STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN HARRIS,

Defendant-Appellant.

UNPUBLISHED
January 28, 1997

No. 182340
Muskegon County
LC No. 94-036742-FH

Before: Doctoroff, C.J., and Corrigan and R.J. Danhof,* JJ.

PER CURIAM.

Defendant was convicted by a jury of attempted breaking and entering an occupied dwelling with intent to commit a felony. MCL 750.92; MSA 28.287 and MCL 750.110; MSA 28.305. He thereafter pleaded guilty to habitual offender second, MCL 769.10; MSA 28.1082, and was sentenced to a term of sixty to ninety months' imprisonment. He appeals as of right. We affirm.

Defendant was charged with attempting to break and enter an occupied dwelling with the intent to commit either larceny or criminal sexual conduct. The trial court granted the prosecutor's pretrial motion to admit prior bad-acts evidence pursuant to MRE 404(b) for the purpose of proving defendant's intent.

At trial, Clarence Burch testified that, on February 18, 1994, at approximately 11:20 p.m., he looked out his window and observed defendant peering into the window of a neighbor's apartment. An 11-year old girl, who was baby-sitting, was inside the apartment and was visible from the outside. Burch called 9-1-1 and reported his observations. Burch then observed defendant remove the screen from the apartment window. As defendant was putting the screen down, two police officers arrived, whereupon defendant took off running. Officers Matt Kolkema and Peter Boterenbrood gave chase on foot, but lost sight of defendant as he ran between some houses while heading towards Sanford Street. Officer Kolkema reported defendant's location over his police radio.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Officer Timothy Lewkowski overheard the radio transmission and proceeded to Sanford Street where he observed defendant running across the street. Officer Lewkowski pursued defendant, who ignored commands to stop. Officer Lewkowski eventually apprehended defendant, who was out of breath and perspiring quite heavily. Defendant kept repeating that the police had the wrong person and he had done nothing wrong. Officer Lewkowski brought defendant back to the crime scene where he was identified by Clarence Burch as the person who Burch observed remove the screen from the apartment window. Officer Kolkema also observed that defendant was wearing hiking boots with a distinctive tread that matched the imprints in the snow beneath the apartment window. Additional testimony revealed that defendant was not known to anyone inside the subject apartment, nor had anyone granted defendant permission to enter the apartment.

As evidence of defendant's intent, the prosecutor presented the testimony of two women concerning an incident that occurred on October 6, 1985. On that date, the two women were awakened from their sleep sometime after midnight to find defendant, a stranger, inside their house. Defendant had gained entry through a window. He cornered the women in a bathroom and then exposed himself and stated that he "wanted some pussy." The women were able to escape and run to a neighbor's house. When they returned, they discovered that a purse and some money had been taken.

Defendant first argues that his right to a unanimous verdict was violated when the charge of attempted breaking and entering with intent to commit a felony was submitted to the jury under alternative theories of intent (i.e., intent to commit larceny or intent to commit criminal sexual conduct), but the jury was not specifically instructed that it was required to unanimously agree on the specific felony intended. Assuming, without deciding, that unanimity was required,[1] we find that reversal is not warranted.

In *People v Burden*, 395 Mich 462, 468-469; 236 NW2d 505 (1975), our Supreme Court held that a jury verdict was not required to be set aside for failure to specifically instruct on unanimity where trial counsel did not object to the instructions given and declined an offer to have the jury polled. See also *People v King*, 58 Mich App 390, 403; 228 NW2d 391 (1975); *People v Timothy Washington*, 43 Mich App 150, 152-153; 203 NW2d 744 (1972) (failure to give unanimity instruction did not warrant reversal where defense counsel neither requested such an instruction, nor objected to its absence, and the balance of the instructions adequately conveyed the concept of unanimity); MCL 768.29; MSA 28.1052 (failure to instruct on any point of law shall not be ground for setting aside a verdict unless such instruction was requested by the accused).

Here, counsel did not request a specific unanimity instruction, nor did he object to the instructions as given. Additionally, after the verdict was announced, counsel specifically declined an offer by the trial court to have the jury polled. We also note that, contrary to what defendant argues on appeal, the jury received a general instruction on unanimity.[2] Accordingly, we find that reversal is not warranted.

Next, defendant challenges the propriety of his on-the-scene identification by Clarence Burch. He contends that his on-the-scene identification by Burch was improper because it was conducted without the benefit of counsel. Additionally, he contends that the identification procedure was unduly suggestive, thereby tainting Burch's subsequent in-court identification. Defendant did not raise either of these issues below. Where issues concerning identification procedures are not raised at trial, this Court will not review the matter unless a refusal to do so would result in manifest injustice. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). A review of the record convinces us that no manifest injustice is apparent because, apart from the identification by Burch, both Officer Kolkema and Officer Boterenbrood identified defendant as the person they observed running from the window of the victim's apartment, and there was also evidence that defendant was wearing hiking boots that had a distinctive tread which matched the imprints in the snow beneath the apartment window.[3]

Next, defendant argues that he was denied a fair trial by the admission of the prior bad-acts evidence. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McMillan*, 213 Mich App 134, 137; 539 NW2d 553 (1995). MRE 404(b) states:

> (1) 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.

The Michigan Supreme Court addressed the admissibility of other bad acts evidence in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). Under the standard announced in *VanderVliet*, prior bad-acts evidence is admissible if (1) it is offered for a purpose other than to prove the defendant's character or propensity, (2) the evidence is logically relevant under MRE 402, and (3) its probative value is not substantially outweighed by the danger of unfair prejudice. *Id.* at 74-75.

Here, the prior bad-acts evidence was offered, not to show that defendant was a person of bad character or had a propensity for committing certain crimes, but, rather, for the purpose of proving defendant's intent, a proper purpose under MRE 404(b).

Regarding the second prong of admissibility under MRE 404(b), defendant argues that the proffered bad act and the charged crime are not sufficiently similar to meet the test of logical relevance set forth in *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982). However, the Supreme Court in *VanderVliet* stated that "the *Golochowicz* 'test' does not set the standard for the admissibility of other acts evidence." *VanderVliet*, *supra* at 65-66. Although the Court noted that "*Golochowicz* identifies the requirements of logical relevance when the proponent is utilizing a *modus operandi* theory to prove *identity*," *id.* at 66 (emphasis in *VanderVliet*), here the prosecutor did not offer the prior bad-acts evidence to prove *identity*, but, rather, to prove intent. As the Supreme Court explained in *VanderVliet*:

> The second requirement in *Golochowicz*, that a special circumstance or quality exist, 'refers to the relationship between the charged and uncharged offenses which supplies the link between them and assures thereby that evidence of the separate offense is probative of some fact other than the defendant's bad character," [*Golochowicz, supra*] at 310. This language *does not require a showing of distinctive similarity in every instance where Rule 404(b) evidence is proffered.* Where the proponents' theory is not that the acts are so similar that they circumstantially indicate that they are the work of the accused, *similarity between charged and uncharged conduct is not required*. [*VanderVliet*, *supra* at 69; emphasis added.]

According to *VanderVliet*, "[w]hen 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*, *supra* at 79-80, quoting Imwinkelried, Uncharged Misconduct Evidence, § 3:11, p 23.

In the case at hand, the proffered prior bad act was similar to the charged crime in that it involved an unauthorized, forcible entry, of a female's residence, at nighttime. Intent, which is a necessary element of the charged crime, was a material issue in this case, especially since defendant fled after being detected, before gaining entry into the subject apartment. In the prior case, upon gaining entry, defendant made a demand for sex and then stole some property from the residence. The testimony concerning the prior case is sufficiently similar to the charged crime to be relevant to the issue of intent. Accordingly, we find that the relevance requirement of MRE 404(b) was satisfied.

Defendant also argues that the prejudicial effect of admitting the prior bad-acts evidence outweighed its probative value. To be inadmissible, however, the danger of unfair prejudice must *substantially* outweigh the probative value of the evidence. "Unfair prejudice" does not simply mean "damaging." *People v Harvey*, 167 Mich App 734, 745-746; 423 NW2d 335 (1988). Any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id*. Assessing probative value against prejudicial effect requires a balancing of factors, including the time necessary to present the evidence and the potential for delay, whether the evidence is cumulative, how directly the evidence tends to prove the fact in support of which it is offered, how important the fact sought to be proved is, the potential for confusion, and whether the fact can be proved another way with fewer harmful collateral effects. *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976). Undue prejudice may not exist, for example, where the proponent of the evidence has no less prejudicial means by which the substance of the evidence can be admitted. *People v Cadle*, 204 Mich App 646, 656; 516 NW2d 520 (1994).

As noted above, intent was a key issue in the case. In addition to determining whether defendant attempted to break and enter into the subject apartment, the jury was also required to determine defendant's intent upon entry. Because defendant fled the scene before he had an opportunity to gain entry, the jury was left with little evidence from which to infer defendant's intent. These circumstances contributed to the value of the prior bad-acts evidence. Indeed, the importance of

such evidence with respect to the issue of intent was recognized in *VanderVliet*, wherein the Supreme Court observed:

> [O]ther acts evidence is especially pertinent where the trial court determines that the issue 'involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.' [*VanderVliet* at 85, quoting *Huddleston v United States*, 485 US 681, 685; 108 S Ct 1496; 99 L Ed 2d 771 (1988).]

We also observe that the prosecutor emphasized, in both opening statement and closing argument, that defendant was not on trial for the prior offense, and the prior bad-acts evidence was to be considered only insofar as it was probative of defendant's intent in this case.[4] Additionally, the trial court issued a cautionary instruction to the jury that the prior bad-acts evidence was not to be considered for the purpose of "show[ing] that the defendant is a bad person or that he is likely to commit crimes," and that it "must not convict this defendant here because you think he is guilty of other wrongful conduct." We are satisfied, therefore, that the prior bad-acts evidence was not given undue weight by the jury. Accordingly, we conclude that the danger of undue prejudice did not substantially outweigh the probative value of the evidence.

For the reasons stated above, we find that the trial court did not abuse its discretion in admitting the prior bad-acts evidence.

Defendant next argues that the prosecutor improperly elicited testimony concerning his silence, thereby infringing upon his constitutional right to remain silent. Defendant did not object to the alleged improper questioning. Generally, failure to object to a prosecutor's questions precludes appellate review. *People v Wilson*, 196 Mich App 604, 609; 493 NW2d 471 (1992). We will briefly address the issue, however, because it involves an alleged constitutional error, *People v Schollaert*, 194 Mich App 158, 162; 486 NW2d 312 (1992), and because defendant also argues that defense counsel was ineffective for failing to object.

Defendant's claim relates to the prosecutor's examination of Officer Lewkowski, in relevant part, as follows:

> *Q*: Please sum up for us why you thought you had the right guy?
>
> *A*: The circumstances added up. My experience – when you have a guy being chased, and the guy comes running across in front of you, or somebody comes running across in front of you—
>
> *Q*: As expected, based upon the radio transmission just before the crossing of the street?
>
> *A*: Yes, sir. You know, once I had stopped him, a person that's not – that has nothing to hide will talk to you. You know, you ask them stuff; they will talk to you.

Q: He would not stop at your command; is that accurate?

A: No, sir.

Viewed in context, the prosecutor's questions and Officer Lewkowski's answers referred to defendant's flight, not his silence upon arrest. It is well established that evidence of flight is admissible as being probative of consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Furthermore, the line of questioning refers to defendant's actions before he was apprehended. Neither the federal nor Michigan Constitutions preclude the use of a defendant's prearrest, pre-*Miranda*[5] silence. *People v Sutton (After Remand)*, 436 Mich 575, 579-580; 464 NW2d 276 (1990). Accordingly, the questioning was not improper, nor was defense counsel ineffective for failing to object. *People v Hernandez*, 443 Mich 1, 17, n 26; 503 NW2d 629 (1993) (a claim of ineffective assistance of counsel will be rejected where an objection would have been futile).

Defendant also challenges the following portion of the prosecutor's opening statement:

> But the more difficult task is to then think about what the defendant intended once he got in. What was his purpose in crawling through the window? Now, by looking at the context – looking at the surrounding facts and circumstances – *there is no valid explanation* for the defendant, Kevin Harris, to crawl into the window and enter a house of some people that he has no relation to, has no permission to be there, no valid purpose at all, and the only explanation can be, then: What is available to him when he is going into that house? Things that don't belong to him; a young babysitter, who is visible from the street, sleeping on the couch as he tries to enter. I believe there is more than enough evidence, without any further – any further evidence given – to show that the defendant intended to commit a theft once entering that house. [Emphasis added.]

Defendant contends that the prosecutor improperly shifted the burden of proof by stating that "there is no valid explanation" for defendant's actions. Defendant did not preserve this issue with an appropriate objection at trial. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). He argues, however, that defense counsel was ineffective for failing to object. We disagree.

Prosecutorial misconduct issues are decided on a case-by-case basis. *People v Parquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.* Here, viewed in context, the prosecutor was not referring to defendant's failure to come forward with a valid explanation for his actions, see e.g., *People v Holbrook*, 154 Mich App 508, 512-513; 397 NW2d 832 (1986); rather, while referring to the evidence, the prosecutor was suggesting that the "surrounding facts and circumstances" supported the inference that there was no valid explanation for defendant's actions. In this context, the prosecutor's statements were not improper, nor was defense counsel ineffective for failing to object. *Hernandez, supra*.

Defendant next complains that he was denied his right of allocution at sentencing. We disagree. A trial court, complying on the record, must "give the defendant . . . an opportunity to advise the court of any circumstances [he] believe[s] the court should consider in imposing sentence." MCR 6.425(D)(2)(c). The rule requires strict compliance. *People v Berry*, 409 Mich 774, 779; 298 NW2d 434 (1980). Here, the record indicates that defendant was provided with several opportunities to speak. Although defendant contends that interruptions by the trial court interfered with his right of allocution, the record reveals that the trial court only became irritated when defendant interrupted the court's imposition of sentence after defendant had already been given an opportunity to speak and had been warned that he would not be allowed to speak any further once the trial court began to impose sentence. Even then, the trial court agreed to give defendant another opportunity to speak, but defendant declined to do so. Defendant was not denied his right of allocution.

Defendant also challenges the validity of his sentence under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), which holds that it is an abuse of discretion to impose a sentence that is disproportionate to the seriousness of the circumstances surrounding the offense and the background of the offender. The record reveals that defendant is an habitual offender who committed the instant offense while on parole for a similar offense. We find that his sentence does not violate the principle of proportionality. Additionally, we reject defendant's claim that the trial court's remarks at sentencing demonstrate that the court was impermissibly biased against defendant. As this Court observed in *People v Antoine*, 194 Mich App 189, 191; 486 NW2d 92 (1992), "[s]entencing is the time for comments against felonious, antisocial behavior recounted and unraveled before the eyes of the sentencer[,] . . . the language of punishment need not be tepid."

Affirmed.

/s/ Martin M. Doctoroff
/s/ Maura D. Corrigan
/s/ Robert J. Danhof

[1] It is unclear whether unanimity was actually required in this case with respect to the alternative theories of intent. See and compare *Schad v Arizona*, 501 US 624; 111 S Ct 2491; 115 L Ed 2d 555 (1991) (holding that it is constitutionally acceptable to permit jurors to reach one verdict based upon a combination of alternative theories of first-degree murder), *People v Cooks*, 444 Mich 503; 521 NW2d 275 (1994) (noting that specific unanimity is not required in all cases in which more than one act is presented as evidence of the actus reus of a single criminal offense), and *People v Johnson*, 187 Mich App 621, 629-630; 468 NW2d 307 (1991) (holding that juror unanimity was not required regarding the three alternative definitions of malice necessary for a murder conviction).

[2] In its preliminary instructions, the trial court instructed the jury that "[a] verdict in a criminal case must be unanimous. That means that every juror must agree upon it, and it must reflect the individual decision of each one of you." Later, in its final instructions, the trial court instructed the jury that, "[i]n order to return a verdict, it is necessary that *each* of you agrees upon *that* verdict."

[3] Defendant relies on *People v Miller*, 208 Mich App 495, 499; 528 NW2d 819 (1995), for the proposition that his on-the-scene identification by Burch was improper in the absence of counsel. Our Supreme Court, in denying leave to appeal in that case, stated that this Court's decision in *Miller* is to have "no precedential force or effect" for the reason that "[i]t was unnecessary for the Court of Appeals to reach the merits of the defense challenge to the absence of counsel at the on-the-scene corporeal identification of the defendant by the armed robbery complainant because the issue was not preserved for appellate review."

[4] In his opening statement, the prosecutor stated:

> I ask you to consider that other evidence, the evidence of the 1985 breaking and entering, simply for the purpose of thinking about what his intent was in the instant case; and I remind you again, he is not on trial for the prior one. This is just to show what his intent was on February 18, 1994, on the present.

During closing argument, the prosecutor again reminded the jury of the limited purpose of the other acts evidence:

> Consider that prior bad act for the purpose of looking at his intent in the crime that we are looking at today. He is not on trial for that prior act[.]

[5] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).