STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v	No. 213570 Wayne Circuit Court
DEREK DUNLAP, Defendant-Appellant.	Criminal Division LC No. 97-000536

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant Derek Dunlap was convicted by a jury of larceny from the person, MCL 750.357; MSA 28.589, and was sentenced to eighteen months' probation. Defendant appeals as of right. We affirm.

This case arises from Jesse Williams' claim that defendant and Phillip Curtis, who were on-duty Detroit police officers, stole $660 from his wallet during an arrest. Defendant contends that the trial court abused its discretion by admitting as other acts evidence John Wilkerson's testimony that defendant and Curtis had previously been arrested for stealing $700 from Wilkerson during a police stop.[1] We disagree. The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court

[1] Defendant has failed to provide us with a transcript of the August 28, 1997 motion proceedings in which Judge Vera Massey Jones stated her reasons for granting the prosecutor's motion. Judge David Kerwin, who presided over the trial, overruled defendant's objection at trial, saying that he was relying upon Judge Jones' ruling. As a general rule, failure to file a record forfeits any claim of error which rests in part upon the proceedings contained in the missing record. MCR 7.210(B)(1)(a); *People v Wilson*, 196 Mich App 604, 615; 493 NW2d 471 (1992). However, we have concluded that the quotations from the missing record provided by defendant and the prosecutor give us a sufficient basis on which to rule.

acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).[2]

Use of bad acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) the proponent of the evidence must offer the evidence for a proper purpose; (2) the proponent must establish the relevance of the evidence; and (3) the probative value of the bad acts evidence must not be substantially outweighed by its potential for unfair prejudice. *Crawford*, *supra* at 385; *Starr*, *supra* at 496; *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Upon request, the trial court may provide a limiting instruction as to the use of the other acts evidence regardless whether the evidence was introduced by the prosecutor or the defendant. *Id*. at 75.

Wilkerson's testimony satisfied the requirements for the admissibility of other acts evidence. His testimony was admissible for a permissible purpose, to show that the act against Williams was part of a plan or scheme to steal money from suspects during arrests. The evidence was highly probative of defendant's plan, scheme, or intent to permanently deprive the complainant, Jesse Williams, of his money. Furthermore, the danger of unfair prejudice was minimal, given the trial court's repeated instructions to the jury not to consider Wilkerson's testimony in terms of characterizing defendant as a bad person who acted in conformity therewith, but "only to the extent that it tends to show whether there was a use of a common plan, scheme, or system in doing an act[,] [o]r to show opportunity or intent." We presume the jury followed the court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). The trial court did not abuse its discretion in admitting Wilkerson's testimony.

Defendant next contends that the evidence was insufficient to support his conviction. We disagree. In analyzing the sufficiency of the evidence, this Court must determine whether, examining the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). This Court has described the elements of larceny from the person, MCL 750.357; MSA 28.589, as follows:

> (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with felonious intent, (4) the subject matter must be the goods or personal property of another, (5) and the taking must be without the consent of and against the will of the owner. [*People v Ainsworth*,

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[2] Defendant argues that this Court should adopt the Sixth Circuit's three-part test for reviewing a trial court's ruling as to the admissibility of other acts evidence. See *United States v Johnson*, 27 F3d 1186, 1190 (CA 6, 1994). We need not decide whether this Court should adopt the Sixth Circuit standard because it would not affect our disposition of defendant's claim of error.

197 Mich App 321, 324; 495 NW2d 177 (1992), quoting *People v Jones*, 106 Mich App 429, 432; 308 NW2d 243 (1981).]

Defendant argues that there was insufficient evidence to allow the jury to conclude that he stole Williams' money from Williams' back pocket, or that he possessed the requisite specific intent to support his conviction. Williams' testimony alone provided sufficient evidence for the jury to conclude that the prosecutor proved the essential elements of larceny from the person beyond a reasonable doubt. See *People v Cain*, 238 Mich App 95, 120-121; 605 NW2d 28 (1999); *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994), aff'd sub nom *People v Peterson*, 450 Mich 349 (1995) (holding that a victim's testimony is sufficient to justify a jury's verdict). Williams' testimony that defendant physically removed his wallet containing $660 from his back pocket clearly satisfies the first, second, and fourth elements of the offense. *Cain*, *supra* at 120; *People v McGuire*, 39 Mich App 308, 314-315; 197 NW2d 469 (1972).

Further, Williams' testimony that defendant took his wallet while Williams was being handcuffed satisfies the fifth element—that "the taking must be without the consent of and against the will of the owner." *Ainsworth*, *supra* at 324. We recognize that Williams testified that he attempted to help defendant remove his awkwardly thick wallet from his back pocket. However, when a property owner relinquishes custody of property for a limited purpose, a party has not relinquished possession, and thus has not consented to a felonious taking. *People v Manning*, 38 Mich App 662, 666; 197 NW2d 152 (1972). Williams' actions, undertaken while he was under arrest, did not amount to consent. Williams' testimony clearly shows that he only attempted to help defendant remove his wallet from his back pocket, assuming that defendant wanted to see his identification. We conclude that Williams was attempting to give defendant custody of his wallet and not surrendering possession. *Manning*, *supra* at 666. Therefore, the fifth element is satisfied because defendant took Williams' wallet without consent.

Williams' testimony also indicates that defendant had a felonious intent at the time defendant took Williams' wallet, the third element. For example, Williams testified that defendant never asked him for identification during the arrest, and that defendant went directly for Williams' wallet without searching any other part of his person. According to Williams' testimony, he never saw his wallet or his $660 again after defendant removed the wallet from Williams' back pocket. The jury could reasonably infer from this testimony that defendant intended to permanently deprive Williams of his property. See *Cain*, *supra* at 121 (intent to deprive may be inferred from amount taken and speed with which it was taken).

Defendant also argues that "[t]here is no evidence that [Williams] made complaints regarding this alleged theft once [Williams was] brought into the station." However, defendant ignores Williams' testimony that, when he was brought into the precinct, he began "hollering" to people that one of the officers who took his wallet did not come back to the precinct. Williams also testified that he told the officer who fingerprinted him that the arresting officer took his wallet, but Williams received no response. Also, Williams testified that he told the detective who interrogated him that defendant took his wallet, whereas the detective testified that Williams only stated that he wanted his lawyer. Essentially, defendant is attacking Williams' credibility as a witness. The determination of the credibility of a witness and the weight to be given testimony is for the trier of fact, not this Court. *Wolfe*, *supra* at 514-515.

We affirm.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder