

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK DUANE CROSS,

Defendant-Appellant.

UNPUBLISHED

March 12, 2009

No. 282033

Kent Circuit Court

LC No. 06-008182-FH

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

PER CURIAM.

A jury convicted defendant of one count of third degree fleeing and eluding a police officer, MCL 257.602a(3)(b).¹ Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to a prison term of 30 months to 10 years. Defendant appeals as of right. We affirm, but remand for the ministerial task of correcting the judgment of sentence.

FACTS

Defendant's conviction arises out of an attempted traffic stop in the city of Grand Rapids at approximately 8:00 a.m. on September 25, 2005. Detective Scott Alward testified that he observed a black Pontiac Grand Prix speed past him traveling at approximately 60 miles-per-hour in a 25 mile-per-hour zone. When Alward attempted to pull the Grand Prix over, the driver refused to stop. The Grand Prix eventually stopped, and the driver stepped out. Alward obtained a good look at the driver's face before the driver fled on foot. Alward was unable to catch the driver. Alward discovered defendant's driver's license in the front passenger seat of the car, and the owner of the vehicle informed police that she had loaned the car to defendant that morning. Alward testified that he was "one hundred" percent positive that defendant was the driver who fled from him on the day of the incident. A videotape from the patrol car did not clearly show the driver, but it portrayed two passengers leave the vehicle after the driver fled on foot. One of the passengers, Tony Floyd, testified at trial that defendant was not driving that day and that a person known to him only as "Mouse" was driving and fled the scene. Floyd admitted at trial, however, that he contacted defendant while in jail, informing defendant that "Mouse" was the

¹ The judgment of sentence and felony information improperly cite 257.602a(3)(a). This requires remand for correction.

driver of the vehicle on the day of the incident. Defendant testified that he borrowed the Grand Prix from his sister on September 25, 2005, to drive to a store, but that he changed his mind and purchased crack cocaine instead. Upon exhausting his supply of drugs, he loaned the Grand Prix to three men in exchange for more cocaine. Defendant admitted that he was absconded from parole at the time of the incident.

I

Defendant contends that the trial court committed several evidentiary errors stemming from the admission of evidence that he was on absconder status at the time of the offense. During the second day of trial the prosecutor indicated that she intended to introduce evidence of defendant's absconder status under MRE 404(b) to show motive. The trial court admitted the evidence under MRE 404(b) to show defendant's motive, and held that there was good cause to excuse the prosecutor's late notice of her intent to introduce the evidence.

Defendant preserved his objection to admission of evidence of his absconder status. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). An abuse of discretion exists if the trial court's decision is outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A trial court commits an abuse of discretion when it admits evidence that is inadmissible as a matter of law. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). We review de novo preliminary issues of law regarding admissibility of evidence based on construction of a rule of evidence or statute. *Id.*

Defendant first contends that the evidence was inadmissible under MRE 404(b) because it was not relevant and was more prejudicial than probative. Under MRE 404(b), evidence of a defendant's other crimes, wrongs, or acts is not admissible to show character in conformity therewith; however, it may be admissible for certain purposes such as proof of motive or identity. In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Court set forth a four-part test to govern the admissibility of evidence under MRE 404(b): (1) the evidence must be offered for a proper purpose under 404(b); (2) the evidence must be relevant; (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice; and (4) the trial court may provide a limiting instruction. *Id.* at 55. Relevant evidence is "evidence that is material (related to any 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, 56-57; 614 NW2d 888 (2000). However, "[w]here the only relevance is to character or the defendant's propensity to commit the crime, the evidence must be excluded." *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998).

Here, the prosecutor offered the evidence of defendant's absconder status for the proper purpose of motive. This Court has defined motive as "that which incites or stimulates a person to do an act." *People v Hoffman*, 225 Mich App 103, 106; 570 NW2d 146 (1997), quoting Black's Law Dictionary (rev 5th ed). Proof of motive can be relevant to prove identity. *Sabin, supra* at 68. Evidence showing defendant's motive to flee and elude made his identity as the perpetrator more likely, and identity was the quintessential issue in the proceedings below. The probative value of the evidence was not substantially outweighed by the danger of unfair

prejudice. *VanderVliet, supra* at 55. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *Crawford, supra* at 398. The evidence was more than marginally probative given defendant’s defense and questioning of the eyewitness identification. And, nothing in the record supports that the jury gave the evidence undue or preemptive weight. In addition, the trial court provided a limiting instruction to the jury. See *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002) (finding that a limiting instruction can protect a defendant’s right to a fair trial). The trial court did not abuse its discretion by admitting evidence of defendant’s absconder status under MRE 404(b).

II

Defendant raises the unpreserved argument that evidence of his absconder status should have been excluded because the prosecutor failed to provide adequate notice pursuant to MRE 404(b)(2). Our review is limited to outcome determinative plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Under the plain error analysis, “[t]o avoid forfeiture...three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error [must have] affected substantial rights.” *Id.*, citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). MRE 404(b)(2) states in relevant part:

[t]he prosecution in a criminal case *shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown*, of the general nature of any such evidence it intends to introduce at trial and the rationale...for admitting the evidence. [*Id.* (emphasis added).]

The prosecutor notified the court of her intention to introduce evidence of defendant’s absconder status immediately before opening statements.

Any error in the failure to provide reasonable notice of the intent to introduce prior acts evidence did not affect the outcome of the lower court proceedings. The prior acts evidence was substantively admissible under MRE 404(b), and defendant has failed to demonstrate how he would have proceeded differently at trial if he had received proper notice. *Id.* at 454-455. Reversal is not warranted because the error did not affect defendant’s substantial rights. *Id.*; *Carines, supra*.

III

Defendant contends that, even if evidence of defendant’s absconder status was admissible under MRE 404(b), the trial court erred in admitting evidence that defendant’s parole arose from a prior conviction of armed robbery. During direct examination by the prosecutor, Alward was asked why he thought defendant ran from police. Alward responded by stating that defendant was an absconder on parole, and he then gratuitously added “[with] the original charge armed robbery.” Defendant failed to preserve this issue for review by failing to make a timely and contemporaneous objection. *Knox, supra* 508. We therefore review this unpreserved issue for plain error affecting substantial rights. *Carines, supra*.

Any error resulting from Alward's gratuitous statement did not affect the outcome of the lower court proceedings. Evidence of the armed robbery conviction was separately admitted to impeach defendant's testimony, MRE 609, and defendant raises no challenge to the admission of the evidence for that purpose. Thus, the jury was advised of the prior conviction independent of Alward's testimony, and the trial court provided a limiting instruction to the jury, stating that the armed robbery conviction could only be used to impeach defendant's veracity for truthfulness. See *Magyar, supra*.

IV

Defendant maintains that the trial court erred in refusing to allow him to cross-examine his parole agent about defendant's behavior during his arrest for the parole violation. This issue was properly preserved when defendant sought to introduce the evidence at trial. MRE 103(a)(2); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994).

Defendant's parole agent testified that defendant violated his parole and was arrested for that violation. At the time of defendant's arrest on that violation, he was not arrested or charged with the offense in the instant case. Defense counsel sought to question the parole agent about defendant's behavior when he was arrested to show that defendant did not run from the police. The trial court refused to allow the line of questioning on relevance grounds, noting that defendant's arrest for his parole violation had taken place nine months after the offense in the instant case. We find no abuse of discretion in the trial court's ruling. Although 404(b) does not preclude a defendant from introducing other-acts evidence for a proper purpose, see *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991), defendant was attempting here to offer the precluded evidence to show that he did not flee during his arrest for parole violation, and therefore he would not have fled on the day of the present offense. In other words, that in conformity with his character he would have surrendered peacefully if he had been the driver of the car. The evidence was inadmissible under MRE 404(b).

V

Defendant argues that the trial court erred when it refused to allow defendant to introduce an alibi witness. We review this preserved evidentiary error for an abuse of discretion. *People v Travis*, 443 Mich 668, 691; 505 NW2d 563 (1993).

At trial, defendant planned to have Denise Brisco testify that she gave defendant a ride to his sister's house on the morning of the incident. The prosecutor objected to the introduction of Brisco as an alibi witness because no written notice was provided pursuant to MCL 768.20. The prosecutor received an email containing Brisco's name two days before trial; but the email did not identify Brisco as an alibi witness. The prosecutor learned Brisco was prepared to offer alibi testimony on the afternoon after jury selection. Defense counsel conceded the lack of proper notice, but explained that he forwarded Brisco's name immediately upon learning that she was a potential witness. The trial court excluded Brisco's testimony after applying factors set forth in *Travis, supra* at 678-680.

MCL 768.20 requires defendant to disclose an alibi defense at arraignment or 15 days thereafter, but not less than ten days before trial, "or at such other times as the court directs." In *Travis, supra* at 678-680, the Court acknowledged that a trial court has the discretion to fix the

timeliness of notice even if a party fails to meet the statutory requirements of MCL 768.20. The Court adopted factors from *United States v Myers*, 550 F2d 1036, 1043 (CA 5, 1977), that a trial court should consider when exercising its discretion.

...a district court should consider (1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case. [*Id.* at 682, quoting *Myers, supra* at 1043.]

Applying *Travis, supra*, we find that the prosecutor would have suffered a high degree of prejudice had the alibi testimony been admitted. The prosecutor did not learn of defendant's alibi defense until the day before Brisco was to testify. See *People v Merritt*, 396 Mich 67, 77; 238 NW2d 31 (1976) (Alibi statutes requiring notice are intended to give the prosecution time and information to investigate.). In addition, we find no mitigating factors in the case that would have reduced this prejudice. *Travis, supra* at 682. Moreover, defendant did not offer a good reason for the delayed disclosure, and mere confusion among defense attorneys does not justify late disclosure. *Id.* at 684. ("simple confusion in the prosecutor's office" was not a good reason for the prosecutor's delayed notice of rebuttal witnesses.) The trial court's decision to exclude Brisco's testimony was not outside the principled range of outcomes. *Babcock, supra* at 269. Further, the prosecutor presented overwhelming evidence of defendant's guilt. Alward identified defendant, defendant had motive, defendant's license was in the car, and the owner of the vehicle lent it to defendant that morning. Any error in the refusal to admit the alibi evidence would therefore be harmless.

VI

Defendant next contends that the trial court's exclusion of Brisco's testimony and refusal to allow defendant to cross-examine his parole agent denied him his constitutional right to present a defense. Defendant also contends that the evidentiary rulings combined to deny him his due process rights, his equal protection rights, and his right to a fair trial. Although defendant did not raise these issues during trial, when a question involves a significant constitutional right that may be decisive to the outcome of the case, appellate review is appropriate. *People v Jones*, 201 Mich App 449, 452; 506 NW2d 542 (1993). We review questions of constitutional law de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008).

A criminal defendant has both a state and federal constitutional right to present a defense "which includes the right to call witnesses." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008), citing US Const, Am VI; Const 1963, art 1, § 20. The "right to offer the testimony of witnesses...is in plain terms the right to present a defense..." *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). "Although the right to present a defense is a fundamental element of due process, it is not an absolute right. The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Because the trial court properly excluded defendant's proffered evidence pursuant to established rules of evidence, defendant was not denied his constitutional rights to present a

defense. *Hayes, supra*. And, with respect to defendant's equal protection claim, defendant provides no analysis or supporting authority. This issue is therefore abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant's claim that the combined evidentiary errors denied his due process right to a fair trial is without merit. We review defendant's underlying cumulative error claim to determine if the combination of alleged errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not." *Id.* at 388. In order for this Court to reverse a defendant's conviction on the basis of cumulative error, "the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *Id.* The only possible errors in this case were Alward's reference to defendant's armed robbery when discussing motive, and the prosecutor's failure to provide adequate notice with respect to the prior-acts evidence. These errors did not seriously prejudice defendant. *Id.* As discussed above, the trial court provided a limiting instruction with respect to the armed robbery, which was properly admitted under MRE 609. Further, the other-acts evidence was substantively admissible and defendant did not show how he would have reacted differently at trial had he been given adequate notice. Thus, there was no prejudice. For that reason, defendant was not denied his right to a fair trial.

VII

Defendant argues that the jury's verdict was against the great weight of the evidence. Defendant failed to preserve this issue by first moving for a new trial, and we therefore decline to address it. MCR 2.611(A)(1)(e); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Moreover, our review of the record reveals that the evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003).

VIII

Defendant next argues that he was denied the effective assistance of counsel when his counsel failed to provide proper notice of his intent to claim an alibi defense. Because defendant failed to move for a new trial or evidentiary [*Ginther*²] hearing before the trial court, our review is limited to the facts contained in the record.³ *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

When a defendant claims on appeal that counsel was ineffective at trial, defendant has the burden to show "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or

² See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

³ Within his brief on appeal, defendant requests a remand. This request is improper. MCR 7.211(A), (C)(1).

unreliable.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

After the preliminary examination at which defendant was represented by the county defender’s office, attorney Richard Zambon was appointed as defense counsel. Zambon moved to withdraw as counsel, and the trial court then appointed Freeman Haehnel to represent defendant. Haehnel learned of Brisco and her anticipated testimony two days before trial. He notified the prosecutor’s office about her by email at that time but did not indicate she was an alibi witness. Haehnel indicated at trial that he wanted to call Brisco as an alibi witness, and that Brisco was prepared to testify that she had driven defendant home at approximately 6:30 or 7:30 on the morning of the incident. Haehnel’s failure to notify the prosecutor immediately that Brisco was an alibi witness arguably fell below an objective standard of reasonableness. However, given the evidence that Alward observed the vehicle in question at approximately 8:00 that morning, Brisco’s testimony did not provide an alibi. It was not a substantial defense of which defendant was deprived by counsel’s conduct. Thus, defendant cannot demonstrate that, but for counsel’s conduct, the outcome of trial would have been different.

IX

Finally, defendant contends that his sentence is not proportionate to the charged offense. Appellate defense counsel did not submit a copy of defendant’s presentence investigation report. Defendant has therefore waived this issue. *People v Rodriguez*, 212 Mich App 351, 355; 538 NW2d 42 (1995); MCR 7.212(C)(6). Nevertheless, a sentence within the properly scored guidelines range is presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

Affirmed, but remanded for the ministerial correction of the judgment of sentence. Jurisdiction is not retained.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey