STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 16, 2002
v	No. 226511 Wayne Circuit Court
CLEVELAND EVANS, Defendant-Appellant.	LC No. 99-007724

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 8-1/2 to 20 years' imprisonment for the robbery conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first contends that the trial court erred in denying his motion for appointment of an expert witness in the field of eyewitness identification. We disagree.

A trial court's denial of a motion requesting the appointment of an expert witness is reviewed for an abuse of discretion. *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995); *People v Hill*, 84 Mich App 90, 96; 269 NW2d 492 (1978). An abuse of discretion exists when the result is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment or an exercise of passion or bias. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Here, defendant requested an expert "at County expense" to essentially testify regarding the fallibility inherent in eyewitness identification. A defendant is entitled to the appointment of an expert at public expense only if he cannot otherwise proceed safely to trial. MCL 775.15; *Hill*, *supra* at 95-96. "[A] defendant must show a nexus between the facts of the case and the need for an expert." *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1997), citing *Jacobsen*, *supra*. Denying an indigent defendant a court-appointed expert does not warrant reversal unless it results in a fundamentally unfair trial. *Leonard*, *supra* at 582-583.

In this case, the trial court did not abuse its discretion by declining to appoint an expert on eyewitness identification. There was an insufficient showing of necessity for an expert where defendant was able to adequately present his attack on the complainant's identification through cross-examination, argument, and the trial court's jury instructions. In specific, defense counsel questioned complainant at length regarding her identification of defendant, including the traumatic and transitory conditions under which it was made. In addition, two eyewitnesses testified and provided descriptions of defendant that differed somewhat from complainant's description of defendant. Also, defendant presented alibi witnesses who, if believed, would have called complainant's identification of defendant into question. Further, during closing argument, defense counsel addressed the weaknesses in complainant's identification of defendant, as well as the inconsistent aspects of the descriptions of the assailant provided by other eyewitnesses of the robbery. Finally, at the conclusion of the trial, the court included in its instructions to the jury CJI2d 3.06 (witness credibility) and CJI2d 7.8 (identification), which apprised the jury of the proper considerations in determining whether to accept or reject eyewitness identifications. Under these circumstances, we conclude that the trial court did not abuse its discretion by denying defendant's motion to appoint an expert to provide testimony on the fallibility of eyewitness identifications, and that defendant's trial was not fundamentally unfair.[1]

II

Defendant next argues that the trial court abused its discretion by excluding the proposed testimony of a character witness, who would have testified that she "knows [defendant's] work history," "that [defendant] is an employed person," and that defendant is "not a person who is without visible means of support." We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

At trial, the prosecutor asserted, *inter alia*, that defendant committed the robbery because he was unemployed and needed money. On appeal, defendant cites MRE 404(a)(1), which allows a criminal defendant to introduce evidence of his character to prove that he could not have committed the crime charged. *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986). We find that the trial court did not abuse its discretion in denying defendant's request because the proposed testimony was irrelevant where it essentially contradicted defendant's own testimony. See MRE 401. As the trial court noted, defendant, himself, had already testified that he had been laid off. We also note that, even if there was merit to defendant's contention, defendant has not established that it is more probable than not that the alleged error was outcome determinative, particularly given his testimony concerning his work history. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Accordingly, this claim does not warrant reversal.

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[1] In the lower court, defendant sought the appointment of the expert at "County expense." On appeal, defendant states that the court disallowed the expert testimony, even at defendant's expense. We note that, in either case, reversal is not required because defendant has not established that it is more probable than not that the lack of such an expert was outcome determinative. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

III

Next, defendant argues that the trial court erred in denying his motion for a continuance until the following day to secure the presence of an eyewitness who would have testified that the assailant was "larger and taller than the Defendant." Again, we disagree.

We review a trial court's denial of a continuance for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999); *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). When deciding whether the trial court abused its discretion in denying a defendant's motion for a continuance, this Court considers whether the defendant asserted a constitutional right, had a legitimate reason for asserting the right, had been negligent, and had requested previous adjournments. *Id*. Defendant must also demonstrate prejudice. *People v Paquette*, 214 Mich App 336, 344; 543 NW2d 342 (1995); *Lawton*, *supra*. After weighing the above factors, we find no abuse of discretion.

On the Wednesday afternoon of the sixth day of trial, defense counsel notified the court that his next witness was not present to testify. The court had stated on the preceding Friday that all defense witnesses should be in court by 9:00 a.m. on Tuesday. The witness was not in court on Tuesday or at any time on Wednesday. Defense counsel stated that he talked to the witness on Wednesday morning and told her to be in court at 2:00 p.m., and that a later attempt to contact the witness was unsuccessful. The trial court gave defense counsel a brief period of time to locate the witness, but denied his request for a continuance until the following day. After defendant could not locate the witness, the trial court questioned defense counsel regarding the substance of the witness' testimony. The court again denied defendant's request for an overnight continuance, noting that it questioned defense counsel extensively regarding defense witnesses on the preceding Friday, advised the defense that each witness was to be in court on Tuesday at 9:00 a.m., and that if there were problems, such as health issues, counsel should have timely advised the court. The court also noted that the witness had not been present in court on Tuesday or at any time on Wednesday. We also note that the witness would have provided similar and cumulative testimony because two other eyewitnesses had previously testified and provided descriptions of defendant that differed somewhat from complainant's description of defendant. Under these circumstances, although defendant was advancing his constitutional right to call witnesses in his defense, we find no abuse of discretion in the court's denial to adjourn until the following day.

Within this issue, defendant also argues, in a cursory manner, that the trial court's desire to not delay the trial caused it to improperly deny his request that the jurors be taken outside to view defendant sitting in his car in order for them to observe him as observed by complainant when she identified him. We find this claim to be without merit. Although we agree with defendant that complainant's identification of defendant was a critical issue, we agree with the trial court that, in addition to the untimely nature of the request, such a demonstration was improper, particularly where complainant had already testified about her observations, because the jurors' observations are not necessarily indicative of what complainant observed. Moreover, the record shows that testimony and photographs regarding the circumstances surrounding complainant's identification of defendant were admitted, and defense counsel cross-examined complainant at length regarding her identification. We also note that, in order to execute the demonstration, defense counsel requested to simply walk the jurors outside and have them view defendant sitting in his car. Given this informal, impromptu, and imprecise method by which

defense counsel sought to conduct the proposed demonstration, it is questionable that the particular conditions surrounding complainant's identification of defendant would have been replicated. We therefore conclude that the trial court did not abuse its discretion in denying defendant's request.

IV

Defendant claims that his conviction should be reversed because the trial court erred in admitting evidence of a different robbery under MRE 404(b). We disagree. The admissibility of bad 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).

MRE 404(b) governs the admissibility of evidence of a defendant's other crimes, wrongs, or acts. Such evidence is admissible under MRE 404(b) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998), citing *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

The trial court did not err in admitting the challenged evidence under MRE 404(b). The evidence was not simply offered to show that defendant had a bad character. Rather, it assisted the jury in weighing the witnesses' credibility, particularly where defendant denied that he was the assailant and both the complainant and the victim of the other robbery identified defendant. It was also probative of defendant's common scheme, plan, or system where both robberies were against women, both occurred while each was out exercising, both occurred in the same area within days of each other, and, in both cases, jewelry was stolen. Further, contrary to defendant's suggestion, evidence is not inadmissible simply because the very nature of the evidence is prejudicial, and defendant has not demonstrated that he was unfairly prejudiced by the evidence. See MRE 403. Accordingly, this issue does not warrant reversal.

V

Defendant's next claim is that he was denied a fair and impartial trial because of prosecutorial misconduct. We disagree. Because defendant failed to timely object to the alleged improper conduct below, this Court reviews this claim for plain error affecting defendant's substantial rights, i.e., that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Our review of the record reveals that, viewed as a whole and in context, the challenged conduct does not rise to the level of error requiring reversal. First, the prosecutor's remark that "unless the jury returns a just verdict, there would be no closure for the robbery victims" did not deny defendant a fair trial. Prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jurors, or arguments that appeal to the jury to sympathize with the

victim. *Bahoda*, *supra* at 266-267; *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). However, the prosecutor's comment in this case, which was made during rebuttal, occurred at the end of a lengthy discussion of the evidence, was isolated and was not so inflammatory that defendant was prejudiced. See *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). Moreover, the trial court's instructions to the jury to not be influenced by prejudice or sympathy, and that the lawyers' comments are not evidence cured any prejudice. See *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001), citing *Bahoda*, *supra* at 281.

We also reject defendant's claim that he is entitled to a new trial because the prosecutor asked him during cross-examination whether he was a "thief" by accepting unemployment benefits while working. The fact that defendant was receiving unemployment benefits as a result of losing his job, yet working as a painter, was put in issue during the direct examination of defendant. The prosecutor's cross-examination of defendant was responsive to defendant's direct examination testimony and defendant's denial on cross-examination did not improperly interject any evidence of other bad acts by defendant. See, generally, *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988) ("[d]efendant cannot now be heard to complain regarding questions asked by the prosecutor on cross-examination when he himself 'opened the door' concerning such evidence in an effort to support his defense . . . "). Because defendant was not prejudiced by the prosecutor's comment or question, defendant has failed to show plain error affecting his substantial rights. See *Carines*, *supra*. Accordingly, this claim does not provide a basis for reversal.

VI

Defendant also argues that trial counsel was ineffective because he failed to obtain telephone records to support his alibi defense, failed to timely file a motion to quash, and was tardy to court on several occasions. Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). If the record does not contain sufficient detail to support defendant's ineffective assistance claim then he has effectively waived the issue. *Id*.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id*. A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Having considered each of defendant's contentions, we find that none presents a cognizable claim for relief. First, defendant has failed to provide a copy of the phone record that purportedly supports his alibi defense. Further, given that the jury rejected his testimony, as well

as that of his two alibi witnesses, defendant has not demonstrated that, but for trial counsel's alleged inaction, the outcome would have been different.[2] See *Effinger, supra*. In addition, defendant has failed to provide a copy of the motion to quash, any supporting citation or argument concerning his claim that the motion was untimely filed, or any argument that a motion to quash was meritorious. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (citation omitted). Finally, defendant has failed to provide any record citations to support his claim that trial counsel was consistently tardy to court. See MCR 7.212(C)(7). Rather, our review of the record shows that the trial court admonished defendant and defense counsel on more than one occasion because of *defendant's* tardiness. Accordingly, defendant has failed to establish that defense counsel was ineffective during trial. See *Pickens, supra*; *Effinger, supra*.

VII

We also reject defendant's final argument that the cumulative effect of several errors deprived him of a fair trial. Because no cognizable errors were identified that deprived defendant of a fair trial, reversal under the cumulative effect theory is unwarranted. See *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh

[2] We note that there is a copy of a phone bill in the lower court file, but it is unclear whether it was admitted at trial, and it is not dispositive evidence of defendant's alibi.