

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 13, 2011

v

MIKE TORRES ZUNIGA,
Defendant-Appellant.

No. 301473
Kent Circuit Court
LC No. 10-002810-FC

Before: MARKEY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316(1), and the trial court sentenced defendant to life in prison without the possibility of parole. Defendant appeals as of right. We affirm.

Defendant first argues that insufficient evidence of his identity as a perpetrator exists to sustain his conviction. In reviewing sufficiency of the evidence claims, we examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). “The prosecutor is not required to present direct evidence linking the defendant to the crime,” *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991), and “[i]dentity may be shown by either direct testimony or circumstantial evidence.” *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

The evidence established that, shortly before the murder, defendant obtained a gun from his friend and that a call was placed from defendant’s cellular telephone to the victim’s cellular telephone. Cellular telephone records also revealed that defendant’s cellular telephone was in the area of the neighborhood where the murder occurred at the time the call was made. Defendant’s DNA matched DNA found on a lighter near the victim’s body. An eyewitness testified that the shooter was a young, Hispanic male who wore a dark colored hooded sweatshirt, and other witnesses testified that defendant was wearing a black hooded sweatshirt the following morning. During the altercation, there was arguing in Spanish, and defendant and the victim both spoke Spanish. Shortly after the murder, defendant and codefendant told defendant’s sister they had killed someone. Later, defendant and codefendant picked up a friend and discussed how they had robbed someone. Defendant was holding some money; the victim

had recently been given \$300 but only had 11 cents in his pocket when the police processed the crime scene. Defendant and codefendant also had what appeared to be a hat that had been crushed down, and the victim usually wore a cowboy hat. After visiting his cousin the morning after the murder, defendant told his cousin to be careful when hugging him goodbye because he had a gun. Defendant later returned the gun to his friend and thereafter conveyed a message to his friend to dispose of it. Defendant also stated that he shot the victim while codefendant was in the car, and he later joined in a toast to the murder. Viewing the evidence in a light most favorable to the prosecution, the evidence showed that defendant was in the vicinity of the crime during the relevant timeframe, had access to a gun and took measures to have it disposed of later, admitted that he shot the victim, and had money after the crime while the victim, who previously had money, was left with 11 cents. Substantial circumstantial evidence linked defendant to the crime, and a rational trier of fact could have found beyond a reasonable doubt that defendant was the individual who robbed and murdered the victim.

Defendant next argues that the trial court abused its discretion in admitting other-acts evidence that he fired a gunshot at a vehicle shortly before the murder. “The admissibility of other acts evidence is within the trial court’s discretion and will be reversed on appeal only when there has been a clear abuse of discretion.” *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009). “A court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes.” *Id.* at 670.

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. MRE 404(b); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). It may, however, be admissible for other purposes, such a proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, 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. MRE 404(b)(1). For other-acts evidence to be admissible, (1) the prosecutor must offer the other-acts evidence under something other than a character or propensity theory; (2) the evidence must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *Id.* at 74-75; MRE 401; MRE 403. Here, the prosecutor offered the other-acts evidence for the proper purpose of proving defendant’s identity as the shooter. The evidence was relevant because it tended to make defendant’s identity as the shooter more probable than it would be without the evidence. That is, the fact that a Hispanic male passenger in the suspect vehicle with an identified codefendant gestured gang signs at a vehicle shortly before the murder in the neighborhood where the murder occurred and then fired a gunshot at the vehicle from the same type of gun given to defendant by a friend shortly before the murder, tended to make defendant’s identity as the shooter more probable than it would be without the evidence. Finally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The evidence was especially probative of defendant’s identity as the shooter because no bullets, projectiles, or shell casings were found in or near the victim’s body, and the danger of unfair prejudice was minimized by the trial court’s limiting instruction. Accordingly, the trial court’s decision to admit the other-acts evidence did not fall outside of the range of reasonable and principled outcomes and thus constituted a proper exercise of discretion. *Waclawski*, 286 Mich App at 669-670.

Defendant also argues that the trial court abused its discretion in admitting other evidence that was irrelevant and unfairly prejudicial. However, defendant fails to explain or rationalize the basis for his position with respect to any of them; therefore, he has abandoned these claims of error. *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009); *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Defendant next argues that the prosecutor engaged in misconduct when she referred to the only individual who came from the location where the shooting occurred as the “shooter[.]” We review preserved issues of prosecutorial misconduct de novo to determine if the defendant was denied a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Issues of prosecutorial misconduct are reviewed on a case-by-case basis by examining the record and evaluating the remarks in context. *Id.* Considered in context, it is evident that the prosecutor’s reference to the only individual who came from the location where the shooting occurred as the “shooter” did not constitute misconduct that denied defendant a fair and impartial trial. *Id.*

Defendant next argues that he was denied his right to a speedy trial. We review unpreserved claims of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). “[T]he federal and state constitutions and Michigan statutory law guarantee criminal defendants a speedy trial without reference to a fixed number of days.” *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003); US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1. “When a defendant claims a violation of this right, the [] court must consider four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant’s assertion of the right; and (4) any prejudice to the defendant.” *Id.* “When the delay is less than eighteen months, the defendant must prove prejudice.” *Id.*

With regard to the first factor, the length of the delay was seven months. With regard to the second factor, reasons for the delay included defendant’s motion to adjourn the preliminary examination, which is attributable to defendant, *Waclawski*, 286 Mich App at 666, and adjournment of trial to allow for further discovery and so that codefendant could be tried first. With regard to the third factor, defendant did not assert the right to a speedy trial. With regard to the fourth factor, the unspecified loss of evidence or memory, and anxiety, alone, are insufficient to establish that he was denied the right to a speedy trial. *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). Taking the four factors into consideration, defendant was not denied his right to a speedy trial. *McLaughlin*, 258 Mich App at 644. Because there is no plain error affecting defendant’s substantial rights, he is not entitled to relief on this unpreserved issue. *Carines*, 460 Mich at 763-764.

Lastly, defendant argues that the cumulative effect of all errors deprived him of a fair trial. “The cumulative effect of several minor errors may warrant reversal where the individual errors would not.” *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). In this case, however, there were no errors that could aggregate to deny defendant a fair trial. *Id.*

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello