

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
January 18, 2005

v

No. 250492  
Kent Circuit Court  
LC No. 02-011891-FC  
LC No. 03-002598-FC

MICHAEL ANTION GRAY,  
Defendant-Appellant.

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

No. 251206  
Kent Circuit Court  
LC No. 02-011431-FH  
LC No. 02-011890-FC  
LC No. 03-001917-FC

MARIO MAURICE JONES,  
Defendant-Appellant.

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Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant Gray appeals as of right from his jury trial conviction of two counts of armed robbery, MCL 750.529. The trial court sentenced him to three concurrent terms of 13 to 50 years in prison. We affirm Gray's convictions, but remand for the trial court to vacate the additional sentence.

Defendant Jones appeals as of right from his jury trial conviction of carrying a concealed weapon, MCL 750.227(2); felon in possession of a firearm, MCL 750.224f; receiving and concealing a stolen firearm, MCL 750.535b(2); two counts of armed robbery, MCL 750.529; and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to concurrent terms of 14 to 90 months in prison for both the CCW and felon in possession convictions, 14 to 180 months in prison for the receiving and concealing conviction,

and 17 to 50 years in prison for the two armed robbery convictions. The trial court imposed a consecutive two-year sentence for the felony-firearm conviction. We affirm.

This case involves a series of separate crimes committed by one or both of the defendants in fall 2002. Both Gray and Jones were charged with robbing a McDonald's restaurant on October 4 in case numbers 03-02598 and 03-02597, respectively. Both Gray and Jones were also charged with robbing a Wendy's restaurant on October 7 in case numbers 02-011891 and 02-011890, respectively. Jones alone was charged with robbing a Kentucky Fried Chicken (KFC) restaurant on October 26 in case number 03-01917. And following a traffic stop on November 1, Jones was charged with CCW, felon in possession of a firearm, and receiving and concealing a stolen firearm in case number 02-011431. The cases against each defendant were tried simultaneously, but before separate juries.

### I. Issues common to the appeals of both Gray and Jones

Both defendants contend that the trial court's order consolidating their trials and permitting the introduction of other acts evidence under MRE 404(b) constituted error. We review a trial court's decision regarding whether to admit evidence under MRE 404(b) for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). We also review decisions regarding severance for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). But to the extent that defendants failed to preserve the issue, our review is limited to determining whether plain error affected their substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted only if a plain error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.* at 763.

#### A. Admission of evidence under MRE 404(b)

A trial court's decision on a close evidentiary question does not ordinarily constitute an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion only occurs "when an unprejudiced person, considering the facts on which the court acted, would conclude that there was no justification or excuse for the court's ruling." *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002).

MRE 404(b) provides as follows:

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.

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205; 520 NW2d 338 (1994), our Supreme Court stated that before a trial court may admit evidence of other bad acts, it must determine:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

Regarding the first prong of this test, the trial court stated that the other acts evidence was admissible for the purpose of identifying defendants. Proving identity “through modus operandi, which means a ‘[m]ethod of operating or doing things,’” constitutes a proper purpose under MRE 404(b). *People v Smith*, 243 Mich App 657, 672; 625 NW2d 46 (2000), quoting Black’s Law Dictionary (6<sup>th</sup> ed).

Concerning the second prong, this Court in *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998), stated that although our Supreme Court adopted a new test for admission of evidence under MRE 404(b) in *VanderVliet*, *supra*, the test set forth in *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), “remains valid to show logical relevance where similar-acts evidence is offered to show identification through modus operandi.” The portion of this test pertinent to logical relevance requires that: (1) substantial evidence exists to show that the defendant actually perpetrated the bad act sought to be introduced, (2) there is some special quality of, or circumstance surrounding, the act tending to prove the defendant’s identity, and (3) the evidence is material to the defendant’s guilt. *Golochowicz*, *supra* at 309.

In *Ho*, *supra* at 186-187, the prosecution filed a pretrial motion to admit evidence that the defendant robbed a gas station, to show that he was also the person who robbed and murdered a clerk at a fast food restaurant. In its motion, the prosecution argued that the defendant admitted to robbing the gas station, a .380 caliber handgun was used in each incident, the two locations were approximately two miles apart, the incidents occurred within fourteen days of each other, and both occurred just before the businesses closed for the day. *Id.* The prosecution further asserted that in each incident the defendant had the intent to rob, the intent to kill, and was accompanied by a man who worked at both the gas station and the restaurant. *Id.* Based on the prosecution’s arguments, this Court found that the *Golochowicz* logical relevance test was “satisfied by the substantial evidence that defendant committed the [gas station] robbery and that these two crimes shared special qualities.” *Id.* at 187.

In this case, both defendants assert that substantial evidence did not exist to show that they actually committed the other acts. But the “substantial evidence” required under *Golochowicz* need not consist of proof beyond a reasonable doubt. *Smith*, *supra* at 670-671. The trial court noted that a witness specifically identified Gray as one of the perpetrators of the McDonald’s robbery and that, based on the type of weapon used and his height and build in relation to Gray, substantial evidence existed to believe that Jones was the second perpetrator. In the Wendy’s robbery, witnesses identified both defendants. The KFC robbery was committed by a man matching Jones’ description with a revolver of the same type used in the other robberies, and gift certificates taken from the restaurant were discovered in Gray’s residence. Although not addressed in the trial court’s ruling, it is undisputed that Jones was the person found in possession of the revolver at the November 1, 2002 traffic stop. While evidence that the gun recovered during this traffic stop had Gray’s fingerprint on it does not constitute other acts evidence regarding Gray, evidence linking him to a weapon similar to that used in the robberies for which he was charged constitutes relevant evidence admissible under MRE 401. See *People*

*v Mills*, 450 Mich 61, 66-68; 537 NW2d 909, mod 450 Mich 1212; 539 NW2d 504 (1995). As in *Ho, supra* at 187, substantial evidence existed showing that defendants committed the other crimes and their arguments regarding this aspect of relevance must fail.

Additionally, both defendants contend that the evidence of the three robberies did not indicate any shared special aspects that would tend to identify them. But the trial court noted one such aspect in that witnesses in each of the incidents described the weapon used as a long, dark-colored revolver with a wooden handle. Moreover, the prosecution asserted that the robberies were similar in that they occurred within a thirty day period and that in each incident the perpetrators entered the restaurant through the front door while wearing scarf-like masks and left through a back door. Like the two crimes in *Ho, supra* at 186-187, evidence that the three robberies were committed over a short span of time and that the perpetrators used the same type of weapon and employed similar methods is sufficient to show that the robberies shared special qualities tending to establish defendants' identities. As in *Ho, supra* at 187, the other acts evidence offered by the prosecution meets the logical relevancy test set forth in *Golochowicz, supra* at 309.

Regarding the unfair prejudice prong of the test from *VanderVliet*, this Court in *Smith, supra* at 674, stated that "virtually all evidence introduced at trial by an opponent is specifically intended to prejudice the other party." But "[g]iven the pressing need to prove that defendant was the person who committed the charged crimes and the logical tendency for the [other] offense [] to help demonstrate defendant's identity," it could not say that the risk of prejudice substantially outweighed the probative value of the other act evidence. *Id.* at 674-675. Here, as in *Smith, supra* at 675, the trial court found, and we agree, that the danger of unfair prejudice posed by the other acts evidence did not outweigh its probative value.

Finally, regarding the fourth prong of the test, the trial court stated that it would provide a limiting instruction to the juries regarding the other acts evidence, if either defendant requested one. However, both defendants opted to forego such an instruction.

The evidence offered by the prosecution under MRE 404(b) meets the standards for the admission of other acts evidence set forth by our Supreme Court in *VanderVliet, supra* at 55; therefore, the trial court's admission of the evidence did not constitute an abuse of discretion.

#### B. Consolidation of the separate charges into a single trial

The defendants do not argue that their rights were violated by their joint trial before separate juries. Rather, Gray asserts that his trial for the armed robbery of McDonald's should have been held separately from his trial for the armed robbery of Wendy's. Similarly, Jones argues that he was entitled to four separate trials for each of the four cases brought against him.

MCR 6.120(A) provides that "[t]wo or more informations or indictments against a single defendant may be consolidated for a single trial." But MCR 6.120(B) provides that criminal defendants have the right to severance of unrelated offenses:

On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on

(1) the same conduct, or

(2) a series of connected acts or acts constituting part of a single scheme or plan.

MCR 6.120(B) is a codification of our Supreme Court's decision in *People v Tobey*, 401 Mich 141, 151; 257 NW2d 537 (1977), that where "offenses are joined solely because they are of the same or similar character, the defendant shall have a right to severance of the offenses." *People v Abraham*, 256 Mich App 265, 271-272; 662 NW2d 836 (2003).

Jones argues that based on this Court's decision in *People v Daughenbaugh*, 193 Mich App 506, 509; 484 NW2d 690, mod 441 Mich 867; 490 NW2d 886 (1992), he was entitled to severance of the charges against him. In *Daughenbaugh*, the defendant was charged with a series of armed robberies that occurred over a three-month period. *Id.* at 508. This Court held that the defendant was entitled to separate trials on each charge because the crimes were not committed to facilitate one another and did not arise out of the same transaction. *Id.* at 510. This Court further stated that the trials must be severed even if evidence of the other crimes could be admitted in each of the separate trials under MRE 404(b). *Id.* at 510-511.

However, in *Daughenbaugh*, *supra* at 508, the defendant opposed the prosecution's motion for consolidation in the trial court. Here, Gray did not move for severance at trial. Similarly, Jones did not object to the trial court's consolidation of his trials on the charges arising from the traffic stop and the Wendy's and KFC robberies. Consequently, both defendants failed to assert their rights under MCR 6.120(B) and we review the issue only for plain error affecting substantial rights. In arguing that he was prejudiced by the admission of evidence regarding all of the robberies under MRE 404(b), Gray asserts that the trial court erred in failing to provide him with two separate trials. However, because the trial court did not abuse its discretion in admitting this evidence, no prejudice occurred. Gray has failed to demonstrate plain error; therefore, we decline to further review the issue.

Jones argues that the joinder of these charges into a single trial prejudiced him and violated his due process right to a fair trial. But because he failed to request severance, the trial court was not required to provide him with separate trials under MCR 6.120(B). Jones has not established that the trial court abused its discretion by consolidating his trials for the weapons charges and the Wendy's and KFC robberies into a single proceeding, pursuant to MCR 6.120(A). Jones has failed to demonstrate plain error; therefore, we decline to further review the issue as it relates to the consolidation of these charges.

Jones did, however, raise the issue of severance at trial in relation to the McDonald's robbery. At the hearing on the prosecution's motion to admit MRE 404(b) evidence, his counsel argued that his trial for the McDonald's robbery should be held separately from his trial on the remaining charges. Defense counsel noted that witnesses could identify Jones in the Wendy's and KFC robberies, but not in the McDonald's robbery, even though he previously worked at the McDonald's restaurant that was robbed and was known to its employees. Defense counsel argued that holding the trials together would prejudice Jones in the trial for the McDonald's robbery, because the jury would likely convict him based on the testimony identifying him in the other robberies.

As in *Daughenbaugh*, the McDonald's robbery and the other crimes were not part of a single transaction and there is no evidence that the other crimes were committed to facilitate the McDonald's robbery. Because Jones requested a separate trial for the McDonald's robbery, the trial court erred in failing to sever this offense under MCR 6.120(B). Because this is a preserved nonconstitutional error, Jones must demonstrate that it is more probable than not that the error resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). However, the jury acquitted Jones of the McDonald's robbery. Further, Jones did not argue that having a combined trial for the McDonald's robbery and the remaining charges would result in any prejudice to him regarding the other charges. Thus, Jones cannot show that a miscarriage of justice occurred. The trial court's error was harmless, and we affirm Jones' convictions.

## II. Issues unique to the appeal of defendant Jones

Jones first contends that insufficient evidence existed to support his convictions for the Wendy's and KFC robberies. To obtain a valid conviction, the prosecution must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When reviewing a challenge to the sufficiency of the evidence, this Court examines the evidence in the light most favorable to the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). This includes all determinations concerning the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, mod 441 Mich 1201; 489 NW2d 748 (1992). The scope of review remains the same whether the evidence presented is direct or circumstantial. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences arising from it may constitute sufficient evidence to prove the elements of a crime. *People v Bulmer*, 256 Mich App 33, 37; 662 NW2d 117 (2003).

Here, Jones does not contest that the armed robberies occurred. Rather, he claims that the prosecution failed to present sufficient credible evidence identifying him as the perpetrator. The identity of the perpetrator is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). But the physical evidence presented by the prosecution circumstantially identifies Jones as the person who robbed the Wendy's and KFC restaurants. The revolver found in Jones' car matched the description of the weapon given by witnesses from both robberies. When shown the weapon found in Jones' car, the Wendy's manager stated that he was sure it was the same gun used in the robbery. Although two detectives admitted that many guns of this sort existed, they testified that it was unusual for this sort of weapon to be used in a robbery. The victim of the KFC robbery testified that the perpetrator took both cash and KFC gift certificates, and identified the gift certificates discovered in Gray's residence as those that had been redeemed at the restaurant. Jones' fingerprints were found on three of these coupons. Additionally, several ripped T-shirts were discovered in Gray's residence. All of the witnesses testified that the robbers wore bandanas or scarves over the lower portion of their faces and one witness testified that the masks looked as if they were made from T-shirts.

Jones asserts that the prosecution failed to account for explanations other than his guilt as to why he had possession of the revolver, how the KFC coupons arrived at Gray's residence, and why the ripped shirts were located in Gray's residence. But the prosecution need not negate every reasonable theory consistent with a defendant's innocence. *Nowack, supra* at 400. Based

on the circumstantial evidence presented, a rational juror could reasonably infer that Jones was the person who committed the robberies in question.

In addition to this circumstantial evidence, witnesses from both robberies identified Jones as the perpetrator. Positive identification by a witness may constitute sufficient evidence to support a conviction for a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). And the credibility of identification testimony is a question of fact that this Court does not resolve anew on appeal. *Id.* When examined in the light most favorable to the prosecution, a rational jury could find that the circumstantial evidence and identification testimony presented by the prosecution established beyond a reasonable doubt that Jones committed the Wendy's and KFC robberies.

Jones next contends that the trial court violated his right to present a defense by refusing to allow him to call an alibi witness for the KFC robbery. If a defendant charged with a felony proposes to offer an alibi, he must notify the prosecution of his intention to claim that defense within fifteen days after his arraignment but "not less than 10 days before the trial of the case, or at such other time as the court directs." MCL 768.20. A trial court may exclude alibi evidence if a defendant fails to give the notice required by statute. *People v McMillan*, 213 Mich App 134, 140; 539 NW2d 553 (1995). In determining whether to allow an alibi witness to testify despite a notice violation, a trial court should consider the following:

"(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case." [*People v Travis*, 443 Mich 668, 682; 505 NW2d 563 (1993), quoting *United States v Myers*, 550 F2d 1036, 1043 (CA 5, 1977).]

Application of the factors listed in *Travis*, *supra* at 682, to this case supports the trial court's decision to exclude the alibi testimony. Jones failed to inform the prosecution of the witness' existence until the first day of trial and the delay appears to have been due to miscommunication between his defense attorneys. No subsequent events mitigated the harm of the late disclosure and both eyewitness testimony and fingerprint evidence linked Jones to the KFC robbery. Further, despite the lack of notice, the trial court gave Jones the opportunity to make an offer of proof regarding the substance of the proposed testimony, and he failed to do so. Based on these circumstances, the trial court's decision to exclude the proposed alibi testimony did not constitute an abuse of discretion and we affirm his conviction for the KFC robbery.

Jones also asserts that he received ineffective assistance of counsel. But because he failed to move for an evidentiary hearing or a new trial, the issue is unpreserved and our review is limited to mistakes apparent on the record. *McMillan*, *supra* at 141. Effective assistance of counsel is presumed and the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). In order to establish ineffective assistance of counsel, a defendant must show "(1) the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). Where the record

does not contain sufficient detail to support an ineffective assistance claim, the defendant has effectively waived the issue. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Jones first asserts that his attorney was ineffective for failing to give alibi notice or call alibi witnesses. But his counsel decided not to call the alibi witness allowed by the trial court and did not make an offer of proof regarding the testimony of any other alibi witnesses. As in *Davis, supra* at 369, the record does not contain any information concerning the proposed witnesses' testimony or how this would have benefited Jones' case. Jones has not overcome the strong presumption that his counsel's decision not to call an approved alibi witness or make an offer of proof regarding the testimony of other alibi witnesses constituted sound trial strategy. *Rodgers, supra* at 715.

Jones further alleges that his counsel was ineffective for failing to object to irrelevant testimony from a detective. Under MRE 401, evidence is relevant if it has "any 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." *Mills, supra* at 66-67. Each of the statements Jones claims should have been challenged meets this standard and objections based on relevance would have failed. Because a defense counsel need not "make a meritless motion or a futile objection," defense counsel's failure to object on these grounds did not constitute ineffective assistance. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Additionally, Jones contends that his trial counsel was ineffective for failing to object to what he alleges were improperly suggestive procedures employed at the lineups at which he was identified. Based on the trial record, the procedures were not unduly suggestive and any objection by defense counsel would have been futile.

None of the alleged failures of Jones' trial attorney constitute ineffective assistance of counsel and we affirm his convictions.

### III. Issues unique to the appeal of defendant Gray

Gray contends that the trial court denied him a fair trial by inadvertently stating that he was present during the McDonald's robbery. In order to preserve an argument that the trial court made improper comments in the presence of the jury, a defendant must object at trial. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). Because Gray raised no such objection, we review the issue for plain error affecting his substantial rights. *Carines, supra* at 763.

Although a trial court has wide "discretion and power in the matter of trial conduct," it "pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). But the record must be reviewed as a whole and "[p]ortions of the record should not be taken out of context in order to show trial court bias against [a] defendant." *Id.*

Although the trial court stated that the person on the videotape was Gray, the record reveals, and defendant concedes, that it did not intend to identify him. Based on the context of

the comment, it unlikely that the trial court's statement had an undue influence on the jury. After stating that the person on the videotape was defendant, the trial court immediately struck its comment and emphasized that it was not attempting to positively identify Gray. The trial court's comments did not pierce the veil of judicial impartiality and Gray was not deprived of a fair and impartial trial. Further, when instructing the jury, the trial court stated that if the jury believed the trial court had an opinion as to Gray's guilt or innocence, it should disregard that opinion when reaching its verdict. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *Abraham, supra* at 279. The instructions given alleviated any prejudice that might have resulted from the trial court's remark. Gray has failed to demonstrate plain error; therefore, we affirm Gray's convictions.

Additionally, Gray asserts that, although he was only convicted of one count of armed robbery in case number 02-011891, the trial court erroneously imposed two sentences. The prosecution initially charged Gray with two counts of armed robbery in 02-011891 and one count of armed robbery in 03-02598. Based on a motion from the prosecution, the trial court dismissed one of the charges in 02-011891. The jury then convicted Gray of each of the two counts charged. But at sentencing, the trial court imposed three concurrent terms of 13 to 50 years in prison, two for the armed robbery convictions in 02-011891, and one for the armed robbery conviction in 03-02598. The record clearly indicates that the second sentence in 02-011891 was based on inaccurate information and is therefore invalid. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Consequently, we remand with instructions for the trial court to vacate the second sentence in 02-011891 and correct the judgment of sentence.

We affirm in part, remand in part. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Henry William Saad

/s/ Richard A. Bandstra