

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
March 13, 2012

v

TRAMMANUEL DURHAM,  
Defendant-Appellant.

No. 302563  
Wayne Circuit Court  
LC No. 10-002260-FC

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Before: STEPHENS, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit murder, MCL 750.83, conspiracy to commit armed robbery, MCL 750.175a; MCL 750.529, attempted armed robbery, MCL 750.92; MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 210 months to 50 years for the assault with intent to commit murder conviction, 108 months to 20 years for the conspiracy to commit armed robbery conviction, six months to five years for the attempted armed robbery conviction, and two years for the felony-firearm conviction. We affirm.

Defendant argues that the trial court lacked impartiality, as indicated by the derisive comments it directed toward defense counsel and its appearance of partisanship, and therefore, deprived defendant of his right to a fair and impartial trial. We disagree.

Although a trial court has wide discretion and powers concerning trial matters, that discretion is not unlimited. *People v Conley*, 270 Mich App 301, 307-308; 715 NW2d 377 (2006). If the trial court's comments or conduct "pierces the veil of judicial impartiality," this Court must reverse the defendant's conviction. *Id.* at 308. In determining whether the trial court's comments or conduct pierced the veil of judicial impartiality, this Court must determine whether the conduct or comments were of such a nature to have unduly influenced the jury, thereby depriving the defendant of his right to a fair and impartial trial. *Id.* at 308. In conducting such a review, "[p]ortions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

The federal and state constitutions guarantee a defendant the right to a fair and an impartial trial. *Conley*, 270 Mich App at 307. "Trial judges who berate, scold, and demean an

attorney, so as to hold him up to contempt in the eyes of the jury, destroy the balance of impartiality necessary for a fair hearing.” *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). While unfair criticism of defense counsel is always improper, such comments only warrant reversal of a defendant’s conviction where they deprive defendant of his right to a fair and impartial trial. *Id.* Although we find that the trial court did express annoyance and frustration with defense counsel, in reviewing the entire record, we conclude that the trial court’s conduct and comments did not pierce the veil of impartiality.

During voir dire, the trial court indicated that it would impose rules and ensure that both parties would follow such rules in order to ensure a fair and efficient trial. The trial court required defense counsel to sit down and stated that defense counsel exceeded his allotted time, after defense counsel entered into what defendant concedes was inappropriate questioning during voir dire. The record shows that the trial court provided both the prosecution and defense counsel five minutes during that particular segment of voir dire and roughly enforced the time limits equally.

We disagree with defendant’s argument that the trial court’s refusal to allow defense counsel to approach the bench on two occasions reflected the trial court’s bias and prejudice against defense counsel. On one of those occasions, the trial court denied defense counsel’s request to approach the bench moments after sustaining defense counsel’s objection to the prosecution’s questioning. On several occasions, the trial court also expressed impatience and frustration with the prosecution’s failure to follow court directions. Overall, the record shows that the trial court, although showing signs of annoyance and frustration, did not appear biased against defendant or defense counsel. The trial court expected certain behavior and order in the courtroom, and when it appeared that the parties did not follow such expectations, the trial court responded, at times expressing annoyance and frustration. As our Supreme Court has noted, outward expressions of impatience, dissatisfaction, annoyance, or anger, if “‘within the bounds of what imperfect men and women . . . sometimes display,’” do not generally establish partiality or bias. *Cain v Dep’t of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996) (quoting *Liteky v United States*, 510 US 540, 555-556; 114 S Ct 1147; 127 L Ed 2d 474 (1994)). Accordingly, we conclude that the trial court’s conduct and comments did not unduly influence the jury, and therefore, defendant was not deprived of his right to a fair and impartial trial.

Additionally, the trial court’s instruction to disregard any comments or opinions that it expressed at trial cured any impact that the exchanges between defense counsel and the trial court may have had on the jury. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) (“Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.”)

Defendant next argues that the admission of “other acts” evidence deprived him of his right to a fair trial because its prejudicial effect substantially outweighed its probative value as it only served as propensity evidence. We disagree. This Court will review for plain error due to defendant’s failure to object to the introduction of other acts evidence at trial. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001). To establish plain error, defendant must show that: (1) an error occurred; (2) the error was plain; and, (3) the plain error affected defendant’s substantial rights. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001).

MRE 404(b)(1), which governs a trial court's decision to either admit or exclude "other acts" evidence, provides:

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.

Thus, to be admissible, evidence of "other acts" must be relevant to an issue other than propensity. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Further, the evidence must be relevant under MRE 402,<sup>1</sup> and not present a danger of undue prejudice that substantially outweighs its probative value in light of the availability of other means of proof and facts. *Id.* at 74-75.<sup>2</sup> The party moving for admission of "other acts" evidence bears the burden to not merely recite one of the purposes allowed under MRE 404(b)(1) when offering such evidence but to also "explain how the evidence related to the recited purposes." *People v Dobek*, 274 Mich App 58, 85; 732 NW2d 546 (2007).

Defendant failed to establish that it was plain error to admit the "other acts" evidence. The prosecution filed a pretrial notice of its intent to introduce evidence of "other acts" for the

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<sup>1</sup> Under MRE 402, all relevant evidence is admissible unless otherwise provided by constitution or court rule. *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). "Relevant evidence" is evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998) (quoting MRE 401).

<sup>2</sup> In *VanderVliet*, 444 Mich at 74, our Supreme Court directed Michigan courts to employ the evidentiary safeguards presented the Supreme Court in *Huddleston v US*, 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988), when assessing the relevance of evidence under MRE 404(b). The Supreme Court in *Huddleston* states:

[F]irst, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, see Advisory Committee's Notes on Fed Rule Evid 404(b), 28 U S C App, p 691; S Rep No 93-1277, at 25; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted. [*Huddleston*, 485 US at 691-692.]

“purpose of showing intent, identification, capacity, opportunity, plan and/or scheme.”<sup>3</sup> The prosecution served notice that it intended to introduce evidence that defendant and the other men planned to commit armed robberies on the evening of October 10, 2009, including evidence of the robbery of Samantha Wilson and Alexis Butler on Parkgrove Street, and defendant’s involvement in a carjacking of a vehicle used while furthering the conspiracy. We conclude that the “other acts” evidence was relevant to establish that defendant intended to conspire with the other assailants to commit armed robbery. To prove conspiracy, the prosecution must establish that the defendant intended to combine with others to accomplish an illegal objective. *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). At trial, evidence was admitted that demonstrated that defendant was present during the initial discussions to perpetuate armed robbery, defendant joined all of the other assailants in driving around looking for potential victims, and he was present for the robbery of the two women and the attempted robbery of an unidentified man. “When other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts ‘are of the same general category.’” *VanderVliet*, 444 Mich at 79-80. This evidence shows that defendant had knowledge of, and had the intent to conspire to commit armed robbery. Additionally, evidence of defendant’s knowledge and intent was relevant to negate defendant’s defense that he did not conspire to commit armed robbery that evening. Accordingly, we conclude that the evidence was relevant in establishing intent and knowledge, and therefore, the evidence was properly admitted.

Further, the “other acts” evidence served the proper purpose of establishing that there was a common plan, scheme, or system to conspire and commit armed robbery. “Other acts” evidence offered to establish a common plan, scheme, or system is a proper noncharacter purpose. *People v Pattison*, 276 Mich App 613, 616; 741 NW2d 558 (2007). “[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.” *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). Here, the evidence regarding the robbery and carjacking are sufficiently similar to support the inference that the assailants and defendant had a plan or scheme to patrol the neighborhood and commit armed robberies. Given the probative value of this evidence to establish knowledge, intent, scheme, plan, or system of the conspiracy to commit armed robbery, we conclude that the evidence was properly admitted, and therefore, defendant failed to establish plain error regarding the admission of such evidence.

