STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2014
v	No. 313508 Wayne Circuit Court
MARCELLEZ MASON CROCKETT, Defendant-Appellant.	LC No. 12-000441-FC

Before: SERVITTO, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] Defendant was sentenced to 15 to 30 years for each armed robbery conviction, and two years for the felony-firearm conviction. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of the armed robberies of two persons on September 30, 2011 in Detroit, Michigan. LaToya Lawrence and her boyfriend, James Fordham, were walking in the "area of Lauder and Cambridge in the city of Detroit," around 12:30 p.m. They were walking down the street to go to the store when a green Chrysler vehicle pulled up next to them. The occupants of the vehicle asked where they could obtain some marijuana. Lawrence and Fordham responded that they did not know. Lawrence and Fordham then observed defendant, who had been in the driver's seat, jump out of the vehicle with a handgun and demand money. When he jumped out of the vehicle, defendant was "a foot or so" away from Lawrence and Fordham. Defendant pointed the gun in their direction. Lawrence began running, but defendant chased her, knocked her to the ground, searched her, and removed $200 from her pockets. Meanwhile, a second person got out of the vehicle, patted down Fordham, and told defendant that Fordham did not have any money. That person then got back into the vehicle, and Fordham began to approach defendant and Lawrence, but defendant pointed his gun at Fordham and told him to

[1] Defendant was also originally charged with receiving and concealing stolen property – a motor vehicle, MCL 750.535(7), but was acquitted of this charge at the conclusion of the jury trial.

"get back." There were "quite a few people" with defendant, but he was the only person with a gun. Lawrence was able to describe the vehicle, the license plate number, and a description of defendant to police.

The police came to Fordham's home on the date of the incident and took an oral statement from Fordham. Later, Fordham went to the Detroit Police Department to provide a written statement. The police also showed him a photo array of individuals who fit the description given by Fordham and Lawrence; however, Fordham could not identify anyone from the robbery. That day, Lawrence identified defendant from the photo array as the individual who robbed them. Lawrence later was shown the same photo array before defendant's preliminary examination and again identified defendant. Fordham picked out defendant in a live lineup at the police station. At trial, Lawrence identified defendant as the individual whom she had picked out of the photo array.

Detroit Police Officer Steven Turner testified that he prepared the photo array in this case by printing pictures out of a "mug shot computer," which uses pictures taken of people who have been arrested. Turner testified that when he presented the photo arrays to Fordham and Lawrence, defendant had an attorney present because he was "already arrested."

Furman Goodman testified at defendant's trial that his green Chrysler 300 was carjacked on September 29, 2011 by an individual with a gun, but Goodman was not able to identify the individual. Goodman was presented with a photo array shortly after the carjacking, but was unable to identify anyone. However, at a later unspecified court date, Goodman did identify an individual, who was not defendant, as the person who had committed the carjacking.

Detroit Police Officer Robert Skender was called to testify at defendant's trial regarding "some surveillance on some guys wanted for car jacking [sic]," on October 1, 2011. However, defendant objected to this line of questioning as impermissible MRE 404(b) evidence, and the prosecutor decided to not use Skender as a witness.

II. OTHER ACTS EVIDENCE

Defendant first argues that he was prejudiced by the introduction of improper MRE 404(b) other acts evidence. We disagree.

Unpreserved evidentiary claims are reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). A plain error is one that is "clear or obvious," and the error must have affected the defendant's "substantial rights." *Id*. at 763. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence." *Id*. at 763-764 (internal citations omitted). A preserved evidentiary claim is reviewed for an abuse of discretion by the trial court. *People v Danto*, 294 Mich App 596, 598-599; 822 NW2d 600 (2011). The trial court abuses its discretion "when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009).

Evidence of other acts of a defendant as evidence of character is generally excluded. However, such other acts evidence may be admissible under MRE 404(b). 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.

To be admissible, the other acts evidence (1) must be offered "under something other than a character or propensity theory," (2) must be "relevant under MRE 402," and (3) "the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403." *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). "Finally, the trial court, upon request, may provide a limiting instruction under MRE 105." *Id*. In order for the prosecution to present other acts evidence, it must provide reasonable notice in advance of trial of its intent to present the evidence. MRE 404(b)(2).

First, defendant challenges Furman Goodman's testimony regarding the carjacking of his green Chrysler 300 that occurred before the armed robbery of LaToya Lawrence and James Fordham. This claim was not preserved for review by timely objection at trial. Thus, this Court will review it for plain error. *Carines*, 460 Mich at 764.

In the first instance, it is unlikely that Goodman's testimony even qualifies as other acts evidence under MRE 404(b), because it did not directly implicate defendant in the carjacking. Defendant was not specifically identified by Goodman, and Goodman in fact testified that he identified another person as the carjacker. However, even if this evidence did constitute MRE 404(b) other acts evidence, it would still not warrant reversal because defendant has failed to show that he was prejudiced. Defendant was not directly implicated by Goodman's testimony and there was other direct evidence of his guilt, specifically, the identification testimony of the victims, Fordham and Lawrence. Defendant cannot show plain error affecting his substantial rights, and this claim accordingly fails.

Second, defendant challenges Detroit Police Officer Steven Turner's testimony regarding (1) the use of mug shots for the photo array that was shown to Lawrence and Fordham, and (2) the fact that defendant was under arrest at the time of the identification. This claim was also not preserved for review, because defendant failed to object at trial, and thus is reviewed for plain error. *Carines*, 460 Mich at 764.

Defendant argues that this evidence was impermissible because it tended to show a prior history of arrests and that he was in custody on an unrelated charge when Lawrence and Fordham identified him. This argument is without merit. There is no indication that this testimony even falls within the purview of MRE 404(b). Instead, the record indicates that Turner's testimony was introduced to show the identification procedure used by police. Even if this evidence were inadmissible under MRE 404(b), this testimony was introduced for another

purpose, and thus is admissible. See *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000) (holding that evidence that is admissible for one purpose, such as evidence introduced as noncharacter evidence, is not rendered inadmissible simply because it is precluded for a different purpose, such as inadmissible character evidence). Here, the testimony regarding the use of mug shots and of defendant's arrest at the time of the identification merely relates to the process through which Lawrence and Fordham identified defendant. The testimony was relevant because it directly related to how the photo array was assembled, and the circumstances of the identification. Finally, the testimony was more probative than prejudicial because it clarified the identification procedure at the police station to the jury. Defendant has failed to show how either this testimony regarding the identification procedure or the specific identifications were unfairly prejudicial to him. See MRE 403; see also *People v Feezel*, 486 Mich 184, 198; 783 NW2d 67 (2010).

Lastly, defendant challenges Skender's testimony regarding his surveillance of suspected carjackers. Defendant argues that Skender indicated in his testimony that defendant was under surveillance for carjacking. In fact, Skender merely testified that "they were doing some surveillance on some guys wanted for a car jacking [sic]." There was no direct indication that defendant was under surveillance. Further, after defense counsel's objection and a brief sidebar with the trial court, the prosecution dismissed the witness and no further testimony was taken. Skender's brief statement did not directly implicate defendant and was not unfairly prejudicial. We find no reversible error in the admission of Skender's statement.

Defendant challenges the above evidence in light of what he argues to be unreliable identification testimony by Lawrence and Fordham. This Court has consistently held that credibility is an issue for the trier of fact. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Further, this Court has stated that "positive identification by witnesses may be sufficient to support a conviction of a crime." *Id*. There is no indication that the credibility of Lawrence and Fordham has any bearing on the admissibility of other evidence.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that his trial counsel was ineffective for failing to object to the multiple instances of improper MRE 404(b) other acts evidence, and for failing to request a curative instruction after Skender was dismissed as a witness. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's "findings of fact are review for clear error . . .," and questions of "constitutional law are reviewed by this Court de novo." *Id*. Defendant did not move for a new trial or an evidentiary hearing. Thus, "this Court's review is limited to mistakes apparent on the record." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

Both the United States Constitution and the Michigan Constitution provide the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). To adequately prove a claim of ineffective assistance of

counsel, a defendant must prove (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Smith v Spisak*, 558 US 139, 150; 130 S Ct 676; 175 L Ed 2d 595 (2010). See also *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Further, "[b]ecause the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001).

In evaluating an ineffective assistance of counsel claim, this Court "will not substitute its judgment for that of counsel on matters of trial strategy, nor will [this Court] use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). This Court has held that "declining to raise objections . . . can often be consistent with sound trial strategy." *Id*. A defendant must overcome the presumption that his counsel's performance was strategic. *Id*. Here, defendant has failed to overcome this presumption.

First, we have found that there was no error in the admission of Turner's testimony regarding the use of defendant's mug shot in the photo array and the fact of defendant's arrest at the time of the identification. Consequently, defense counsel was not ineffective in failing to object to that evidence. "[C]ounsel does not render ineffective assistance by failing to raise futile objections." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Second, defendant argues that his trial counsel was ineffective for failing to request a curative instruction after objecting to Skender's testimony as improper MRE 404(b) testimony. This Court has held that "[f]ailing to request a particular jury instruction can be a matter of trial strategy." *People v Dunigan*, 299 Mich App 579, 584; 831 NW2d 243 (2013). Defendant has not overcome the presumption of trial strategy; for example, counsel may not have requested a curative instruction because doing so would have highlighted the issue before the jury. See *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Further, it is unlikely that an instruction would have changed the outcome of defendant's case, because Skender did not mention defendant by name and did not specify any individuals who were under surveillance.

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Mark T. Boonstra