

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS LONNIE-ALFRED WARD,

Defendant-Appellant.

UNPUBLISHED

January 24, 2012

No. 299151

Muskegon Circuit Court

LC No. 09-058530-FC

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of armed robbery, MCL 750.529, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a habitual offender, fourth offense, MCL 769.12, to consecutive prison terms of 33 to 75 years' imprisonment for each armed robbery conviction and two years' imprisonment for each felony-firearm conviction. Additionally, he was sentenced to 10 to 40 years' imprisonment for his earlier guilty plea to possession of a firearm by a felon, MCL 750.224f, and two years' imprisonment for an attendant felony-firearm charge to which he also pleaded guilty. He appeals that decision as of right, and for the reasons set forth in this opinion, we affirm.

Defendant's convictions arose out of the armed robbery of a sporting goods store in Muskegon Heights. Defendant entered the store with a mask and gun and demanded money from the proprietors, Su Hwan Kim and Joung Suk Kim. They acquiesced, and defendant directed them to a bathroom at the rear of the store. While they were there, the sound of other patrons in the store caused a distraction, and Su attacked defendant. Su wrestled the gun away from defendant and secured him in a headlock until police arrived. Defendant testified on his own behalf and denied that he intended to rob the store. Instead, he alleged that it was a misunderstanding. He testified that he accidentally dropped his gun on the floor, and after seeing the gun, Su and Joung mistakenly assumed that he intended to rob them.

Defendant first argues that the trial court erred when it admitted evidence of his 1981 robbery under MRE 404(b)(1). "This Court reviews evidentiary decisions for an abuse of discretion." *People v Martzke (On Remand)*, 251 Mich App 282, 286; 651 NW2d 490 (2002).

MRE 404(b)(1) provides the following:

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.

For evidence that implicates MRE 404(b) to be admissible, the evidence must be offered for a proper purpose. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing a defendant's character to show his propensity to commit the charged offense. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005).

Here, the prosecution offered evidence of the 1981 robbery committed by defendant under MRE 404(b)(1). Because the 1981 robbery was similar factually to the instant robbery, the prosecution offered the evidence of the earlier robbery as evidence that defendant's actions were not accidental, as he claimed. In that 1981 robbery, defendant entered a store, threatened employees with a gun, and demanded money. He directed the employees to wait in the store's bathroom until the robbery was finished.

Over defendant's objections, the trial court admitted the evidence for the purpose of showing that, contrary to defendant's version of events, his actions in the Muskegon Heights sporting goods store were not accidental. Thus, because the evidence was not admitted to show that defendant had a propensity to rob but instead was admitted to show defendant's intent, or the lack of mistake or accident, the purpose was proper.

However, even MRE 404(b) evidence must satisfy the requirements of MRE 403. *Knox*, 469 Mich at 509. MRE 403 states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Under this test, "[e]vidence is unfairly prejudicial when there exists a danger 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).

Defendant argues that evidence of his 1981 robbery was too stale to be probative, and thus, its admission was unfairly prejudicial. He also alleges that this Court has not adopted a rule regarding the age of other acts evidence in the context of MRE 404(b)(1), and he invites this Court to adopt his position that remote events are unfairly prejudicial. We decline the invitation.

Contrary to defendant's assertions, this Court has held that "there is no time limit applicable to the admissibility of other acts evidence." *People v Yost*, 278 Mich App 341, 405; 749 NW2d 753 (2008). Instead, this Court considers the age of the act in conjunction with its analysis of whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. See *id.*

Here, the probative value of the evidence of the 1981 robbery was not substantially outweighed by the danger of unfair prejudice, despite the fact that it occurred nearly 30 years

ago. Indeed, the two robberies were very similar in their nature and execution. Defendant entered both stores around closing time, threatened employees with a weapon, and directed them to wait in the bathroom of the respective stores until he made his escape. The similarities between the acts demonstrate that the evidence was probative in showing the lack of accident or mistake. The fact that the crimes occurred nearly 30 years apart lessens the likelihood that the jury would presume from the earlier crime that defendant had a propensity to commit robberies and necessarily committed the present ones. Thus, while the danger of unfair prejudice may exist, we find that the trial court did not err when it determined that the probative value of the evidence was not substantially outweighed by that danger. Moreover, the trial court gave a limiting instruction to the jury. In general, limiting instructions are sufficient “to enable the jury to compartmentalize evidence and consider it only for its proper purpose.” *Crawford*, 458 Mich at 399 n 16. Consequently, the trial court did not abuse its discretion when it admitted evidence of the 1981 robbery under MRE 404(b)(1).

Next, defendant argues in his Standard 4 brief that he was denied the right to represent himself at trial. A trial court’s factual findings surrounding a defendant’s waiver of counsel is reviewed for clear error. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). A factual finding is clearly erroneous if it leaves the reviewing court with a definite and firm conviction that a mistake was made. *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). And we review a trial court’s ultimate decision regarding whether to allow a defendant to represent himself for an abuse of discretion. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003).

The right of a defendant to proceed *in propria persona* is guaranteed by the United States and Michigan Constitutions. *Russell*, 471 Mich at 187-188. However, the right to self-representation is not absolute. *People v Anderson*, 398 Mich 361, 366-368; 247 NW2d 857 (1976). In order for a defendant to be able to represent himself, the trial court must determine that three requirements are met: “(1) the defendant’s request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily . . . , and (3) the defendant’s self-representation will not disrupt, unduly inconvenience, and burden the court.” *Russell*, 471 Mich at 190.

The trial court initially found all that all three requirements were met and granted defendant’s motion to represent himself. But over a month later, during a motion hearing, the trial court found that defendant’s self-representation would be disruptive, revoked defendant’s ability to represent himself, and appointed counsel for defendant. Defendant alleges that the trial court erred when it did so, and therefore improperly denied his request to proceed *in propria persona*. However, a trial court may deny a defendant’s request if it determines that he will unduly disrupt the proceedings. *People v Ahumada*, 222 Mich App 612, 615; 564 NW2d 188 (1997). Here, the trial court warned defendant on multiple occasions to stop arguing a motion that had already been decided, but defendant persisted in arguing it. The exchange went as follows:

THE COURT: [Defendant], I’ve made my ruling. See you want to keep arguing with me. I have made my ruling. There’s no relief I can give you on that. All right? . . . So I’m done with that issue. . . .

Sir, what's your next motion?

THE DEFENDANT: No. Your Honor, excuse me.

THE COURT: If you continue on that, I'm going to find out that your participation is disruptive to the Court, and I'm going to take away your right to represent yourself and appoint counsel for you.

THE DEFENDANT: Okay.

THE COURT: Now I'm done with that motion, sir.

THE DEFENDANT: Okay. Well, I'm done with that motion too. . . .

* * *

I understand exactly what you just said.

THE COURT: So let's go on to your next motion.

THE DEFENDANT: Your Honor, I would like to go back to this motion once because

THE COURT: [Defendant], this is my last warning.

THE DEFENDANT: Okay.

THE COURT: If you keep doing that, I'm going to find that your representation will be disruptive to the Court. If you continue throughout the trial this way, it will be impossible to get through this trial.

Go to your next motion.

THE DEFENDANT: Well, Your Honor, I'm just trying to get an understanding. That's all I'm asking for is an understanding how

THE COURT: All right. All right. Mr. Swanson, you are appointed to be counsel for the Defendant. I'm taking away your right to represent yourself on the grounds that it is apparent to me all you're going to do is disrupt the Court. You are refusing to follow my instructions. I've given you three warnings, and you obviously aren't capable of representing yourself. You're not even capable of following my simple instructions. . . .

After reviewing the record, we conclude that the trial court's finding, that defendant's continued self-representation would be disruptive to the proceedings, was not clearly erroneous. Defendant exhibited a complete inability to follow the trial court's simple and repeated requests and instructions, which, if allowed to continue, would have been a serious disruption for any future proceedings. Therefore, the trial court did not abuse its discretion when it revoked defendant's right to represent himself.

Finally, defendant's Standard 4 brief alleges that his convictions for felony-firearm violated his constitutional protection from double jeopardy. He did not preserve this issue, so we review this unpreserved constitutional claim for plain error that affected defendant's substantial rights. *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). Defendant pleaded guilty to one count of felony-firearm and one count of possession of a firearm by a felon before trial. We disagree that his subsequent convictions for felony-firearm were both successive and multiple punishments for the same offense.

Defendants enjoy a constitutional protection from double jeopardy, including the right to be free from successive prosecutions after a conviction, and from multiple punishments for the same offense. *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). In the instant case, however, defendant's convictions were not successive or multiple punishments.

By pleading guilty to one count of felony-firearm and proceeding to trial on the other counts, which were related to two separate counts of armed robbery, defendant requested separate proceedings on the charges. *People v Matuszak*, 263 Mich App 42, 49-50; 687 NW2d 342 (2004). The prohibition on successive prosecutions does not apply when defendants request separate proceedings on related charges. *Id.* Thus, defendant's subsequent convictions for felony-firearms were not successive punishments.

Moreover, under MCL 750.227b, the Legislature intended for defendants who used firearms during the commission of felonies to face felony-firearm charges *for each felony committed*. *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001). Here, each of defendant's felony-firearm convictions corresponded to a different felony conviction. One correlates to being a felon in possession of a firearm, MCL 750.224f. The other two correlate to the two armed robbery convictions, MCL 750.529, with one pertaining to the victim Su and the other pertaining to the victim Jounge. Accordingly, his convictions did not violate double jeopardy. See *id.* Because defendant has not shown any error that was plain or obvious, or an error that affected a substantial right, his claim for relief fails.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello