

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ORLANDO FOUNTAIN,

Defendant-Appellant.

UNPUBLISHED

March 2, 2001

No. 218209

Wayne Circuit Court

LC No. 98-009723

Before: Markey, P.J., and McDonald and K. F. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to ten to twenty years on the armed robbery conviction and two years on the felony-firearm conviction. Defendant now appeals by right. We affirm.

This case arises from the robbery of mail being delivered by a United States postal worker. The postal worker positively identified defendant as her assailant in the case in chief and by another postal worker in a similar uncharged mail robbery. Defendant's motion to exclude his pretrial identification was denied by the trial court after a *Wade*¹ hearing held. At trial, the prosecutor introduced evidence of both the charged and uncharged robberies. From this and other claims of error, defendant now appeals.

Introduction of evidence

Defendant first argues that the trial court improperly admitted testimony that an unidentified informant prompted the postal inspector to investigate defendant as a suspect. Defendant claims that the testimony infringed on his constitutional right to confront his accusers and that the prejudice ensuing from this information far outweighed its probative value. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490,

¹ *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

494; 577 NW2d 673 (1998). “An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made.” *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). The prejudicial effect of evidence is best determined by the trial court’s contemporaneous assessment of the presentation, credibility, and effect of the testimony. *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995). Generally, great deference is given to a trial court’s decision, and a decision with regard to a close evidentiary question cannot be considered an abuse of discretion. *Id.* at 290.

In *People v Wilkins*, 408 Mich 69, 70-74; 288 NW2d 583 (1980), the Supreme Court reversed the defendant’s conviction because the trial court allowed a police officer’s testimony on the content of the information a tipster provided him. The case at bar is factually distinguishable from *Wilkins* because the only testimony providing content of the informant’s statement to the postal inspector was that defendant’s name was provided, and the statement served to focus the investigation on defendant. This falls short of being prejudicial. Even if the witness did not explicitly provide defendant’s name, it still could have been easily inferred from the nature and context of the inquiry and dialogue. Further, the confirmation of defendant’s involvement in the robbery came from sources independent of the informant – specifically, a photographic array and a lineup. The postal inspector’s testimony was limited to the statement that the inspector was responding to a tip; it provided no details of surrounding circumstances, and it was given for the limited purpose of contextual information explaining why defendant was investigated as a suspect. *Id.* at 73. Therefore, we conclude that the trial court did not abuse its discretion when it admitted this testimony.

Other acts evidence

Defendant argues that the trial court abused its discretion in allowing another mail carrier to testify that he was also robbed and that defendant was the assailant. Defendant claims that the proffered similarity was “merely that two mail carriers were robbed by black males with a gun” and that the prosecutor relied on the prior robbery to prove guilt of the subsequent offense charged. Defendant further argues that the test articulated in *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), remains valid to show logical relevance where similar acts evidence is offered to show identification through modus operandi. Defendant relies on *People v McMillan*, 213 Mich App 134, 138; 539 NW2d 553 (1995), and *People v Ho*, 231 Mich App 178; 186; 585 NW2d 357 (1998), to support his position.

This Court reviews a trial court’s evidentiary rulings under MRE 401 and MRE 403 for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000); *Starr, supra*. The prejudicial effect of evidence is best determined by the trial court’s contemporaneous assessment of the presentation, credibility, and effect of the testimony. *Bahoda, supra* at 291. Generally, a decision with regard to a close evidentiary question cannot be considered an abuse of discretion. *Id.* at 289.

Evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commits such acts. MRE 404(b)(1); *Sabin, supra* at 55. To be admissible under MRE 404(b), evidence of other acts must satisfy three requirements:

First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a “determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under Rule 403.” [Sabin, *supra*, quoting *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994) (citations omitted).]

Additionally, the trial court, upon request, may provide a limiting instruction under MRE 105. *Id.* at 56.

The prosecutor offered two theories of admissibility to support the admission of defendant’s prior acts: (1) to show identification or lack of mistake, and (2) to show the existence of a plan or scheme or method by which defendant accomplished the robberies. This satisfies the first step in the analytical framework because MRE 404(b)(1) does not require exclusion of otherwise admissible evidence and only prohibits the use of specific acts to prove a person’s character. *Sabin, supra*. However, mere articulation of a proper purpose does not complete the analysis because “the trial court must still determine whether the evidence under a proper theory, has a tendency to make the existence of a fact of consequence in the case more or less probable than it would be without the evidence.” *Id.* at 60; see, also, MRE 401.

In the case at bar, the offense charged was armed robbery and the prosecutor was required to prove: (1) an assault, (2) a felonious taking of property from the victim's presence or person, and (3) that the defendant was armed with a weapon described in the statute. *People v Carines* 460 Mich 750, 757; 597 NW2d 130 (1999). Here, defendant’s general denial placed all elements of the charge at issue, *Starr, supra* at 501, and identity is logically relevant and necessary to proving that defendant committed the crime charged.

The *Golochowicz* test for identification requires that: (1) there is substantial evidence that the defendant committed the similar act, (2) there is some special quality of the act that tends to prove the defendant’s identity, (3) the evidence is material to the defendant’s guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. *Ho, supra* at 186; see, also, *Golochowicz, supra* at 309. Defendant maintains that the analysis fails on the second prong because there are insufficient similarities in the act to establish a special quality that proves defendant’s identity. We disagree.

The circumstances of the other acts evidence support the conclusion that the logical relevance test is satisfied by the substantial evidence that defendant committed the earlier robbery and that both crimes shared similar qualities. *Ho, supra* at 187. A review of the record suggests a reasonable inference that both robberies were committed within fairly close geographic proximity. Both robberies occurred at a time of optimum return because of month-end social security checks in the mail. Both mail carriers described their assailants as a dark-complexioned, black male. The descriptions of the color of the firearms used in the robberies differ but are, nonetheless, sufficiently similar to conclude that they were the same weapon. This Court concludes that the circumstances of the robbery suggest familiarity and knowledge of the area

and were conclusive of a signature pattern that supports identification. Likewise, the evidence also is admissible under MRE 404(b) because it 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.” *Sabin, supra* at 63.

Next, the inquiry turns to a determination under MRE 403 of whether, although relevant, the evidence may be excluded because its probative value is substantially outweighed by the danger of unfair prejudice. Prejudice has been defined as meaning more than simply damage to an opponent’s cause and includes an undue tendency to move the tribunal to decide on an improper basis, commonly, an emotional one. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).

The trial court in admitting the evidence determined that the prejudicial effect of its admission was outweighed by the probative effect on the issues of identification, plan, and scheme. We agree. The issue of identification was contested by defendant; consequently, the prosecutor was required to support the complainant’s identification. Because both mail carriers positively identified defendant and the robberies were sufficiently similar to support the identifications, we conclude that the prejudicial effect did not substantially outweigh its probative value, so the trial court did not abuse its discretion by allowing the testimony.

Reasonable doubt instruction

Defendant argues that the trial court’s instructions undercut the burden of proof by suggesting that the jurors had a duty to articulate and justify their doubts to the other jurors. *People v Foster*, 175 Mich App 311, 319; 437 NW2d 395 (1989), overruled in part on other grounds sub nom *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988). To withstand a constitutional challenge, a reasonable doubt instruction when read in its entirety must leave no doubt in the mind of the reviewing court that the jury understood the prosecutorial burden of proof and what constituted a reasonable doubt. *People v Hubbard, (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996); *Jackson, supra*.

Because this issue was not preserved, defendant must show that: (1) an error occurred, (2) the error was plain, i.e., clear and obvious, and (3) the plain error affected substantial rights. *Carines, supra* at 763. It is impermissible for instructions defining reasonable doubt to shift the burden of proof by requiring the jurors to have a reason to doubt the defendant’s guilt. *Jackson, supra*. Instead, what is required is that the instructions must convey that a reasonable doubt is an honest doubt based on reason. *Id.*

In a prior case, this Court determined that prosecutorial comments that reasonable doubt required that the doubt have a reason did not misinform the jury. *People v Lee*, 212 Mich App 228, 254; 537 NW2d 233 (1995). Taken in context, the court’s statement, “[t]hat you can assign a reason for having,” did not impermissibly require articulation or justification of the reason for the jurors’ doubt, but instead implied that the doubt should be related to the evidence or lack of evidence.

Suppression of identification evidence

On October 22, 1998, a *Wade* hearing was held where defendant challenged both the photographic array and a later corporeal lineup in which he was positively identified. Defendant argues that the cumulative effect of the testimony showed uncertainty in the identification and that there was clear error in allowing this evidence because it was prejudicial and affected the outcome of the trial. We disagree. Review of a trial court's decision to admit identification evidence is considered under a clearly erroneous standard. *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993); *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). Clear error exists where the reviewing court is left with a definite and firm conviction that a mistake was made, *Kurylczyk, supra*, and warrants reversal only when the error is not harmless beyond a reasonable doubt, *People v Hampton*, 138 Mich App 235, 239; 361 NW2d 3 (1984). When reviewing pretrial identification procedures, this Court evaluates the fairness and suggestiveness of identification procedures in the light of the total circumstances. *Kurylczyk, supra* at 311-312 (Griffin, J.), 318 (Boyle, J.); *People v Doursey Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). The test is whether the procedure was so impermissibly suggestive that there is a substantial likelihood of misidentification. *Kurylczyk, supra* at 306 (Griffin, J.), 318 (Boyle, J.). Factors to consider include the opportunity of the witness to view the defendant at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Id.* at 306, 309 (Griffin, J.), 318 (Boyle, J.).

Defendant maintains that the pretrial photographic array used to identify him was unduly suggestive because his photograph was the only one with the hands showing and the complainant could immediately exclude nine of the twelve photographs. Simply because an identification procedure is suggestive does not render it constitutionally defective. *Id.* at 306 (Griffin, J.), 318 (Boyle, J.); *Colon, supra*. Likewise, differences in the composition of photographs and in physical characteristics of the individual photographed have been found not to render a lineup impermissibly suggestive. *Kurylczyk, supra* at 304-305 (Griffin, J.), 318 (Boyle, J.).

The circumstances of the challenged identification are sufficient to withstand constitutional scrutiny because defendant's identity was imprinted by (1) a preliminary encounter where defendant greeted the complainant, and (2) observation of her assailant from a distance of two feet for the approximately three- to four-minute duration of the robbery. The length of time between the robbery and the photographic array was only a matter of weeks. Given the nature of the robbery and the complainant's statement that she was focused on the incident itself and looked directly into defendant's face, allows a conclusion that the length of time between the robbery and the identification was insufficient to detract from its reliability. *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996). The photographic array was neither unduly suggestive nor did it allow a substantial likelihood of misidentification that would implicate due process concerns.

Defendant also challenges the suggestiveness of a later corporeal lineup. Like the photographic lineup, the corporeal lineup must be examined in light of the totality of its circumstances. *Kurylczyk, supra* at 311-312 (Griffin, J.), 318 (Boyle, J.). Differences among

participants are significant only if they are apparent to the witness and substantially distinguish the defendant to the extent that there exists a substantial likelihood that these differences, rather than recognition of the defendant, were the basis of the identification. *Id.* at 312 (Griffin, J.), 318 (Boyle, J.). If counsel was present at the lineup, then the defendant bears the burden of showing that the lineup was impermissibly suggestive. *McElhaney, supra* at 286. Defendant fails to meet this burden. All participants in the lineup were uniformly identified as “black males, medium complexion . . . [, dressed in] jail greens.” The complainant took approximately one minute to identify defendant as her assailant, explaining later that she picked out defendant because “[h]e was the person that I best recalled in my mind of the person that robbed me. He fit the description in my mind.” We find no support for defendant’s argument that the lineup was unduly suggestive.

Prosecutorial misconduct

Defendant next claims that he was denied a fair trial because the prosecutor denigrated defense counsel and vouched for a key prosecution witness. Appellate review of allegedly improper remarks is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998).

This Court reviews unpreserved claims of prosecutorial misconduct for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Instances of prosecutorial misconduct are decided case by case, and this Court must examine the pertinent portion of the record and evaluate the prosecutor’s remarks in context. *Id.* at 721. Reversal is warranted only when a plain error affected substantial rights and resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763, 774; *Schutte, supra* at 720.

After reviewing the record, we conclude that defendant’s allegations of prosecutorial misconduct are unsubstantiated because the prosecutor’s comments, when taken in context, were a fair rebuttal to defendant’s theory of the case and did not rise to a level sufficient to deny defendant a fair and impartial trial.

Cumulative Error

Defense counsel argues that even if the errors set forth on appeal do not warrant reversal individually, when taken together they constitute reversible misconduct because their cumulative and prejudicial effect denied defendant a fair trial. Regarding “alleged cumulative error,” “the test to determine whether reversal is required is not whether there are some irregularities, but whether defendant has had a fair trial.” *People v Duff*, 165 Mich App 530, 539; 419 NW2d 600 (1987). Because we find no error, defendant’s right to a fair trial has not been denied. *Id.*; see, also, *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). Consequently, reversal of defendant’s conviction is not warranted on the basis of cumulative error.

Sentencing Issues

Defendant next claims that his sentence was excessively disproportionate. He also claims that the use of erroneous guidelines scoring requires a remand for resentencing. This Court reviews sentencing decisions for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra* at 636. Departures from the sentencing guidelines' range are permitted, but are suspect and subject to scrutiny on appeal. *Id.* at 656-657; *People v Rockey*, 237 Mich App 74, 79; 601 NW2d 887 (1999). "Permissible factors that may be considered by the court when imposing a sentence include the severity and nature of the crime, the circumstances surrounding the criminal behavior, the defendant's attitude toward his criminal behavior, the defendant's social and personal history, and the defendant's criminal history, including subsequent offenses." *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000).

In the present case, the trial court based its departure from the guidelines on defendant's prior conviction involving possession of a loaded handgun. The trial court considered the instant offense particularly serious in light of the fact that defendant was still on probation at the time the present offense was committed and also considered the social impact of robbing a United States postal worker, identifying it as an attack on the United States. Based on these factors, the trial court properly concluded that the guidelines' recommendation would not adequately serve as a deterrent or protect the public and that an upward departure from the guidelines' recommendation of thirty-six to ninety-six months was justified.

Review of guidelines' calculations is limited. A sentencing court has discretion in scoring provided that there is evidence on the record that adequately supports a particular score. *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999). The analytical framework requires that a sentence must be overturned and new sentencing ordered only where (1) the factual predicate is wholly unsupported, (2) a factually predicate is materially false, and (3) the sentence is disproportionate. *Id.* at 131. Because the sentence was proportionate, this Court need not address the issue challenging the guidelines' scoring.

Determinate Sentencing

Defendant urges this Court to find, in contravention of previously decided cases, that the Michigan Constitution, by expressly authorizing indeterminate sentencing in Article 4, § 45, prohibits determinate sentencing such as the two-year mandatory incarceration for felony-firearm. MCL 750.227b; MSA 28.424(2). Moreover, defendant requests that we indicate in the text of our opinion our disagreement with *People v Cooper*, 236 Mich App 643, 660-664; 601 NW2d 409 (1999), pursuant to MCR 7.215(H)(2). We decline to do so.

This Court has consistently ruled that although the Michigan Constitution authorizes only indeterminate sentences, it includes no prohibition against a statute requiring determinate sentencing as punishment for a crime. *Cooper supra* at 661; *Snider, supra* at 426. Because

defendant has raised no new arguments in this regard, the rules of constitutional construction and stare decisis require that the decision of the trial court be affirmed.

We affirm.

/s/ Jane E. Markey

/s/ Gary R. McDonald

/s/ Kirsten Frank Kelly