STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2013
v	No. 304458 Oakland Circuit Court
JOHNNY CLARENCE BRYANT III, Defendant-Appellant.	LC No. 2010-232779-FC

Before: TALBOT, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to commit armed robbery, MCL 750.157a, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 30 years and 10 months to 50 years for the robbery and conspiracy convictions, and a consecutive five-year term of imprisonment for the felony-firearm conviction. Defendant appeals by right. We affirm.

I. BASIC FACTS

The victim, RH, invited Charles Campbell to his home for a "date" on March 25, 2010. During the evening, Campbell left the house, saying that he needed to go to his car for a minute. Campbell returned accompanied by another man whom he addressed as "Kia." The two men assaulted and robbed RH. The offense was carried out over a period of one to two hours, during which the person referred to as Kia spoke throughout and did most of the talking. Defendant was subsequently apprehended for a possible parole violation based in part on his participation in the robbery. RH attended the preliminary parole violation hearing and identified defendant's voice as Kia's. Other circumstantial evidence, including records from Campbell's and defendant's cell phones, linked defendant to the crime. Defendant denied any involvement in the offense, claiming that he lost his cell phone on March 24 or 25 and did not recover it until March 27.

II. VOICE IDENTIFICATION TESTIMONY

Defendant first argues that the trial court should not have admitted RH's identification testimony because he did not identify anything peculiar about defendant's voice that would enable him to recognize it, because the parole violation hearing constituted an unduly suggestive identification procedure, and because defendant was not represented by counsel during the identification procedure. We disagree.

The trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion exists when the decision made is outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). The trial court's decision to admit identification evidence is reviewed for clear error. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*.

Vocal identification evidence is competent if the identifying witness's testimony is "positive and unequivocal." *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009). The witness must be able to provide an explanation for his ability to make the voice identification, such as some peculiarity of the voice or familiarity with the voice. *People v Bozzi*, 36 Mich App 15, 19, 22; 193 NW2d 373 (1971). RH's testimony demonstrated that he had ample opportunity to become familiar with Kia's voice because the robbery lasted over two hours and RH testified that Kia did most of the talking during the event and at times addressed him directly. When RH heard defendant speak at the parole violation hearing, he immediately recognized the voice as Kia's. Accordingly, RH's voice identification testimony was "positive and unequivocal," and was competent. *Murphy (On Remand)*, 282 Mich App at 584. We are therefore not left with a "definite and firm conviction" that the trial court erred when it admitted the testimony. *Harris*, 261 Mich App 51.

Nonetheless, defendant argues that RH's identification testimony should not have been admitted because it was tainted by the alleged unduly suggestive nature of the parole violation hearing at which RH first identified defendant by his voice. "An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). "If the trial court finds the procedure was impermissibly suggestive, evidence concerning the identification is inadmissible at trial unless an independent basis for in-court identification can be established 'that is untainted by the suggestive pretrial procedure.'" *Id.* at 542-543 (citation omitted). The prosecutor has the burden of proving that there is an independent basis for the in-court identification by clear and convincing evidence. *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973), overruled in part on other grounds by *People v Hickman*, 470 Mich 602, 603-604; 684 NW2d 267 (2004).

It appears that the trial court agreed that the identification procedure was unduly suggestive but that there was an independent basis for RH's in-court identification, because, at an evidentiary hearing, the court analyzed the admissibility of RH's identification testimony by reviewing the various factors in *People v Kachar*, 400 Mich 78, 95-96, 98-99; 252 NW2d 807 (1977), for determining whether there is an independent basis for a witness's identification

testimony. The evidence presented at the evidentiary hearing indicated that although RH had no prior familiarity with defendant, he never misidentified another person as defendant. RH testified that he had consumed some alcohol before Campbell left the house and fell asleep for a period of time until Campbell returned, but RH did not indicate that he was intoxicated after he woke and the trial court did not clearly err in finding that RH's ability to hear clearly was not affected by intoxication. RH testified that the robbery took place over a relatively long period of time and that Kia spoke to him several times throughout the ordeal. RH attended the parole violation hearing just two weeks later and, upon hearing defendant's voice, immediately recognized it as that of Kia.

Most of the relevant factors in *Kachar* support a finding of an independent basis for RH's identification of defendant's voice. The only factor that weighs against an independent basis for RH's identification of defendant's voice is factor 1, "[p]rior relationship with or knowledge of the defendant," *Kachar*, 400 Mich at 95, because RH had never previously seen or heard defendant. But considering that the offense was carried out over a prolonged period of time, during which the suspect identified as Kia spoke throughout and did most of the talking, RH had a sufficient opportunity to familiarize himself with Kia's voice. Therefore, the trial court was justified in discounting the weight to be given to factor 1. Accordingly, the trial court did not clearly err in finding that there was a sufficient independent basis for RH's identification testimony.

Defendant does not address the merits of his claim that he was entitled to counsel at the identification procedure. We therefore decline to consider this issue. *Harris*, 261 Mich App at 50 (failure to address the merits of a claim constitutes abandonment of the issue).

III. OTHER ACTS EVIDENCE

Defendant next argues that the trial court erred by admitting other acts evidence under MRE 404(b)(1). We disagree.

We review the trial court's decision whether to admit evidence for an abuse of discretion. *Hine*, 467 Mich at 250. Under MRE 404(b)(1), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show action in conformity therewith. But such evidence may be admitted 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" if that purpose is material. MRE 404(b)(1).

RH was never able to identify defendant visually as Kia because his bedroom was dimly lit. However, he noted that Kia was quite slim and wearing a form-fitting woman's sweater with a matching cap. Later, Kia shoved his foot in RH's face and RH saw that he was wearing tight blue jeans tucked into shiny dark women's boots. To prove that defendant was Kia, the prosecutor offered evidence that several years earlier, defendant had committed another robbery while dressed as a woman.

In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), mod on other grounds 445 Mich 1205 (1994), the supreme court held that other acts evidence is admissible if (1) the evidence is offered for a proper purpose, (2) the evidence is relevant under MRE 402 to an issue

or fact of consequence at trial, and (3) the evidence is not substantially more prejudicial than probative under MRE 403. If the evidence is admitted, the court may, upon request, provide a limiting instruction regarding its use to the jury. *Id.* at 74-75. Regarding whether other acts evidence is offered for a proper purpose, the Supreme Court has explained that "evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity." *People v Mardlin*, 487 Mich 609, 615-16; 790 NW2d 607 (2010).

The trial court did not err by admitting the evidence of defendant's prior conduct. Evidence that defendant had previously committed a robbery while dressed as a woman, coupled with other evidence linking defendant to Campbell, made it more probable that defendant was Campbell's accomplice Kia, who was a man dressed as a woman. Accordingly, although the evidence was probative of defendant's character, it was also probative of defendant's identity as the suspect known as Kia. Accordingly, because this evidence was not probative "solely to the defendant's character or criminal propensity," *Mardlin*, 487 Mich at 616, it was offered for a proper purpose under MRE 404(b)(1). Moreover, identity is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Accordingly, the evidence was relevant under MRE 402.

Additionally, the Supreme Court has explained that unfair prejudice under MRE 403 "may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). Here, the trial court instructed the jury on the proper, limited use of the other-acts evidence, both before the evidence was introduced and again in its final instructions. "Jurors are presumed to follow their instructions . . ." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The trial court's instruction therefore minimized any potential that the jury would give the evidence of defendant's prior conduct "undue or preemptive weight." *Blackston*, 481 Mich at 462. Accordingly, the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. The trial court did not abuse its discretion by admitting this evidence.

IV. MOTION FOR MISTRIAL

Defendant next argues that the trial court erred by denying his motion for a mistrial after a witness disclosed that she was an investigator for the state of Michigan "with the absconder recovery [unit]. . . ." We disagree.

The trial court's ruling on a motion for a mistrial is reviewed for an abuse of discretion. *People v Waclawski*, 286 Mich App 634, 708; 780 NW2d 321 (2009). "A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). "[N]ot every instance of mention before a jury of some inappropriate subject matter warrants a mistrial." *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), overruled in part on other grounds by *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007). "[A]n unresponsive and volunteered answer to a proper question is not cause for granting a motion for mistrial," *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983),

and does not provide a basis for relief absent some evidence that "the prosecutor conspired with or encouraged the witness" to give the testimony at issue, *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990), or unless "the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

Several days after the offense, defendant was taken into custody by Amy Lucas, an investigator with the Department of Corrections absconder unit. During trial, the parties stipulated that Lucas would be referred to simply "as an investigator with the State of Michigan." When Lucas was called to testify, the prosecutor had her state her name and then asked, "And I believe you are an officer and an investigator for the State of Michigan, is that correct?" Lucas replied, "Investigator with the absconder recovery . . . ," whereupon the prosecutor immediately interrupted and established that she was "with the State of Michigan."

It is unclear from the record whether the prosecutor failed to instruct Lucas not to disclose her title or whether he instructed her not to disclose her title and she failed to comply. In any event, there is no indication that the prosecutor deliberately sought to inject defendant's parole absconder status into the trial, given that he framed his question regarding Lucas's identity in accordance with the parties' stipulation and immediately corrected Lucas when she began to say that she was with the absconder recovery unit. Further, Lucas's statement was not so prejudicial as to warrant a mistrial. Lucas stated that she was looking for defendant but did not say why and, in light of the fragmented way in which the evidence was introduced, the jury could have as easily inferred that defendant was being sought in connection with the robbery as for being some type of absconder. In addition, Lucas did not mention that she was with the Department of Corrections, so the brief reference to "absconder recovery" would not have been understood as referring to prisoners in general or parole absconders in particular. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

V. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the evidence was insufficient to prove that he conspired with Campbell to rob RH. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo on appeal. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). "In reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "It is for the trier of fact . . . to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

> A criminal conspiracy is a mutual understanding or agreement between two or more persons, expressed or implied, to do or accomplish a criminal or unlawful act. It is a crime separate and apart from the substantive offense. The elements of a conspiracy are satisfied immediately upon entry by the parties into a mutual agreement; no overt acts need be established. [*People v Bettistea*, 173 Mich App 106, 117; 434 NW2d 138 (1988).]

While the agreement itself is the essence of a conspiracy, "direct proof of the agreement is not required, nor is proof of a formal agreement necessary. It is sufficient that the circumstances, acts, and conduct of the parties establish an agreement. A conspiracy may be proven by circumstantial evidence or may be based on inference." *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991) (citations omitted). Conspiracy is a specific intent crime and "requires both the intent to combine with others and the intent to accomplish the illegal objective." *Id*. at 392-393.

The evidence showed that Campbell made a date with RH for the night of March 25 and kept pushing the time back, eventually settling on 10:30 p.m. Telephone records showed that Campbell called defendant at 3:05 p.m. that day and the call lasted 16 minutes. Immediately following that call, Campbell called RH. Defendant called Campbell at 4:10 p.m. Campbell called defendant at 5:44 p.m. and the call lasted almost five minutes. Later that night, Campbell called defendant at 9:38 p.m. and again called RH immediately after that call. Campbell called defendant twice more just after 10:00 p.m. Campbell arrived at RH's house at 10:30 p.m. After the two men went upstairs, Campbell excused himself and left the room. He reappeared accompanied by defendant. The two men proceeded to assault RH and demand money. Defendant took RH's ATM card and left to make a withdrawal at a nearby ATM while Campbell held RH hostage. After defendant returned from the ATM, the two men left the house together. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that the two men conspired to rob RH.

VI. DOUBLE JEOPARDY

Defendant's final issue is that because the conspiracy was proven solely by evidence of the robbery itself, his conviction of both conspiracy to commit armed robbery and armed robbery violated his double jeopardy rights. Defendant did not raise this double jeopardy issue below. Accordingly, this issue is unpreserved. *People v Geno*, 261 Mich App 624, 626; 683 NW2d 687 (2004). Therefore, it is reviewed for plain error affecting defendant's substantial rights. *People v Scott*, 275 Mich App 521, 524; 739 NW2d 702 (2007).

Defendant's argument is not completely clear. The prohibition against double jeopardy does not preclude the conviction of and punishment for both conspiracy to commit a crime and the underlying crime itself. *People v Denio*, 454 Mich 691, 709-710; 564 NW2d 13 (1997). Defendant recognizes this principle of law, but contends that it only holds true if sufficient evidence is presented to establish both the conspiracy and the underlying crime, not when the conspiracy is proven solely by evidence of the underlying crime. If there is insufficient evidence to prove the conspiracy offense, defendant could not be convicted of or punished for that offense and he would not be subjected to multiple punishments. As discussed above, the mere fact that defendant committed the robbery with Campbell was not the sole evidence of the conspiracy; the

telephone calls before the robbery and the manner in which the robbery was committed provided circumstantial evidence that defendant and Campbell had conspired to commit the offense. There was no error, plain or otherwise.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens