

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENYON CLINTON,

Defendant-Appellant.

UNPUBLISHED

October 17, 2006

No. 261378

Macomb Circuit Court

LC No. 02-002881-FC

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions for armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, kidnapping, MCL 750.349, and two counts of possession of a firearm during the commission of a felony, MCL 750.227. The trial court sentenced defendant as an habitual offender, MCL 769.10, to 35 to 60 years' imprisonment for the armed robbery, conspiracy, and kidnapping convictions, and two years' imprisonment for the felony-firearm convictions. We affirm.

Defendant first argues the trial court erred in finding that there was an independent basis for the victim's in-court identification. Whether an independent basis validates a victim's in-court identification is a factual determination made in light of the totality of the circumstances. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998). "We review the trial court's findings for clear error." *Id.*

When a witness is exposed to an impermissibly suggestive pretrial identification procedure, his in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the "in-court identification has a basis independent of the prior identification procedure." *Id.* In determining whether an independent basis exists, a court should look at (1) the prior relationship with or knowledge of the defendant, (2) the opportunity to observe the offense, which includes such factors as length of time of the observation, lighting, noise or other factors affecting sensory perception and proximity to the alleged criminal act, (3) the length of time between the offense and the disputed identification, (4) the accuracy or discrepancies of untainted descriptions and the defendant's actual description, (5) any previous proper identification or failure to identify the defendant, (6) any prior identification of another person as defendant, (7) the nature of the alleged offense and the physical and psychological state of the witness, and (8) any idiosyncratic or special features of the defendant. *Id.* at 116.

In this case, there was a basis for the identification independent from any tainted pretrial identification procedure. While the victim did not have a prior relationship with defendant, he had an opportunity to observe defendant outside the store and inside the car. There was abundant light outside the store and defendant's face was uncovered throughout the robbery. The victim was with defendant in the back seat of the car for over 15 minutes. The disputed identification occurred almost three years after the shooting but the victim's prior descriptions of the gunman fit defendant. Although the victim stated on the night of the robbery that he did not think he would be able to identify the gunman later, he later testified that he remembered more details after calming down. While the robbery terrified him, the victim also testified that he concentrated on defendant because defendant had the gun. Viewing the totality of the circumstances, we conclude that the trial court did not clearly err in finding that there was an independent basis for the victim's in-court identification.

Defendant next argues he was denied a fair trial by the admission of other acts evidence. We disagree. We review the admission or exclusion of evidence by the trial court for a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). The court abuses its discretion when its decision is so palpably and grossly contrary to fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but its defiance. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

MRE 404(b)(1) governs admissibility of other acts evidence. It 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)(1), other acts evidence must be (1) offered for a proper purpose, i.e., to prove something other than propensity to commit like acts, (2) relevant under MRE 402, as enforced through MRE 104(b); and (3) the evidence's probative value must not be substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). However, where the other acts evidence is offered to show identity through *modus operandi*, as is the case here, the four-part test of *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), remains the proper test. *VanderVliet*, *supra* at 66; *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998). The *Golochowicz* test requires that (1) there is substantial evidence that the defendant committed the other act, (2) there is some special quality of the act that tends to prove the defendant's identity, (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. *Golochowicz*, *supra* at 309.

As described above, the first part of the *Golochowicz* test requires that there is substantial evidence that the defendant committed the other act. In this case, defendant was convicted of attempting to kidnap and rob another victim hours after the events of this case. That victim testified that defendant was the one who attempted to abduct her, and a videotape showed the

entire incident. On the basis of that evidence, we conclude that the trial court did not abuse its discretion in finding that there was substantial evidence that defendant committed the other act.

The second part of the *Golochowicz* test requires some special quality of the act that tends to prove the defendant's identity. The record reflects that the perpetrator in both crimes approached the victim after the victim left a store in the city of Warren. In both cases, the perpetrator had a gun and tried to take the victim into the backseat of a white Caprice. In both cases, the perpetrator had at least one accomplice driving the Caprice. The crimes did differ as to the time of day and the number of vehicles in the parking lot, but considering the similarities between the incidents, we conclude that the trial court did not abuse its discretion in finding that the substantial similarity of the facts in the two cases was a special quality tending to prove the perpetrator's identity.

Third, the question of identity must be material to the determination of the defendant's guilt. *Golochowicz, supra* at 309. This question is one of relevancy, and the proponent of the other acts evidence must show a relationship between the challenged evidence and a material fact at issue. The challenged evidence must make the fact at issue more or less probable than it would be without the evidence. *VanderVliet, supra* at 60. In this case, defendant's identity as the man who robbed and abducted the victim was particularly at issue because defendant argued that he was not the perpetrator and that the eyewitness testimony was mistaken. We therefore conclude that the trial court did not abuse its discretion in finding that the question of identity was material to the determination of the defendant's guilt.

“The fourth prong of *Golochowicz* is merely a restatement of the Rule 403 test applied to all evidence to determine its legal relevance.” *VanderVliet, supra* at 71. MRE 403 allows for the exclusion of otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The trial court is in the best position to gauge the effect of such testimony. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).

In this case, the trial court recognized there was a danger that the jury would convict defendant on the basis of bad character or give undue weight to the fact that defendant committed a similar crime. But the trial court also noted that with regard to the issue of identity, the other acts evidence had very high probative value. The two crimes were very similar and the other acts evidence helped to establish identity, which was the main fact at issue in this case. While there was a danger of unfair prejudice, we conclude that the trial court did not abuse its discretion in finding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael J. Talbot