# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JOSEPH MARTINEZ,

Defendant-Appellant.

UNPUBLISHED
June 25, 1996

No. 181996
LC No. 94-001218-FC

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Before: Doctoroff, C.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from convictions of armed robbery, MCL 750.529; MSA 28.797, and conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1). Defendant was sentenced to 40 to 120 months' imprisonment for each conviction, the terms to be served concurrently. On appeal, defendant claims that there was insufficient evidence to support a verdict of guilty beyond a reasonable doubt. He also contends that he was denied a fair trial by the admission of evidence of defendant's prior bad acts and by the trial court's denial of his opportunity to rehabilitate a defense witness. Finally, defendant claims that his sentence was disproportionate. We affirm.

On June 19, 1994, at approximately 3:20 a.m., an individual wearing a bandanna over his face and a sweatshirt above his eyes robbed a Total gas station at knifepoint, taking $87 in cash. Several witnesses at trial testified that defendant aided and abetted in the robbery by helping to plan the crime, supplying clothing to the perpetrator, and assisting in the disposal of those clothes. This testimony was sufficient to support a finding that defendant "performed acts or gave encouragement that aided or assisted the commission of the crime" and that he "intended the commission of the crime or had knowledge that the principal intended its commission at the time [he] gave the aid or assistance." *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). Thus, viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to support defendant's conviction. *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994).

Defendant also claims that he was denied his right to a fair trial because evidence of an unrelated bad act was admitted into trial. We disagree. The prosecution solicited testimony that, prior to the robbery, defendant and several of his associates went "car shopping," which is a term for stealing items out of parked automobiles. Defendant objected to such testimony, stating that it was improper character evidence. Generally, evidence which is admitted solely for the purpose of showing defendant's inclination for wrongdoing is not admissible. MRE 404(b); *People v Vandervliet*, 444 Mich 52, 63; 508 NW2d 114 (1993). However, evidence of other acts can be admitted when the evidence is relevant to an issue other than propensity to commit crimes, such as intent, preparation, scheme, plan or system in doing an act. MRE 404(b). The trial court ruled that the testimony was admissible. We agree. The testimony indicated that defendant went "car shopping" shortly before the robbery. Both the "car shopping" and the robbery occurred on the same night, and both involved theft. Accordingly, the testimony was relevant to show that defendant had a plan to steal and that he had the intent to steal. *VanderVliet*, *supra* at 85. Defendant answered the charges against him with a general denial, thus making evidence of his plan to steal and the intent to steal relevant issues. *Id.*, at 83-84. Based on the foregoing, we find that the trial court did not abuse its discretion in admitting the evidence regarding defendant's "car shopping" activities, as the evidence was relevant to show plan and intent to steal.

Defendant next contends that he was denied a fair trial because, after a defense witness was cross-examined, defendant's attorney was denied the ability to rehabilitate the witness with a prior consistent statement made during the preliminary examination. We disagree with defendant, and find that the trial court properly excluded the witness' prior consistent statement. Generally, prior consistent statements of a witness are inadmissible. *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987). A party may use such a statement to rebut a charge of recent fabrication, but only if "the earlier consistent statement was given at a time prior to the existence of any fact which would motivate bias, interest, or corruption on the part of the witness." *People v Lewis*, 160 Mich App 20, 29; 408 NW2d 94 (1987). In this case, the witness' prior consistent statements were taken from his testimony at the preliminary examination. Presumably, the witness' motives did not change from the time of the preliminary examination to the time of trial. Defendant did not show that the witness' potential bias had not yet developed at the time of the preliminary hearing. Thus, the trial court did not abuse its discretion in excluding the prior consistent statements.

Finally, defendant claims that his 40 month sentence was disproportionate to the crime because defendant was only a minor participant in aiding and abetting the robbery. We disagree, and find the sentence proportionate pursuant to *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Defendant's 40 month sentence fell within the recommended guidelines' range of 18 to 60 months' imprisonment, thus, the sentence is presumptively proportionate. *People v Cotton*, 209 Mich App 82, 85; 830 NW2d 495 (1995). To overcome this presumption, a defendant must present "unusual circumstances." *Id.* Defendant contends that his lack of a prior criminal record and his "very minor" participation in the robbery entitle him to a lesser sentence. However, neither of these constitute "unusual circumstances" which could support a finding that defendant's sentence was disproportionate.

*People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994) Accordingly, defendant's 40 month sentence was proper and did not constitute an abuse of discretion.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald