

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY RAY KEFFER,

Defendant-Appellant.

UNPUBLISHED

October 28, 2004

No. 250152

Wayne Circuit Court

LC No. 02-014432-01

Before: Wilder, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his conviction after a jury trial of felonious assault, MCL 750.82, possession of a firearm by a convicted felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of thirty months' to four years' imprisonment for the felonious assault conviction and thirty to sixty months' imprisonment for the felon in possession conviction, to be served consecutive to the mandatory two-year sentence for felony firearm. This case arose when defendant waived a gun in the air and threatened to shoot the complainant.

Defendant argues that the trial court abused its discretion by admitting other-acts evidence against him because the most likely purpose for the evidence was to show defendant's bad character and propensity to commit the offenses, and the evidence's potential for unfair prejudice substantially outweighed its marginal probative value. We disagree.

A trial court's decision whether to admit other-acts evidence is reviewed for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Before other-acts evidence may be introduced, the prosecution must satisfy a three-part test: (a) there must be a reason for admitting the evidence, other than to show bad character or a propensity to act accordingly, (b) it must be relevant, and (c) the danger of undue prejudice cannot substantially outweigh the evidence's probative value, especially where there are other means of proof. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

In the case at hand, the prosecutor proposed to introduce the subsequent incident between defendant and the complainant to show defendant's motive, intent, and opportunity. The reasons were specifically provided for in MRE 404b(1). Evidence is relevant when it has a tendency to make a material fact more or less probable. *Sabin, supra* at 60. Thus, to be relevant, the evidence must be both material and probative. *Crawford, supra* at 388. Materiality refers to

whether the fact was truly at issue. *Id.* In his motion, the prosecutor explained that defendant told police he did not have a gun and did not threaten the complainant. Therefore, whether defendant had a gun and, thus, had the opportunity to commit the assault, was at issue.

Moreover, felonious assault is a specific intent crime. *People v Robinson*, 145 Mich App 562, 564; 378 NW2d 551 (1985), citing *People v Joeseype Johnson*, 407 Mich 196; 284 NW2d 718 (1979). By denying that he threatened the complainant, defendant placed his intent to commit assault at issue. And motive is relevant to establish intent. *Sabin, supra* at 68. Thus, the evidence was material. Evidence of intent is probative because it negates the reasonable assumption that the incident was an accident. *People v VanderVliet*, 444 Mich 52, 80; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The evidence showed that defendant subsequently threatened to shoot the complainant and a witness with a gun, and this evidence made it less likely that he acted accidentally or innocently in the case at hand. The more often a defendant acts in a particular manner, the less likely it is that the defendant acted accidentally or innocently, *VanderVliet, supra* at 79 n 35, and conversely, the more likely it is that the defendant's act is intentional.

Where other-acts evidence is offered to show intent, the acts must only be of the same general category to be relevant. *VanderVliet, supra* at 79-80. In both the charged incident and the subsequent incident defendant approached men as they were walking on property they had recently purchased from defendant's stepbrother. In both incidents, defendant became angry for little apparent reason, showed them a gun, and threatened to shoot them. Thus, both incidents were very similar, and the subsequent other-acts evidence was relevant to his intent.

The third criterion is whether the danger of undue prejudice from the other-acts evidence substantially outweighed its probative value. Unfair prejudice exists when there is a tendency that the evidence will be given too much weight by the jury. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod 450 Mich 1212 (1995). The court indicated that it weighed the evidence's prejudicial effect against its probative value and found the evidence admissible. Whether other-acts evidence is more prejudicial than probative is best left to the contemporaneous assessment of the trial court. *Sabin, supra* at 71. And even if this were a close evidentiary question, a trial court's decision on a close evidentiary question is not an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). Moreover, after final argument, the court took care to limit any prejudicial effect by giving a cautionary instruction. The instruction clearly apprised the jury of the limited purpose for which it was allowed to consider the other-acts evidence. And juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next argues that the prosecutor's references to the fact that complainant knew defendant by another name impinged his credibility and denied him a fair trial. We disagree.

Unpreserved evidentiary errors are reviewed for plain error affecting a defendant's substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). The prosecutor never stated that defendant had somehow caused the complainant to believe that defendant had a different name. Instead, the prosecutor attempted to establish that the person the complainant knew was, in fact, defendant. Nevertheless, defendant argues that the prosecutor's repeated references implied that defendant had used an alias, and that this undermined defendant's credibility. To support his argument, defendant cites MRE 608, MRE 404(a)(1), and *People v*

Johnnie Johnson, 409 Mich 552; 297 NW2d 115 (1980). However, we find defendant's authority inapposite.

According to the language of MRE 608, the rule applies to a witness's character for truthfulness. Because defendant did not testify in the instant case, MRE 608 does not apply. MRE 404(a)(1) does, however, apply to a defendant's character. But it indicates that evidence of a defendant's character may not be used to prove "*action in conformity therewith on a particular occasion.*" MRE 404(a). Defendant has not indicated how the prosecutor's references to the other name demonstrated an attempt to prove that he acted in conformity with respect to the charged offense. Instead, defendant argues that the prosecutor attempted to attack defendant's credibility by the repeated references. Therefore, MRE 404(a)(1) also does not apply. And *Johnnie Johnson*, *supra* at 557-558, specifically dealt with the application of MRE 404(1)(a) to a prosecutor's redirect examination of a witness that went beyond the scope of cross-examination and elicited character testimony. That is not the case here.

Nevertheless, there is a split of authority on whether use of an alias may be used to impeach credibility. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996), citing *People v Pointer*, 133 Mich App 313, 316; 349 NW2d 174 (1984). However, evidence of an alias can be used – as it appeared to be used here – to establish a defendant's identity. *Id.* And evidence that is admissible for one purpose does not become inadmissible for another purpose. *VanderVliet*, *supra* at 73. Therefore, plain error did not occur.

Defendant next claims that the prosecutor committed misconduct when he repeatedly bolstered the credibility of his witnesses and vouched for their credibility. We disagree.

A claim of prosecutorial misconduct is reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). An unpreserved claim of prosecutorial misconduct may not be reviewed unless the error could not have been cured by an objection, or a miscarriage of justice would result from a failure to review the issue. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). A prosecutor may not vouch for the credibility of a witness by suggesting that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). He may, however, argue that a witness should be believed on the basis of the evidence presented, especially when there is conflicting evidence and defendant's guilt must be determined by the credibility of the witnesses. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

The instant case called for this type of credibility determination. The complainant testified that defendant threatened him with a gun. And the complainant's business partner stated that defendant had threatened him with a revolver on another occasion. This conflicted with the testimony of defendant's witness. Defendant's witness testified that defendant was just standing there when complainant started yelling, got in his car, and drove away; he said he never heard any threats, did not see a gun, and had never seen defendant with a revolver. Thus, it was proper for the prosecutor to argue from the evidence that the complainant and his business partner were credible. *Thomas*, *supra* at 455. Each of the facts mentioned by the prosecutor was supported by testimony at trial. And there is no indication that the prosecutor suggested that he had special knowledge that the witnesses would testify truthfully. However, even if the comments could be construed as improper vouching, any prejudice from the comments could have been removed by a prompt curative instruction. *Knapp*, *supra* at 382-383. And the court

specifically informed the jury that the attorneys' comments were not evidence. Therefore, reversal is not required.¹

Defendant claims that insufficient evidence was presented to convict defendant of the charged offenses because the gun was not produced at trial. We disagree.

A claim of insufficient evidence is reviewed de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), in a light most favorable to the prosecutor, to determine whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt, *People v Jermell Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). With respect to felonious assault, the prosecutor must prove “(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 Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999), citing *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). With respect to felony firearm, the prosecutor must prove “that the defendant possessed a firearm during the commission of . . . a felony.” *Id.* With respect to felon in possession, the prosecutor must prove that the defendant was a convicted felon in possession of a firearm and either (a) he did not pay all imposed fines, (b) he did not serve all terms of imprisonment, (c) he did not successfully complete all conditions of probation or parole, or three years had not passed since he completed the requirements under (a), (b), and (c). See *People v Calloway*, 469 Mich 448, 451-452; 671 NW2d 733 (2003). Thus, all three offenses required possession of a firearm or dangerous weapon.

“Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130, reh den 461 Mich 1205 (1999). Although defendant did not have a firearm when he was arrested, this is irrelevant to whether he possessed a firearm when the offenses were committed. See *People v Burgenmeyer*, 461 Mich 431, 439; 606 NW2d 645 (2000). Moreover, *People v Smith*, 231 Mich App 50, 52-53; 585 NW2d 755 (1998), indicates that the prosecutor is not required to produce a gun at trial to sustain a conviction of felonious assault or felony firearm. The prosecutor did present the complainant's testimony, which indicated that defendant left and came back brandishing a gun and threatening to shoot him.

The complainant's testimony, if believed, established that defendant possessed a gun when the crimes were committed. And it is a jury's prerogative to determine witness credibility. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Although defendant presented eyewitness testimony that he did not have a gun at the time, conflicts in evidence must be resolved in favor of the prosecutor, *id.* at 562. Viewing the evidence in a light most favorable

¹ In two sentences, defendant claimed he received ineffective assistance of counsel because counsel failed to challenge the prosecutor's closing argument. He does not indicate how his counsel's failure to object fell below professional norms, how it affected the outcome of the proceedings, or how it made the proceedings fundamentally unfair. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). When an argument is given cursory treatment, with little or no citation to authority, it is considered abandoned on appeal. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

to the prosecutor, we conclude that there was sufficient evidence to convict defendant of all three counts. *Jermell Johnson, supra* at 722-723.

Defendant appears to argue that he is entitled to a new trial because the officer who arrested him was subsequently indicted for planting weapons and drugs on suspects. A new trial may be granted on the basis of newly discovered material evidence, “which could not with reasonable diligence have been discovered and produced at trial.” MCR 2.611(A)(1)(f). However, a defendant must also demonstrate that the newly discovered evidence would probably have produced a different result on retrial. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). Defendant claims that William Melendez, the individual indicted for planting evidence on suspects, was the officer who arrested him. However the arrest record indicates that two other officers arrested defendant. Moreover, the arresting officer did not testify at trial; therefore, there is no factual support for defendant’s claim. Furthermore, a gun was not found or presented in defendant’s case. Where no physical evidence was presented, it is difficult to see how information – that an officer may have planted evidence in an unrelated case – would be material or would probably produce a different result on retrial. Therefore, defendant has failed to demonstrate that a different result would be probable, and a new trial is not warranted. *Lester, supra* at 271.²

Defendant next argues that he was denied his constitutional right to present a witness on his behalf. We disagree.

Unpreserved claims of evidentiary error are reviewed for plain error affecting a defendant’s substantial rights. *Jones, supra* at 355-356. The only “facts” defendant gives to support his claim that he was denied the right to present a witness are in the language of the issue presented itself. “Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.” *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Nevertheless, the lower court record does not contain a defense witness list that would indicate defendant intended to call this witness; nor does it contain a subpoena for this witness. And the decision to call a witness is considered a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Moreover, the transcripts provided do not indicate that defendant sought to present this witness, and no docket listing was provided with the lower court record, which might indicate missing transcripts. This Court has refused to consider issues when the appellant failed to produce the transcript. *People v Coons*, 158 Mich App 735, 740; 405 NW2d 153 (1987). Therefore, defendant has abandoned this issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

² With respect to defendant’s argument that his property was illegally searched, there is no evidence in the lower court record indicating that an illegal search occurred. Nevertheless, the remedy for evidence unlawfully obtained is, generally, exclusion of the evidence. *People v Goldston*, 470 Mich 523, 528-529; 682 NW2d 479 (2004). Because no physical evidence was presented, there is no indication that this information would have produced a different result at trial. Moreover, this information was available to defendant’s counsel and could have been presented at the first trial. Therefore, a new trial is not warranted. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998); MCR 2.611(A)(1)(f).

Affirmed.

/s/ Kurt T. Wilder
/s/ Joel P. Hoekstra
/s/ Donald S. Owens