

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY AHLAN DALE,

Defendant-Appellant.

UNPUBLISHED

June 13, 1997

No. 189725

Kent Circuit Court

LC No. 94-003407-FC

Before: Bandstra, P.J., and Hoekstra and J.M. Batzer*, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797. Defendant later pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, and was sentenced to 30 to 60 years' imprisonment. Defendant now appeals as of right, and we affirm.

Defendant first argues that the trial court abused its discretion in admitting evidence of prior bad acts under MRE 404(b). Although defendant failed to object and preserve this issue with respect to his possession of cocaine at the time of his arrest, he did properly preserve the issue with respect to the theft of a pistol believed to have been used in the subsequent robbery, a barricaded gunman episode involving defendant, and statements attributed to defendant concerning plans to escape from jail. We agree with the trial court's ruling that the evidence of escape plans was admissible as evidence of guilty knowledge, and does not necessitate a 404(b) analysis.

Turning to the remaining preserved claims involving the pistol theft and barricaded gunman incident,¹ our Supreme Court has held that relevant other acts evidence does not violate MRE 404(b) unless it is offered solely to show the criminal propensity of an individual in order to establish that he acted in conformity therewith. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). Here, we agree with the trial court's application of

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

this rule, and conclude that the evidence in question was not offered to show conformity to character, but rather, that defendant had access to and possession of a weapon. Because this evidence related to one of the elements of the crime charged and because we believe that the evidence was not unfairly prejudicial, the trial court did not abuse its discretion in admitting the evidence at issue.

Defendant next argues that he was denied a fair trial by the trial court's failure to give final cautionary instructions regarding the use of the evidence involving other bad acts. Because defendant did not object to the instructions, relief will not be granted on appeal unless there is a showing of manifest injustice, *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993). Here, we conclude that the trial court's instructions, given before the testimony was allowed and at the close of trial, that the evidence was to be used only for the limited purpose of proving whether defendant had access to and possession of a weapon used in the robbery, and that it could not be used to convict defendant merely because he might be guilty of other bad conduct were sufficient to avoid manifest injustice.

Next, defendant argues that the trial court erred in failing to give a requested instruction regarding the possibility of leniency for an informant-witness in exchange for his favorable testimony. The determination of whether a jury instruction is applicable in a case is within the sound discretion of the trial court. *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996). Instructions are acceptable as long as they fairly present to the jury the issues to be tried and sufficiently protect a defendant's rights. *Id.* Here, defendant's requested instruction would have indicated to the jury that there had been an agreement that the witness would receive favorable consideration on a pending charge in exchange for his testimony against defendant. The trial court refused the request because there was no evidence showing that such a deal had been made. A jury need not be instructed with respect to any "future possibilities" regarding leniency. See *People v Atkins*, 397 Mich 163, 173-174; 243 NW2d 292 (1976). We agree with the trial court's decision that the standard instruction to consider whether a witness had any bias or personal interest or whether the witness was promised anything that would affect his or her testimony was sufficient to address the possibility that the informant witness testified in hopes of leniency.

Defendant also argues that he was denied a fair trial as a result of the prosecutor's repeated misconduct in exceeding the scope of admissible evidence of other bad acts, eliciting improper testimony and interjecting irrelevant issues, and misrepresenting the expectation of leniency for the informant-witness. We disagree.

First, defendant argues that the prosecutor erred in exceeding the scope of the trial court's order regarding the admissibility of evidence of other bad acts under MRE 404(b) and in repeatedly eliciting improper and prejudicial testimony from his witnesses and interjecting his own irrelevant and inflammatory remarks. Defendant did not object to the prosecutor's conduct at trial, and unless a timely instruction could not have cured the error, we review defendant's allegations only for a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, we find no miscarriage of justice because the complained of conduct either was not erroneous, involved unresponsive answers from witnesses, or timely instructions could have cured the errors.

Defendant's final argument of prosecutorial misconduct is that the prosecutor erred in failing to divulge a favorable agreement or understanding that the prosecution had with an informant witness. It is unclear to us what error defendant is asserting in this regard because he has shown no evidence of any actual agreement or understanding. Further, as stated above, there is no duty of disclosure for merely future possibilities of leniency. See *Atkins, supra* at 173. Here, we conclude that the prosecutor did not act improperly in failing to disclose something which did not exist.

Defendant next argues that he was denied effective assistance of counsel because his trial counsel failed to object to the admission of evidence of other bad acts and failed to request a cautionary instruction regarding that evidence. Defendant did not move for a new trial, and nothing in addition to the trial court record was offered to support defendant's contention that he was denied effective assistance of counsel; thus, our review is limited to the lower court record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). To prevail on an ineffective assistance of counsel claim, defendant must show that his trial counsel's performance was deficient measured against prevailing professional norms and that the deficiency resulted in prejudice to defendant in the outcome of the case. *Stanaway, supra*, 687-688. Here, we believe that trial counsel's actions could be considered trial strategy. Even assuming otherwise, defendant has failed to show that there is a high probability that the deficiencies affected the outcome of the case. *Id.* Given the substantial amount of evidence supporting the prosecution's case, it is not highly probable that the deficiencies alleged by defendant had any bearing on the outcome of the case.

Defendant next argues that he was denied a fair trial as a result of being shackled on his arms and legs at trial, to which he did not object at trial. We disagree. Although shackling a defendant during trial is permitted only in extraordinary circumstances, *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996), such circumstances existed in this case. Defendant was charged as a fourth felony offender; there was evidence that he was involved in the present crime involving use of a dangerous weapon; and probably most persuasive, there was evidence that he had plans to attempt to escape from jail while incarcerated on the present charge. Further, defendant had two prior escape convictions. Based upon, defendant's prior record, as well as facts in the present case, we find no abuse of discretion in the decision to shackle defendant.

Defendant also argues that his sentencing was improper because the trial court failed to consider established sentencing factors or articulate its reasons for sentencing, and violated the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). We disagree. Contrary to defendant's argument, the trial court indicated that defendant's sentence was based on information contained in the presentence information report and that it considered the factors set forth in the sentencing guidelines. We further find defendant's sentence to be proportionate. As indicated by the presentence report, defendant had previously been convicted of eight felonies and three misdemeanors. In addition, the report discussed "numerous negative factors" present in defendant's case, including property related crimes, escape convictions, suspicions of other criminal activity, threats of violence, crimes involving weapons, and the incident in which defendant barricaded himself in a home and held 30 to 40 officers at bay for several hours. The trial court indicated its consideration of these factors in sentencing defendant. Given the circumstances surrounding the offender and offense, we

conclude that the trial court did not abuse its discretion and that defendant's sentence was proportionate.

Defendant's final argument is that, even if the above errors did not individually rise to the level of error requiring reversal, the cumulative effect of errors denied defendant a fair and impartial trial. We disagree. Although due process does not require that a trial be perfect and without irregularities, the total weight of errors at trial may constitute imperfection to the point of violating due process. *People v Rosales*, 160 Mich App 304, 312-313; 408 NW2d 140 (1987). Even where any one of the errors may not itself warrant reversal, the totality may compel a new trial. *People v Miller*, 211 Mich App 30, 44; 535 NW2d 518 (1995). In this case, we do not believe that the cumulative effect of the above-alleged errors denied defendant a fair trial.

Affirmed.

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

/s/ James M. Batzer

¹ We decline to review defendant's claim of error regarding the admission of evidence involving cocaine possession because defendant did not object below and has failed to demonstrate that manifest injustice will result from our failure to review this claim. *People v Burton*, 219 Mich App 278, 292; 556 NW2d 201 (1996).