

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES DORIAN HOLMES,

Defendant-Appellant.

UNPUBLISHED

May 24, 2011

No. 296263

Muskegon Circuit Court

LC No. 09-058049-FC

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

Defendant Charles Dorian Holmes appeals as of right his jury conviction for armed robbery. MCL 750.529. The trial court sentenced defendant to serve 24 to 45 years in prison. Because we conclude that there were no errors warranting relief, we affirm.

The jury convicted defendant on the basis of evidence that he aided and abetted an armed robbery. Evidence at trial showed that defendant drove Robert Beane from their hometown of Baldwin to the greater Muskegon area, where Beane robbed a Fifth Third Bank. Defendant parked the vehicle in a nearby abandoned shopping area and waited for Beane, who rode a bicycle the rest of the way to the bank. Beane entered the bank, screamed that he had a bomb, and left with money stolen from an open teller's drawer. Beane evaded the police officers who responded to the robbery and returned to defendant's vehicle. Defendant then drove them back to Baldwin. Police were able to identify Beane from security camera footage and a palm print that was left on the teller's counter. Eventually, police identified defendant as the driver of the getaway vehicle.

On appeal, defendant first argues that there was insufficient evidence to support his conviction because there was no evidence that he had the intent necessary to prove that he aided and abetted Beane's robbery. When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence presented at trial in a light most favorable to the prosecution to determine whether a rational jury could find that each element of the crime was proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

Under our aiding and abetting statute, a person who “procures, counsels, aids, or abets” the commission of an offense can be punished as though he or she directly committed the offense. MCL 767.39. In order to convict a defendant on an aiding and abetting theory, the prosecutor must first prove that someone committed the underlying crime and then must show that the defendant “performed acts or gave encouragement that assisted the commission of the crime” and “intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.” *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (quotation and citation omitted). At trial, defendant did not dispute that Beane committed an armed robbery and did not contest the fact that he drove Beane to the scene of the crime. Rather, he argued that he did not intend to commit the robbery and did not know that Beane intended to commit a robbery. The prosecutor may establish the requisite intent for aiding and abetting through circumstantial evidence. *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992).

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to show that defendant “intended the commission of the crime or had knowledge that the principal intended its commission at the time that [defendant] gave aid and encouragement.” *Robinson*, 475 Mich at 6. Defendant’s then-girlfriend testified that defendant told her he knew what was going to happen ahead of time. She also testified that defendant told her that he did not intend to get caught for the robbery and that he wanted the “quick money” so he could give it to her to help out with bills and other needs. It is up to the finder of fact to make decisions about credibility of witnesses and the probative value of evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). We will not usurp the role of the jury by deciding on appeal that this testimony should not have been believed. *Id.* Further, the detective testified that when defendant was interviewed by the police he frequently changed his story and, at first, attempted to provide an alibi for Beane. Eventually defendant admitted everything to the police, except that he claimed that he did not plan to rob the bank with Beane and was not aware of Beane’s plan to rob the bank. “A jury may infer consciousness of guilt from evidence of lying or deception.” *People v Unger*, 278 Mich App 210, 227; 749 NW2d 272 (2008). Taken as a whole, there was clearly sufficient evidence for a rational jury to find that defendant drove Beane to the scene of the robbery with the intent to commit the robbery or that he had done so knowing that Beane intended to commit the robbery.

Defendant next argues that his trial counsel was ineffective because he failed to meet with him before trial and failed to request a directed verdict. Because there was no evidentiary hearing before the trial court, our inquiry is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In order to prevail on an ineffective assistance of counsel claim, the defendant must demonstrate that trial counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 311-312; 521 NW2d 797 (1994).

In *People v Payne*, 285 Mich App 181, 189; 774 NW2d 714 (2009), this Court found an attorney was not ineffective despite failing to meet with the defendant during the time between the preliminary examination and the first day of trial. This Court noted that “the record reveal[ed] that defense counsel was prepared for trial, displayed an adequate knowledge of the evidence, and was fully prepared to cross-examine the prosecution’s witnesses.” *Id.* This Court

held that in light of defense counsel's performance at trial, it could not conclude that counsel's failure to meet with the defendant constituted representation that fell below an objective standard of reasonableness. *Id.*

Here, the record demonstrates that defense counsel was prepared for trial. Counsel focused on the fact that the evidence in this case was circumstantial, and that there is no direct evidence tending to show that defendant knew about the plan for the robbery ahead of time. Defense counsel even put Beane on as a defense witness in support of that theory. Counsel adequately cross-examined all the prosecution's witnesses, and focused on defendant's lack of intent during closing argument. Thus, defendant has not demonstrated that trial counsel's performance was deficient. Further, counsel was not ineffective for failing to move for a directed verdict. Counsel is not obligated to bring meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Counsel's failure to move the trial court for directed verdict does not constitute ineffective assistance because, as already noted, there was clearly sufficient evidence to support a guilty verdict.

Defendant also argues that the trial court erred when it denied his request for a new trial. Defendant moved for a new trial on the ground that his trial counsel was ineffective. We review a trial court's decision regarding a motion for a new trial for an abuse of discretion. *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). Because trial counsel was not ineffective, the trial court did not abuse its discretion when it denied defendant's motion for a new trial on that basis.

Defendant also argues that the trial court erred when it denied defendant's request for an evidentiary hearing regarding the issue of effective assistance of counsel. We review a trial court's decision whether to hold an evidentiary hearing for an abuse of discretion. *Unger*, 278 Mich App at 216-217. An evidentiary hearing regarding ineffective assistance of counsel should be granted if a defendant has "set forth . . . facts that would require development of a record to determine if defense counsel was ineffective." *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007). Defendant argued that if counsel would have met with him before trial, counsel would have been adequately prepared for trial. However, defendant failed to show how his trial counsel was unprepared. Accordingly, he failed to establish the existence of any facts that required the development of a record. The trial court did not abuse its discretion when it denied defendant's request for an evidentiary hearing.

Defendant next argues that the trial court abused its discretion when it admitted evidence of defendant's prior conviction for armed robbery. We review preserved evidentiary issues for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). Nevertheless, even if the trial court abused its discretion in admitting the evidence, the error will not warrant relief unless, after an examination of the entire cause, it is more probable than not that the error was outcome determinative. *Lukity*, 460 Mich at 495-496. When the admission of evidence involves a preliminary question of law, such as whether a rule of evidence or statute governs admissibility of the evidence, this Court reviews the question of law de novo. *Id.* at 488.

Defendant was previously convicted of armed robbery in 1995. Defendant's prior conviction stems from the armed robbery of a video store clerk. Defendant was the getaway driver in the prior robbery, and also carried out the act of robbing the individual with another man. After defendant and his accomplices were apprehended, they admitted that they needed cash and viewed robbery as an easy way to obtain it. MRE 404(b)(1) permits the admission of evidence of other crimes, wrongs, or acts in order to prove "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." This Court has held that MRE 404(b)(1) is a rule of inclusion, and that as a result, other-acts evidence should be admitted as long as the admission is not being offered solely to demonstrate criminal propensity. *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002). In *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), the Court explained the approach to the admissibility of other-acts evidence:

First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact or consequence at trial. Third, under MRE 403, a determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*Id.* at 55-56 (quotations and citation omitted).]

In this case the evidence that defendant had committed a robbery in the past was offered to establish defendant's intent and lack of mistake or accident. Thus, the evidence was proffered for a proper purpose under the court rule. MRE 404(b)(1). Additionally, the evidence was logically relevant for that purpose. Evidence is relevant for the proffered proper purpose if there is "a relationship between the evidence and a material fact at issue" that can be demonstrated "by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). In the context of 404(b), the proffered evidence "truly must be probative of something *other* than the defendant's propensity to commit the crime." *Id.* at 390. Here, the evidence that defendant had aided and abetted a previous armed robbery and did so in part as the getaway driver was minimally relevant to both defendant's intent when he drove Beane to the scene of the robbery at issue and to show that it was less probable that he was mistaken about Beane's intent. That is, the evidence of defendant's involvement in a prior robbery—when considered in light of the other evidence adduced at trial—tended to show that it was less likely that defendant acted innocently when he drove Beane to the Muskegon area. It also tended to show that defendant understood the role that a getaway driver should play, understood what his accomplice would do, and did not drive to the scene by mistake or accident. Finally, this evidence tended to corroborate defendant's former girlfriend's testimony that defendant told her that he aided and abetted the robbery at issue to get some quick cash, which was the same reason that he committed the prior robbery.

Although offered for admittedly proper purposes, it is a closer question as to whether the evidence was unduly prejudicial under MRE 403. Even though evidence might be relevant, under MRE 403, a trial court may exclude the evidence if the “probative value is substantially outweighed by the danger of unfair prejudice” All evidence offered against a defendant in a criminal trial is prejudicial to some degree. *People v Fisher*, 449 Mich 441, 451-452; 537 NW2d 577 (1995). However, with evidence of prior unlawful conduct, there is an added danger that the evidence will carry special weight with the jury. *People v Roper*, 286 Mich App 77, 91; 777 NW2d 483 (2009). Nevertheless, in this case, we cannot conclude that the trial court abused its discretion. The evidence was admissible for a proper purpose and, in light of defendant’s theory of the case, it is a close question as to whether the prior acts evidence was unfairly prejudicial. See *Sabin*, 463 Mich at 67 (stating that a trial court’s decision on “a close evidentiary question” normally cannot be an abuse of discretion). Moreover, the trial court instructed the jury regarding the proper use of the evidence. This instruction mitigated the danger that the jury would give undue or improper weight to the evidence. See *Roper*, 286 Mich App at 106. Therefore, on this record, we conclude that the trial court did not abuse its discretion in admitting this evidence. Similarly, because the trial court properly admitted this evidence under our court rules, we reject defendant’s contention that the admission violated his due process right to a fair trial.

Next, defendant argues that he was denied a fundamentally fair trial when a detective testified that defendant was lying at the time of his interview. Because the issue is not properly preserved, we review the alleged error for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The detective testified at trial regarding the interrogation tactics used in the interview of defendant, and then a videotape of the interview was played for the jury. During the interview, the detective told defendant multiple times that he believed defendant was being honest. During trial, the prosecution asked the detective whether he actually believed—at that time—that defendant was being honest and the detective testified that he really believed defendant was lying throughout the interview. Defendant now argues that the detective’s comments about the interview denied his right to a fair trial.

A witness cannot comment on the credibility of another witness during trial. *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, the detective was not commenting on the credibility of a witness at trial; he was commenting on his beliefs at the time of the interview. Moreover, the detective’s testimony explained his statements during the interview, specifically, his technique was to make defendant think the police believed him. Further, the trial court instructed the jury to judge the credibility of the detective in the same manner as it would judge the credibility of any other witness; thus, any prejudicial effect of the improper comment was cured by the instructions given to the jury. *Id.* at 18. Defendant has not established plain error affecting his substantial rights.

Defendant next argues that the trial court abused its discretion when it scored offense variable (OV) 19 on the basis of conduct that occurred after the sentencing offense was committed. This Court reviews the “proper interpretation and application of the legislative sentencing guidelines” de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). The sentencing guidelines are mandatory and the trial court had to accurately score them on the basis of the facts of this case; the trial court did not have the discretion to ignore evidence or

refuse to score a particular variable. See *People v Bemer*, 286 Mich App 26, 32; 777 NW2d 464 (2009) (“Under the clear dictates of this statutory language, trial courts do not have any discretion in the scoring of the listed variables—each variable must be scored.”). Nevertheless, this Court will defer to the trial court’s findings at sentencing and will uphold those findings if there is any evidence to support them. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Here, the trial court was required to score OV 19, which considers any interference or attempted interference with the administration of justice. See MCL 777.22(1) (stating that the sentencing court must score OV 19); MCL 777.49 (requiring the sentencing court to score points on the basis of conduct that interfered in the administration of justice). Here, the trial court found that defendant lied to the police when he was questioned and, on that basis, determined that OV 19 should be scored at 10 points. See MCL 777.49(c). Defendant argues that the trial court erred in scoring this variable because conduct that was not part of the sentencing offense cannot be considered when scoring OV 19. However, in *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010), our Supreme Court expressly held that OV 19 may be scored for conduct that occurred after the sentencing offense was completed. There was evidence to support the trial court’s finding that defendant lied to the police and, once the trial court determined that lying to the police constituted interference with the administration of justice, it had to score OV 19 at ten points. MCL 777.49(c). Therefore, the trial court did not err in scoring that variable.

Finally, in his Standard 4 brief defendant argues that the trial court erred when it sentenced him as a habitual offender because it failed to comply with the requirement set forth in MCL 769.13(5), which provides that the “existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing.” Defendant argues that his prior convictions were never determined by the trial court. However, it is clear from the record that the trial court reviewed defendant’s presentence report, which purportedly reflected that defendant had six prior felony convictions. Regardless whether the trial court was required to do more, an issue we do not decide, defendant cannot demonstrate that the outcome of the proceedings was affected. *Carines*, 460 Mich at 763-764. Defendant does not deny that he is a fourth-habitual offender.

There were no errors warranting relief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly