

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN DAVID MCGINN, JR.,

Defendant-Appellant.

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UNPUBLISHED  
February 18, 2003

No. 237621  
Saginaw Circuit Court  
LC No. 00-019264-FH

Before: O'Connell, P.J., and Fitzgerald and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of fourth-degree fleeing and eluding a police officer, MCL 750.479a(2), and transporting open intoxicants in a vehicle, MCL 257.624a, entered after a jury trial. We affirm.

At trial the evidence showed that at approximately 4:00 p.m. on September 11, 2000, a rainy, overcast day, a black Jeep passed a police radar station at a high rate of speed. The officer operating the radar identified defendant as the driver of the Jeep. Other officers pursued the Jeep; however, the driver abandoned it in a field and fled on foot. Subsequently, defendant was seen walking in the area and was apprehended. His clothes were wet and muddy, and he had fresh scratches on his arms and legs. Defendant denied that he was the driver of the Jeep. The police found open intoxicants in the Jeep.

Prior to trial the prosecution served notice that it intended to offer other acts evidence pursuant to MRE 404(b) to show identity, plan, or scheme. Over defendant's objection the prosecution presented the testimony of a state trooper who stated that on June 22, 1997, he pursued a vehicle that was traveling at a high rate of speed. The trooper identified defendant as the driver of the vehicle. Defendant attempted to elude the trooper, abandoned the vehicle in a grassy area, and fled on foot. When apprehended, defendant maintained that he had not been driving the vehicle. The vehicle contained open intoxicants.

Two witnesses, one of whom was defendant's wife, testified that on the day of the incident a man they identified as Lopez took defendant's black Jeep in order to do an errand for defendant. Defendant's wife indicated that several hours later defendant left in his green Jeep to pick up Lopez after he telephoned and stated that he had fled from the police.

Jason Bain testified that on June 22, 1997, he, defendant, and John Meyers were riding in a red sports car. Meyers was driving the car. Bain indicated that defendant and Meyers had similar appearances. He denied that defendant drove the car.

Defendant testified that on September 11, 2000, Lopez took his black Jeep to pull a boat out of the water. Defendant maintained that later in the day when he was searching for Lopez his green Jeep got stuck in mud and timber. He stated that he was walking to a friend's home when the police apprehended him. Defendant denied that he fled from the police.

The jury found defendant guilty as charged. Defendant moved for a directed verdict of acquittal or in the alternative a new trial. He contended that the verdict was against the great weight of the evidence, and that the trial court abused its discretion by admitting other acts evidence. The trial court denied the motion, finding that a rational trier of fact could reach the conclusion reached by the jury in this case. The court sentenced defendant to concurrent terms of six months in jail, with credit for one day.

Evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show that he acted in conformity with it, but may be admissible for other purposes, such as to show proof of motive, opportunity, intent, preparation, scheme, plan, system in doing an act, knowledge, identity, or absence of mistake or accident. The other crimes, wrongs, or acts may be contemporaneous with or prior to or subsequent to the conduct at issue. MRE 404(b)(1). To be admissible, other acts evidence must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

If other acts evidence is offered to establish identification through a system in doing an act: (1) there must be substantial evidence that the defendant committed the other act; (2) there must be some special quality or circumstance of the other act tending to prove the defendant's identity or system; (3) the evidence must be material to the defendant's guilt of the charged offense; and (4) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *People v Smith*, 243 Mich App 657, 670; 625 NW2d 46 (2000). Evidence is relevant if it is material and has probative value. Evidence is material if it tends to make the existence of any fact that is of consequence to the action more probable or less probable than it would be without the evidence. *People v Crawford*, 458 Mich 376, 388-390; 582 NW2d 785 (1998).

The admissibility of other acts evidence is within the discretion of the trial court. *Id.*, 383. A preserved nonconstitutional error is presumed to be harmless. The defendant bears the burden of showing that error resulted in a miscarriage of justice. The error justifies reversal if it is more probable than not that it affected the outcome of the case. *People v Lukity*, 460 Mich 484, 493-496; 596 NW2d 607 (1999); *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

Defendant argues that the trial court abused its discretion by admitting other acts evidence. We disagree. The prosecution sought to admit evidence of the 1997 incident for the purpose of showing that the circumstances of the charged offenses were so similar to the 1997

incident that it was clear that defendant committed the charged offenses. The trooper's testimony constituted substantial evidence that defendant committed the other act. Defendant was identified as the driver in both the 1997 incident and in the charged offenses. In both cases it was alleged that defendant attempted to elude police in a vehicle chase, drove a vehicle onto private property, abandoned the vehicle, and attempted to flee on foot. Open intoxicants were found in the vehicle in the 1997 incident and in the charged offenses. In both cases defendant maintained that another person, who could not be located, was driving the vehicle. The other act had special qualities that tended to prove defendant's identity as the perpetrator of the charged offenses, and was material to the issue of defendant's guilt of the charged offenses. *Crawford, supra*, 388-390.

Finally, the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice. This determination is best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). The jury was entitled to accept the trooper's testimony regarding the 1997 incident. *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). The trial court instructed the jury regarding the proper consideration to be given to the other acts evidence. A jury is presumed to follow the instructions given to it. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The evidence established that the 1997 incident was strikingly similar to the charged acts, and the similarities between the 1997 incident and the charged acts identified defendant as the perpetrator of the charged acts. *Smith, supra*. The trial court did not abuse its discretion by admitting the other acts evidence. *Crawford, supra*, 383.

If the evidence is insufficient to support a conviction, due process requires that the trial court direct a verdict of acquittal. MCR 6.419(A); *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). When ruling on a motion for a directed verdict the trial court must consider the evidence presented by the prosecutor up to the time the motion was made in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). The court may not determine the weight of the evidence or the credibility of witnesses, regardless of inconsistencies or vagueness in the testimony. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). When reviewing a trial court's decision on a motion for a directed verdict, we review the record de novo to determine whether the evidence presented by the prosecutor, viewed in a light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the charged offense were proven beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). Determining whether a verdict is against the great weight of the evidence requires a review of the entire body of proofs. The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). If the evidence conflicts, the issue of credibility should be left for the trier of fact. *Lemmon, supra*, 642-643. An objection going to the great weight of the evidence can be raised only by a motion for a new trial before the trial court. *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988).

Defendant argues that the trial court erred by denying his motion for a directed verdict or a new trial. We disagree. Defendant does not contest that the evidence showed that a black Jeep passed by the radar station at a high rate of speed, that the Jeep attempted to elude the police, that the driver of the Jeep abandoned the vehicle and fled on foot, and that the police found open intoxicants in the vehicle. The identification of the driver of the Jeep was the crucial issue in this case. The radar officer identified defendant as the driver of the black Jeep. In deciding defendant's motion for a directed verdict, the trial court was not entitled to find this evidence not credible in light of the fact that the officer made his observation under less than ideal conditions. *Mehall, supra*. This evidence, viewed in a light most favorable to the prosecution, was sufficient to support the jury's finding that defendant was the perpetrator of the charged offenses. *Schultz, supra*. The jury was entitled to accept the testimony that defendant was the driver of the black Jeep and to reject the testimony given by defendant's alibi witnesses. *Marji, supra*. The trial court correctly left the issue of the credibility of the witnesses to the jury. *Lemmon, supra*. The evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. The trial court did not err by denying defendant's motion for a directed verdict or a new trial. *Aldrich, supra; Gadomski, supra*. The trial court's statement of its reasons for denying the motion was sufficient.

Affirmed.

/s/ Peter D. O'Connell  
/s/ E. Thomas Fitzgerald  
/s/ Christopher M. Murray