

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN BRADLEY JONES,

Defendant-Appellant.

UNPUBLISHED

November 25, 2008

No. 280617

Muskegon Circuit Court

LC No. 07-054562-FH

Before: Murphy, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of armed robbery, MCL 750.529; felon in possession of a firearm, MCL 750.224f; and two counts of possession of a firearm during the commission of a felony, second offense, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent five-year terms for the felony-firearm convictions, to be followed by concurrent terms of 50 to 90 years for armed robbery and ten to 30 years for felon in possession. Because we conclude that there were no errors warranting relief, we affirm. This appeal has been decided without oral argument under MCR 7.214(E).

On appeal, defendant argues that the trial court abused its discretion by admitting testimony regarding another armed robbery and an attempted armed robbery under MRE 404(b). The trial court concluded that this evidence was properly offered under MRE 404(b)(1) to show a common plan, system, or scheme with each armed robbery, as well as defendant's intent, identity, and knowledge of the crime.

A trial court's admission of other-acts evidence is reviewed for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). A trial court abuses its discretion when it admits evidence that is inadmissible as a matter of law. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Before other-acts evidence may be introduced, the prosecution must satisfy a three-part test: (a) there must be a reason for its admission other than to show character or propensity, (b) it must be relevant, and (c) the danger of undue prejudice cannot substantially outweigh its probative value, especially if there are other means of proof. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). [*People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005)].

Although defendant's accomplice implicated defendant in the armed robbery at issue, defendant argued that the accomplice was not credible given that he stood to gain an advantage in sentencing for testifying. Apart from the accomplice's testimony, there was circumstantial evidence linking defendant to the crime—he was found weeks afterward while trying to remove clothing similar to that used in the robbery, and items discovered at the time of his arrest were consistent with his involvement. However, defendant disputed his involvement. Therefore, identity was an issue. MRE 404(b)(1) expressly lists proof of identity as a proper purpose for introducing other acts evidence. This evidence was not presented to show that defendant had robbed in the past and therefore might have done so in this instance. The consistent scheme or plan involving the two robberies and one attempted robbery—two masked men garbed in black entering a store when customers were unlikely to be present and targeting the cash offices with one robber brandishing a gun—tended to establish that the accomplice's testimony was credible. Moreover, the evidence that defendant was caught after the last similar incident while in possession of distinctive clothing described in all the robberies tended to establish defendant's identity as the culprit in the robbery at issue.

The other acts evidence was therefore relevant under MRE 401 and offered for a proper purpose under MRE 404b. Nevertheless, defendant argues that it was more prejudicial than probative because, without the other acts evidence, there was only the accomplice's testimony and circumstantial evidence to prove he was involved in the charged offense. But MRE 403 does not bar the admission of evidence merely because it is damaging; MRE 403 bars evidence whose probative value is *substantially* outweighed by the danger of *unfair* prejudice. See MRE 403. Any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). That alone does not make it unfair to permit its admission. 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. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). This is not such a case. The trial court did not abuse its discretion by admitting the other acts evidence.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael R. Smolenski