STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CICSO DESTIN GREEN,

Defendant-Appellant.

UNPUBLISHED
July 30, 2013

No. 310003
Wayne Circuit Court
LC No. 11-007496-FC

Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Defendant, Cisco Destin Green, appeals as of right his jury trial convictions of armed robbery, MCL 750.529, possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b, and felon in possession of a firearm ("felon in possession"), MCL 750.224f. The trial court sentenced defendant to 135 to 300 months' imprisonment for the armed-robbery conviction, two years' imprisonment for the felony-firearm conviction, and 40 to 60 months' imprisonment for the felon-in-possession conviction. We affirm.

This case arises out of a robbery outside a liquor store. The victim testified at trial that just before 10:00 p.m. on May 20, 2011, she exited Action Liquor in Detroit and approached her vehicle to leave when defendant stepped out of the passenger-side door of a vehicle parked next to her and robbed her at gunpoint.

Defendant first argues that the trial court erred when it admitted evidence of his alleged involvement in another armed robbery. We disagree.

A trial court's decision to admit evidence is discretionary and will not be disturbed by this Court "absent a clear abuse of discretion." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "An abuse of discretion occurs when the [trial] court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). Decisions concerning the admission of evidence often involve preliminary questions of law, which this Court reviews de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). If a trial court admits evidence that as a matter of law is inadmissible, it abuses it discretion. *Id*. A trial court's decision on a close evidentiary question, however, cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

MRE 404(b)(1), which governs a trial court's decision to either admit or exclude other-acts evidence, 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. [*People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001), quoting MRE 404(b)(1).]

Thus, to be admissible, other-acts evidence must be relevant to an issue other than propensity. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). Further, the evidence must be relevant under MRE 401[1] and not present a danger of undue prejudice that substantially outweighs its probative value in light of the availability of other means of proof and facts. *Id*. at 74-75; see also MRE 403. Additionally, the party moving for admission of the other-acts evidence bears the burden to not merely recite one of the purposes allowed under MRE 404(b)(1) when offering such evidence but to also "explain how the evidence relates to the recited purposes." *People v Dobek*, 274 Mich App 58, 85; 732 NW2d 546 (2007). Further, when specifically determining whether other-acts evidence is admissible to establish identity through modus operandi, the trial court must also find the following:

> (1) there is substantial evidence that the defendant committed the similar 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. [*People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998), citing *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982).]

The prosecution offered evidence of defendant's alleged involvement in a separate armed robbery to prove the identity of the perpetrator that committed the armed robbery at issue. After reviewing the record, we conclude that the trial court did not abuse its discretion by finding that the evidence was admissible to establish identity through modus operandi. There was substantial evidence that defendant committed the other armed robbery as the victim of the other armed robbery identified defendant as the perpetrator. In addition, as the trial court noted, there were several similarities between both robberies, including the timing of the robberies, selection of the victims and locations, and the type of weapon used during the robberies. More specifically, each robbery occurred in a parking lot of a liquor store, and the liquor stores were in close proximity. The robberies occurred on the same day and about 30 minutes apart from one another. Both

[1] "Relevant evidence" is evidence that 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." MRE 401.

victims were female and were robbed after exiting the stores. During the robberies, defendant used a black revolver and made similar statements to the victims before taking their purses. Further, during each robbery, defendant had an accomplice, and both victims described the getaway vehicle as a white van. Given these similarities between the robberies, the evidence was relevant as it tended to prove that defendant was the perpetrator at issue. Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, especially considering that identification was at issue, the evidence was material to establish identity, and after the witness testified the trial court instructed the jury regarding the proper use of the other-acts evidence.[2] Accordingly, the evidence was properly admitted. See *id.* at 187 ("[Because] the similarity in the crimes pointed to defendant as the perpetrator of this crime . . . the similar-acts evidence was admitted for a proper purpose, namely, to prove that defendant committed this crime.").

Defendant also argues that there was insufficient evidence to convict him of felon in possession and felony-firearm because the prosecution failed to establish that he possessed a "firearm" as defined by statute. We disagree.

This Court reviews de novo claims of insufficient evidence. *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009). "Due process requires that, to sustain a conviction, the evidence must show guilt beyond a reasonable doubt." *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). There is sufficient evidence to sustain a conviction if after reviewing the evidence in a light most favorable to the prosecution, it is determined that a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Further, "all conflicts with regard to the evidence must be resolved in favor of the prosecution." *Lee*, 243 Mich App at 167.

Under the felon-in-possession statute, "a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a *firearm* in this state. . . ." MCL 750.224f (emphasis added). "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235

[2] Defendant contends in his brief that while the trial court had previously agreed to provide a limiting instruction regarding the other-acts evidence, it denied his counsel's request at trial. Defendant misconstrues the record. Following the other-act witness's testimony, the trial court gave a proper limiting instruction to the jury. While it appears that defense counsel sought to have the limiting instruction read again at the time of final instructions, the trial court gave an abbreviated version. Nevertheless, the jury was instructed regarding the proper use of the other-acts evidence, and jurors are presumed to follow their instructions. See *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011).

Mich App 499, 505; 597 NW2d 864 (1999). "Possession can be proved by circumstantial or direct evidence and is a factual question for the trier of fact." *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011). A "firearm" is "'a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air. Firearm does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB's not exceeding .177 caliber.'" *People v Brown*, 249 Mich App 382, 383-384; 642 NW2d 382 (2002), quoting MCL 750.222(b). This Court has concluded that neither the felon-in-possession statute nor the felony-firearm statute mandates that the "firearm" be operable at the time the offense is committed. *Id.* at 383-385.

At trial, the victim testified that defendant exited a vehicle while possessing a gun and that defendant aimed the gun at her. The victim recalled that she panicked when she saw the gun, which she described as a black revolver. Throughout her testimony, the victim clearly testified that she observed defendant with a gun, not some other object or device. The jury heard this evidence and ultimately concluded that defendant was in possession of a firearm. Because this Court defers to the jury to decide such questions of fact and there was sufficient evidence for the jury to reasonably infer that defendant possessed a firearm, defendant's convictions are supported by the record.

Lastly, defendant argues that the trial court committed error requiring reversal by excluding him from the courtroom during the rendition of the verdict. We disagree.

We review for an abuse of discretion a trial court's decision to remove a defendant from the courtroom during trial. See *People v Harris*, 80 Mich App 228, 230; 263 NW2d 40 (1977) ("The trial judge acted within the proper scope of discretion in removing defendant from the proceedings."). "A defendant has a right to be present during the voir dire, selection of and subsequent challenges to the jury, presentation of evidence, summation of counsel, instructions to the jury, *rendition of the verdict*, imposition of sentence, and any other stage of trial where the defendant's substantial rights might be adversely affected." *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984) (emphasis added). "The defendant's right to be present at his trial is a right guaranteed to him by statute, MCL § 768.3 . . ., and by the due process clause of the Fourteenth Amendment." *People v Gross*, 118 Mich App 161, 164; 324 NW2d 557 (1982). However, a defendant's constitutional right to be present is not absolute. *People v Krueger*, 466 Mich 50, 54 n 9; 643 NW2d 223 (2002). "It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings . . . ." *Illinois v Allen*, 397 US 337, 343; 90 S Ct 1057; 25 L Ed 2d 353 (1970). Thus, in *Illinois v Allen*, 397 US at 343, the United States Supreme Court determined that a defendant may waive his right to be present through disruptive behavior, holding as follows:

> [A] defendant can lose his right to be present at trial if, *after he has been warned by the judge that he will be removed if he continues his disruptive behavior*, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. [Emphasis added.]

Although the *Allen* Court held that a judge must warn a defendant of the potential for removal before actually removing the defendant from the courtroom during trial, we have held that a defendant need not be warned before removal where "the nature of a defendant's disruption consists of violence toward another person"; we emphasized that a defendant who has committed a physical act of violence in a courtroom should not be permitted "one free swing" at the risk of the safety of others in the courtroom. *People v Staffney*, 187 Mich App 660, 664-665; 468 NW2d 238 (1991).

Here, on the first day of trial, after the jury had been selected and excused for a recess, defendant expressed profanities toward the court after an exchange occurred regarding the shirt defendant was wearing.[3] After this incident, defendant was present throughout the trial and did not engage in disruptive conduct.

On the fourth day of trial, after it was announced that the jury had reached a verdict, the trial court indicated that it would not return defendant to the courtroom, explaining its decision as follows:

> [T]he Court has received a message from the jury we have reached a verdict. Now because of the defendant's violent and belligerent behavior in other words him fighting with the staff at the 36th District Court and cursing me out in open court this Court is leaving the defendant in his cell.
>
> The cell has been wired and there's a microphone so that the defendant can hear what is taking place in the courtroom.
>
> But I'm not going to risk the safety of the parties involved because of this.

In opposition to the court's decision to exclude defendant, defense counsel argued that defendant wanted to be present in the courtroom for the verdict, and counsel emphasized that defendant had not been disruptive after his outburst on the first day of trial. The court responded,

> Now, in a related matter earlier this month we had another defendant his [sic] handcuffs in the court room turn to the jury after the jury gave it's [sic] verdict and said fuck yaw.

* * *

[3] The incident occurred after defense counsel advised the court that he had just learned that defendant was wearing a shirt with two pistols depicted on the back. The trial court, apparently amused, indicated that it wanted to photograph the shirt. Defendant, apparently offended, stated, "[y]ou want to take a picture of me fuck you." The trial court told defendant he was in contempt of court, at which point defendant stated that he was already locked up, and "what you gonna do to me." The court stated that defendant would be locked up some more, and defendant responded, "[d]on't say shit to these people fuck these people."

> [Defendant in this case] has shown he has no respect for authorities in this courtroom.
>
> ***
>
> I'm not putting anybody at risk of being harmed or insulted or disrespected in any way. He's violent and he's mean and he's going to stay back where he is.

Given the record before this Court, we conclude that the trial court abused its discretion by excluding defendant from the courtroom during the rendition of the verdict. The trial court excluded defendant from the courtroom without first warning him that he could be excluded if he continued to be disruptive after his outburst on the first day of trial. See *Allen*, 397 US at 343. Furthermore, defendant did not commit a physical act of violence in the courtroom during his trial such that a warning before exclusion would be unnecessary. See *Staffney*, 187 Mich App at 664-665. Significantly, defendant did not even continue to be disruptive after his outburst on the first day of trial. Although the trial court stated that defendant was "fighting" with the staff at the 36th District Court, the record before this Court does not establish the nature of the "fighting," i.e., whether defendant actually engaged in violent physical contact with someone, or when the "fighting" occurred. Furthermore, the trial court erroneously considered the conduct of *another defendant* in an earlier separate proceeding to find that *defendant in this case* posed a risk of insulting the jury after the rendition of its verdict. In sum, the trial court failed to "indulge every reasonable presumption against [defendant's] loss of the right to be present during trial." *People v Mallory*, 421 Mich 229, 248 n 13; 365 NW2d 673 (1984); see also *Allen*, 397 US at 343 ("[C]ourts must indulge every reasonable presumption against the loss of constitutional rights . . . .").

Nevertheless, "the test for whether defendant's absence from a part of his trial requires reversal of his conviction is whether there was any reasonable possibility that defendant was prejudiced by his absence." *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995). Prejudice from a defendant's absence is not presumed, and a defendant bears the burden to prove otherwise. *People v Buie (On Remand)*, 298 Mich App 50, 59; 825 NW2d 361 (2012); *People v Woods*, 172 Mich App 476, 480; 432 NW2d 736 (1988). Although defendant was absent during the rendition of the verdict, defendant has not established a reasonable possibility that he was prejudiced by his absence. Defendant's absence made no difference in the outcome of his trial. See *Woods*, 172 Mich App at 480. The jury was not aware during deliberations that defendant would not be in the courtroom during the rendition of its verdict. And there was a microphone in defendant's cell so that he could hear what was taking place in the courtroom. Although defendant argues that he was unable to communicate with his attorney during the rendition of the verdict, defendant does not explain how his inability to communicate with counsel prejudiced him. Accordingly, reversal is not warranted.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro