S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2008
v	No. 267248 Washtenaw Circuit Court
ANDREW TYRONE BELL, Defendant-Appellant.	LC No. 05-000382-FC

Before: Kelly, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, use of a firearm during a felony (felony-firearm), MCL 750.227b, and carrying a concealed weapon (CCW), MCL 750.227. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 25 to 40 years for the armed robbery, 6 to 20 years for felon in possession of a firearm, and 6 to 20 years for CCW, consecutive to two years for felony firearm. We affirm defendant's convictions, but vacate his sentence. We remand for clarification of defendant's score for offense variable (OV) 13 and reinstatement of his original sentence, or for resentencing.

On the day of the incident underlying this case, defendant walked into a Speedway gas station in Ann Arbor in the early morning and robbed it at gunpoint. The incident was caught on tape by surveillance cameras, and then pictures from the tape were published in the Ann Arbor News in an attempt to find someone who could identify the robber. During the robbery, defendant was wearing a knit hat, dark sunglasses, and a distinctive sweatshirt with a "Johnny Blaze" logo on it. A few weeks after the robbery, a cab driver reported to police that he had picked up a man who looked like the individual in the newspaper pictures and who was wearing a "Johnny Blaze" sweatshirt. The cab driver told police that he drove defendant to an address on Hemlock. Defendant's mother testified that she lived at the address with defendant's fiancée, but added that defendant only stayed there occasionally.

A month after the robbery at Speedway, a man robbed the Hell Country Store in Livingston County at gunpoint. The robbery was similar in many respects, and the store clerk identified defendant as the robber, but the robbery was not tried with this case and is not the subject of this appeal. A witness at the store identified the getaway vehicle and most of its license plate. The next day, defendant was arrested getting into that vehicle at a Chi-Chi's restaurant while in the company of a woman named Ivy Staples, a woman who lived at an

apartment frequented by defendant. Two search warrants were executed at the apartment, one by Livingston County police and the other by Ann Arbor police. In one bedroom police found clothes resembling those worn during each robbery, along with a firearm that matched the one used in both robberies. Multiple witnesses, including the cab driver, defendant's mother, and his fiancée all said that the robber in the surveillance photos looked like defendant. Defendant claimed that he was not the robber. He challenged the validity of the search and claimed that there was no indication that he lived at the searched apartment.

Defendant first argues that there was insufficient evidence to support his convictions because there was no physical evidence, such as DNA, fingerprints, or gunshot residue, tying him to the scene. He also claims that there was no way to tie him to the items found at the apartment and that the gas station attendant was inherently unbelievable because he initially identified someone else as the robber. We disagree.

"[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Under this deferential standard of review, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

As an initial matter, there is no requirement that the prosecution must present physical evidence of the sort described by defendant. Circumstantial evidence and the reasonable inferences it engenders are always sufficient to support a conviction, provided the prosecution meets its burden of proof. *Id*. The prosecution is not obligated to prove its case with absolute scientific and metaphysical certainty, and it is not required to disprove every plausible alternative explanation of the evidence proffered by a defendant. *Id*. Therefore, defendant's arguments about the nature of the evidence presented, or more particularly, about the quality of the evidence he would have preferred, only invite speculation and are unavailing.

Regarding defendant's challenges to the admitted evidence, the items found in the searched apartment were sufficiently linked to him at trial. The prosecutor presented evidence that defendant stayed at the apartment and that his "Johnny Blaze" sweatshirt was later found in the apartment. Defendant's distinctive van was seen at the apartment, and defendant was arrested in the company of Staples, who lived at the apartment and further associated him with it. The items found in the apartment included the clothing and firearm that matched the items from the Speedway robbery. Taking all these facts in the light most favorable to the prosecutor, there was ample evidence for a jury to infer that the items found at the apartment were defendant's property. See *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002).

We also reject defendant's argument that the trial court should have suppressed the identification of the Speedway employee. The Speedway employee's initial identification of another individual as the possible robber only goes to the weight given to his later identification of defendant as the robber, not to the admissibility of the identification. See *People v Gray*, 457 Mich 107, 122; 577 NW2d 92 (1998). Other identification evidence included surveillance photos of defendant robbing the store; physical evidence, such as the sunglasses, sweatshirt, hat,

and firearm used in the robbery, found in defendant's apartment; and a witness who identified defendant wearing the distinctive sweatshirt that matched the one captured on videotape. Taken with all of the other evidence and viewed in the light most favorable to the prosecution, there was more than sufficient evidence for the jury to find that defendant was the man who robbed the Speedway gas station.

Defendant next claims that the trial court abused its discretion by improperly admitting other acts evidence regarding the robbery of the Hell Country Store in Livingston County. Specifically, defendant argues that this case does not represent the type of "signature crimes" case in which the criminal patterns of two different crimes are so similar that the same individual most likely committed them both. See *People v Smith*, 243 Mich App 657, 671-672; 625 NW2d 46 (2000). Defendant further argues that a common plan or scheme between the robberies would only be relevant if defendant contended that the charged robbery never occurred. See *People v Ewoldt*, 7 Cal 4th 380, 394 n 2; 867 P2d 757 (1994). Defendant claims that he instead only challenged the Speedway assistant's identification of the robber, so any common pattern between the two robberies was irrelevant to anything other than defendant's propensity to rob convenience stores. We disagree. "The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Although the robberies arguably lack the detailed similarity that usually indicates a series of "signature crimes," *Ewoldt*, *supra* at 402-403, the unique facts of this case make the similarities of the Country Store robbery particularly relevant to the identification of the Speedway robber, apart from their relevance to defendant's character. From the Speedway robbery, authorities had a photograph of defendant and could identify his distinctive clothing. In that robbery, defendant disguised himself with a knit hat and sunglasses, carried a semi-automatic handgun, and asked the Speedway attendant if there was any money tucked under the drawer of the cash register. However, defendant disappeared after the robbery without leaving any direct thread that police could use to track him. Instead, police had to resort to publishing still photographs and hoping that a reader would recognize the robber and provide them with more information. Afterward, a cabdriver reported that he had just identified the robber's distinctive sweatshirt and driven the robber to defendant's mother's house, after which the police began tracking defendant as a suspect. Their efforts led them to defendant's apartment and van, but the only connection between the robbery and defendant at that point was the videotape of him in disguise and the cabdriver's recognition of his shirt.

In contrast, the Country Store robbery provided the victims and police with a direct connection between the Country Store robbery and defendant—his van. In that robbery, the robber wore a white embroidered hat, sunglasses, and a blue-striped shirt. As in the Speedway robbery, the robber carried a dark-colored handgun and similarly asked the attendant to check under the drawer of the cash register. This robber had physical features that, according to the witnesses, exactly matched those of the Speedway robber and defendant. From the Country Store robbery, police identified defendant's distinctive van, which led to his arrest and further linked him with Staples and the apartment. This connection led to the next critical link in defendant's direct association with the Speedway robbery—the clothing and firearm from that robbery. The knit hat, tennis shoes, sweatshirt, and sunglasses matching those worn in the Speedway robbery were found in the apartment in close proximity to the white cap and striped

shirt identified from the Country Store robbery. The common factor of the firearm was also discovered in this area of the apartment.

In most "signature crime" cases, the primary means of identification is the distinctive, but shared, details that surround each crime. In this case, the robberies shared a good many distinctive details, but more importantly, almost every one of the robberies' dissimilarities evaporated in light of the commingled physical evidence found in defendant's apartment. In a typical identification case, the robber would be seen wearing the same attire or disguise. In this case the differences in defendant's attire were accounted for by the discovery of both outfits in a single location attributed to defendant primarily through the second crime. Because defendant adamantly disputes that he robbed the Speedway, and likewise adamantly denies any association with the apartment or the telltale clothing and firearm found there, the discovery of the distinctive embroidered white hat and striped shirt in the location of the other incriminating articles of clothing identified defendant as the robber of the Speedway.

But the evidence of the white hat and striped shirt are devoid of meaning to the jurors without the testimony that defendant was wearing them when he robbed the Country Store in a substantially similar manner. Without the evidence about the second robbery, the jurors would not have fully understood the up-stream connections between defendant and his van, Staples, the apartment, the common physical evidence that implicated defendant in both robberies, and the unique physical evidence peculiar to the robbery at issue. See *Starr*, *supra* at 502. Therefore, the Country Store robbery and its attendant evidence were relevant to something other than defendant's character: specifically, his identity as the guilty party in the case at bar. Under the unusual circumstances of this case, the trial court did not abuse its discretion by deciding that the evidence of the second robbery peculiarly identified defendant as the Speedway robber. *Id*. at 491.

We also question the premise for defendant's argument that commission of the charged offense was not at issue, so defendant's similar design or plan was irrelevant to the proceedings. See *Ewoldt*, *supra* at 394 n 2. As explained in *People v VanderVliet*, 444 Mich 52, 77-78; 508 NW2d 114 (1993), defendant's entry of a plea of not guilty did not formally concede anything before trial, and the prosecutor still bore the burden of demonstrating that the robbery was committed. In any event, because the evidence was introduced for a proper, non-character reason, we reject defendant's argument that he should receive a new trial.

Defendant next claims the trial court erred by refusing to hold a "required" evidentiary hearing regarding the assistant manager's identification of defendant as the person who robbed the Speedway. We disagree. Defendant provides no authority to support his contention that a hearing was required, especially considering the trial court's review of the photographic evidence about the similarities of the subjects in the lineup. Defendant likewise failed to provide any authority to the trial court below when he originally requested the hearing. The record persuades us that the trial court correctly reviewed the factual issue presented and acted within its discretion when it resolved the issue without further hearing. MCL 768.29; see also *United States v Rowan*, 518 F2d 685, 690 (CA 6, 1975).

Likewise, defendant's claims of suggestibility in the lineup are vague and conclusory. Defendant says that he was the only bi-racial person in the lineup without indicating how he knew this or how it affected the identification. The only description provided at trial indicated

that the others in the lineup were of "similar complexion, height" and "descriptors" as defendant. Defendant did not dispute this assertion at the time, and the trial court did not contradict it as the photographs of the lineup were reviewed in open court. Because defendant fails to substantiate any claim that the assistant manager's identification was tainted by the suggestiveness of the dissimilar participants in the lineup, we will not disturb the trial court's decision to allow the identification evidence. *Rowan*, *supra* at 690-691.

Defendant also claims that the warrant used by Ann Arbor police to search the apartment was defective for lack of probable cause. We disagree. "Probable cause to issue a search warrant exists if there is a substantial basis for inferring a fair probability that evidence of a crime is in the stated place." *People v Osantowski*, 274 Mich App 593, 615; 736 NW2d 289 (2007).

Defendant claims that the warrant was defective because it was issued, in part, on the opinions of witnesses who identified him from the still photos originating from the Speedway videotape. Defendant argues that only the magistrate's opinion about whether the photos represented defendant would be relevant to the propriety of issuing a warrant. We disagree. The purpose of the warrant procedure was to test the probability of finding the evidence at the apartment, and individuals who personally saw defendant and could identify him in the photographs were much more useful in this regard than a magistrate who did not know defendant and would have to compare the images to another image before forming an opinion. Because the identifications tended to make it more probable that the items sought were at the apartment, defendant fails to demonstrate any flaw in the magistrate's reliance on the information.

We also reject defendant's challenge that the magistrate lacked probable cause to believe that the items were at the apartment. There was sufficient evidence to suggest that defendant had very recently stayed at the residence searched, making it probable that the incriminating items could be found there. It does not matter how often defendant stayed there. Certainly, defendant was free to argue that the items found were not his, but such an argument did not affect the magistrate's determination of the probability of finding them. Therefore, between the identifications and surveillance, there was sufficient probable cause to support the search warrant for the Broadway apartment, and the trial court did not abuse its discretion when it declined to suppress the fruits of that search. *Id*. at 618.

Defendant claims that the "Johnny Blaze" sweatshirt was illegally seized because it was not on the Livingston County warrant, and the Livingston County police found it first. However, defendant has no argument that observation of the sweatshirt was within the scope of the Livingston County warrant when those officers were looking for distinctive clothing as well. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). Moreover, the Livingston County officers never seized the item after they distinguished it from the clothing that related to their warrant and investigation, and they merely informed the incoming Ann Arbor police of its presence in the bedroom. Therefore, the search was appropriate, and the trial court did not abuse its discretion when it failed to suppress the sweatshirt as evidence. *Id*.

Defendant claims that the prosecutor engaged in misconduct by attempting to admit improper other acts evidence by eliciting testimony from police officers about other witnesses who identified defendant. He also claims that it was improper for those witnesses to testify directly because they were not "experts" in person identification. Lastly, defendant claims that

the prosecutor engaged in misconduct by calling defendant's defense "smoke and mirrors." We disagree with all of defendant's arguments.

"Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Unpreserved claims of error may only be reviewed for plain error that "resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Reversal is not required "where a curative instruction could have alleviated any prejudicial effect." *Id*. at 329-330.

Defendant's claim that the prosecutor engaged in misconduct by attempting to admit improper 404(b) evidence is without merit. "A finding of prosecutorial misconduct may not be based on a prosecutor's good-faith effort to admit evidence." *Abraham*, *supra* at 278. In this case, nothing suggests that the prosecutor's attempt to admit that proper evidence was done in bad faith.

Regarding the police officers' testimony, it is at least arguable that the evidence was not introduced to prove the truth of the matter asserted, but instead to explain why police put defendant under surveillance. MRE 801(c); see *People v McAllister*, 241 Mich App 466, 470; 616 NW2d 203 (2000). Therefore, the prosecutor did not commit misconduct by eliciting the testimony. Further, unlike the witnesses in *McAllister*, the identifying witnesses in this case also testified, subject to full cross-examination. Regarding the propriety of their testimony, one does not need to be an "expert" to offer a lay opinion that a photograph looks like a particular individual, so witnesses could freely testify about whether they thought defendant resembled the person in the robbery surveillance photos as long as that testimony would help the jury. MRE 701. Similarly, the police officer was competent to testify that he thought the sunglasses found in the apartment matched those seen worn in the robbery.

Defendant next claims that the prosecutor engaged in misconduct by calling the defense strategy "smoke and mirrors." We disagree. This Court has previously rejected a similar claim that the phrase "smoke and mirrors" amounted to prosecutorial misconduct. *People v Rodriguez*, 251 Mich App 10, 31-32, 40; 650 NW2d 96 (2002). Moreover, any undue prejudice resulting from the use of those three words was cured by the jury instructions limiting the purposes of the attorneys' arguments and erasing any effect that they could have had on the verdict. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant claims that even if none of the individual claims of prosecutorial misconduct merit reversal, they collectively tainted the fairness of his trial, necessitating reversal. However, defendant has not demonstrated any misconduct, so even in the aggregate, defendant's claims do not warrant reversal. *People v Bahoda*, 448 Mich 261, 292-293 n 64; 531 NW2d 659 (1995).

Defendant also challenges his sentencing. He claims that his sentencing guidelines score was improperly calculated because it included facts not found beyond a reasonable doubt by the jury and because the scores for OV 4 and OV 13 were not supported by the record. We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Moreover, we will uphold a score if any legitimate

evidence supports it. *Id*. The holding in *People v Drohan*, 475 Mich 140, 162-164; 715 NW2d 778 (2006), directly contradicts defendant's argument that a jury must decide the validity of any facts that support a particular score.

Defendant claims that OV 4, psychological injury to a victim, was improperly scored ten points because there was no fact or testimony showing that the assistant manager of the Speedway incurred a "[s]erious psychological injury requiring professional treatment . . . ." MCL 777.34. However, the assistant manager's testimony indicated that he was frightened and flustered by the experience, and the pre-sentence report (PSIR) indicated that he missed several days of work after the robbery and subsequently quit his job at Speedway. The PSIR indicated that he told his supervisor that he would never work for a convenience store again. A victim's indication of fearfulness and dread during an encounter has previously been found to be all that was needed to support a ten-point score for OV 4. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). Therefore, there was enough information in the record to sustain the trial court's score of ten points for OV 4.

Defendant also claims that OV 13 was scored incorrectly because defendant had, at most, only one other crime against a person in any five-year period surrounding this offense, and the trial court's score of twenty-five points required three felonies within the five-year period. MCL 777.43. Although we are not persuaded that the trial court lacked a factual basis for scoring OV 13, that factual basis was not evident from the record. There were clearly two crimes against a person within five years of the date of this offense: the two armed robberies already discussed at length. The other offenses listed within that period in defendant's PSIR were two counts of second-degree home invasion that defendant pleaded down to a misdemeanor. Second-degree home invasion, while it does not require anybody to be present, is classified as a crime against a person. MCL 777.16f. If substantiated, those two listed offenses in early 2003 and the two robberies in 2004 would combine to make four felonies against a person within a five-year period. But although it is true that conviction is not required to score a crime under OV 13, the record in this case does not reflect anything more than the bare charges at the time of his 2003 arrest. Defendant pleaded the charges down to a misdemeanor conviction for receiving and concealing stolen property, and no other evidence of the validity of the weightier charges has been placed on the record. Therefore, although the trial court may very well have had evidence from which it could properly score twenty-five points for OV 13 (the trial judge could have taken the original plea or otherwise received information about the validity of the other charges from the court's own files), the existing record does not appear to support that score. Because our review is limited by the record before us, *Hornsby*, *supra*, we vacate the trial court's current sentence pending clarification, on the record, of the OV 13 score (including any necessary factual finding), or for resentencing. We do not find any other problem with defendant's sentence.

Finally, defendant claims that he was denied the effective assistance of counsel because his trial counsel failed to object to his sentencing scores for OV 4 and OV 13. We disagree. As noted above, defendant received the appropriate score for OV 4, so any objection to that score would have been futile. Moreover, because the sentencing issues for OV 13 and OV 4 were raised by defendant's motion for resentencing, MCR 6.429(C), and because we have reviewed their merits, any failure to preserve the issues initially at sentencing has been rendered moot.

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell