STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL EMANUAL MCINTIRE,

Defendant-Appellant.

UNPUBLISHED
August 15, 1997

No. 186395
Macomb Circuit Court
LC No. 94-001954-FH

Before: Smolenski, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, possession of a firearm during the commission of a felony, 750.227b; MSA 28.424(2), second-degree retail fraud, MCL 750.356d; MSA 28.588(4), and he was subsequently convicted of being an habitual offender, third offense, MCL 769.11; MSA 28.1083. He was sentenced to three to eight years' imprisonment for felonious assault, and two years' imprisonment for felony-firearm, to be served consecutively. He was also sentenced to 93 days' imprisonment for second-degree retail fraud with 241 days credit for time served. Defendant now appeals as of right. We affirm.

Defendant first argues that the evidence was insufficient to convict him of felonious assault and possession of a firearm during the commission of a felony. In reviewing the sufficiency of the evidence, this Court must consider the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have concluded that the elements of the crime were established beyond a reasonable doubt. *People v McCrady*, 213 Mich App 474, 484; 540 NW2d 718 (1995). A trier of fact may make reasonable inferences from the facts, if the inferences are supported by direct or circumstantial evidence. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). Intent may be inferred from all the facts and circumstances of the case. *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991). This Court may not interfere with the jury's role of determining the weight and credibility of the evidence. *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993).

The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempt to commit a felony. *Id.*

Defendant argues that the evidence was insufficient to prove that he possessed a dangerous weapon because Officer Northrup was the only witness to testify that defendant pointed a weapon at him and his testimony was not credible. However, in reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and may not determine the credibility of witnesses. *Herbert*, *supra* at 474. This argument has no merit because the jury clearly found Officer Northrup to be a credible witness.

Defendant next argues that the evidence was insufficient because felonious assault is a specific intent crime, and there was no evidence presented at trial to support a finding that he intended to injure Northrup or place him in reasonable apprehension of an immediate battery, because defendant could not have known whether or not the weapon was loaded. We disagree. "Because the law recognizes the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to sustain a conclusion that a defendant entertained the requisite intent." *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985). Viewed in a light most favorable to the prosecution, the evidence indicates that, during a struggle with Northrup, defendant took Northrup's weapon from its holster and pointed it at his chest. Even if the weapon had not been loaded, the jury could reasonably have inferred from this conduct that defendant intended to injure Northrup or place him in reasonable apprehension of an immediate battery. Therefore, the evidence was sufficient to convict Northrup of felonious assault.

Defendant next argues that his convictions of felonious assault and possession of a firearm during the commission of a felony were against the great weight of the evidence. This Court reviews a denial of a motion for a new trial based on a great weight of the evidence argument under an abuse of discretion standard. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). The question is whether the verdict was manifestly against the clear weight of the evidence. *Id.* A verdict may be vacated only when it does not find reasonable support in the evidence, but is more likely attributed to causes outside the record, such as passion, prejudice, sympathy, or some extraneous influence. *Id.* A new trial may be granted when the verdict has resulted in a miscarriage of justice. *Id.*

Defendant argues that his convictions were against the great weight of the evidence because Northrup was the only witness who testified that defendant pointed a weapon at him. He argues that Dolson's testimony did not corroborate Northrup's testimony, and defendant's testimony contradicted it. We disagree. While a judge may grant a new trial after finding the prevailing party's witnesses not to be credible, this exercise of judicial power is to be undertaken with great caution, mindful of the special role accorded jurors under our constitutional system of justice. *Herbert*, *supra* at 476.

In the present case, the jury heard evidence that defendant stole cigarettes from a convenience store and fled in a waiting vehicle. After a high speed automobile chase, and then a chase on foot, Officer Northrup tackled defendant and wrestled with him. During this struggle, defendant gained control of Northrup's weapon, and Northrup yelled "he's got my gun." Hearing this, Officer Dolson

struck defendant on the neck, and Northrup regained control of the weapon. Defendant admitted to stealing the cigarettes but testified that he did not intend to evade police and told the driver of the car to stop. He stated that he ran from the car after it had collided with electric poles because he was afraid that the live wires would ignite the car's gas tank. He denied taking Northrup's weapon. On this record, we find that defendant's convictions were not manifestly against the clear weight of the evidence. The jury sifted through the evidence and determined the weight and credibility of the conflicting testimony. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant next argues that he was denied the effective assistance of counsel by his trial counsel's stipulation to the statements of two witnesses who were working in the convenience store on the night of the events that gave rise to defendant's convictions. The stipulation amounted to an admission that defendant committed retail fraud. Defendant argues that this was not within sound trial strategy and was prejudicial to him, because it relieved the prosecution of its burden of proof on the issue of the retail fraud, suggesting to the jury that the rest of the prosecution's case had been proven, and because it precluded the defense of resisting an unlawful arrest.

To prove ineffective assistance of counsel, defendant must prove that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), cert den *Michigan v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995). Trial counsel is presumed competent, and defendant has the burden of proving that the complained-of conduct is not within sound trial strategy. *Id*.

Arguing that a defendant is guilty of an offense is not necessarily ineffective assistance of counsel. *People v Walker*, 167 Mich App 377, 382; 422 NW2d 8 (1988).

> Where the evidence obviously points to defendant's guilt, it can be better tactically to admit to the guilt and assert a defense or admit to guilt on some charges but maintain innocence on others. Such a trial tactic may actually improve defendant's credibility and will not be second-guessed. [*Id.*]

In the present case, defense counsel stipulated to all events leading up to the foot chase, including the fact that defendant committed the retail fraud, and to the written statements of the two witnesses. We find that defendant has not overcome the presumption that defense counsel's decision to concentrate his case on the more serious crime of felonious assault was sound trial strategy.

Furthermore, defendant has not met his burden of proving that the outcome of his trial would have been different but for counsel's alleged error. Officer Northrup testified that defendant ran out of the store carrying three cartons of cigarettes, and the manager ran after him yelling "he's the one that just took the cigarettes." Defendant testified that he walked out of the store with the cigarettes without paying for them because he was angry about an argument he had that day at work. In light of this

evidence, we find that the outcome of the trial would not have been different even if defense counsel had not stipulated to the statements of the two witnesses.

Defendant also argues that defense counsel's stipulation denied him the effective assistance of counsel because it precluded arguing the defense of resisting an unlawful arrest. We disagree. In light of the other evidence indicating that defendant committed retail fraud, there is no indication that a defense of resisting an unlawful arrest would have been successful. Therefore, defendant was not denied the effective assistance of counsel.

Defendant next argues that Officer Northrup's testimony must be stricken for failure of adequate identification in the record, because he was identified only by his last name. We disagree.

The confrontation clause of the Sixth Amendment and its Michigan counterpart, Const 1963, art I, § 20, guarantee a criminal defendant the right to be confronted with the witnesses against him. *People v Sammons*, 191 Mich App 351, 356; 478 NW2d 901 (1991), cert den 505 US 1213; 112 S Ct 3015; 120 L Ed 2d 888 (1992). The ability to identify one's accusers is an important aspect of confrontation. *Id.* at 366. Reversal for failure to disclose certain identifying information will not be required where there is sufficient reason for the nondisclosure, and the defendant is possessed of sufficient other information with which to place the witness in his proper setting, thus testing credibility. *Id.* at 367. Violations of the right to cross-examination are subject to a harmless-error analysis. *People v Mack*, 218 Mich App 359, 364; 554 NW2d 324 (1996).

In the present case, defendant did not object to the prosecution's failure to identify Northrup by his full name and did not ask him his full name on cross-examination. Furthermore, the record indicates that defendant knew Northrup's full name, and had filed a civil suit against him in federal district court prior to the trial in the instant case. Therefore, the prosecution's failure to identify Northrup by his full name on the record did not deprive defendant of his right to confrontation.

Defendant next argues that he is entitled to resentencing because the sentencing guidelines were incorrectly scored and because his sentence was disproportionate. Because defendant did not provide this Court with a copy of his presentence investigation report at the time the brief was filed, this issue is not properly preserved. MCR 7.212(C)(7); *People v Rodriguez*, 212 Mich App 351, 355; 538 NW2d 42 (1995). However, we believe that the sentence is proportionate to the circumstances of the offense and defendant's criminal background. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990). Furthermore, because defendant was sentenced as an habitual offender, the sentencing guidelines are not relevant to the proportionality of his sentence. *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996). Therefore, we decline to address the alleged scoring errors.

Defendant next argues that the trial court erred in denying his motion to dismiss the habitual offender charge because the prosecutor did not comply with the requisite notice statute.

MCL 769.13(1); MSA 28.1085(1) provides:

> In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a

> written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after filing of the information charging the underlying offense.

Defendant was arraigned on August 16, 1994 on charges of assault with a dangerous weapon and second-degree retail fraud, and an information was filed on August 25, 1994. Also on August 25, 1994, the prosecutor filed an habitual offender fourth offense notice. Therefore, the notice was timely, and defendant's argument is without merit.

Defendant next argues that the examining magistrate erred in binding defendant over for trial because there was no showing of probable cause that defendant had committed felonious assault or felony-firearm. We disagree.

A defendant must be bound over for trial if evidence is presented at the preliminary examination that a crime has been committed and there is probable cause to believe that the defendant was the perpetrator. *People v Tower,* 215 Mich App 318, 319-320; 544 NW2d 752 (1996). There must be some evidence from which each element of the crime may be inferred. Probable cause that the defendant has committed the crime charged is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that the accused is guilty of the offense charged. *Id.* at 320. At the preliminary examination, the prosecution is not required to prove each element of the crime beyond a reasonable doubt. Rather, where there is credible evidence both to support and to negate the existence of an element of the crime, a factual question that exists should be left to the jury. *People v Kieronski,* 214 Mich App 222, 229; 542 NW2d 339 (1995).

Defendant argues that there was no evidence presented at the preliminary hearing that he intended to injure Northrup or to place him in reasonable apprehension of a battery, and there was insufficient evidence that defendant possessed a firearm to support a finding of probable cause. We disagree. Northrup testified at the preliminary examination that defendant grabbed his holster, unsnapped the safety belt, pulled out his weapon and pointed it toward his chest. Officer Dolson testified that he saw Northrup and defendant struggling, but could not see what they were struggling over. Northrup advised Dolson that defendant had his gun. This testimony was sufficient to warrant a cautious person in the belief that defendant possessed a firearm, and that he intended to injure Northrup or place him in reasonable apprehension of a battery. Therefore, the district court did not abuse its discretion in binding defendant over for trial on charges of felonious assault and felony firearm.

Defendant next argues that the trial court abused its discretion in admitting evidence of alleged bad acts he committed after he was arrested. Officers Northrup and Dolson both testified that, after defendant was arrested and placed in the police car, he kicked the windows of the police car and ultimately had to be subdued with pepper spray. Prior to trial, defendant brought a motion in limine to suppress this evidence, arguing that it was irrelevant to the crimes for which defendant was arrested and was substantially more prejudicial than probative. The prosecution argued that the evidence was relevant because it demonstrated that defendant was combative with police and therefore contradicts defendant's position that the assault never took place. The trial court denied defendant's motion.

Defendant argues on appeal that the trial court's admission of this evidence was an abuse of discretion because it was not relevant other than to show his criminal propensity, and it was not part of the res gestae of the crime. 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.

To be admissible under MRE 404(b), the evidence must be offered for some reason other than to show criminal propensity, it must be relevant, and its relevance must not be substantially outweighed by the danger of unfair prejudice. The trial court, upon request, may provide a limiting instruction. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994).

One exception to the general prohibition against bad acts evidence is that evidence of acts, conduct, and demeanor at the time of the offense or shortly before or after the offense may be admitted as part of the res gestae of the crime. *People v Stoker*, 103 Mich App 800, 807; 303 NW2d 900 (1981). Evidence of other criminal acts is admissible when so blended or connected with the conduct in question that proof of one incidentally involves the other or explains the circumstances of the other. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996); *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). The trial court, prior to admission of evidence under the res gestae exception, should find that the evidence is relevant and that the probative value outweighs any prejudicial effect. *Stoker*, *supra* at 807. Evidence is relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401; *VanderVliet*, *supra* at 60. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

We find that the evidence was properly admitted under the res gestae exception to MRE 404(b). The incident in the back of the police car occurred immediately after defendant's arrest and was relevant to show that he was combative toward police, which contradicts defendant's assertion that he ran because he was afraid that the downed electrical wires would start a fire, and that the assault never took place. Therefore, the trial court did not abuse its discretion in denying defendant's motion in limine.

Defendant next argues that the trial court abused its discretion in denying his motion for discovery and inspection, and in admitting Northrup's holster, belt, gun, and attachments. He argues

that, had he been given the opportunity to inspect the gun, holster, belt and attachments, he could have determined whether the equipment could have been utilized in the manner described by Officer Northrup, and he could have had the equipment tested for fingerprints.[1]

While a criminal defendant has no general right to discovery, discovery will be ordered when the trial court in its discretion determines that the thing to be inspected is admissible into evidence and a failure of justice may result from its suppression. *Stanaway*, *supra* at 680; *Mack*, *supra* at 361. Discovery should be granted where the information sought is necessary to a fair trial and a proper preparation of a defense. *People v Graham*, 173 Mich App 473, 477; 434 NW2d 165 (1988). In granting or denying pretrial discovery, the trial court should consider whether the defendant's rights can be fully protected by cross-examination. *Id.*

In the present case, defendant requested production of the gun, belt, and holster in order to inspect the equipment to determine whether the factual scenario described by Officer Northrup was physically possible. At trial, defense counsel cross-examined Northrup extensively regarding his version of the incident and suggested in his closing arguments that the events as Northrup described them were physically impossible. After reviewing the record, we find that defendant was not denied the opportunity to prepare his defense that the assault could not have taken place as Officer Northrup described.

Defendant also argues that the trial court erred in admitting the gun, belt, and holster into evidence because there was a break in the chain of custody, and because they were never tested for fingerprints and they were never tagged as evidence. We disagree.

The admission of real evidence does not require a perfect chain of custody. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). Any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims. *Id.* In order to obtain the admission of real evidence, a prosecutor must lay a foundation identifying the items as what they are purported to be and displaying that the items are connected with the accused or the crime. *People v Jennings*, 118 Mich App 318, 322; 324 NW2d 625 (1982). An adequate foundation for admission of real evidence requires testimony that the object offered is the object that was involved in the incident, and that the condition is substantially unchanged. *People v Beamon*, 50 Mich App 395, 398; 213 NW2d 314 (1973). Factors to consider include the nature of the article, the circumstances surrounding the preservation and custody of it, and the possibility of intermeddlers tampering with it. *Id.* "If, after considering such factors, the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence." *Id.*

In the present case, Officer Northrup identified the gun, belt, and holster in court as the equipment that he was carrying on the night of the assault. He also testified that the items were either in his possession or locked up at all times since the incident, and that he has taken care to

insure that they were not tampered with. On this record, we find that a proper foundation was laid and that the trial court did not abuse its discretion in admitting the items into evidence.

Affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage

[1] As of January 1, 1995, discovery in criminal cases has been governed by MCR 6.201. However, defendant's motion was brought on September 12, 1994. Therefore, we will apply the law as it existed prior to January 1, 1995.