

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 15, 2012

v

TYRONE ANTHONY SMITH,

Defendant-Appellant.

No. 302093
Genesee Circuit Court
LC No. 10-027247-FC

Before: MURPHY, C.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of armed robbery, MCL 750.529; first-degree home invasion, MCL 750.110a(2); assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); possession of a short-barreled shotgun or rifle, MCL 750.224b; felon in possession of a firearm, MCL 750.224f; possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced, as an habitual offender, fourth offense, MCL 769.12, to 37 1/2 to 70 years' imprisonment for each of the armed robbery convictions; 290 months to 50 years' imprisonment for the first-degree home invasion conviction; 290 months to 50 years' imprisonment for the assault with intent to commit criminal sexual conduct involving sexual penetration conviction; 290 months to 50 years' imprisonment for the possession of a short-barreled shotgun or rifle conviction; 290 months to 50 years' imprisonment for the felon in possession of a firearm conviction; two years' imprisonment for the felony-firearm conviction; and 37 1/2 to 70 years' imprisonment for the assault with intent to do great bodily harm less than murder conviction. For the reasons stated in this opinion, we affirm.

I. UNDERLYING FACTS

Defendant's convictions arise from the assault and robbery of the 63-year-old victim, Carrie Mance. Mance lived with Alfred Jackson, whom she had a relationship with for 41 years. Mance went to sleep at approximately 5:00 a.m. on June 3, 2010, and left the patio door cracked open. She testified that she woke to find defendant in her bedroom, sitting on the floor, going through her purse. It was later discovered that Mance was missing money and a cellular telephone. Mance testified that defendant told her to lie down when he noticed that she was awake. Mance observed a shotgun on top of the television in her bedroom. Defendant covered

Mance's head with the comforter and started beating her head with his fists. Mance testified that defendant continued to beat her, rubbed her buttocks, and penetrated her rectum with his finger. Mance testified that she had never met or seen defendant before the assault and robbery occurred.

Eventually, Mance was able to escape and run to the front of the apartment where Jackson was sleeping on the couch. Defendant followed Mance and ordered Jackson to give him money. When Jackson did not immediately comply, defendant went through Jackson's pockets and took his money. Defendant pulled Mance back into the bedroom, told her to get on the bed, and started to beat her again. Mance testified that defendant suddenly stopped beating her and stated that he was shot. Defendant ran from the bedroom. Mance followed defendant and observed Jackson and defendant struggling over the shotgun. Mance saw defendant kick Jackson in the ribs. Defendant fled the apartment with the shotgun, and Mance called 911.

Police responded to the apartment complex. Defendant was discovered lying face down in the threshold of the door to an apartment unit in another building that was in the same apartment complex as Mance's apartment. Defendant was with Larry Montgomery, who called defendant his cousin. Mance's cellular telephone was recovered from inside the apartment where defendant was discovered. Montgomery directed the police to a shotgun that was in a bush outside of the apartment building. Montgomery was endorsed as a witness by the prosecution, but did not appear at trial. The prosecution informed the trial court that it could not locate Montgomery and defense counsel requested a missing witness jury instruction. A due diligence hearing was held, and the trial court concluded that the prosecution exercised due diligence and denied defense counsel's request for the instruction.

Defendant was transported to a hospital, and arrested later that day. Defendant was interviewed by police twice, once at the hospital and once while he was in the county jail. Defendant initially denied touching Mance, but later admitted to touching her buttocks. Defendant claimed that Mance initiated the contact, and he denied penetrating her rectum. Defendant admitted to stealing Mance's money, but claimed he did so when she was in a different room. Defendant also admitted stealing a cellular telephone, but denied robbing Mance and Jackson. Defendant denied bringing the shotgun into the house, but admitted carrying it out of the house.

Defendant was charged with nine counts, and convicted by a jury of eight counts. The jury was unable to reach a verdict on count four, first-degree criminal sexual conduct, MCL 750.520b(1)(e), and the trial court entered an order of nolle prosequi dismissing that count without prejudice.

Defendant filed a motion for a new trial and an evidentiary hearing. Relevant to the issues on appeal, defendant argued that he was entitled to a new trial because the trial court failed to substantially comply with the waiver of counsel procedures. Defendant further argued that he was entitled to a new trial because of the trial court's erroneous reasonable doubt instruction that shifted the burden of proof to defendant. Finally, defendant argued that the trial court erred in admitting other acts evidence pursuant to MRE 404(b) because the other acts were insufficiently similar to the charged crimes.

A hearing was held on defendant's motion for a new trial, and after hearing arguments the trial court denied defendant's motion. The trial court found that defendant unequivocally requested to represent himself, that it informed defendant of the dangers and disadvantages of self-representation, that it informed defendant that he would be required to follow the rules of procedure and evidence, and that the trial court was not burdened by defendant's self-representation, and that it substantially complied with MCR 6.005. The trial court also found that its comments regarding reasonable doubt during voir dire did not shift the burden of proof to defendant. Finally, the trial court found that the other acts evidence was properly admitted and, even if not properly admitted, any error was not error requiring reversal.

II. SELF-REPRESENTATION

On appeal, defendant first argues that the trial court failed to comply with the waiver of counsel procedures, and that the trial court's failure to comply with the proper procedures constituted a structural error requiring reversal. Defendant's Standard 4 Brief raises the same issue. The prosecution maintains that the trial court substantially complied with the waiver of counsel procedures.

We review the record de novo to determine whether the trial court's factual findings regarding a defendant's waiver of the right to counsel were clearly erroneous. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). We review the application of constitutional standards to uncontested facts and any interpretation of the law de novo. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004).

Michigan law guarantees the right of self-representation. *Williams*, 470 Mich at 642; Const 1963, art 1, § 13; MCL 763.1. A trial court is required to make three findings before granting a defendant's waiver of counsel request:

First, the waiver request must be unequivocal. Second, the trial court must be satisfied that the waiver is knowingly, intelligently, and voluntarily made. To this end, the trial court should inform the defendant of potential risks. Third, the trial court must be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of court business. [*Williams*, 470 Mich at 642, citing *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976).]

Additionally, substantial compliance with MCR 6.005(D), which governs procedures concerning a defendant's waiver of the right to an attorney, is required to secure a valid waiver. *Russell*, 471 Mich at 191. MCR 6.005(D) provides in pertinent part:

The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

“Substantial compliance requires that the [trial] court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures.” *Russell*, 471 Mich at 191. “[C]ourts *must* indulge every reasonable presumption against the waiver of the right to counsel. *Id.* at 193 (emphasis in original).

At the beginning of trial before the jury was selected, defendant asked the trial court if he could cross-examine the witnesses himself. The trial court stated that the decision should be discussed between defendant and defense counsel. The trial court cautioned defendant regarding self-representation by telling defendant “just be careful, because [defense counsel] is a professional at this; and it’s like anything else, you know, if you’ve never changed a tire, don’t start trying to change one now, you know what I’m saying?” The trial court also informed defendant that ultimately “the answer would have to be yes” if defendant was sure that he wanted to cross-examine witnesses himself.

Defense counsel gave an opening statement, and then informed the trial court that defendant had indicated he wanted to cross-examine the first witness, Mance, himself. Defense counsel stated that he thought it was a bad idea. The trial court asked defendant whether he wanted to cross-examine Mance and defendant answered in the affirmative. The trial court asked defendant if he discussed the decision with his attorney, and informed defendant that he would be held to the same standard as a lawyer with regard to cross-examination. After defendant affirmed that he was sure he wanted to cross-examine Mance, the trial court stated that it would allow it. Defendant proceeded to conduct cross-examination of Mance, and managed to impeach her with inconsistent testimony from the preliminary examination and the police report.

Defense counsel continued representing defendant when the prosecution called its next witness; however, defendant conducted the cross-examination of a police officer witness on the third day of the trial. After the prosecution finished its direct examination of the officer, the trial court addressed defendant and asked if he was going to be conducting the cross-examination, and defendant answered “yes.” The trial court then stated: “We’ve done it once before, but, sir, you understand you have the right to an attorney. You have the right to court appointed counsel if you cannot afford an attorney; do you understand that?” Defendant responded he did understand and that he had elected to conduct the cross-examination. The trial court asked defendant if he had discussed his decision with defense counsel and defendant indicated that he had. The trial court again asked defendant if he understood what his rights were, and defendant answered affirmatively. The trial court reminded defendant that he could consult with defense counsel, and asked defendant if he had any questions for defense counsel. Defendant indicated that he did not have any questions. The trial court asked defense counsel if he felt he had enough time to talk to defendant about his right to counsel, and defense counsel replied that he “thinks” defendant understands. Defendant was then permitted to cross-examine the officer. Defense counsel did not say anything on the record during the time that defendant cross-examined either the officer or Mance.

Defendant also gave his own closing argument. Before the trial court allowed him to proceed with closing, the trial court reminded defendant that he had a right to counsel, and asked defendant if he understood his right to counsel. Defendant answered affirmatively. The trial court reminded defendant that defense counsel was available for guidance, and asked defendant if he had enough time to talk to defense counsel. Defendant answered affirmatively and again indicated he intended to conduct the closing argument. Defendant was then permitted to make his own closing argument.

Based on the record before us, we conclude that the trial court did not substantially comply with the waiver of counsel requirements. While the trial court did elicit an unequivocal waiver from defendant, it failed to inform defendant about the risks of self-representation and did not pursue a dialogue with defendant to test the knowing and understanding nature of his self-representation request. Further, the trial court did not advise defendant about the charges he faced, the maximum possible prison sentences, any mandatory minimum sentences required by law, or the risks involved in self-representation as required by MCR 6.005(D)(1). There is no indication that the trial court consulted the court rules before permitting defendant to represent himself. Accordingly, defendant's attempted waiver of his right to counsel was ineffective.

Because the trial court's error implicates defendant's constitutional right to counsel, our next inquiry is whether the error was structural or nonstructural. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). A structural error requires automatic reversal; however, a nonstructural error does not require reversal if proved harmless beyond a reasonable doubt. *Id.* This Court explained in *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005), that "the harmless error doctrine is not entirely inapplicable to ineffective waivers of the right to counsel." Accordingly, we must determine whether the ineffective waiver "resulted in a total or complete deprivation of [defendant's] right to counsel, whether this total deprivation occurred during a critical stage of the proceeding, and whether the effect of the deprivation pervaded the entire proceeding." *Id.*

First we consider whether defendant experienced a total or complete deprivation of counsel. This Court has held that the assistance of standby counsel constitutes a complete deprivation of counsel because standby counsel is not responsible for directing the defendant's defense and is not "counsel" within the meaning of the Sixth Amendment. *Id.* at 227-228. In this case defense counsel acted as standby counsel during the cross-examination of two witnesses, one of which was the victim, and during closing argument. Accordingly, defendant was completely deprived of counsel during those stages of the trial. Further we note that it cannot be contested that defendant's deprivation of counsel occurred during a critical stage of the proceedings. A critical stage of the proceedings refers to "a step of a criminal proceeding . . . that holds significant consequences for the accused." *Id.* (quotation and citation omitted). In this case defendant represented himself during the trial by cross-examining two witnesses and giving the closing argument. Accordingly, defendant was completely deprived of counsel during a critical stage of the proceedings.

We now consider whether the effect of defendant's deprivation of counsel during a critical stage of the proceedings pervaded the entire trial. Defendant has not argued that the error contaminated the entire proceedings and has not identified any effects of the error on his trial. Defendant successfully impeached the victim during his cross-examination by highlighting

inconsistencies between her testimony at trial and at the preliminary examination. Defendant also successfully brought out inconsistencies between the police report and the victim's trial testimony. Defendant's cross-examination of the police officer similarly highlighted the victim's inconsistent statements regarding the events on the night of the assault. Significantly, defendant brought out the fact that the victim failed to immediately tell police that she was sexually assaulted. Defendant highlighted the victim's inconsistent statements in his closing argument. The effectiveness of defendant's cross-examination and closing argument is demonstrated by the fact that the jury was unable to reach a verdict on the charge of first-degree criminal sexual conduct, MCL 750.520b(1)(e). Further, we note that defendant has not identified any defenses that he lost, or testimony that should have been developed in support of such defenses, as a result of his deprivation of counsel. Under these circumstances, we conclude that defendant's deprivation of counsel did not pervade the entire trial.

Because we conclude that defendant's deprivation of counsel did not pervade the entire proceeding, the constitutional error was nonstructural and we must consider whether the error was harmless beyond a reasonable doubt. We quantitatively assess the error in the context of the other evidence presented in order to determine whether the error was harmless beyond a reasonable doubt. *People v Clark*, 453 Mich 572, 600-601; 556 NW2d 820 (1996). An error is harmless beyond a reasonable doubt if there is "no reasonable possibility that the [error] complained of might have contributed to the conviction." *Id.* at 601 (citation and quotation omitted).

In this case, we conclude that the error was harmless beyond a reasonable doubt. Defendant's representation of himself was apparently beneficial to his defense considering the fact that the jury was unable to reach a verdict on the criminal sexual conduct charge and the charge was accordingly dismissed after the trial. Further, the evidence supporting defendant's convictions was overwhelming. The victim specifically identified defendant as the perpetrator and testified to his criminal conduct, defendant was located in the apartment complex where the victim lived, and defendant admitted to being in the victim's apartment that night. Accordingly, in light of the fact that defendant's self-representation resulted in the dismissal of one of the most serious charges against him and the overwhelming evidence of his guilt, we conclude that the error was harmless beyond a reasonable doubt. Accordingly, reversal is not warranted.

III. DEFENDANT'S REQUEST FOR THE MISSING WITNESS INSTRUCTION

Defendant next argues that the trial court erred when it denied defense counsel's request for a missing witness instruction based on its conclusion that the prosecution demonstrated due diligence. Specifically, defendant argues that the efforts to locate the witness were untimely and inadequate.

We review for an abuse of discretion "a trial court's determination of due diligence and the appropriateness of a 'missing witness' instruction." *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

“A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial.” *Eccles*, 260 Mich App at 388. “A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence.” *Id.* If the trial court finds that the prosecutor failed to exercise due diligence, then “the jury should be instructed that it may infer that the missing witness’s testimony would have been unfavorable to the prosecution’s case.” *Id.* “[D]ue diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness.” *Id.* at 391, citing *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988).

On the fourth day of trial the prosecution informed the trial court that it was unable to locate Montgomery, who was an endorsed witness. Defense counsel requested a missing witness jury instruction. The prosecution requested that the trial court conduct a due diligence hearing. The trial court agreed, and the prosecution presented the testimony of Detective Randy Kimes. Kimes testified that before trial, Montgomery was subpoenaed, but failed to appear.¹ After trial had commenced, he was assigned to locate Montgomery and personally serve him. He began by locating through a website previous addresses for Montgomery. Kimes then went to the most recent addresses, but Montgomery was not present at any of them. Kimes did speak with neighbors and showed a picture of Montgomery to them. None of the persons Kimes questioned knew Montgomery or recognized Montgomery from the photograph. Kimes also attempted to locate Montgomery through a driver’s license, but he did not have a valid driver’s license. In addition, Kimes called a cellular telephone number that he believed was Montgomery’s. He testified that the person that answered identified himself as someone else. Next, Kimes reported that he searched the building at the apartment complex where defendant was found with Montgomery shortly after the incident, but again Montgomery was not to be found there. The prosecutor also informed the trial court that checks of local jails, the Department of Corrections, the district court records and a search for Montgomery using the Law Enforcement Information Network all failed to provide any leads regarding his whereabouts.

After hearing these proofs, the trial court concluded that the prosecution exercised due diligence because the detective obtained Montgomery’s mug shot and went to previous locations where he lived in an effort to locate him. Further, the trial court noted that defendant would probably have more information regarding Montgomery’s location than law enforcement. Accordingly, the trial court denied defendant’s request for the missing witness instruction.

Having reviewed the evidence of due diligence presented below, we conclude that the trial court did not abuse its discretion in finding that the prosecution exercised due diligence. While we are troubled by the fact that no meaningful attempts to personally serve Montgomery were commenced until after trial had begun, we believe the record establishes that once efforts to locate Montgomery began, the attempts to find him were comprehensive. Consequently, the trial

¹ The prosecutor indicated the subpoena was mailed to Montgomery along with a card to be mailed back presumably indicating that the person had received the subpoena. Obviously this does not constitute personal service.

court's determination that the prosecution exercised due diligence was not outside the principled range of outcomes.

Further, we note that even assuming the failure to give the missing witness jury instruction was an abuse of discretion, defendant has failed to explain how the trial court's refusal to give the missing witness instruction affected the outcome of the trial. "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26. Montgomery's testimony may have been harmful to defendant in light of the fact that he led police to the shotgun. Moreover, even if the jury were to have presumed that Montgomery's testimony would have been adverse to the prosecution, it is not more probable than not that it would have affected the outcome of the trial given the significant evidence establishing defendant's guilt.

IV. REASONABLE DOUBT INSTRUCTION

Defendant argues that he is entitled to a new trial because the trial court gave the jury a constitutionally defective instruction regarding the definition of reasonable doubt.

Because defendant did not object to the trial court's explanation of reasonable doubt at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763.

On appeal, defendant objects to the trial court's explanation of what constitutes reasonable doubt given during voir dire of the jury after one of the potential jurors expressed confusion. The trial court stated, in part:

So a reasonable doubt is just that, a doubt based on reason and common sense, okay. And where people get into trouble I think with the reasonable doubt is that they're not using their common sense; and, if you say you have a doubt, then you should be able to articulate from the evidence the basis for that doubt [F]irst of all, you have a doubt of his guilt; and then, if you have that doubt, is that doubt reasonable, is it based on reason and common sense. And, if it is, then you articulate it. And that's what I consider a reasonable doubt.

After a jury panel was sworn the trial court formally instructed the jury on the meaning of reasonable doubt. The trial court stated:

A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considered evaluation of all the evidence and circumstances in the case.

The trial court gave an identical instruction when it again instructed the jury on the meaning of reasonable doubt before sending the jury to deliberate.

“To pass scrutiny, a reasonable doubt instruction, when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt.” *People v Hubbard*, 217 Mich App 459, 487; 552 NW2d 493 (1996), citing *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988).

Even assuming the trial court’s discussion of reasonable doubt during voir dire constituted plain error, defendant cannot demonstrate that the error affected his substantial rights. While it is an improper shift of the burden of proof to instruct the jury that it must have a reason to doubt the defendant’s guilt, *Jackson*, 167 Mich App at 391, the trial court’s discussion of reasonable doubt in this case did not constitute an improper shift of the burden of proof. The trial court instructed the jury twice during trial regarding the meaning of reasonable doubt, and both times the trial court adhered to the language of the standard jury instruction. The discussion of reasonable doubt defendant cites to on appeal occurred before the jury was impaneled, and before the trial court twice provided a proper instruction on reasonable doubt. Jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 227; 749 NW2d 272 (2008). The trial court properly defined reasonable doubt both times the jury was formally instructed on its meaning. In light of the proper instructions, we conclude that any error during voir dire did not constitute an error that affected the outcome of the trial. Accordingly, defendant is not entitled to reversal of his convictions.

V. OTHER ACTS EVIDENCE

Lastly, defendant argues that the trial court abused its discretion when it permitted admission of other acts evidence. Specifically, defendant argues that the other acts evidence was inadmissible to demonstrate absence of mistake or accident because there was no claim that the offenses were committed due to mistake or accident. Defendant also argues that the other acts evidence was not admissible to show scheme, plan, or system because the two incidents were not sufficiently similar and occurred 18 years apart. Finally, defendant argues that even if the other acts evidence was admissible pursuant to MRE 404(b), it should have been excluded pursuant to MRE 403.

We review the admission of other-acts evidence for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). “A trial court abuses its discretion when it admits evidence that is inadmissible as a matter of law.” *Id.*

MRE 404(b)(1) permits evidence of other crimes, wrongs, or acts for specified purposes. MRE 404(b)(1) provides that:

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.

This Court has held that MRE 404(b)(1) is a rule of inclusion, and that as a result, other acts evidence should be admitted as long as the admission is not being offered solely to demonstrate criminal propensity. *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002). In *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), the Court explained the approach to the admissibility of other acts evidence:

First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact or consequence at trial. Third, under MRE 403, a determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105.²

The evidence in this case was offered to show absence of mistake or accident, scheme, plan, or system in doing an act, and to negate the defenses that the victims in this case voluntarily let defendant in, that there was no assault, and that their property was not stolen; it was not admitted to show character and propensity. Therefore, the evidence was offered for proper purposes. While we agree with defendant that mistake or accident was never alleged, the trial court's admission of the evidence was not an abuse of discretion where the evidence was relevant to other permissible purposes under MRE 404(b).

In this case, the evidence was relevant for the purpose of showing scheme, plan, or system. “[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.” *Id.* at 63. In this case, the charged offense and the other act were sufficiently similar to support an inference that they were part of a common plan, scheme, or system of doing an act. In both cases the victims were an elderly couple, defendant entered their home by force or without permission, defendant used violence against one or more of the victims, and defendant attempted to or did rob the victims of money or other items. While there are dissimilarities, “a high degree of similarity is not required, nor are distinctive or unusual features required to be present.” *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

Defendant specifically argues that the other act was too old to be probative. This Court “has found that a 20-year gap between a prior incident and a charged offense was insufficient to dispel the probative value when the similarity of the acts indicated the defendant’s scheme.” *McGhee*, 268 Mich App at 611, citing *People v Knapp*, 244 Mich App 361, 380; 624 NW2d 227 (2001). “The remoteness of an act only affects the weight of the evidence rather than its admissibility.” *Id.* at 611-612. Accordingly, the 18-year gap between the two offenses did not negate the other act’s probative value.

² Quotation and citation omitted.

Finally, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. “Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury.” *Id.* at 614. Given defendant’s claim that he was there with consent and did not commit assault or robbery, the evidence was highly relevant to showing a scheme, plan, or system of doing an act and, thus, rebutting defendant’s claim. Defendant specifically contends that the prejudice was greater because the jury learned that defendant was convicted; however, the trial court instructed the jury that it could not use the evidence to show that defendant is a bad person or likely to commit crimes. This instruction served to limit the danger of unfair prejudice by restricting the use of the evidence. See *People v Pesquera*, 244 Mich App 305, 320; 625 NW2d 407 (2001). Accordingly, we conclude that the trial court did not abuse its discretion in finding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence, and ultimately, in permitting the admission of the other acts evidence.

Affirmed.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray