STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 22, 2015
v	No. 322745 Kalamazoo Circuit Court
HENRY VICTOR SMITH, Defendant-Appellant.	LC No. 2013-001794-FC

Before: TALBOT, C.J., and BECKERING and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of armed robbery, MCL 750.529. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 25 to 50 years' imprisonment. For the reasons below, we affirm.

I. FACTUAL BACKGROUND

On December 6, 2013, defendant and Jerome Crenshaw robbed the Sunny Mart on South Westnedge Avenue in Kalamazoo, Michigan. When defendant and Crenshaw entered the store, defendant pointed a BB gun at the clerk, Surinder Kaur, and ordered her to take money out of the register. According to Crenshaw, once Surinder opened the register, defendant took cash out of the drawer and stuffed it into his pockets. At trial, Deb Kaur, another employee who was behind the counter during the robbery, positively identified defendant as the man who pointed the BB gun at Surinder. Surinder testified that both of the men were wearing masks so she could only see their eyes, and she was frightened because she believed defendant was going to shoot her.

After the robbery, Crenshaw and defendant ran outside and got into a gray minivan with a driver inside waiting for them.[1] A motorist witnessed Crenshaw and defendant run to the van and she informed the police. On a hunch, Kalamazoo Police Officer Peter Hoyt sent officers to the Hilltop apartment complex, where Officer John Resseguie saw two men get out of a van matching the description of the getaway van. The police apprehended defendant and Crenshaw inside one of the buildings. Crenshaw confessed that he and defendant robbed the Sunny Mart,

[1] The identity of the driver was not determined at the time of trial.

and the police arrested both men. At the station, the police found a grocery bag containing $3,513 in cash in the crotch area of defendant's pants. At trial, defendant's ex-wife, Dorothy Smith, testified that defendant was a heroin addict who was homeless as of November 2013. Officer Scott Brooks testified that Crenshaw told him he and defendant robbed the Sunny Mart because they were heroin addicts and they needed money for drugs.

II. OTHER ACTS EVIDENCE

Defendant first argues that the trial court erred by admitting testimony from defendant's ex-wife that defendant was a heroin addict. Although defendant argues that this testimony was admitted in violation of MRE 404(a), the prosecutor offered the evidence, and the trial court allowed it, for the purpose of showing defendant's motive for robbing the Sunny Mart. Accordingly, the admissibility of the evidence is properly considered under MRE 404(b) rather than MRE 404(a).

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

> 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.

Admissible other acts evidence is not limited to the exceptions set forth in MRE 404(b)(1). *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Rather, "other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *Id.*

To determine whether other acts evidence is admissible under MRE 404(b), we apply the following four-pronged standard:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*VanderVliet*, 444 Mich at 55.]

In this case, the prosecutor offered evidence that defendant was a heroin addict to show that his motivation for robbing the Sunny Mart was to obtain money to support his addiction. This is a proper purpose under MRE 404(b)(1). See *People v Hoffman*, 225 Mich App 103, 105; 570 NW2d 146 (1997). The prosecutor also had to show that the evidence was relevant to establish a material fact in the case or was "otherwise probative of a fact other than the defendant's character or criminal propensity." *People v Mardlin*, 487 Mich 609, 615; 790 NW2d

607 (2010). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. To prove armed robbery, a prosecutor must show that a defendant intended to permanently deprive the victim of property. *People v Parker*, 230 Mich App 337, 344; 584 NW2d 336 (1998). Because evidence of defendant's drug use was relevant to show his intent to permanently deprive the Sunny Mart owners of property, the prosecutor satisfied the second admissibility prong of MRE 404(b). *VanderVliet*, 444 Mich at 55.

Even if evidence is relevant to demonstrate a proper purpose under MRE 404(b), it is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice under MRE 403. *VanderVliet*, 444 Mich at 55. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398. Defendant's drug addiction was highly probative of his motive for robbing the Sunny Mart. See *People v Rice (On Remand)*, 235 Mich App 429, 441; 597 NW2d 843 (1999) (holding that evidence of a defendant's drug use and need for money to purchase drugs was highly relevant to show his motive for committing a crime). Further, evidence of defendant's drug addiction did not create a danger that the jury would conclude that defendant had a propensity to commit armed robbery because using drugs and committing a robbery are completely different acts. There is also no indication that evidence of defendant's drug use injected extraneous considerations such as jury bias, shock, anger, or sympathy. *People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011). Finally, the trial court provided the jury with a limiting instruction, which cushioned the prejudicial effect of the evidence. *Crawford*, 458 Mich at 385. In sum, the drug addiction testimony was admissible under MRE 404(b), and the trial court did not abuse its discretion in admitting the evidence.

III. PROSECUTORIAL ERROR

Defendant also seems to argue that the prosecutor committed error by eliciting the testimony regarding his drug addiction and commenting on this addiction during closing argument. Because defendant did not raise a claim of prosecutorial error below, we review the issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In assessing whether a prosecutor's conduct amounted to error, we examine the entire record and any of the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007).

To the extent that defendant argues the prosecutor committed error by eliciting the testimony regarding his drug addiction, his argument fails because a "prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant." *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). As discussed above, the challenged testimony was admissible under MRE 404(b), so the prosecutor did not commit error.

Defendant also implies that the prosecutor committed error by arguing during closing argument that defendant's motive for robbing the Sunny Mart was to get money to support his heroin addiction. However, the prosecutor's remarks were appropriate because they constituted reasonable inferences arising from the evidence, and responded to defendant's closing argument

attacking Crenshaw's credibility. See *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001); see also *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Defendant has not established plain error warranting reversal. Also, insofar as defendant argues that the admission of evidence of his drug addiction and the prosecutor's alleged errors violated his due process rights, defendant failed to support this claim with relevant law and has therefore abandoned it on appeal. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that his trial counsel was ineffective for failing to timely file notice of an alibi witness and failing to call his alibi witness at trial. Whether a defendant was denied the effective assistance of counsel presents a mixed question of constitutional law and fact. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). We review questions of constitutional law de novo and a trial court's factual findings for clear error. *Id.* at 484-485.

To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness, and that absent counsel's errors, there is a reasonable probability that the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302; 521 NW2d 797 (1994). In doing so, a defendant must overcome a strong presumption that his counsel's performance constituted sound trial strategy. *People v Carrick*, 220 Mich App 17, 22; 558 NW2d 242 (1996).

Alibi testimony is "testimony offered for the sole purpose of placing the defendant elsewhere than at the scene of the crime." *People v McGinnis*, 402 Mich 343, 345; 262 NW2d 669 (1978) (citation and quotation marks omitted). To present alibi testimony, a defendant must serve notice on the prosecution under MCL 768.20(1). If notice under MCL 768.20(1) is not provided, the trial court may, in its discretion, preclude alibi testimony. *People v Travis*, 443 Mich 668, 679-680; 505 NW2d 563 (1993). When an ineffective assistance of counsel claim is premised on counsel's failure to file notice under MCL 768.20(1) and consequent failure to present an alibi witness, the defendant must demonstrate that the witness would have given favorable alibi testimony. *Pickens*, 446 Mich at 327.

In this case, after the reading of the jury verdict, defense counsel stated on the record that defendant told her in December 2013 that Benny Alexander was with him on the day of the robbery and could offer alibi testimony. Defense counsel attempted to contact Alexander and serve him with a subpoena, but her efforts were unsuccessful. Although Alexander called defense counsel's office on the penultimate day of trial, she did not notice his message until the next day. After speaking with Alexander that morning, her subsequent attempts to contact him were unsuccessful. Counsel further stated that she did not file notice under MCL 768.20(1) because she was unsure what information Alexander had or whether she would be able to produce the alibi testimony at trial.

Under these circumstances, defendant has not shown that his counsel's conduct fell below an objective standard of reasonableness. Defense counsel was unable to subpoena Alexander through no lack of effort on her own part, and her reluctance to file notice before she was able to confirm the alibi testimony was a matter of trial strategy that this Court will not second guess. *People v Henry*, 239 Mich App 140, 149; 607 NW2d 767 (1999). Further,

defendant has failed to establish that Alexander would have offered favorable alibi testimony. Alexander's testimony is not on the record. Although defense counsel stated that Alexander would testify that on December 6, 2013, he gave defendant a ride to the Hilltop apartment complex at some time between 12:00 p.m. and 2:00 p.m., there is no indication that Alexander actually knew where defendant was at the time of the robbery. See *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995). Thus, even if counsel's failure to provide notice under MCL 768.20(1) fell below an objective standard of reasonableness, defendant has not shown that there was a reasonable probability that the outcome of the proceedings would have been different absent counsel's alleged errors.

V. TRANSPORT BY DEPUTIES

Defendant contends that he was deprived of a fair trial when prospective jurors saw him outside the courtroom in handcuffs and in the custody of deputies. Defendant did not raise this issue before the trial court, so we review his claim for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. Except in extraordinary circumstances, a defendant has the right to be free from shackles during trial. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). "However, this rule does not extend to circumstances in which a defendant may be shackled outside a courtroom to prevent escape." *People v Moore*, 164 Mich App 378, 384-385; 417 NW2d 508 (1987), mod on other grounds 433 Mich 851 (1989).

Before the end of voir dire and outside the presence of potential jurors, the trial court stated that deputies were escorting defendant through the hallway of the courthouse while some of the potential jurors were walking in the same hallway. Although defendant was in handcuffs, his hands were behind his back and out of the jurors' sight. The deputies escorting defendant said that when they saw the jurors, they backed defendant away so the jurors could not see his handcuffs. After conceding that he was backed away so his handcuffs were not visible, defendant argued that he was prejudiced by the fact that the jurors saw him in the presence of deputies. The trial court rejected defendant's argument, noting that two deputies stood in court throughout the trial anyway.

Defendant's argument entirely concerns events that occurred outside of the courtroom. Again, the right to be free from shackles during trial generally does not extend to circumstances outside of the courtroom where shackles may be used to prevent escape. *Moore*, 164 Mich App at 384-385. Further, defendant conceded at trial that the jurors did not see his handcuffs, thus waiving the argument on appeal. *People v McGraw*, 484 Mich 120, 138; 771 NW2d 655 (2009). Therefore, defendant has not established that he was prejudiced by this incident such that reversal is warranted.

VI. JUDICIAL IMPARTIALITY

Finally, defendant argues that the trial court pierced the veil of judicial impartiality or, in the alternative, abused its discretion when it prevented defense counsel from asking Officer John Stolsonburg, the police officer who transported defendant to the police station after his arrest, about defendant's hands as they appeared at the time of arrest compared to how they appeared at trial. Defendant did not raise a claim of judicial impartiality below, so we review the issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. We review preserved

evidentiary claims for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). However, even if a trial court improperly precluded evidence, reversal is not required unless the defendant establishes that "it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

A trial judge has broad discretion to control the conduct of witnesses and attorneys in the courtroom and to participate properly in the questioning of witnesses. *People v Cole*, 349 Mich 175, 199; 84 NW2d 711 (1957). However, " 'great care should be exercised that the court does not indicate its own opinion and does not lay undue stress upon particular features of a witness' testimony that might, in the eyes of the jury, tend to impeach [the witness].' " *People v Stevens*, 498 Mich 162, 168; ___ NW2d ___ (2015), quoting *Simpson v Burton*, 328 Mich 557, 564; 44 NW2d 178 (1950) (alteration in original).

> A trial judge's conduct deprives a party of a fair trial if the conduct pierces the veil of judicial impartiality. A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party. [*Stevens*, 498 Mich at 164.]

During defendant's direct examination of Stolsonburg, Stolsonburg testified that he put defendant in his police car on the day of the robbery and that defendant had handcuffs on before Stolsonburg met him. Defense counsel wanted to ask Stolsonburg to testify as to whether the appearance of defendant's hands at arrest differed from their appearance at trial, but the trial court prevented the question because Stolsonburg said he could not recall what defendant's hands looked like at the time of arrest. The trial court's intervention in this matter was wholly proper because it was in accord with the Michigan Rules of Evidence. Specifically, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." MRE 602. Because Stolsonburg stated that he had no personal knowledge of the appearance of defendant's hands at the time of arrest, the trial court did not err in preventing him from offering additional testimony on the matter.

The trial court's tone and demeanor before the jury was also entirely appropriate. Immediately after the trial court prevented Stolsonburg from looking at defendant's hands, the trial court called defense counsel to the bench. When defense counsel told the trial court that she intended to ask Stolsonburg to testify regarding the appearance of defendant's hands at arrest as compared to at trial, the trial court instructed the jury to leave the courtroom before it determined whether to allow the testimony. Thus, the trial court took affirmative measures to prevent the jury from being influenced by the discussions regarding admission of Stolsonburg's testimony.

Moreover, the trial court's conduct in light of the surrounding circumstances does not suggest impartiality. Although the trial court prevented defense counsel from questioning Stolsonburg about the appearance of defendant's hands, a photograph of the robber's left hand taken from the Sunny Mart surveillance camera was admitted into evidence along with a photograph of defendant's hands at the time of trial. Defendant's ex-wife was permitted to testify that defendant had a tattoo and scar on his left hand before the date of the robbery, and that the appearance of his hands at trial was as she remembered. Thus, the trial court did not

prevent defendant from arguing that his hands differed from the robber's hands in the surveillance video, or from allowing the jury to consider evidence to that effect. Finally, the trial court instructed the jury that its comments, rulings, questions, and instructions were not evidence, which we presume the jurors followed. *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). There is no indication that the trial judge's conduct improperly influenced the jury by creating an appearance of partiality for or against defendant. Therefore, defendant has not shown that the trial court's conduct amounted to plain error.

Defendant's alternative argument—that the trial court abused its discretion by preventing the questioning of Stolsonburg—is abandoned for lack of analysis or supporting law. *Kevorkian*, 248 Mich App at 389. In any event, we note that the trial court properly precluded the testimony under MRE 602 and thus did not abuse its discretion. *Layher*, 464 Mich at 761. Accordingly, defendant is not entitled to reversal or a new trial.

Affirmed.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael F. Gadola