

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LESLIE GORDON,

Defendant-Appellant.

UNPUBLISHED

September 22, 2005

No. 254639

Wayne Circuit Court

LC No. 03-011072-01

Before: Hood, P.J., and White and O’Connell, JJ.

PER CURIAM.

Defendant was convicted of four counts of first-degree felony murder, MCL 750.316, three counts of first-degree premeditated murder, MCL 750.316, two counts of assault with intent to murder, MCL 750.83, two counts of assault with intent to rob while armed, MCL 750.89, and second-degree murder, MCL 750.317. She was sentenced to life in prison on each of her four first-degree felony murder convictions, life in prison on each of her three first-degree premeditated murder convictions,¹ eighteen to eighty years in prison on each of her two assault with intent to murder convictions and seventeen to eighty years in prison on each of her two assault with intent to rob while armed convictions. Defendant’s second-degree murder conviction was vacated. She appeals as of right, and we affirm.

Defendant first asserts that she was denied due process when she was convicted of the charged offenses on an aiding and abetting theory notwithstanding that the weight of the

¹ Defendant’s judgment of sentence shows separate convictions and sentences for each of the felony murder and premeditated murder convictions. At sentencing, the prosecutor asked the court to enter one conviction based on alternative theories with respect to each murder, in accordance with *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998). Defense counsel objected, and the court sentenced separately for each conviction. In its written opinion denying a new trial, the court stated that defendant “was sentenced to life imprisonment without possibility of parole on the felony murder convictions (counts 3-8).” Counts 3 through 8, however, encompass three felony murder and three premeditated murder convictions. In her statement of facts on appeal, defendant repeats this assertion. Defendant claims no error, and no failure of effective assistance, based on *Bigelow, supra*.

evidence supported her duress defense. The trial court denied defendant's motion for a new trial, which was based in part on this argument. We find no error.

When reviewing a denial of a motion for a new trial, this Court reviews for an abuse of discretion. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). "An appellate court will find an abuse of discretion only where the denial of the motion was manifestly against the clear weight of the evidence." *Id.* "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 McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

A defendant asserting the defense of duress has the burden of establishing a prima facie case of duress. To establish a prima facie case, the defendant must present sufficient evidence from which a jury could find that: (1) the threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, (2) the conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant, (3) the fear or duress was operating on the mind of the defendant at the time of the alleged act, and (4) the defendant committed the act to avoid the threatened harm. *People v McKinney*, 258 Mich App 157, 164; 670 NW2d 254 (2003).

Here, defendant brought forth some evidence that she feared Michael Scofield would kill her or cause serious bodily harm to her. However, there was ample evidence to support the jury's rejection of that defense. Defendant testified that Scofield never pointed a gun at her or threatened her with his gun. Defendant had several opportunities to escape if she so chose but did not attempt to do so. When Scofield's gun fell to the floor during the police chase, defendant picked it up and had possession of the only gun while in Scofield's Corvette as Scofield was driving, and defendant did not use the gun to threaten Scofield or throw the gun out the window so Scofield could not have it, but rather, gave the gun back to Scofield. After the Corvette crashed and Scofield ran away, defendant did not stay in the car and wait for the police to help her, but rather, ran in the direction that Scofield had run in. Finally, State Trooper Jack Taeff, who was the first law enforcement officer to find Scofield and defendant, testified that defendant did not appear relieved when Scofield shot himself. We conclude that the trial court did not abuse its discretion when it denied defendant's request for a new trial.

Defendant next asserts that she was denied her right to a fair trial because the trial judge's jury instructions did not include specific language that she should be found not guilty of aiding and abetting if Scofield's acts were unanticipated and went beyond the common enterprise agreed to by defendant. We conclude that this issue has been waived by defense counsel's expression of satisfaction with the trial court's proposed and subsequent instructions to the jury. *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). Further, the instructions given adequately conveyed the concept that defendant, herself, must have possessed the requisite intent.

Defendant's final issue on appeal is that she was denied her right to due process when other act evidence regarding her involvement in a prior robbery of the Novi Fine Wine Store (NFWS) was allowed into evidence. We disagree.

Defendant failed to object to the other act evidence at the time of its admission, and thus, has failed to properly preserve this issue for appeal. *People v Knox*, 469 Mich 502, 508; 674

NW2d 366 (2004). This Court reviews unpreserved claims for plain error, which affect a defendant's substantial rights, and merit reversal only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763, 773; 597 NW2d 130 (1999); *People v Newton*, 257 Mich App 61, 65; 665 NW2d 504 (2003).

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, but may 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, whether the crimes, wrongs or acts are contemporaneous with or prior or subsequent to the conduct at issue. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); MRE 404(b)(1). The purpose of the limitation on the admissibility of bad acts evidence is to avoid convicting a defendant based upon his bad character rather than upon evidence that he is guilty beyond a reasonable doubt of the crime charged. *Id.*; MRE 404(b)(1). The list of proper purpose exceptions in MRE 404(b) is non-exclusive. *People v Sabin*, 463 Mich 43, 68; 614 NW2d 888 (2000). A proper purpose is any purpose other than one establishing the defendant's character to show his propensity to commit the charged offense. *People v VanderVliet*, 444 Mich 52, 89; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); MRE 404(b). If a proper purpose is shown, the "bad acts" evidence will be admissible if the evidence is relevant and has probative value that is not substantially outweighed by unfair prejudice. Further, the trial court must, upon request, provide a limiting instruction to the jury. *Crawford, supra*, at p 384; MRE 404(b). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *Id.* at 385; MRE 401, 402.

Evidence of misconduct committed by a defendant and similar to that charged is logically relevant to show that the charged act occurred when the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. *People v Ackerman*, 257 Mich App 434, 440; 669 NW2d 818 (2003). Evidence of similar acts is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot, but the evidence must indicate the existence of a plan rather than a series of similar spontaneous acts. *Id.* The plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. *Id.*

Defendant's, Raod Dawood's and Sergeant David Heater's testimony relating to defendant and Scofield robbing the NFWS earlier in the day on September 11, 2003, was not offered to establish defendant's character to show her propensity to commit the charged offenses. The evidence was offered to help establish a common scheme or plan and defendant's intent. The evidence helped establish a common scheme and plan by showing that defendant and Scofield brought the same bag with zip-ties, a gun and gloves in it to both the NFWS and Neil's Party Store (NPS), and that defendant's job was to assist Scofield by distracting the respective clerks by asking for a lottery ticket and then standing by the door and looking out for people. *Ackerman, supra*, at 440. By establishing a common scheme and plan the evidence also helped establish that defendant and Scofield entered NPS with the intent to rob it.

Further, defendant used the evidence to support her theory that she did not intend to kill anyone at NPS, and had no idea that Scofield had such an intention. We conclude that the trial court did not commit plain error by failing to sua sponte suppress the evidence. *Crawford, supra*, at 383-384.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Helene N. White

/s/ Peter D. O'Connell