

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 12, 2013

v

TYRONZA DARNELL MILLER,

Defendant-Appellant.

No. 312773
St. Joseph Circuit Court
LC No. 12-017786-FC

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Defendant Tyronza Darnell Miller was convicted by a jury of carjacking, MCL 750.529a. He was sentenced as an habitual offender, third offense, MCL 769.11, to 15 to 40 years' imprisonment. He appeals that sentence as of right. We affirm.

Defendant traveled by bus from Arkansas to Michigan to meet Brianna Boals after the two established an online relationship. When the relationship did not work out, Boals told defendant to leave her house. Defendant mentioned getting a ride from someone in Flint, but no one came. When defendant eventually left, Boals noted he was wearing black jeans, a black leather coat with a gray sweatshirt underneath, and a black baseball cap.

At approximately 10:14 p.m. the same day, officers from the St. Joseph County Sheriff's Department were dispatched to a McDonald's. They spoke with the manager, who stated that an individual wearing a black coat with a hooded sweatshirt underneath was making customers feel "uneasy." The officers made contact with the individual, who stated that he was from Arkansas and came to Michigan to meet a woman, but was now waiting for a ride from Flint because the relationship did not work out. The officers gave the man a ride to the nearby Walmart to wait for his ride.

At approximately 12:30 a.m., Maria Carmona was carjacked while walking to her car in the Walmart parking lot. Surveillance cameras captured the incident and identified the perpetrator as a dark skinned male wearing dark jeans, a black coat with a gray hooded sweatshirt underneath and a black baseball cap. Using video footage, store personnel traced that individual's movements backward in time until they saw him getting out of a St. Joseph County police vehicle and entering the store at approximately 10:30 p.m.

A photograph of the individual obtained from Walmart's surveillance cameras was placed in the local newspaper. Boals' son recognized the person in the photograph as the man who was at his house the previous day. Boals confirmed that the man in the photograph was defendant. She gave investigators defendant's cellular telephone number, which ultimately led to defendant's arrest in Texarkana, Arkansas. The stolen vehicle was recovered approximately 7-1/2 miles from where defendant was apprehended.

On appeal, defendant argues first that there was insufficient evidence to support his conviction for carjacking. We review a challenge to the sufficiency of the evidence de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). To determine the sufficiency of the evidence, we look to "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). We draw all reasonable inferences in favor of the prosecution and accord deference to the trier of fact on all credibility determinations. *Id.* at 400. Defendant does not dispute that the elements of carjacking were established. He argues solely that the prosecution failed to establish his identity as the perpetrator, focusing in particular on certain witnesses' inability to identify him in court and the fact that no evidence linking him to the stolen vehicle was found. Identity is an essential element of any criminal offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Identity may be proven by circumstantial evidence and the reasonable inferences arising therefrom. *Nowack*, 462 Mich at 400; see also *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Moreover, positive identification by witnesses can be sufficient to establish identity. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

There was sufficient evidence to convict defendant in this case. Specifically, testimony revealed that defendant arrived in Michigan from Arkansas only days before the carjacking took place. Before defendant left Boal's home, he mentioned getting a ride from someone in Flint. He was wearing dark jeans, a gray hooded sweatshirt, a black leather coat and a black baseball cap. An individual with that same description was later encountered by police at McDonald's. That individual told police he was from Arkansas, had come to meet a woman, and was waiting for a ride from someone in Flint. The individual was taken by police to Walmart, where video surveillance captured him exiting a police vehicle and entering the store. He was later seen on camera carjacking the victim. The vehicle was recovered less than eight miles from where defendant was arrested in Arkansas. Lastly, while some witnesses could not conclusively identify defendant in court, several other witnesses, including Boals, Walmart employees, and the officers who responded to the McDonald's disturbance, positively identified him as the perpetrator. Taking all the evidence in a light most favorable to the prosecution, a rational jury could conclude that defendant was the person who committed the carjacking.

Defendant next argues the trial court erred by allowing the admission of prejudicial prior acts evidence at trial and that his defense counsel was ineffective for failing to object. Defendant did not preserve the evidentiary issue by timely objecting or moving to strike the evidence at trial, *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003), so we review this claim for plain error, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant also

failed to preserve his ineffective assistance claim by moving for a new trial or requesting a *Ginther*¹ hearing, so our review of that claim is limited to mistakes apparent on the record. *People v Sabin (On Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To prevail on a claim of ineffective assistance of counsel, a defendant must establish both that (1) his defense counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To show deficient performance, defendant must "show that counsel's representation fell below an objective standard of reasonableness" as measured "under prevailing professional norms." *Strickland*, 466 US at 688. To show prejudice, defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

MRE 404(b) prohibits the introduction of evidence of an individual's prior conduct as circumstantial evidence of his character in order to prove action in conformity therewith on a particular occasion. The rule does, however, allow such evidence for other, noncharacter purposes, such as proof of motive, intent, preparation, knowledge and identity, among others. In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), our Supreme Court set forth the test for trial courts to use in determining the admissibility of other acts evidence. The *VanderVliet* standard requires a trial court to determine: First, that the evidence is offered for a proper purpose under Rule 404(b); second, that the evidence is relevant under Rules 401 and 402; and third, that the probative value of the evidence is not substantially outweighed by unfair prejudice, as required in Rule 403. *Id.* at 74-75. Finally, upon the admission of other-acts evidence, the trial court may, upon request, provide a limiting instruction to the jury under Rule 105. *Id.* at 75.

Two pieces of testimony are at issue: First, testimony by the McDonald's manager that she called the police because the individual in her store was making her customers feel "uneasy," and second, testimony by Boals that, after defendant left her home, he sent her and her son text messages in which he threatened to kill them. As to the first, we find that Rule 404(b) was not implicated because the incident at McDonald's the night of the carjacking helps explain defendant's arrival at Walmart, where the carjacking took place, and therefore the testimony constituted part of the *res gestae* of the charged offense. *People v Malone*, 287 Mich App 648, 661-662; 792 NW2d 7 (2010), citing *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996) ("Evidence of other criminal acts is admissible when it explains the circumstances of the crime"). Accordingly, there was no plain evidentiary error and defendant cannot prevail on his claim of ineffective assistance of counsel with regard to that testimony. See *People v Unger (On Remand)*, 278 Mich App 210, 257; 749 NW2d 272 (2008) (defense counsel not ineffective for failing to object to the introduction of admissible evidence).

As to the second challenged evidence of the threatening text messages, we find plain error. The prosecution argues on appeal that the testimony regarding the threatening text messages established defendant's identity as the carjacker, a permissible purpose under Rule 404(b). We acknowledge that identity is a proper purpose. We further acknowledge that the

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

testimony was marginally relevant to the issue of the carjacker's identity. See *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998), citing MRE 401 (the threshold for relevance is minimal: any tendency to prove a disputed fact is sufficient). However, whatever marginal probative value the testimony had was substantially outweighed by the danger of unfair prejudice and therefore should have been excluded under Rule 403. *VanderVliet*, 444 Mich at 74-75. The text messages, which contained threats of death, were completely extraneous to the elements of carjacking and were likely to incite sympathy and anger on the part of the jury. Moreover, other, more probative evidence was offered proving defendant's identity as the carjacker that presented a much lower risk of prejudice (such as Boals' description of his clothes and surveillance footage of the carjacker). Accordingly, the trial court committed plain error in allowing the testimony to be admitted.

Nonetheless, we conclude that reversal is not warranted because no prejudice resulted. Under the plain error analysis, defendant cannot show that the plain error affected the outcome of the trial. *Carines*, 460 Mich at 763. In light of the other evidence presented at trial, defendant cannot show that the jury would not have convicted him absent Boals' testimony regarding the text messages. And, because defendant cannot demonstrate that he was prejudiced by the admission of the testimony, his claim of ineffective assistance with regard to that testimony must also fail. *Strickland*, 466 US at 694.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens