STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 13, 2010
v	No. 289689 Wayne Circuit Court
DeJUAN KELLY, Defendant-Appellant.	LC No. 08-004999-03

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant DeJuan Kelly appeals as of right his jury conviction of unlawful imprisonment.[1] Following his arrest for failure to appear for sentencing, the trial court sentenced Kelly to a term of 86 months to 15 years' imprisonment. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Kelly and three codefendants were initially charged with multiple counts of armed robbery[2] and unlawful imprisonment. Kelly and two of the three codefendants were also charged with felony firearm.[3] Evidence at the June 2008 trial on those charges established that the men entered an apartment, bound the occupants, and then robbed them of their personal possessions at gunpoint. The three codefendants pleaded guilty to various offenses. At trial, the jury acquitted Kelly on the armed robbery and felony firearm charges but failed to reach a verdict on the unlawful imprisonment charge. Therefore, the trial court declared a mistrial regarding the unlawful imprisonment charge.

In August 2008, a new jury trial was held on the unlawful imprisonment charge. The jury ultimately convicted Kelly. Kelly now appeals various issues that occurred during trial and sentencing.

[1] MCL 750.349b.

[2] MCL 750.529.

[3] MCL 750.227b.

II. EVIDENTIARY ISSUES

A. STANDARD OF REVIEW

The decision whether to admit evidence is within the trial court's discretion, and we will not disturb that decision absent an abuse of that discretion.[4]

B. PRELIMINARY EXAMINATION TRANSCRIPT

During the August 2008 trial, the trial court considered the prosecution's request to declare one of the victims unavailable and admit his testimony from the preliminary examination. Demond Bryant was in federal custody in Kentucky and the federal authorities would not permit him to be conveyed to Michigan for at least another 30 days. Defense counsel objected, arguing that the examining magistrate had not permitted wide-ranging cross-examination during the preliminary examination. Defense counsel also argued that Bryant was a key witness because he was the only one at the preliminary examination who testified that Kelly tied him up. The trial court reviewed Bryant's preliminary examination testimony, ordered some changes and redactions for the jury, and then ruled that it would be admitted.

The next morning, defense counsel again objected to the admission of Bryant's testimony. Defense counsel first argued that because the prosecution knew where to find Bryant, they should retrieve him from federal custody; but counsel then stated, "I will leave it to the Court's discretion." The trial court affirmed its earlier ruling that the witness was unavailable and noted that it had encountered difficulty when attempting to obtain witnesses from federal custody.

Kelly now argues that the trial court abused its discretion in allowing into evidence the transcript of Bryant's preliminary examination testimony where there was no diligent, good-faith effort to procure Bryant's actual presence at trial.

The prosecution may present evidence at trial through a preliminary examination transcript when a witness is "unavailable." A witness is unavailable where the prosecution "has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown."[5] With respect to due diligence, "[t]he test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it."[6] Due diligence requires attempts to do everything reasonable, not everything possible, to obtain the presence of a witness.[7]

---

[4] *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

[5] MRE 804(a)(5).

[6] *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

[7] *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988).

Kelly argues that the prosecution "made little, if any attempt to secure" Bryant's presence. However, as Kelly also acknowledges, Bryant was in custody at an out-of-state federal prison at the time of trial. The prosecution explained that she had contacted the federal officials but they would "not release him for at least another 30 days because of the extradition laws." And in accepting the preliminary examination transcript, the trial court explained that even an order from the trial court would have done little to secure Bryant's presence because "they [the federal officials] can choose to ignore [the court's] request."

Therefore, we conclude that the trial court did not abuse its discretion in allowing into evidence the transcript of Bryant's preliminary examination testimony.

C. PRIOR TRIAL TESTIMONY REGARDING ROBBERIES

At Kelly's August 2008 trial, Kelly asserted that the witnesses should not be permitted to testify about having their property taken because Kelly had been acquitted of armed robbery in the June 2008 trial. Instead, according to Kelly, the witnesses should only testify about the unlawful imprisonment. The prosecution maintained that the jury must hear the context of the events regardless of the acquittals in the previous trial. The trial court denied Kelly's request and ruled that having the witnesses attempt to omit facts from the sequence of events would make the remaining testimony seem improbable. But the trial court stated that the jury would be instructed to consider only the charge of unlawful imprisonment.

Kelly now argues that the trial court abused its discretion by allowing into evidence the witness testimony from the June 2008 trial regarding the armed robberies. More specifically, Kelly argues that allowance of the testimony violated MRE 404(b), which prohibits admission of evidence regarding prior bad acts if the prosecution offers it solely to show the criminal propensity of an individual to establish that he acted in conformity therewith.[8]

"[T]here are substantial limits on the admissibility of evidence concerning other bad acts."[9] However, it is essential that a jury receive an "intelligible presentation" of the complete story to fully understand the context in which the underlying events took place.[10]

> "It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the 'complete story' ordinarily supports the admission of such evidence."[11]

---

[8] *People v Vandervliet*, 444 Mich 52, 65; 508 NW2d 114 (1993).

[9] *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996); see MRE 404(b).

[10] *Sholl*, 453 Mich at 741.

[11] *Id*. at 742, quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

In other words, "'Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.'"[12] Therefore, a jury is entitled to hear the full *res gestae* regardless whether those facts may also establish criminal acts other than the charged offense.[13]

Thus, the question here is whether the armed robberies were necessary to be revealed during the presentation of the *res gestae* of the unlawful imprisonment.[14] The record shows that the armed robberies were part of the continuous transaction and the facts surrounding the unlawful imprisonment could not be presented without discussing the armed robberies.[15] The trial court did not abuse its discretion in reasoning that the witnesses' accounts would appear improbable without being placed in the proper context. Thus, the evidence was admissible.

Moreover, this Court has held that the fact that the defendant was acquitted on the prior charge is not relevant to its admission.[16] "For it is its occurrence which would bear on the motive and intent of the defendant, not whether or not the defendant was acquitted on the charge. The *res gestae* constitutes substantive evidence and may properly be considered by the jury in determining guilt or innocence."[17]

Therefore, we conclude that the trial court did not abuse its discretion in allowing into evidence the witness testimony from the June 2008 trial regarding the armed robberies.

D. PRIOR ACQUITTAL VERDICT

At Kelly's August 2008 trial, asserting lack of relevance and unfair prejudice, the prosecution objected to the defense request to advise the new jury of the June 2008 jury's acquittal verdicts. The trial court agreed that the new jury should not be advised of the prior verdicts. Kelly now argues that the trial court abused its discretion by denying him the opportunity to admit into evidence the acquittal verdicts from the first trial.

---

[12] *Id*., quoting *Arizona v Villavicencio*, 388 P2d 245, 246 (Ariz, 1964).

[13] *People v Kowatch*, 258 Mich 630, 633; 242 NW 791 (1932); *People v McClure*, 29 Mich App 361, 366; 185 NW2d 426 (1971).

[14] See *McClure*, 29 Mich App at 366.

[15] See *id.*

[16] *Id*.; see also *People v Oliphant*, 399 Mich 472, 495-500; 250 NW2d 443 (1976) (stating that the fact of a defendant's acquittal on charges arising out of prior incidents does not act to bar its admission.)

[17] *McClure*, 29 Mich App at 366 (internal citation omitted).

In support of his argument, Kelly cites *People v Nabers*,[18] in which this Court "express[ed] [its] support" for Judge ALLEN's partial concurrence and dissent in *People v Bolden*.[19] Specifically, in *Nabers*, this Court, stated:

> Defendant was tried for the Swank Men's Shop robbery; this trial ended in a hung jury. Nonetheless, this fact does not automatically bar the admission of such evidence.[3] [*People v*] *Oliphant*, [399 Mich 472, 499-500; 250 NW2d 443 (1976)], *People v Bolden*, 92 Mich App 421, 424; 285 NW2d 210 (1979).[20] However, we take this opportunity to express our support for Judge Allen's partial concurrence and partial dissent in *People v Bolden*, 98 Mich App 452, 464; 296 NW2d 613 (1980), wherein he writes:
>
> > "To the extent that a prior acquittal of the alleged similar act of the defendant reflects on the accuracy of the charge that defendant committed that act, then the defendant should be entitled to show that another jury determined that he did not commit the similar act."
>
> We think the same rationale holds true where defendant was not convicted due to a hung jury.[21]

However, the *Nabers* Court's "support" of Judge ALLEN's statement was merely dicta.[22] Moreover, we find persuasive the conclusion from numerous federal circuits,[23] including the Sixth Circuit, that "evidence of prior acquittals is generally inadmissible."[24] Judgments of acquittal are "inadmissible in large part because they may not present a determination of

---

[18] *People v Nabers*, 103 Mich App 354, 364; 303 NW2d 205, rev'd on other grounds, 411 Mich 1046 (1981).

[19] *People v Bolden*, 98 Mich App 452, 464; 296 NW2d 613 (1980).

[20] Citing *Oliphant*, 399 Mich at 499-500.

[21] *Nabers*, 103 Mich App at 364.

[22] See *People v Wellborn*, unpublished opinion per curiam of the Court of Appeal, issued Dec. 16, 2003 (Docket No. 242229), at 4 n 1. We acknowledge that, pursuant to Michigan Court Rule, an unpublished opinion has no precedential value. MCR 7.215(C)(1); *Charles Reinhart Co v Winiemko*, 444 Mich 579, 588; 513 NW2d 773 (1994). However, we exercise our prerogative to view this opinion as persuasive. *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003); *People v McCullum*, 172 Mich App 30, 33; 431 NW2d 451 (1988).

[23] Although "federal court decisions are not precedentially binding on questions of Michigan law[,]" a court may choose to agree with the analysis of a federal court decision. *American Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 364; 604 NW2d 330 (2000).