Defendant next argues that he was deprived of his right to the effective assistance of counsel when defense counsel questioned witnesses in a manner that undermined defense counsel’s credibility before the jury, failed to make an evidentiary objection, and failed to introduce evidence of defendant’s acquittal in a related case. We disagree. Due to defendant’s failure to move for an evidentiary hearing on his ineffective assistance of counsel claim, we

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<sup>3</sup> In *VanderVliet*, our Supreme Court modified 404(b), to require “the prosecution to give pretrial notice of its intent to introduce other acts evidence at trial, and authorize the trial judge . . . to require the defendant to articulate his theory or theories of defense.” *VanderVliet*, 444 Mich at 89.

confine our review to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

An ineffective assistance of counsel claim “is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court’s findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.* at 579. To justify reversal of a conviction on grounds of ineffective assistance of counsel, a defendant must show that defense counsel’s performance was deficient and that such deficiencies prejudiced defendant’s case. *People v Dendel*, 481 Mich 114, 124-125; 748 NW2d 859 (2008). Defendant must show that “counsel’s performance fell below objective standards of reasonableness and that, but for counsel’s error, there is a reasonable probability that the result of the proceedings would have been different.” *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). This Court presumes that defendant received effective assistance of counsel and places a heavy burden on defendant to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

Decisions to decline to object to procedures, evidence or an argument may fall within sound trial strategy. *People v Unger*, 278 Mich App 210, 242, 253; 749 NW2d 272 (2008). “Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are [also] presumed to be matters of trial strategy . . . .” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defense counsel is afforded wide latitude on matters of trial strategy and this Court abstains from reviewing such decisions with the benefit of hindsight. *Unger*, 278 Mich App at 242-243. “A particular strategy does not constitute ineffective assistance of counsel simply because it does not work.” *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

We find that defense counsel’s unsuccessful attempt to impeach and undermine the credibility of witnesses on the occasions referenced by defendant did not reveal that defense counsel intended to deceive the jury. Throughout the trial, defense counsel sought to undermine the reliability and credibility of the witnesses on several fronts. Defense counsel’s questioning highlighted the weaknesses in their testimony. Although defense counsel’s questioning was damaged on a few occasions by the prosecution, after reviewing defense counsel’s actions without the benefit of hindsight, defense counsel’s questioning formed part of a reasonable trial strategy to weaken the credibility of the witnesses. We conclude that the implementation of such strategy did not destroy defense counsel’s credibility before the jury. In regard to defense counsel’s failure to object to “other acts” evidence, given that the “other acts” evidence was admissible under MRE 404(b), defense counsel was not ineffective for failing to make futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Furthermore, we defer to defense counsel’s decision not to introduce evidence of defendant’s acquittal in a related case as there may have been several reasons for making such a decision, including whether introducing such evidence would elicit other incriminating evidence in the present case or would have served to highlight defendant’s encounters with the criminal justice system. Accordingly, we conclude that defendant failed to establish that his attorney’s performance fell below an objective standard of reasonableness. Further, we note that even if counsel’s performance had been deficient, defendant has failed to show that any such deficiency impacted the outcome of his trial in light of the overwhelming evidence presented against him. As a result, defendant has not shown that he was deprived of the effective assistance of counsel.

Lastly, defendant argues that the trial court's infringement on his right to a fair trial and the lack of the effective assistance of counsel constitute cumulative errors requiring reversal. We disagree. Since defendant did not preserve this issue, we review for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 764-767.

While "the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal," this Court will not grant a new trial unless the cumulative effect of such errors "undermine the confidence in the reliability of the verdict." *Dobek*, 274 Mich App at 106. As addressed above, we conclude that defendant failed to establish that any errors occurred. In the absence of such errors, "there can be no cumulative effect of errors meriting reversal." *Dobek*, 274 Mich App at 106. Furthermore, the evidence presented overwhelmingly establishes that defendant conspired with the other assailants to commit armed robbery, that the co-conspirators committed attempted armed robbery, and that he shot Furman. Therefore, we conclude that even if defendant established the occurrence of any errors, given the weight of the evidence against defendant, the cumulative effect of the errors did not undermine the reliability of the verdict or establish plain error that affected defendant's substantial rights.

Affirmed.

/s/ Cynthia Diane Stephens  
/s/ Mark J. Cavanagh  
/s/ Henry William Saad