

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CHRISTOPHER HOWARD,

Defendant-Appellant.

UNPUBLISHED

October 21, 2010

No. 293585

Oakland Circuit Court

LC No. 2008-221552-FC

Before: MURRAY, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.¹

Defendant's convictions arose out of an attempt by defendant's accomplices to rob complainant at an automatic teller machine in Southfield, Michigan on the night of June 2, 2008. While defendant did not physically commit the assault and attempted robbery, various witnesses, including his alleged accomplices, testified about defendant's involvement in the planning and execution of the crimes. In addition to testimony concerning defendant's participation in the instant robbery, the trial court permitted the prosecution to present testimony that defendant participated in an attempted robbery on June 1, 2008, in Redford, Michigan. On appeal, defendant maintains that the trial court's decision to admit this other act evidence, see MRE 404(b), was erroneous.

A trial court's decision to either admit or exclude evidence "will not be disturbed absent an abuse of . . . discretion." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A

¹ This appeal has been decided without oral argument pursuant to MCR 7.214(E).

trial court abuses its discretion when its decision falls “outside the range of principled outcomes.” *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

MRE 404(b)(1) states:

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.

A challenge brought under MRE 404(b)(1) is subject to the following analysis:

First, the prosecutor must offer the “prior bad acts” evidence under something other than a character or propensity theory. Second, “the evidence must be relevant under MRE 402, as enforced through MRE 104(b)[.]” Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004) (internal citation omitted).]

“[T]he prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b).” *Id.*

After our review of the record, we cannot conclude that the trial court abused its discretion by allowing the prosecution to introduce evidence of defendant’s involvement in an attempted robbery the night before the instant crimes occurred. The prosecution stated in its notice of intent to introduce the evidence that it intended to use the evidence of the prior robbery to show “that [d]efendant intended to commit the charged crimes, had a motive to commit the charged crimes, that the incident was not an accident or a mistake and to rebut a claim that . . . any other witness had fabricated the incident.” The prosecution’s reasons for introducing the evidence were proper in that they did not involve inadmissible character or propensity evidence, and are specifically provided for in MRE 404(b)(1).

Further, it is clear, when the relevance of the evidence is considered, that the prosecution was not attempting to introduce propensity evidence disguised as something else. Specifically, the testimony was relevant to rebut defendant’s theory that he did not play a role in the decision to rob complainant and did not know that his friends intended to commit a robbery when they left the car. The evidence that defendant participated in a robbery the night before makes less believable defendant’s premise of accident or mistake, i.e., that his presence during the crime was mere happenstance. “[W]here a defendant’s willfulness is an issue, the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently.” *People v Magyar*, 250 Mich App 408, 415; 648 NW2d 215 (2002) (quotation marks omitted). In addition, similar acts are relevant, and can be used, to establish intent. See *People v Sabin (After Remand)*, 463 Mich 43, 64-65; 614 NW2d 888 (2000) (agreeing with

premise that mere similarity suffices for evidencing intent). Here, the robberies were similar at least to the extent that they occurred with defendant acting in concert with others to attempt to rob persons stopped in their cars at night.

Furthermore, the probative value of the evidence is not substantially outweighed by its danger of unfair prejudice under MRE 403. All relevant evidence is prejudicial. *Magyar*, 250 Mich App at 416. The pertinent question is whether the evidence was unfairly prejudicial. In addition, it “is not whether the testimony was more prejudicial than probative, but whether the probative value is *substantially* outweighed by the risk of unfair prejudice.” *People v Starr*, 457 Mich 490, 499; 577 NW2d 673 (1998) (emphasis in original). Evidence is unfairly prejudicial where there is a risk 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). Although this risk is increased in the context of prior bad acts evidence involving the same crime, *id.*, the trial court is still in the best position to gauge the effect of such testimony. *Magyar*, 250 Mich App at 415-416.

Contrary to defendant’s position, the evidence was not marginally probative. The principal issues were defendant’s intent, his degree of participation and planning, and his claim that his involvement was accidental. Defendant’s accomplices testified that defendant and the others discussed the prior robbery during their conversation about whether to rob someone for money that evening. The other act evidence was directly probative of defendant’s intent and degree of involvement. It also tended to make less likely defendant’s theory of the case that he was merely present when the crimes were committed. Thus, while the potential for unfair prejudice certainly existed, we do not find that it substantially outweighed the evidence’s relatively strong probative value.

Moreover, we note that the trial court provided a number of limiting instructions, both before the victim of the prior robbery testified and before deliberations, which directed the jury to not use the other act evidence as propensity evidence. In light of the fact that jurors are presumed to follow their instructions, *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), this mitigated any unfair prejudicial effect the evidence may have had. See *Magyar*, 250 Mich App at 416. Accordingly, we conclude that the trial court did not abuse its discretion by permitting the prosecution to introduce evidence of defendant’s involvement in a previous robbery.

Affirmed.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio