

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DIMETRI CURTIS SMITH,

Defendant-Appellant.

UNPUBLISHED

December 29, 2009

No. 286552

Grand Traverse Circuit Court

LC No. 08-010484-FC

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of conspiracy to commit armed robbery, MCL 750.157a, MCL 750.529, armed robbery, unlawful imprisonment, MCL 750.349b, felonious assault, MCL 750.82, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of 180 to 270 months in prison for the conspiracy and armed robbery convictions, 120 to 180 months in prison for the unlawful imprisonment conviction, 32 to 48 months' imprisonment for the felonious assault count, and 160 to 240 months in prison for the home invasion conviction, all to be served consecutively to a two-year term of imprisonment for the felony-firearm charge. Defendant appeals as of right. We affirm.

The charged crimes took place in December 2007 at 525 Grant Street in Traverse City. Josiah LaBonte, one of the victims, recounted that he visited 525 Grant intending to purchase crack cocaine, as he had on several prior occasions from defendant and two other men. LaBonte described that when he arrived at 525 Grant on December 17, 2007, defendant and the other men demanded that he raise his shirt "to . . . see if [LaBonte] had a wire on," which they customarily did whenever LaBonte went there. LaBonte detailed his experience of an ordeal during which defendant and the other two men pointed a 9-millimeter handgun at his head, beat and kicked him, tied him to a chair with electrical cord and simultaneously punched him extensively, untied him and beat his bare body with a red broom handle, then poured vinegar, bleach and salt on his wounds. Before defendant and the other two men eventually released LaBonte, one of defendant's accomplices, while holding the 9-millimeter, went through LaBonte's pants and

removed \$40, his Bridge card, and a cell phone.¹ Defendant testified at trial that he had lawfully entered 525 Grant on December 17, 2007, but denied having participated in or even known about the assault and robbery of LaBonte when it occurred.

Defendant challenges on appeal the trial court's admission of other acts evidence concerning an unsuccessful drug purchase involving defendant that took place a month before the assault and other counts on which he stood trial. The trial court determined that the other acts evidence had relevance toward proving defendant's scheme, plan, or system in doing an act and also bolstered LaBonte's credibility. This Court reviews for a clear abuse of discretion the trial court's decision whether to admit evidence, except to the extent that the ruling involves a legal question of admissibility, which we consider de novo. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003).

Michigan Rule of Evidence 404(b)(1) prohibits the admission of evidence of a defendant's other acts or crimes when introduced solely for the purpose of showing the defendant's action in conformity with his criminal character. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). But evidence of a defendant's other acts or crimes qualifies as admissible under the following circumstances: (1) the prosecutor offers the evidence for a proper purpose under MRE 404(b)(1), including to prove the defendant's scheme, plan or system in doing an act; (2) the other acts evidence satisfies the definition of logical relevance within MRE 401; and (3) any unfair prejudice arising from the admission of the other acts evidence does not substantially outweigh its probative value, MRE 403. *Starr*, 457 Mich at 496; *Ackerman*, 257 Mich App at 439-440.

The two grounds invoked by the trial court, to show defendant's scheme, plan, or system and to bolster the victim's credibility, constitute proper noncharacter purposes under MRE 404(b). *Sabin*, 463 Mich at 59 n 6. Regarding the scheme, plan, or system, "evidence of similar misconduct 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*, 463 Mich at 63. "Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." *Id.* at 66 (internal quotation omitted). Here, the similarities consisted of defendant and his accomplices systematically checking for a wire even people who had previously purchased drugs at 525 Grant, physically abusing the addicts who came to buy drugs, and pointing firearms at them. The trial court in its experience viewed the routine wire checking as highly unique in the area. We conclude that the trial court correctly found that defendant and his accomplices employed a similar scheme, plan, or system in November 2007 and in assaulting LaBonte in December 2007.

The other acts evidence concerning the unsuccessful November 2007 drug purchase also had relevance toward proving defendant's scheme, plan, or system and bolstering LaBonte's

¹ Anita Morris, the other victim, testified that she owned the home at 525 Grant, and that on December 17, 2007 defendant and the two other men had entered without her permission.

credibility. Relevancy requires that “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.” *Sabin*, 463 Mich at 60; MRE 401. Defendant’s denial that he participated in the assault and robbery of LaBonte “place[d] all the elements of the charge at issue.” *Id.* Furthermore, “critical to the instant case and a fact that is also ‘of consequence’ to a determination is the credibility of the witnesses offering testimony.” *People v Mills*, 450 Mich 61, 72; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995). The evidence of the failed drug purchase at 525 Grant in November 2007 strongly tended to corroborate LaBonte’s credibility and to make more probable that defendant utilized a scheme, plan, or system when he participated in the December 2007 assault and robbery of LaBonte.

We lastly conclude that the other acts evidence satisfied the balancing inquiry in MRE 403. The other acts evidence had a high level of probative value with respect to LaBonte’s veracity in this case and defendant’s use of a scheme, plan, or system in committing the December 2007 crimes, which was not substantially outweighed by any danger of unfair prejudice. Unfair prejudice exists where “there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001) (internal quotation omitted). Because the other acts evidence admitted in this case had strong probative force, the trial court did not abuse its discretion in finding no substantial danger of unfair prejudice and admitting the other acts evidence.

In a supplemental pro per brief, defendant avers that the trial court deprived him of a fair and impartial trial by neglecting to sua sponte order a change of venue, that his trial counsel provided ineffective assistance by refusing to move for such relief, and that appellate counsel was ineffective for failing to raise this issue. Generally, a defendant must face trial in the county where he committed the charged crime. MCL 600.8312(1); *People v Jendrzewski*, 455 Mich 495, 499; 566 NW2d 530 (1997). The trial court may change venue to another county “in special circumstances where justice demands or [a] statute provides.” *Jendrzewski*, 455 Mich at 499-500, citing MCL 762.7.

Defendant, an African-American, faced an all white jury venire. However, a change of venue is not necessitated simply because the racial makeup of the jury venire differs from the defendant’s race. Where race will comprise a bona fide issue in a defendant’s trial, the court on request should specifically ask prospective jurors about racial bias or prejudice. *Ristaino v Ross*, 424 US 589, 594; 96 S Ct 1017; 47 L Ed 2d 258 (1976); *Ham v South Carolina*, 409 US 524, 527; 93 S Ct 848; 35 L Ed 2d 46 (1973); *People v Wray*, 49 Mich App 344, 346; 212 NW2d 78 (1973). During voir dire in this case, the trial court thoroughly explored whether the prospective jurors harbored any potential biases or prejudices, and specifically discussed and inquired about racial prejudice. The trial court afforded potential jurors who might have any sort of race-related bias an opportunity to be excused without further interrogation, but none of the potential jurors expressed difficulty with or influence from a racial bias. Defendant thus has failed to substantiate that racial prejudice compromised any juror.

Defendant also expresses concern with the fact that one juror had some acquaintance with LaBonte in high school. However, after the trial court questioned the juror about the extent of his interactions and familiarity with LaBonte in high school and since then, the juror voiced that he would “keep an objective mind.” Although a second juror attended high school with LaBonte

and the juror who knew LaBonte, the record reveals no suggestion that the second juror knew LaBonte. Defendant again has failed to show that any attenuated acquaintance with LaBonte gave rise to any juror bias or partiality.

In summary, the trial court properly questioned the potential jurors to ascertain whether any possessed a racial or other bias against defendant. Because no ground for a change of venue existed, the trial court did not err in neglecting to sua sponte order a change of venue and neither defendant's trial nor appellate counsel was ineffective in failing to raise this issue. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder