

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADONIS KHALID SMITH,

Defendant-Appellant.

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UNPUBLISHED

December 13, 2011

No. 298089

Wayne Circuit Court

LC No. 09-031673-FH

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of attempted breaking and entering a building with intent to commit larceny, MCL 750.92 and MCL 750.110, and possession of burglar's tools, MCL 750.116. Because the trial court properly admitted MRE 404(b) other acts evidence during trial, defendant was not denied the effective assistance of counsel, and the trial court did not abuse its discretion by limiting defendant's redirect examination testimony, we affirm.

At approximately 6:30 a.m. on October 17, 2009, two undercover police officers responded to a reported breaking and entering at a business in Detroit. When they arrived, Officer Dean Muczynski saw two men trying to force open the door to the building with a crow bar and bolt cutters, while a third man acted as an apparent lookout. Officer Muczynski went to the back of the building while his partner remained in front. The men eventually left the front of the building and proceeded toward the back, where they approached Officer Muczynski. When they were approximately five feet away, Officer Muczynski displayed his badge and identified himself as a police officer. All three men ran away, but Officer Muczynski was able to identify defendant as one of the men. Defendant was wearing a black "puffy" jacket and was carrying a pair of bolt cutters. Muczynski chased after the men and caught up with defendant, who dropped the bolt cutters before climbing over a fence. Defendant was eventually apprehended on a nearby porch. He was no longer wearing the black jacket, but Officer Muczynski recognized him as the person he saw at the building.

Defendant testified at trial and maintained that he was walking to the store when he saw someone running toward him. He panicked and ran out of fear. He hid under a porch because he did not know what was going on and was trying not to put himself in danger. Defendant denied possessing bolt cutters and attempting to break into a building.

## I. COUNSEL'S ISSUES

### A. MRE 404(b) OTHER ACTS EVIDENCE

Defendant argues that the trial court erred by admitting evidence regarding his previous convictions, including breaking and entering a building in January 2008 and breaking and entering a building and possession of burglar's tools in March 2008. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). An abuse of discretion occurs if the trial court's decision falls outside the range of principled outcomes. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010).

MRE 404(b)(1) prohibits the admission of evidence involving a defendant's other bad acts unless it is offered for a purpose other than to prove the defendant's bad character and its prejudicial effect does not substantially outweigh its probative value. The purpose of this rule is to prevent a jury from convicting a defendant based on his bad character rather than his guilt of the crimes charged. *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998). Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if it (1) is offered for a proper purpose, i.e., not to prove the defendant's character or propensity to commit the crime, (2) is relevant to an issue or fact of consequence at trial, and (3) the danger of unfair prejudice does not substantially outweigh its probative value. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Further, the trial court, upon request, may provide a limiting instruction under MRE 105. *Id.* at 75. See also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Here, the other acts evidence involved two similar incidents. In January 2008, the police observed defendant carrying items out of a liquor store at approximately 3:30 a.m. after the padlock to the store's door had been cut. Defendant pleaded guilty to attempted breaking and entering with respect to that incident. Defendant was also convicted of breaking and entering and possession of burglar's tools in connection with a March 2008 incident in which he and two other men broke into a building with a crowbar. When the police arrived, defendant fled, running through yards and over fences.

Although defendant argues that the evidence of his prior convictions was not logically relevant to prove his modus operandi or identity, it was not offered for those purposes. Rather, the prosecution sought to admit the evidence to show defendant's intent and his scheme, plan, or system in committing similar offenses. Defendant's intent was a principal issue because the police observed him and two other men using a crowbar and bolt cutters to damage a control panel box on the door to a building, but interrupted them while they were in progress. To convict defendant of the charged offenses, the prosecution had to prove that defendant intended to break into the store to steal property and that he intended to use the bolt cutters to gain entry into the store. Thus, the other acts evidence was probative of defendant's intent and relevant to an issue of consequence at trial. Further, given that defendant's intent was a principal issue and that the trial court instructed the jury on the limited permissible use of the evidence, we are satisfied that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Accordingly, the trial court did not abuse its discretion by admitting the evidence.

## B. DEFENDANT'S REDIRECT TESTIMONY

Defendant next argues that the trial court erroneously refused to allow defense counsel to rehabilitate his testimony on redirect examination. On cross-examination, defendant denied breaking into the liquor store and testified that he lied when he pleaded guilty to the January 2008 offense. Defendant maintained that someone had already broken into the store when he arrived, and he “took a cop” regarding the charge. On redirect examination, defense counsel attempted to elicit testimony regarding the plea deal, but the trial court ruled that the intended questioning constituted an impermissible collateral attack on the prior conviction and that the prosecutor had not “opened the door” to the line of questioning.

MRE 611 states that a court “shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence[.]” The extent to which the trial court permits redirect examination is reviewed for an abuse of discretion. *People v Stevens*, 230 Mich App 502, 507; 584 NW2d 369 (1998). It is also within the trial court’s discretion whether to allow inquiry into matters collateral to the issue at hand. *People v Childers*, 20 Mich App 639, 651-652; 174 NW2d 565 (1969).

The record shows that defendant was permitted to explain that he pleaded guilty pursuant to a plea agreement and that he did not commit the crime as alleged. The trial court’s ruling merely prevented defendant from explaining the terms of his plea agreement, which was collateral to the issue at hand. Defendant argues that the terms of his plea agreement were relevant to his credibility and relies on *People v Guerra*, 469 Mich 966; 671 NW2d 535 (2003). In *Guerra*, the Court disapproved of a portion of this Court’s decision in *People v Gonzalez*, 256 Mich App 212, 223-224; 663 NW2d 499 (2003), holding that the trial court did not abuse its discretion by denying defense counsel’s request to question a witness regarding the terms of her plea agreement. The witness in *Gonzalez* was cooperating with the prosecution pursuant to a plea agreement, and the terms of the agreement were relevant to her motive for testifying. Unlike *Gonzalez*, the terms of defendant’s plea agreement were not relevant to his credibility. Accordingly, *Gonzalez* is distinguishable, and the trial court did not abuse its discretion by excluding the testimony.

## C. CUMULATIVE ERROR

Defendant next argues that the cumulative effect of the alleged errors discussed above denied him a fair and impartial trial. The cumulative effect of multiple errors may require reversal where a single error, standing alone, does not. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). A defendant must show that the combination of errors denied him a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). Here, because no individual error occurred, there can be no cumulative effect of errors requiring reversal. See *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007).

## D. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next contends that trial counsel was ineffective for failing to object to the prosecutor’s notice of intent to introduce other acts evidence. Because defendant did not preserve this issue for appellate review, our review is limited to errors apparent on the record.

*People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, “a defendant must show that counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.” *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). “[A] defendant must overcome the strong presumption that his counsel’s action constituted sound trial strategy under the circumstances.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To establish prejudice, a defendant must demonstrate a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 302-303.

Although defendant argues that his trial counsel was ineffective for failing to object to the prosecution’s notice of intent to introduce other acts evidence, he does not specify the basis on which counsel should have objected. To the extent that defendant’s argument concerns the timeliness of the notice, the record does not indicate that the notice was untimely. MRE 404(b)(2) requires the prosecution to “provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown[.]” Here, the prosecution filed its notice of intent on February 18, 2010, almost three weeks before the start of trial on March 8, 2010. Accordingly, any objection based on the timeliness of the notice would have been futile. Counsel does not render ineffective assistance for failing to make a futile objection. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant’s argument appears to be directed more toward trial counsel’s failure to request a ruling on the admissibility of the other acts evidence before the jury was selected on the first day of trial. Defendant argues that this prevented defense counsel from exploring the potential impact of the evidence on jurors during voir dire. Defendant cannot establish prejudice resulting from counsel’s failure. There is no basis to conclude that the failure to explore this issue with the jurors affected defendant’s right to a fair and impartial jury. See *People v Miller*, 482 Mich 540, 548-549; 759 NW2d 850 (2008). Further, the trial court instructed the jury on the limited permissible use of the other acts evidence, and there is no indication that any juror refused or was unable to follow the instruction. Because defendant has failed to show that the result of the proceeding would have been different absent counsel’s alleged error, he was not denied the effective assistance of counsel.

## II. DEFENDANT’S STANDARD 4 BRIEF

In his Standard 4 brief, defendant asserts an additional ineffective assistance of counsel claim. He contends that trial counsel was ineffective for failing to file a motion to suppress Officer Muczynski’s identification testimony and failing to request an evidentiary hearing pursuant to *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). Defendant’s argument lacks merit.

The relief that defendant requests is appropriate when an identification is the product of an unduly suggestive pretrial identification procedure. See *People v Reynolds*, 93 Mich App 516, 519; 286 NW2d 898 (1979). Here, there was no pretrial identification procedure. Rather, Officer Muczynski’s identification testimony was based on the officer’s eyewitness account of the offense. Although defendant contends that there are reasons to question the reliability of Officer Muczynski’s identification, defendant was not prevented from exploring this issue at trial. It was up to the jury to determine whether Officer Muczynski’s identification was reliable

and credible in light of the factors identified by defendant. See *Watkins v Sowders*, 449 US 341, 347; 101 S Ct 654; 66 L Ed 2d 549 (1981). Accordingly, a motion to suppress Officer Muczynski's identification testimony would have been futile, and counsel was not ineffective for failing to file such a motion. *Darden*, 230 Mich App at 605.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Christopher M. Murray  
/s/ Pat M. Donofrio