

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENVARD EDWARD HANELINE,

Defendant-Appellant.

UNPUBLISHED
October 18, 1996

No. 186237
LC No. 94-009541

Before: Wahls, P.J., and Cavanagh and J.F. Kowalski,* JJ.

PER CURIAM.

After a jury trial, defendant was convicted of uttering and publishing, MCL 750.249; MSA 28.446. He subsequently pleaded guilty as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant was sentenced to thirty months to fourteen years in prison as an habitual offender. He now appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion by admitting testimony that defendant passed a bad check in the same store several days before he committed the present offense. We disagree.

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.

Such evidence is admissible if 1) it is relevant to an issue other than character or propensity, 2) it is relevant to an issue or fact of consequence at trial, and 3) its probative value is not substantially

* Circuit judge, sitting on the Court of Appeals by assignment.

outweighed by the danger of unfair prejudice. *People v Catanzarite*, 211 Mich App 573, 578-579; 536 NW2d 570 (1995).

In the present case, the trial court's findings that the evidence was relevant to defendant's knowledge and intent on August 21, 1994, and that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice were not an abuse of discretion. The evidence was properly admitted pursuant to MRE 404(b).

Defendant also argues that the evidence should not have been admitted because the prosecutor did not notify defendant of his intent to use the evidence at trial, as is required by MRE 404(b)(2). We disagree.

The notice requirement "prevents unfair surprise and offers the defense the opportunity to marshal arguments regarding both relevancy and unfair prejudice." *People v VanderVliet*, 444 Mich 52, 89 n 51; 508 NW2d 114 (1993). MRE 404(b)(2) merely requires "reasonable notice prior to trial." In the present case, defense counsel had an opportunity to argue against the admission of the evidence before trial began. Furthermore, it is clear that the evidence was both relevant and more probative than prejudicial. Therefore, defendant was not harmed by any lack of notice that may have occurred and accordingly, the trial court did not reversibly err by determining that the evidence was not inadmissible due to lack of notice.

Defendant next argues that prosecutorial misconduct denied him a fair trial. Because defendant did not object to the prosecutor's remarks at trial, this Court's review is precluded absent a miscarriage of justice, or unless a cautionary instruction could not have cured the prejudicial effect. *People v Lee*, 212 Mich App 228, 245; 537 NW2d 233 (1995).

A prosecutor's argument is proper if it is based on the evidence and the reasonable inferences from the evidence. *People v Stacy*, 193 Mich App 19, 36-37; 484 NW2d 675 (1992). It is proper for a prosecutor to argue that the evidence establishes the defendant's guilt. *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982). We have reviewed the record and find no error in the prosecutor's closing argument.

Defendant next argues that he was denied effective assistance of counsel. We disagree. Because defendant did not move for a *Ginther*¹ hearing below, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To prove ineffective assistance of counsel, the defendant must show both that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive the defendant of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). To show prejudice, the defendant must show that there is a reasonable probability that, but for the error, the result of the proceedings would have been different. *People v Lavearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Lavearn, supra*, 448 Mich 217.

Defense counsel's statement that a codefendant pleaded guilty was improper as a statement of a fact not in evidence. However, in light of the overwhelming evidence of defendant's guilt, there is not a reasonable probability that, but for counsel's error, defendant would not have been convicted. Therefore, the error was not prejudicial and defendant's conviction will not be reversed because of ineffective assistance of counsel.

Finally, defendant argues that the trial court erred in amending the judgment of sentence without a hearing. We disagree.

MCR 6.429 authorizes a trial court to modify an invalid sentence after it has been imposed. Defendant's original sentence was invalid because it did not comply with MCL 768.7a(2); MSA 28.1030(1)(2), which required defendant's sentence in the instant case to run consecutively to any sentence defendant was required to serve for violation of his parole from an earlier sentence. *People v Kaczorowski*, 190 Mich App 165, 174; 475 NW2d 861 (1991). The trial court's modification of the sentence to comply with MCL 768.7a(2); MSA 28.1030(1)(2) was proper and did not require a hearing.

Affirmed.

/s/ Myron H. Wahls
/s/ Mark J. Cavanagh
/s/ John F. Kowalski

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).