

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD MCFERRIN,

Defendant-Appellant.

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UNPUBLISHED

December 15, 2009

No. 286968

St. Clair Circuit Court

LC No. 08-000805-FC

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of armed robbery, MCL 750.529, carjacking, MCL 750.529a, and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 25 to 50 years for armed robbery and carjacking, and 10 to 20 years for assault. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court improperly allowed MRE 404(b) evidence regarding the robbery of a different cab driver. The evidence was admitted to show defendant's intent to take property and his intent to commit great bodily harm. The trial court listed the similarities in the crimes as being that both victims were cab drivers held down by defendant; defendant had both drive to a number of locations; both were attacked from behind and were grabbed around the neck; both stopped the vehicles in response to force and violence; and both vehicles were taken. This determination is reviewed for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005).

For evidence of other crimes, wrongs, or acts to be admissible under MRE 404(b)(1), the proponent of the evidence must show: (1) that the other acts evidence is for a proper purpose (other than to show character or propensity), (2) that the evidence is relevant to an issue of fact that is of consequence at trial, and (3) that, under MRE 403, the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). Intent is identified as a proper purpose in MRE 404(b). Intent was at issue in this case. A plea of not guilty puts the prosecution to its proofs regarding all elements of the crime charged. *People v VanderVliet*, 444 Mich 52, 78; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). Thus, the prosecutor had to prove intent and accordingly, the evidence was relevant to an issue of fact that was of consequence. The evidence was therefore admissible unless substantially more prejudicial than probative. *Sabin, supra*.

Here, that defendant intended to rob and harm the victim was made more probable by his admission to having a similar intent in a markedly similar crime. On balance, it cannot be said that the trial court abused its discretion in determining that the evidence was not substantially more prejudicial than probative.

Defendant next argues that the victim's in-court identification arose from an encounter with defendant at the court proceeding involving the other robbery. Defendant maintains that the identification did not have "a basis independent of the suggestive procedure." Defendant analogizes to *United States v Emanuele*, 51 F3d 1123 (CA 3, 1995), in arguing that the identification was unduly suggestive. There, a bank teller was unable to identify the defendant in a line up but then claimed she could identify him after seeing him being led from a courtroom in manacles. Here, the victim was never shown a photo or corporeal lineup and thus, did not fail to previously identify defendant.

In *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998), citing *People v Kachar*, 400 Mich 78; 252 NW2d 807 (1977), our Supreme Court recited eight factors to be evaluated in determining if a procedure was unduly suggestive. They are analyzed as follows:

1. Prior relationship with or knowledge of the defendant; here there was no prior relationship or knowledge.
2. The opportunity to observe the offense. The victim observed not only the offense, but also the offender. He testified that he was suspicious of defendant, that defendant walked in front of his car while the headlights were on, and that he turned and observed defendant while the dome lights were on.
3. Length of time between the offense and the disputed identification. Defendant's in-court identification was approximately two years after the crime.
4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description. There was no lineup or showup, but the trial court indicated that the description given at the time of the crime was accurate.
5. Any previous proper identification or failure to identify the defendant. As previously mentioned, there was no inconsistent identification of defendant.
6. Any identification prior to lineup or showup of another person as defendant. There was none.
7. The nature of the alleged offense and the physical and psychological state of the victim. Although the victim may have been shaken by the crime, his observations took place before the crime.
8. Any idiosyncratic or special features of defendant. Apparently, there was nothing of particular note.

Application of these factors to the instant case does not call into question defendant's in-court identification based on the prior identification. Although some factors might weigh in favor of

such a finding, defendant had ample opportunity to observe defendant, his description of defendant was accurate and consistent, and there had been no previous misidentifications.

Defendant next takes issue with the trial court's comment at sentencing that he believed defendant was a threat to society and "will kill" if released from prison in the near future. Defendant asserts that this was speculative, not factual, and that he could not be sentenced based on unsupported opinion. A minimum sentence within the sentencing guidelines range must be affirmed absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Here, the information underlying the opinion was not inaccurate. This opinion followed a recap of the violent nature of this particular crime; the observation that defendant had struck out at another cab driver; and the observation that defendant had ten prior felonies, five prior prison terms, two adult felony probation terms, and a history of substance abuse which had driven this particular crime. In context, it appears that the court was sentencing defendant to a long prison term based on his history. Regardless, the minimum sentence of 25 years was well within the guidelines range of 171 to 570 months. A party may not raise on appeal an issue challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10); *Kimble, supra* at 309; see also MCR 6.429(C). Defendant did not do so. Thus, to the extent defendant is characterizing the court's prediction as inaccurate information, relief is foreclosed.

Finally, defendant argues that the trial court impermissibly ordered him to pay \$3,154.92 in attorney fees without considering his ability to pay. He relies on *People v Dunbar*, 264 Mich App 240, 251-252; 690 NW2d 476 (2004), which was overruled in relevant part in *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009). The *Jackson* Court held that an investigation of a defendant's ability to pay is not required at the time it is imposed, but is required when enforcement of the order is sought. *Id.* at 275. Thus, defendant's challenge is premature.

Affirmed.

/s/ Elizabeth L. Gleicher  
/s/ E. Thomas Fitzgerald  
/s/ Kurtis T. Wilder