

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE KIRK DAVIS,

Defendant-Appellant.

UNPUBLISHED

April 1, 1997

No. 191095

Van Buren Circuit Court

LC No. 94-009149-FC

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to consecutive terms of two years' imprisonment for the felony-firearm conviction and fourteen to twenty-five years' imprisonment for the armed robbery conviction. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in denying his motion for a directed verdict at the close of the prosecution's case. Specifically, defendant contends that because the intruder wore a mask during the commission of the offense and the victim was unable to identify defendant as the perpetrator, the prosecution failed to present sufficient evidence to prove that defendant was the individual responsible for the offenses.

We review a ruling on a motion for a directed verdict by the same standard as must the trial court. We must consider the evidence presented by the prosecution up to the time the motion was made in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The reasonable inferences drawn from circumstantial evidence may be sufficient to prove any element of a crime. *Jolly*, *supra* at 466.

In this case, the prosecution presented the testimony of two witnesses who saw defendant operating a vehicle matching the color and make of the victim's vehicle, which was stolen during the robbery. Further, a police investigator testified that after the police recovered the victim's vehicle, he found defendant's fingerprints on items recovered from the vehicle. Viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the prosecution circumstantially established beyond a reasonable doubt that defendant committed the offenses.

Next, defendant argues that the trial court violated the requirements of MRE 404(b) in admitting evidence of defendant's involvement in another robbery.

To be admissible under MRE 404(b), bad-acts evidence must satisfy three requirements: (1) the evidence must be relevant to an issue other than character or propensity; (2) the evidence must be relevant to an issue or fact of consequence at the trial, and; (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). In addition, the trial court may give a limiting instruction. *Id.* at 75. We review a trial court's decision to admit bad-acts evidence for abuse of discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

In this case, the prosecution theorized that defendant stole the victim's vehicle during the instant offense and later abandoned the vehicle at the scene of the other robbery, where defendant then stole another vehicle. The prosecution contended that defendant got blood on his shoes and pants during the course of the other robbery, and the prosecution presented evidence that when the police arrested defendant, defendant was driving the other stolen vehicle and had dried blood on his pants. Because the perpetrator of the robbery for which defendant was on trial wore a mask and thus could not be identified, the prosecution argued that the limited testimony regarding the other robbery tended to establish defendant's identity as the perpetrator of the instant robbery. Thus, we conclude that the challenged evidence was relevant to a fact of consequence other than character or propensity—defendant's identity. MRE 401; *VanderVliet, supra* at 74-75. We further conclude that the probative value of the challenged evidence was not substantially outweighed by the danger of unfair prejudice, particularly in light of the trial court's cautionary instructions. MRE 403; *VanderVliet, supra*. Accordingly, considering the facts on which the trial court acted, we believe that the trial court justifiably admitted the testimony regarding the other robbery and therefore did not abuse its discretion.

Next, defendant argues that the trial court erred in not granting his motion for a mistrial following a witness' testimony relating to another crime for which defendant was not presently on trial.

The trial court's grant or denial of a mistrial will not be reversed on appeal in the absence of an abuse of discretion. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996). In order for this Court to find an abuse of discretion, it must find the trial court's ruling to be so grossly erroneous that it deprived defendant of a fair trial or amounted to a miscarriage of justice. *Id.* See also *People v Gonzales*, 193 Mich App 263, 265; 483 NW2d 458 (1992).

In this case, the trial court instructed the jury after the challenged testimony and at the close of trial to consider the testimony regarding the other crime only for the purpose of establishing a continuum of events to aid in determining defendant's guilt or innocence of the crime charged. The trial court specifically instructed the jury that the testimony was not admissible for the purpose of proving defendant's character in order to show that he acted in conformity therewith. Because jurors are presumed to follow the instructions of the trial court until the contrary is clearly shown, *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994), we conclude that the trial court's cautionary instructions cured any alleged prejudice resulting to defendant. Therefore, because the alleged irregularity did not deny defendant a fair trial or result in a miscarriage of justice, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Affirmed.

/s/ Joel P. Hoekstra

/s/ William B. Murphy

/s/ Michael R. Smolenski