to provide a defense. Defense counsel is not required to make a futile objection. *People v Wilson*, 252 Mich App 390, 393-394, 397; 652 NW2d 488 (2002).

Defendant next contends that the trial court erred in admitting evidence of his prior involvement with stolen automobiles pursuant to MRE 404(b). We disagree. The propriety of a trial court's admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Evidence of a criminal defendant's prior bad acts is generally not admissible at trial in order to ensure that the defendant is afforded a fair trial based on the evidence, rather than on his prior actions. *People v Starr*, 457 Mich 490; 577 NW2d 673 (1998). MRE 404(b)(1) 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.

The above list of exceptions is not exclusive. *People v Sabin*, 463 Mich 43, 56; 614 NW2d 888 (2000). To be admissible pursuant to MRE 404(b), the prosecutor must offer the evidence for something other than a theory of propensity, the evidence must be relevant and the probative value of the evidence must not be substantially outweighed by its prejudicial effect. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). The trial court may provide a limiting instruction if one is so requested. *Id.* The wrongful admission of evidence of prior bad acts does not in itself justify reversal; rather, a defendant must show the error was most likely outcome determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001.

Defendant and the prosecution assert different controlling tests on this issue. Defendant contends that for evidence of prior bad acts to be admitted, the prior act and the accused act must possess "uncommon, and distinctive characteristics as to suggest the handiwork or signature of a single actor, the defendant." *People v Golochowicz*, 413 Mich 298, 319; 319 NW2d 518 (1982). The prosecution contends that *Golochowicz* has been overruled, and that the court's ruling in this case was proper if the evidence was offered for a proper purpose, was relevant, and the probative value was not outweighed by unfair prejudice. *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). Upon review, it is clear that *VanderVliet* did not expressly overrule *Golochowicz*, but did state that *Golochowicz* only applied to the limited instance where prior act evidence was introduced as a modus operandi that demonstrated identity. Here, the prior bad act evidence demonstrated motive, knowledge, and a common scheme. However, because the prosecution's argument heavily implied that the evidence of the prior acts established defendant's identity as the perpetrator of the accused crimes, this Court will apply the *Golochowicz* test.

Applying *Golochowicz*, we conclude that the trial court did not abuse its discretion in admitting the evidence of defendant's prior acts. Contrary to defendant's assertions, the prior acts were remarkably similar to the accused carjacking and unlawful driving away of a motor vehicle. On three occasions before the day in question, defendant was implicated in car thefts that occurred when a motorist parked a vehicle in the same general area of Shelby Township, left the doors unlocked and the keys in the vehicle. In each instance, the vehicle was taken without confronting the driver. In the last two instances, the stolen vehicles were subsequently taken to the same neighborhood in Detroit as the neighborhood defendant was arrested in on September 6, 2006. The similarities are numerous and not merely superficial. The prior acts are sufficiently unique to qualify as a signature as required by *Golochowicz*.

In addition to being sufficiently similar, the probative value of the prior act evidence was not outweighed by the likelihood of unfair prejudice. The evidence in question was certainly prejudicial. However, its probative value was likewise high. There was little evidence that defendant was the individual who took the van in question from the Shelby Township parking lot. Rather, the evidence merely established that he later possessed the stolen van in a Detroit neighborhood. By introducing the prior act evidence, the prosecution was able to show that

defendant did not merely obtain possession of the vehicle after someone else stole it, as he had a pattern of stealing cars from the same neighborhood and in the same manner. Furthermore, the trial court instructed the jurors that the evidence of the prior acts could only be considered to show that defendant previously used a similar scheme or to demonstrate the identity of the person who committed the crimes in question. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Therefore, defendant is not entitled to relief.

In discussing the admission of the MRE 404(b) evidence, defendant also challenges Detective Hogan's testimony that no additional cars were stolen in a similar manner after defendant was taken into custody. That evidence is not properly classified as MRE 404(b) evidence as it is not evidence of a prior act committed by defendant. To the contrary, it is evidence of a lack of an occurrence. Therefore, the general test of admissibility applies.

Relevant evidence is "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. Generally, relevant evidence is admissible and irrelevant evidence is not. MRE 402. Even when relevant, evidence may be excluded where it is substantially more prejudicial than probative, if it causes confusion, if it is cumulative or if it misleads the jury. MRE 403. Defendant has cited no authority to support his position that it was improper to introduce testimony that he remained in custody after his arrest. Rather, defendant cites to *Estelle v Williams*, 425 US 501, 504; 96 S Ct 1691; 48 L Ed 2d 126 (1976), which held that it was improper to have a defendant wear jail attire in front of the jury. Obviously, no such act is alleged to have occurred in this case and defendant is therefore seeking an extension of the rule from *Estelle*. Such an extension is not justified, as the rule from *Estelle* seeks to prevent a defendant from having the physical appearance of a criminal while standing before a jury. The fact that defendant was in custody is no more an indication that he is a criminal than the fact that he was charged with a crime. Furthermore, the evidence that there were no further car thefts of a similar manner in Shelby Township was relevant, as it spoke to the identity of the individual responsible for the string of thefts. Its probative value was not outweighed by a likelihood of unfair prejudice as the mere fact that defendant had been in custody was not prejudicial. The fact that defendant was in custody was essentially implied before Detective Hogan's statement, as the parties frequently reference *Miranda* rights, which only apply to custodial interrogations. Detective Hogan's testimony was therefore properly admitted.

Finally, defendant asserts that there was insufficient evidence presented at trial to support his convictions. Defendant does not refer to any specific conviction, nor does he specifically cite an element of a charged offense that the prosecution failed to establish. Rather, defendant merely makes the general assertion that "some evidence" alone will not suffice to secure a conviction and that inferences alone are insufficient. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). The failure to sufficiently brief an issue is tantamount to an abandonment of that issue on appeal. *Id.* Consequently, this Court will not consider defendant's assertion that the evidence presented at trial was insufficient.

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald