STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 18, 2011
v	No. 294235 Wayne Circuit Court
ERIC SIMS, Defendant-Appellant.	LC No. 09-008837-FC

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to fifteen to twenty five years' imprisonment for his armed robbery conviction, to be served consecutive to 2 years' imprisonment for his felony firearm conviction. Defendant appeals as of right. We affirm.

I. BASIC FACTS AND PROCEEDINGS

At trial, the prosecution presented evidence that on March 22, 2009, Daniel Craighead and his brother, Trevaughn, drove to a Boys and Girls Club located in the city of Detroit. After arriving, they exited the car and walked to the basketball court. Daniel returned to his car to retrieve his jogging pants, and while closing the trunk, he noticed a Ford Taurus driven by defendant approaching him. Daniel testified he recognized defendant from a roller-skating event, at which defendant introduced himself as "Booksee." Daniel also testified that defendant must have recognized him at the basketball court because defendant asked Daniel if he still had the designer eyeglasses that he had been wearing when they first met. Daniel replied that he no longer had the eyeglasses.

There were four other young men in the Taurus and defendant recognized one of the passengers as "Darius." Although Daniel admitted that he had seen Darius "at his [Darius'] house, the mall, and skating," he denied that he knew that Darius was defendant's brother. Daniel admitted that Darius had been dating "Rashelle," who had a twin sister, "Neshelle," whom Daniel previously dated. Daniel denied that he knew defendant had also dated Neshelle.

Daniel and defendant walked to the basketball court. The passengers in the Taurus joined them and they played basketball. At some point, Daniel saw a passenger of the Taurus hand

defendant a handgun. Defendant pointed it at Daniel's head and stated, "strip, I want it all." Daniel responded, "are you serious," and defendant cocked the gun. People at the basketball court began to flee. Defendant then turned and fired the gun in the air. Daniel then saw that a passenger of the Taurus also had a gun, which he fired twice in the air. Daniel began to strip and passengers of the Taurus searched his clothes for money. They found approximately $140, and then walked back toward the Taurus. Daniel left in the other direction. Daniel went to a friend's house, called to check on Trevaughn and began walking toward the basketball courts but met police officers responding to two 911 calls in regard to a shooting. One 911 call described the shooter as having a mohawk hairstyle, which defendant had at that time. Daniel provided police a statement and identified defendant in a photographic lineup.

Notably, Trevaughn fled the court toward a friend's house after defendant brandished the gun. There, he provided a description of the offense to his friend's father, Glenn Talpert. Talpert then drove Trevaughn to find Daniel. At one point, Talpert passed by the basketball courts and noticed that no one was there. They drove until they encountered Daniel, who at that time was with police officers.

The prosecution also presented evidence of defendant's other "bad acts." Tony Clark testified that on May 21, 2008, she attended her birthday party at the Mai Tai restaurant on Eight Mile Road and Alcoy. She left with her friend, April Black, and a Ford Thunderbird approached them. Defendant was in the passenger seat. When Clark and Black reached the car, defendant opened Black's car driver-side door, and while laughing and giggling, stated, "give me your purse." He then pointed a long gun, possible an AK-47, inside the car. Clark and Black gave defendant their purses. Defendant then demanded Clark's eyeglasses and she complied. Clark wrote down the license plate of the Ford Thunderbird and provided it to police. After defendant had been arrested, Clark identified defendant in a photographic lineup. Although she testified at a jury trial, defendant was found not guilty. Black also identified defendant as the robber and gave testimony consistent with Clark, except she believed the weapon to be a shotgun.

Ronald Reed testified that he had driven defendant to the Mai Tai restaurant. He testified that defendant had earlier put something in his trunk. Reed testified that defendant told him he wanted to "hit a lick," which means to rob someone. He testified that they arrived at the Mai Tai, noticed two women exiting together. Defendant exited the car and retrieved a long gun from the trunk. Reed testified that he saw defendant point the gun at the two women and take their purses. He testified that defendant returned to the car, put the gun in the trunk, and they drove away. He admitted that he later pled to two counts of unarmed robbery in return for his testimony.

Defendant testified at trial. He admitted that his nickname was Booksee. He testified that he walked, not drove, to the basketball court. He testified that he played basketball. He testified that he left the basketball court on foot and denied any involvement in the robbery. Rather, defense counsel asserted that Daniel and his brother had fabricated the story because of a dispute between Daniel and defendant over Neshelle. The jury convicted defendant. This appeal ensued.

II. BAD ACT EVIDENCE

Defendant first argues that the trial court erred in admitting evidence that he robbed Clark and Black. Defense counsel preserved this alleged error. The admissibility of bad acts evidence is within the trial court's discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). A court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

MRE 404(b) generally governs admission of evidence of bad acts. It provides:

> (1) 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.

To be admissible, evidence of other crimes, wrongs, or acts must satisfy the following three requirements: "(1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice." *People v Magyar*, 250 Mich App 408, 413; 648 NW2d 215 (2002), citing *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982). "A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense." *Id*., citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205; 520 NW2d 338 (1994). "[E]vidence 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." *People v Sabin*, 463 Mich 43, 63; 614 NW2d 888 (2000). However, the trial court must closely scrutinize the logical relationship between the evidence and the fact in issue. *People v Dobek*, 274 Mich App 58, 86; 732 NW2d 546 (2007). A general similarity between the charged and uncharged acts does not alone establish a plan, scheme, or system used to commit the acts. *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004), citing *Sabin*, 463 Mich at 64.

Defendant specifically argues that the instance offense is very different from the May 21, 2008 offense to evidence a plan, scheme, or system. We agree with defendant and find that the two offenses only share vague and general similarities. At most, the evidence only establishes that defendant had a leading role in the commission of two armed robberies. The May 21, 2008 offense occurred at night in a private parking lot while the instant offense occurred in broad daylight in front of thirty or forty people. The weapon used in the May 21, 2008 offense was a long gun that was not fired while the instant offense involved a handgun that was fired. Further, the similarities between the offenses diverge when considering that the element of surprise was employed in the May 21, 2008 offense while defendant played basketball with the victim before

robbing him in the instant offense. In addition, there is simply no parallel with Daniel being forced to strip in the instant case. We conclude that evidence of a partially masked man committing a robbery of two women alone after dark in their car with a longer gun sheds little light on the identity of the person that robbed Daniel in broad daylight in the presence of at least thirty other people with a handgun. Accordingly, we conclude that the trial court abused its discretion in admitting evidence of the May 21, 2008 offense.

However, even if properly preserved, error in the admission of bad acts evidence does not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. The defendant bears the burden of establishing that, more probably than not, a miscarriage of justice occurred. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

We cannot conclude that the evidence admitted in regard to the May 21, 2008 offense was outcome determinative. The prosecution presented the bad act evidence but did not emphasize it during trial. In fact, during closing argument and rebuttal, the prosecutor only mentioned the bad act evidence in the following light:

> Judge the credibility. If you want, you can believe [defendant] . . . . You can believe that Miss Black is wrong. You can believe that Miss Clark is wrong. You can believe that Trey and Daniel are wrong and that Ronald Reed—everyone's wrong and the entire world is against one man."

On the other hand, defense counsel did emphasize the bad act evidence, stating the following during closing argument:

> What has been touched, and I ask you—and I'm old school. There's something inherently unfair about what has occurred from our perspective, and this is our argument. He had the misfortune to be brought into court, tried before a jury of your peers, found not guilty by a jury of your peers. You then have the misfortune to be in court again, and what does the prosecution do? Attempt to damn you by bringing up witnesses who have been found not to be credible by a previous jury. I mean this is not Guantanamo, this is not Afghanistan. This is United States of America. It's something unfair about that. And I don't care what the evidence rule books say, it's permissible according to this judge, that judge, something unfair about that.

Here, the prosecutor relied on the bad act evidence only to maintain defendant's testimony, that he was not the person that committed the crime, should not be believed. Nothing in the argument suggests that defendant should be convicted of the instant offense because he committed a previous offense. Further, the trial court properly instructed the jury to only consider the bad acts evidence in regard to the identity of the perpetrator and expressly forbade the jury from considering the evidence to believe that defendant was a bad man who is likely to commit crimes. Thus, the likelihood that the jury considered the bad act evidence as indicative of defendant's propensity to commit the instant offense is unlikely.

Further, we conclude that the trial court's error was not outcome determinative because the lower court record contains ample evidence of defendant's guilt. In regard to identity, the prosecution presented evidence that Daniel and Devaughn identified defendant as the perpetrator of the instant offenses. In response, defendant argued that they fabricated because Daniel and defendant both had a relationship with the same women. However, the prosecution presented evidence corroborating defendant's identification as the offender. Further, the prosecution presented Talpert's testimony that he had talked to Trevaughn shortly after the incident. Talpert confirmed Trevaughn's description of the offense and confirmed that the playground was deserted shortly the offense. Further, the prosecution presented two 911 calls that reported details of the crime, particularly that the offender had a mohawk hairstyle, which defendant had at that time. We conclude that defendant failed to establish that improper admission of the bad act evidence requires reversal.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that insufficient evidence supports his convictions. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

Defendant claims Daniel's lack of credibility is "evidenced by his failure to acknowledge a prior relationship with the defendant until it was elicited during cross examination." However, the record reflects that defendant expressly denied that he knew defendant dated a woman that he previously had dated. This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

Further, Devaughn also identified defendant as the offender. In addition, the identifications were corroborated in large part by Talpert's testimony confirming Trevaughn's description of the offense and the 911 calls reporting gunfire, one of which noted the offender had a mohawk hairstyle. Here, there is record evidence that defendant drew a handgun, pointed it at Daniel and told him to strip his clothes. There is evidence that defendant or his accomplices then took $140 from Daniel's pants. This is sufficient evidence to sustain a jury conviction for both armed robbery and felony firearm.

IV. SENTENCING

Defendant last argues that his sentence is cruel and unusual under the United States Constitution, US Const, Am VIII, and the Michigan Constitution, Const 1963, art 1, § 16. We agree with the prosecutor, however, that any sentence within the sentencing guidelines is presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

A proportionate sentence cannot constitute cruel or unusual punishment. *Id.*

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly