

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 4, 2013

v

JOSEPH ALAN BIGELOW,
Defendant-Appellant.

No. 305758
Wayne Circuit Court
LC No. 11-002505-FC

Before: CAVANAGH, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions for first-degree murder, MCL 750.316, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to life in prison without parole for the first-degree murder conviction, 30 to 50 years in prison for the assault with intent to murder conviction, and two years in prison for the felony-firearm conviction. For the reasons set forth below, we affirm.

I. CONDUCT OF THE PROSECUTOR

Defendant argues that the prosecutor denied him a fair trial by impermissibly shifting the burden of proof during closing argument. This Court reviews preserved claims 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). We decide prosecutorial misconduct claims on a case-by-case basis, examining the record and the prosecutor’s remarks in context. *Id.*

In his closing argument, the prosecutor said, “They can’t give you any alternative explanation for his whereabouts. There’s nobody who can come into this Court and say, ‘I was with Joseph Bigelow[.]’” Defendant maintains that this statement suggested to the jury that defendant had to produce evidence to account for his whereabouts when the crime occurred. We disagree.

“[A] prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecutor’s theory of the case.” *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). “A prosecutor may not imply in closing argument that the defendant must present a reasonable explanation for damaging evidence or comment on the defendant’s

failure to present evidence because such an argument tends to shift the burden of proof.” *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). However, it is not improper for a prosecutor to argue that inculpatory evidence is undisputed, even if the defendant is the only person who could have contradicted the evidence. *Id.* at 464.

Read in context, the prosecutor’s comments related to the fact that the evidence presented regarding defendant’s whereabouts during the time of the crime was undisputed. The words, “can’t” and “there’s nobody who can” in the prosecutor’s argument communicate the idea that the evidence could only show one thing, that defendant was at or near the crime scene during the time of the crime, and that it is impossible to present any evidence to the contrary. In our view, the statement at issue was no more than a summation of the evidence adduced at trial that showed defendant was at the crime scene and no evidence could show differently. This is a permissible argument regarding the undisputed nature of the inculpatory evidence. See *Fyda*, 288 Mich App at 464-465 (“The prosecutor’s statements were proper commentary on the weaknesses of [the defendant’s] theory of defense and did not constitute prosecutorial misconduct.”); *Goodin*, 257 Mich App at 433 (“[A] prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecutor’s theory of the case.”). Moreover, following defense counsel’s objection, the prosecutor explicitly told the jury that the defendant did not have the burden of proof. The preceding statements regarding the evidence of defendant’s whereabouts that night and the prosecutor’s subsequent statement that defendant, in fact, did not have to prove anything, demonstrate that the statement did not improperly shift the burden of proof.

Moreover, were we to find that the prosecutor erred in making the disputed remarks, the trial court cured any alleged error in its instructions to the jury that the prosecution has the burden to prove all the elements of the offense beyond a reasonable doubt and that defendant had an absolute right not to testify. Because we presume jurors follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), there is no basis to conclude that the jury believed that defendant had the burden of offering evidence of his whereabouts on the night of the crime.

II. DEFENDANT’S COURTROOM ATTIRE

Defendant contends that the trial court violated his due process rights by compelling him to wear prison attire in front of the jury. In situations like this, in which the trial court observed defendant and concluded his clothing did not resemble “prison garb,” we review a trial court’s decision for an abuse of discretion. *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993).

At the start of trial, defendant requested an adjournment to obtain civilian clothes or a brief recess to change into civilian clothes brought into court by a family member. The trial court denied defendant’s request for an adjournment because the trial date had been set three months earlier, during which time defendant had ample opportunity to obtain civilian clothes. For safety and security reasons, the trial court also denied defendant’s request to change into clothes at the courthouse. We hold that the trial court did not abuse its discretion in either regard.

Generally, if a defendant makes a timely request to be allowed to wear civilian clothes, his request must be granted. *Harris*, 201 Mich App at 151. However, a defendant is not deprived of due process by wearing jail garb that appears to be civilian clothing. *Id.* at 151-152. Denial of due process occurs only if a defendant's clothing impairs the presumption of innocence. *People v Lewis*, 160 Mich App 20, 30-31; 408 NW2d 94 (1987).

Here, the trial court looked at defendant's clothing and found that it did not resemble prison attire:

There's no prejudicial markings on the clothing. The -- any jail markings have been turned inside out.

We've done this numerous times, Mr. Comorski [defense counsel], and there has been numerous Court of Appeals cases indicating that as long as we take those steps to remedy the situation, that that is not unduly prejudicial to the defendant as long as -- in fact, we've actually even had them in their green shirts with the -- the identifiable markings turned inside out, which is not quite what we have here. We have him wearing a white T-shirt and his green pants inside out so the markings are not displayed to the jury. So we're good to go.

We "defer to the trial court's opportunity to observe defendant and its finding that the clothes did not prejudicially mark defendant as a prisoner." *Harris*, 201 Mich App at 152. We find no abuse of discretion in denying defendant's request.

III. OTHER ACTS EVIDENCE

Defendant asserts that the trial court erred in granting the prosecution's motion to admit other acts evidence under MRE 404(b). The admissibility of bad 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 Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). 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). "The determination whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to a contemporaneous assessment of the presentation, credibility and effect of the testimony." *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). Preliminary questions of law are subject to de novo review. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

The evidence at issue involved a separate fatal shooting of Dwight Osborne that occurred six days prior to the charged offenses and allegedly involved defendant. Specifically, the evidence introduced at trial included testimony from defendant's companion who was with him when he shot Osborne without provocation or warning, security camera footage capturing the shooting, and testimony from police officers who investigated the shooting. In its pre-trial motion, the prosecution offered three purposes for the evidence: identity, intent, and motive. In the event defendant argued he was not the perpetrator, the other acts evidence tended to establish his identity in light of the similarities between the two crimes. Alternatively, if defendant's theory of the case was self-defense, the evidence tended to show that defendant formed the

requisite intent for first-degree murder. The prosecution also argued that the evidence tended to establish defendant's motive in committing the crime because both murders were "thrill killings." The trial court granted the prosecution's motion and ruled that, depending on how the trial played out, the evidence was admissible to show either identity or intent.

Defendant argues that the two shootings were not sufficiently similar to show defendant's intent or identity regarding the charged offenses, and the evidence was unnecessary to establish identity because an eyewitness was slated to identify defendant as the perpetrator. We hold that the evidence was admissible under MRE 404(b) to establish intent. MRE 404(b)(1) provides:

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.

Evidence sought to be admitted under MRE 404(b) must meet four requirements:

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. [*People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).]

MRE 404(b) plainly provides that "intent" is a proper purpose for which to admit other acts evidence. At issue here are the second and third elements of *VanderVliet*. Regarding the second element of MRE 404(b), relevance, this Court assesses relevancy by determining whether the evidence, under a proper theory, has any tendency to make the existence of a fact of consequence in the case more or less probable than it would be without the evidence. See MRE 401, 402; *People v Sabin*, 463 Mich 43, 57; 614 NW2d 888 (2000). The relevance element includes two inquiries: materiality and probativeness. *Sabin*, 463 Mich at 57 ("Relevant evidence is evidence that is material [related to any fact that is of consequence to the action] and has probative force [any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence]."). "Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case." *Crawford*, 458 Mich at 389, citing McCormick, *Evidence* (4th ed), § 185, p 773. The probative force inquiry requires the evidence have "any tendency to make the existence of any [consequential] fact . . . more probable or less probable than it would be without the evidence." MRE 401. This is a low threshold. *Crawford*, 458 Mich at 390.

As part of its burden of proof regarding the first-degree murder and assault with intent to commit murder charges, the prosecution had to prove beyond a reasonable doubt that defendant intended to cause the deaths of Jerob Mathis and Brittany Burrell. See MCL 750.316(a) (defining first-degree murder as "Murder perpetrated by means of . . . willful, deliberate, and

premeditated killing.”); MCL 750.83 (defining assault with intent to commit murder as “Any person who shall assault another with intent to commit the crime of murder[.]”); see also *Crawford*, 458 Mich at 389 (stating that the elements of the offense are always “in issue” and, thus, material).

The trial court did not explain in its ruling the relevance between the separate shooting and defendant’s intent in this case. However, absent the other acts evidence, a reasonable jury faced with Mathis’s testimony could conceivably disbelieve the explanation that defendant, without warning or provocation, shot Mathis and Burrell for no apparent reason. Other acts evidence that showed defendant committed another unprovoked killing for no apparent reason was relevant to show whether defendant formed the requisite intent in this case. Intent, always an issued in murder trials, became even more important when the jury was presented with testimony that defendant stated after the shooting that he shot someone in self-defense. However, the other acts evidence, which involved a similar unprovoked shooting in the back of the victim’s head, included evidence that defendant admitted to shooting someone intentionally, i.e., not in self-defense. Faced with arguably implausible testimony that defendant simply shot Mathis and Burrell for no reason, in addition to evidence that defendant may have acted in self-defense (and therefore did not form the requisite intent), the other acts evidence tending to show defendant formed the requisite intent under similar circumstances was logically relevant to whether defendant formed the requisite intent for the charged offenses.

Defendant argues that the evidence was unduly prejudicial because limiting instructions are insufficient when there is no valid purpose for the evidence. However, as discussed, there was a valid purpose for the evidence. Defendant further argues that, even assuming a valid purpose, the limiting instructions themselves were nonetheless insufficient. Here, the court instructed the jury as follows:

You may only think about whether this evidence tends to show that the -- the -- that the defendant specifically meant to kill and for an alternative purpose of who committed the crime that the -- or crimes that the defendant is now charged with. You must not consider the evidence for any other purpose. For example, you must not decide that it shows the defendant is a bad person or that he’s likely to commit crimes.

You must not convict the defendant here because you think he is guilty of other bad acts or bad conduct.

“A carefully constructed limiting instruction rendered by the trial court would be sufficient to counterbalance any potential for prejudice spawned by the other acts evidence.” *People v Martzke*, 251 Mich App 282, 295; 651 NW2d 490 (2002). Because we presume jurors follow their instructions, there is no reason to believe that the jury was prejudiced by the evidence or considered it for improper purposes. *Graves*, 458 Mich at 486.

Because the evidence was both logically relevant to establishing defendant’s intent regarding the charged offense and not unduly prejudicial in light of the limiting instructions, we hold that the trial court did not abuse its discretion in admitting the other acts evidence under MRE 404(b).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Douglas B. Shapiro