STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2008
v	No. 274718 Wayne Circuit Court
MICHAEL BAKER, Defendant-Appellant.	LC No. 06-007618-01

Before: Talbot, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of armed robbery, MCL 750.529. The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to 35 to 60 years in prison. We affirm.

Defendant argues that the trial court abused its discretion when it admitted, under MRE 404(b), other-acts evidence of a robbery of Julia Williams. (The present case involved the robbery of Jahnille Allen). We disagree. This Court reviews the admissibility of other-acts evidence for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). A court abuses its discretion when it chooses an outcome that lies outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

Generally, "evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); MRE 404(b). Such evidence may be admissible, however, for other purposes under MRE 404(b)(1s), which states:

> 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.

Generally, to be admissible under MRE 404(b)(1), other-acts evidence must (1) be offered for a proper purpose; (2) be relevant under MRE 402, as enforced through MRE 104(b); and (3) have probative value that is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). Additionally, the trial court, upon request, shall provide a limiting instruction. *Id*., p 75. However, where the other-acts evidence is offered to show identity through modus operandi, as is the case here, the four-part test of *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), applies. *VanderVliet*, *supra*, p 66; *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998). The *Golochowicz* test 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*, p 186.]

Evidence of the robbery of Williams satisfies the *Golochowicz* test of admissibility. First, substantial evidence that defendant committed that robbery existed because Williams identified him and he was pursued and arrested near the scene of the robbery. Second, special qualities of the robberies existed to prove defendant's identity in the present case. The robberies both occurred outside, within close proximity. They were also committed within two days of each other. Both victims were female. Their robber wore a camouflage jacket and dark pants and shoes, and he did not obscure his face. His demands for money were similar: "Look, B----, give me what you got and hurry up" and "B----, give me all you got." The robber implied he had a gun, but did not show it or discharge it. Although the robber succeeded in kidnapping Williams only, he wanted both victims to go with him afterward.

Third, evidence of the robbery of Williams was material to defendant's guilt. To be relevant, evidence must make a fact at issue more or less probable than it would be without the evidence. MRE 401. Defendant's identity as the robber was particularly at issue because defendant argued that he was not the robber and that Allen's identification of him in the lineup was mistaken. Evidence that defendant robbed another woman under similar circumstances, therefore, made defendant's identity as Allen's robber more probable.

Fourth, the probative value of the testimony was not outweighed by its potential for unfair prejudice. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the trier of fact. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). The record does not establish a tendency that the other–acts evidence would be given preemptive or undue weight by the jury. Moreover, the trial court and the prosecutor informed the jury that evidence of the Williams robbery should only be used as evidence of identity in Allen's robbery. The trial court also instructed the jury that evidence of the Williams robbery should not be used to decide that defendant is a bad person or that he is likely to commit crimes. We hold that the evidence cannot be characterized as unfair under *McGuffey*. Furthermore, the determination of whether the probative value of evidence is substantially outweighed by its prejudicial effect is "best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony . . . ." *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002) (internal citations and quotation marks omitted). We conclude

that the trial court did not abuse its discretion when it admitted evidence of the robbery of Williams.

Defendant next argues that the prosecutor failed to present legally sufficient evidence that defendant was armed to support his armed robbery conviction. We disagree. This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). This Court "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of armed robbery are: "(1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute." *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004) (internal citations and quotation marks omitted).

> The existence of some object, whether actually seen or obscured by clothing or something such as a paper bag, is objective evidence that a defendant possesses a dangerous weapon or an article used or fashioned to look like one. Related threats, whether verbal or gesticulatory, further support the existence of a weapon or article. [*People v Jolly*, 442 Mich 458, 469; 502 NW2d 177 (1993).]

Moreover, MCL 750.529 indicates that guilt may be predicated on the defendant's having "represent[ed] orally or otherwise that he or she is in possession of a dangerous weapon." Circumstantial evidence is sufficient for the jury to conclude that the "dangerous weapon" element of the statute was satisfied. *Jolly*, *supra*, pp 470-471.

Allen testified that she feared the way defendant held his right hand inside his jacket and pointed out at her. She believed he had a weapon. She also believed that she was being robbed because defendant said, "Look, B----, give me what you got and hurry up." Taken together, there was objective evidence that defendant had an object obscured in his jacket that was a dangerous weapon or fashioned to look like one or that defendant represented orally or otherwise that he was in possession of a dangerous weapon. There was sufficient evidence for a trier of fact to conclude beyond a reasonable doubt that defendant was armed as required by the statute.

Defendant next argues that the prosecutor's closing argument and rebuttal included instances of prosecutorial misconduct that require reversal. We disagree. This Court reviews prosecutorial misconduct claims under the plain error doctrine when the claims are not properly preserved by a contemporaneous objection and a request for a curative instruction. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). To warrant reversal, there must have been a clear or obvious error that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Rice (On Remand)*, 235 Mich App 429, 434; 597 NW2d 843 (1999).

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's

> remarks in context to determine whether the defendant was denied a fair and impartial trial. [*Id*.]

Generally, prosecutors are afforded great latitude in their closing arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

The evidence of the robbery of Williams was admitted to prove identity under MRE 404(b), but defendant claims that in her closing argument, the prosecutor improperly argued that it was admitted as substantive evidence that defendant committed both armed robberies. Defendant takes the prosecutor's statement out of context. In her closing argument, the prosecutor explained the purpose of the other-acts evidence under MRE 404(b), stating:

> We heard from Miss Julia Williams. And what is important about Miss Julia Williams' case, you are not here to decide whether the defendant is guilty of that case at all. What you are here to figure out in terms of Miss Williams' case is whether that was defendant in the green camouflage jacket that robbed both women. This is his identity and that is very important . . . .

Taken as a whole, the prosecutor did not misstate the law during her closing argument. Rather, she clarified that the robbery of Williams was admissible to prove identity in the present case. *Crawford*, *supra*, p 383. Therefore, we hold that this statement was proper.

Defendant also claims that the prosecutor improperly bolstered or vouched for her case during rebuttal when she said, "Ladies and gentleman, I absolutely, one-hundred percent believe in my case." A prosecutor is free to argue that the evidence demonstrates that the defendant is guilty. However, a prosecutor may not improperly vouch for the defendant's guilt by using the prestige of her office. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995). Nevertheless, "the prosecutor's comments must be considered in light of defense counsel's comments. [A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001) (internal citation and quotation marks omitted).

Rather than simply indicating that the evidence demonstrated defendant's guilt, the prosecutor's statement arguably placed the prestige of her office behind her case. The statement, considered alone, may have been improper, but it must be considered in the context of defendant's attorney's accusations during his closing argument. He stated: "If the People believed in their case and believed everything they had done, it would have been Miss Allen, the police and everything. But they're bringing this other piece in because they don't believe in their case . . . ." Because the prosecutor's remark was made in response to defense counsel's argument, it did not amount to prosecutorial misconduct requiring reversal.

Next, defendant claims that the prosecutor improperly misquoted Allen's testimony when she said that defendant told Allen, '"B----, give me your money or I'll kill you, hurry up,' something to that effect," rather than, "Look, B----, give me what you got and hurry up." However, the prosecutor implied that she did not directly quote Allen when she said, "something to that effect." Moreover, the trial court instructed the jury that the "lawyers' opening statements and closing arguments are . . . not evidence." We believe that this instruction was sufficient to

cure any prejudice resulting from the prosecutor's brief comment. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). The prosecutor's statement did not deny defendant a fair trial.

Defendant next argues that he was denied the effective assistance of counsel when his trial attorney failed to object to the instances of alleged misconduct in the prosecutor's closing argument and rebuttal. We disagree. Because defendant did not move below for an evidentiary hearing regarding the ineffective assistance issue, this Court's review is limited to the facts contained in the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*., pp 484-485.

Effective assistance is strongly presumed and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Id.*, p 485. To demonstrate ineffective assistance, a defendant must show that: (1) his attorney's performance fell below an objective standard of reasonableness, (2) there is a reasonable probability that this performance affected the outcome of the proceedings, and (3) the proceedings were fundamentally unfair or unreliable. *Id*., pp 485-486; *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Counsel is not required to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

We have concluded above that the instances of alleged prosecutorial misconduct either did not constitute actual misconduct or did not affect the outcome of the proceedings; accordingly, we find no validity to defendant's ineffective assistance claim.

Defendant lastly argues that the trial court erred when it denied his motion for resentencing. Defendant claims that proof of service of the prosecutor's intent to seek an enhanced sentence, see MCL 769.12 and MCL 769.13, was not filed and he did not have actual notice of the prosecutor's intent to seek an enhanced sentence. We disagree. "[T]he interpretation and application of statutes is a question of law that is reviewed de novo." *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). To the extent that the issues being appealed require this Court to review the trial court's factual findings, review is for clear error. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

"MCL 769.13(2) . . . provides that the prosecution shall file in the lower court a written proof of service of its notice of intent to seek an enhanced sentence." *People v Walker*, 234 Mich App 299, 314; 593 NW2d 673 (1999). However, where proof of service is absent from the lower court file, but a defendant had actual notice of intent to enhance, any error is harmless because the defendant was able to respond to the habitual offender charge. *Id*., pp 314-315.

The prosecutor included notice of her intent to enhance defendant's sentence based on his alleged status as a fourth-offense habitual offender in defendant's felony information. Defendant's attorney acknowledged receipt of the felony information. The record also reflects that defendant's charges, including the fourth-offense habitual offender notice, were read to defendant at his preliminary examination. Therefore, even if proof of service is absent from the

lower court file, defendant and his attorney had actual notice of the prosecutor's intent to seek enhancement from the felony information and preliminary examination. Consequently, defendant was able to respond to the habitual offender charge. Thus, we conclude that any error involving a failure to file proof of service was harmless and that the trial court properly denied defendant's motion for resentencing.

Affirmed.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Patrick M. Meter