[24] *Wellborn*, unpub op at 4 n 1, quoting *United States v Gricco*, 277 F3d 339, 352-353 (CA 3, 2002).

innocence, but rather only a decision that the prosecution has not met its burden of proof beyond a reasonable doubt."[25]

Therefore, we conclude that the trial court did not abuse its discretion by denying Kelly the opportunity to admit into evidence the acquittal verdicts from the first trial.

III. JURY INSTRUCTIONS

A. STANDARD OF REVIEW

Kelly points out that, in ruling that the August 2008 jury was not to be told about the acquittals in Kelly's first trial, the trial court stated that it would instruct the jury to disregard the fact of the prior trial. However, Kelly argues that the trial court committed reversible error because, according to Kelly, the trial court ultimately failed to give that instruction to the jury.

This Court reviews jury instructions in their entirety to determine if error requiring reversal occurred.[26]

B. ANALYSIS

After the trial court agreed that the August 2008 jury would not be advised of the prior acquittal verdicts, it stated that it would instruct the jurors that they should disregard the fact that there was an earlier trial and base their verdict solely on the evidence presented in this trial. In Kelly's brief on appeal, his counsel asserts that "nowhere in the transcript supplied to appellate counsel does the court give that instruction to the jury." However, on page 116 of the August 19, 2008 trial transcript, the trial court *did* clearly instruct the impaneled jurors to disregard the fact that there was an earlier trial. Specifically, the trial court instructed the jury,

> This case has been tried before and during this trial you may hear some references to the first trial. Sometimes a case must be retried before a new jury, and you should not pay any attention to the fact that this is the second trial. Your verdict must be based only on the evidence in this trial. You must decide the facts only from what you hear and see.

Moreover, when asked, counsel for both parties stated that they had no objections to the trial court's instructions.

Therefore, we conclude that Kelly's claim of instructional error is without merit.

---

[25] *Gricco*, 277 F3d at 353.

[26] *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000).

IV. SENTENCING

A. STANDARD OF REVIEW

Kelly argues that the trial court abused it discretion in sentencing him when it erroneously scored prior record variable (PRV) 6 and offense variable (OV) 4.

The interpretation and application of the statutory sentencing guidelines are legal questions subject to our de novo review.[27] However, this Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score.[28]

B. ANALYSIS

1. PRV 6

Before imposition of the sentence, the prosecution objected to the scoring of PRV 6. The prosecution objected to the scoring of 10 points for that variable, arguing that the proper scoring was 20 points. According to the prosecution, while under the jurisdiction of the juvenile court following a 2007 adjudication for carrying a concealed weapon, Kelly escaped from his court-ordered community placement. Therefore, at the time Kelly committed the instant offense, he was listed as an escapee in the LEIN system. The trial court granted the prosecution's request and scored PRV 6 at 20 points. Kelly now argues that the trial court erred in scoring PRV 6 at 20 points because he was a juvenile escapee, not an adult prisoner.

Under MCL 777.56(1)(a), 20 points are appropriate where "[t]he offender is a prisoner of the department of corrections or serving a sentence in jail." According to MCL 777.56(3)(b), "'Prisoner of the department of corrections or serving a sentence in jail' includes an individual who is an escapee." Nothing in PRV 6 indicates that it was not meant to apply to an escapee from juvenile confinement. Indeed, in MCL 777.50(1), in which the Legislature specifically limited the use of juvenile adjudications when scoring PRVs 1 to 5, supports that a trial court is permitted to take juvenile adjudications into account when scoring PRV 6. In other words, if the Legislature had intended to limit application of PRV 6 to adult prisoners only, it was capable of specifying such a limitation. Moreover, in *People v Endres*,[29] this Court affirmed the trial court's scoring of PRV 6 based on the defendant's juvenile conviction.

Therefore, we conclude that the trial court did not abuse its discretion in scoring PRV 6 at 20 points.

---

[27] *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

[28] *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

[29] *People v Endres*, 269 Mich App 414, 422-423; 711 NW2d 398 (2006).

2. OV 4

The prosecution also objected to the scoring of OV 4. The prosecution objected to the scoring of 0 points for that variable, arguing that the proper scoring was 10 points. The trial court agreed with the prosecution and scored OV 4 at 10 points. Kelly now argues that the trial court erred in scoring OV 4 at 10 points because there was no showing of any psychological or other injury, specifically noting that none of the victims submitted a victim impact statement.

Under MCL 777.34(1)(a), 10 points are appropriate if "[s]erious psychological injury requiring professional treatment occurred to a victim." Here, in ruling on the prosecution's request, the trial court explained that the victims had testified that

> they were scared to death. They thought he [sic] were gonna die. And one woman was struck in the face. And I think that that's—and being tied up. And I do remember the testimony about the pillow.

On this latter point about the pillow, the trial court was apparently referring to the testimony that, while the victims were tied up, Kelly said that he was not leaving any witnesses and demonstrated to his codefendants how to use a pillow as a "silencer." The trial court opined, "I think that would cause some serious psychological injury that may require professional treatment . . . ."

Because the evidence adequately supported the score,[30] we conclude that the trial court did not abuse its discretion in scoring OV 4 at 10 points.

We affirm.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

[30] *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).