STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 11, 2013
v	No. 309264 Oakland Circuit Court
WESTLEY ROBERTTHOM JOHNSON, Defendant-Appellant.	LC No. 2011-239053-FH

Before: BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant Westley Robertthom Johnson of impersonating a police officer in violation of MCL 750.215(3), and attempted use of false pretenses to defraud a victim of money between $200 and $1,000 in violation of MCL 750.218(3)(a). Contrary to defendant's appellate challenge, the prosecutor provided a proper legal basis for admitting evidence that defendant had committed an identical offense in the past. The trial court also correctly instructed the jury on the elements of the charged offenses. And the prosecutor presented sufficient evidence to establish defendant's guilt beyond a reasonable doubt, while defendant failed to adequately support his defense that he abandoned his criminal enterprise. We therefore affirm.

I. BACKGROUND

On September 4, 2011, Jing Zhen responded to a Craig's List advertisement placed by defendant offering to sell two Blackberry cellular telephones. The two communicated by email and text messaging and arranged to meet the following afternoon at the Somerset Mall food court. When defendant arrived at the meeting, he asked to see Zhen's identification to conduct a background check. Defendant told Zhen that he was an undercover Troy police officer, showed Zhen a badge, warned Zhen that he was carrying a gun and handcuffs, and accused Zhen of committing a felony by attempting to purchase stolen goods. Defendant threatened to arrest Zhen unless he agreed to cooperate by giving defendant the $600 in cash he had agreed to pay for the phones. Zhen was suspicious and refused to cede the funds. Defendant attempted to negotiate with Zhen for a portion of the funds, but Zhen "called his bluff" and told defendant to arrest him. Defendant then feigned the need to telephone his superior officer, walked away from the table and never returned.

Zhen immediately filed reports with mall security and the Troy Police Department. The officers were able to locate defendant using closed circuit surveillance cameras as defendant did

not leave the mall after the offense. Defendant admitted that his initial plan was to "scam" Zhen, but claimed that he changed his mind and never asked Zhen to give him $600 to avoid arrest.

II. OTHER ACTS EVIDENCE

Defendant challenges the trial court's admission of evidence that he committed a similar crime in the past. Specifically, the prosecutor presented evidence that on September 29, 2010, an undercover officer contacted defendant at the same email address used in this case in response to a Craig's List advertisement offering to sell cellular telephones. Defendant met that officer at a McDonald's restaurant, told the officer that he was a FBI agent "investigating a stolen property complaint," showed the officer a fake FBI badge, and "asked [the officer] to cooperate by giving him the $750 that [the officer] had brought to purchase the phones[.]" Defendant was arrested as a result of that incident. Defendant filed a motion in limine to exclude the evidence, but the trial court accepted the prosecutor's argument that the evidence was admissible to prove defendant's intent, absence of mistake, and preparation, scheme, plan, or system in doing an act.

We review a trial court's evidentiary decisions for an abuse of discretion and underlying legal issues de novo. *People v Kowalski*, 492 Mich 106, 119; 821 NW2d 14 (2012). When the prosecution seeks to admit evidence of other crimes, the evidence is admissible only when (1) it is offered to show something other than character or propensity, MRE 404(b)(1); (2) it is relevant under MRE 402; and (3) the probative value is not substantially outweighed by unfair prejudice, MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Under MRE 404(b)(1), evidence of other acts may be admissible for purposes other than to establish character or propensity, including to prove "motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident."

Defendant argues that the prosecution failed to provide a specific rationale for admitting the evidence and instead improperly used a "shotgun" approach by merely reciting the list of appropriate purposes under MRE 404(b)(1). "It is insufficient for the proponent of the evidence to merely recite one of the purposes articulated in MRE 404(b). The proponent must also explain how the evidence relates to the recited purposes." *People v Dobek*, 274 Mich App 58, 85-86; 732 NW2d 546 (2007), citing *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). However, the failure to cite a specific purpose under MRE 404(b) is not fatal:

> *Crawford*, however, should not be read as imposing a heightened requirement for establishing the theory of admissibility or suggesting that the prosecution's failure to identify at trial the purpose that supports admissibility requires reversal. The requirement under MRE 404(b)(2) that the prosecution provide notice of the general nature of the other acts evidence and rationale for admitting the evidence is designed to ensure that the defendant is aware of the evidence and to provide an enlightened basis for the trial court's determination of relevance and decision whether to exclude the evidence under MRE 403. [*People v Sabin (After Remand)*, 463 Mich 43, 60 n 6; 614 NW2d 888 (2000).]

Defendant was adequately informed regarding the evidence to be presented and how it tied to the current matter. As the prosecutor stated at the motion hearing, "these are two of the

exact same crimes basically." The evidence bolstered Zhen's credibility as he described events nearly identical to the evidence presented by the undercover officer in the 2010 case. The similarities between the two incidents tended to establish "a plan, scheme, or system to do the acts." *Id.* at 66. The past crime was also relevant to prove that defendant intended to represent himself as a police officer and take Zhen's money under false pretenses, negating defendant's theory that Zhen simply "assumed" defendant was a police officer or that defendant abandoned his plan. *People v McGhee*, 268 Mich App 600, 611; 709 NW2d 595 (2005) ("The more often a defendant acts in a particular manner, the less likely it is that the defendant acted accidentally or innocently . . . and conversely, the more likely it is that the defendant's act is intentional.").

Moreover, the court gave the jury a limiting instruction:

> You may only think about whether this evidence tends to show that the defendant had a reason to commit the crime and/or that the defendant specifically meant to impersonate a peace officer and/or the defendant acted purposefully, that is not by accident or mistake or because he had misjudged the situation, and/or . . . [t]hat the defendant had used a planned system or characteristic scheme that he has used before or since.

As the other acts evidence was highly relevant and admitted for a proper purpose, and as the court gave a limiting instruction to reduce the evidence's prejudicial effect, the trial court acted within its discretion.

III. JURY INSTRUCTIONS

Defendant contends that the trial court improperly instructed the jury on the elements of the offenses with which he was charged.

> We review de novo claims of instructional error and questions of statutory interpretation. This Court reviews jury instructions as a whole to determine whether there is error requiring reversal. The instructions must include all the elements of the charged offense and must not omit material issues, defenses, and theories if the evidence supports them. Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights. [*People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998) (citations omitted).]

Defendant argues that the court added an element in the jury instruction that does not exist in the impersonating-an-officer statute. The court instructed the jury that the prosecutor must establish the following elements beyond a reasonable doubt:

> First, that the defendant was not an officer of the City of Troy Police Department. Second, that the defendant represented to another person that he was an officer of the City of Troy Police Department. Third, that the defendant made this representation to commit or attempt to commit another crime. *It does not matter whether the other person believed the defendant's representation or whether the defendant was successful in committing another crime.* [Emphasis added.]

MCL 750.215 does not state that the victim must believe the defendant's representation or that the defendant must have been successful in committing another crime. Rather, the statute only requires the prosecutor to establish that the defendant falsely represented himself as a police officer in an attempt to commit another crime. MCL 750.215(1), (3). Defense counsel elicited testimony that Zhen did not truly believe that defendant was a police officer. By injecting this information, which was irrelevant under the statute, defense counsel could have confused the jury. The instruction merely clarified the actual elements of the offense and was neither erroneous nor misleading.

Defendant further argues that the trial court erroneously added an additional element to the crime of false pretenses. The court instructed the jury in relation to this offense:

> To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant intended to commit false pretenses in an amount between $200 and $1,000 which is defined as; first, that the defendant used pretense; second, that the defendant knew the pretense was false at the time he used it; third, that at the time he used the pretense the defendant intended to defraud or cheat someone; *fourth, that another person relied on the defendant's pretense*; and fifth, that by relying on this pretense the person suffered a loss between $200 and $1,000. Second, that the defendant took some action toward committing the alleged crime but failed to complete the crime. [Emphasis added.]

Defendant contends that the false pretense statute, MCL 750.218, does not include an element of reliance by the victim. However, it is well established in Michigan precedent that "detrimental reliance on the false representation by the victim" is indeed an element of the completed offense. *In re People v Jory*, 443 Mich 403, 412; 505 NW2d 228 (1993); *People v Dewald*, 267 Mich App 365, 371; 705 NW2d 167 (2005). And the court gave the instruction regarding the victim's reliance when explaining the elements of the completed offense of using false pretenses to defraud a victim. It is true that, when the victim does not rely on the defendant's pretense, the defendant cannot be guilty of false pretenses, only attempt. *People v Wogaman*, 133 Mich App 823, 828; 350 NW2d 816 (1984). But the court properly instructed the jury on the elements of the underlying offense and the method of determining defendant's guilt of attempt. Defendant has established no instructional error in this regard.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant finally contends that the prosecutor presented insufficient evidence to support his attempted false pretenses conviction beyond a reasonable doubt because he "voluntarily walked away from these alleged offenses." We review a challenge to the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). A prosecutor need not present direct evidence of a defendant's guilt. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (quotation marks and citation omitted). When reviewing a challenge to the sufficiency of the

evidence, we must be mindful that it is the sole province of the jury to weigh the evidence and make credibility determinations. *People v Mardlin*, 487 Mich 609, 626; 790 NW2d 607 (2010)

An attempt to commit an offense consists of two elements: "(1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation." *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993) (quotation marks and citation omitted).

> Abandonment is an affirmative defense, and the burden is on the defendant to establish by a preponderance of the evidence voluntary and complete abandonment of a criminal purpose. *People v Kimball*, 109 Mich App 273, 286; 311 NW2d 343 (1981), modified on other grounds 412 Mich 890, 891; 313 NW2d 285 (1981). The abandonment defense is not available where "the defendant fails to complete the attempted crime because of unanticipated difficulties, unexpected resistance, or circumstances which increase the probability of dete[c]tion or apprehension." *Id.* at 286-287. The limitations on the abandonment defense also were stated in Dressler, Understanding Criminal Law, § 27.08, p 356:
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> > "Abandonment by the defendant is 'voluntary' when it is the result of repentance or a genuine change of heart. On the other hand, the defendant is not entitled to the defense if her motivation for withdrawal was that she feared arrest, realized that she lacked an essential instrumentality to complete the crime or for some other reason could not successfully proceed, or if she merely post-poned her criminal endeavor until a better opportunity presented itself." [*People v Cross*, 187 Mich App 204, 206-207; 466 NW2d 368 (1991).]

The only evidence that defendant "abandoned" his criminal pursuit came from his own self-serving testimony. Defendant admitted that he travelled to Somerset Mall with the intention of defrauding Zhen of $600. Defendant arranged the meeting and even carried a fake police badge with him. While defendant claimed that he suddenly changed his mind and denied identifying himself to Zhen as a police officer or offering Zhen the opportunity to avoid arrest by turning over the $600, Zhen testified that defendant actually made these statements. The jury was free to credit Zhen's testimony over that of defendant and determine that defendant did attempt to defraud Zhen through the use of false pretenses. Accepting Zhen's testimony as true, as required in a sufficiency challenge, defendant did not "abandon" his criminal venture until Zhen refused to turn over the money. The defense is not available to defendant where his criminal attempts were thwarted by his victim's refusal to cooperate. *Id.* at 206. As defendant did not meet his burden of establishing his affirmative defense while the prosecution met its burden of proof, the jury could find defendant guilty beyond a reasonable doubt.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher