

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMITRICE DESHAWN VANN,

Defendant-Appellant.

UNPUBLISHED

June 19, 2012

No. 304041

Oakland Circuit Court

LC No. 2010-234339-FC

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Defendant Damitrice Deshawn Vann appeals his jury conviction of armed robbery,¹ carjacking,² larceny of a firearm,³ and possession of a firearm during the commission of a felony.⁴ The trial court sentenced Vann as a habitual offender,⁵ second offense, to serve 13 years and 10 months to 40 years in prison for his armed robbery conviction, 13 years and 10 months to 40 years in prison for his carjacking conviction, three years to seven years and six months in prison for his larceny of a firearm conviction, and to two years in prison for his felony-firearm conviction. The sentence for armed robbery runs consecutive with the conviction for felony-firearm. Vann received 152 days credit for all the sentences except armed robbery. We affirm.

I. FACTS

At about 2:30 a.m. on September 12, 2010, Tracey Mills parked at North Park Towers Apartments where she lived. Mills did not see anyone outside and was startled when she noticed two men at the well-lit entrance of the apartment building. She identified one man as defendant Vann and the other as his codefendant, Alex Jerome Perry, Jr. When Mills swiped her fob to

¹ MCL 750.529.

² MCL 750.529a.

³ MCL 750.357b.

⁴ MCL 750.227b.

⁵ MCL 769.10.

gain access to the building, Vann knocked her hand down and pointed a gun to her forehead. Mills tried to run away, but was wearing high heels and fell. When she fell, Mills' purse, keys, and .380 semi-automatic handgun, for which she had a concealed weapons permit, fell out onto the ground. Mills testified that Vann took her keys and that Perry took her purse and gun. The two men ran to Mills' car, Vann got in the driver's seat, and the men left quickly. Mills called the police as soon as her attackers fled. Mills provided police with detailed descriptions of her attackers.

Mills testified that during the evening of September 12, 2010, she saw Vann in the food court area of the Motor City Casino, where she worked, and immediately identified him as one of her attackers. Samantha Gibbs testified that she was with Vann and Perry at the Motor City Casino in the early morning hours of September 11, 2010. And Gibbs and Perry testified that Vann was ejected from the casino after Vann and Mills had a verbal altercation. However, Mills denied that an altercation occurred or that she ever saw Vann or Perry before September 12, 2010.

Mills further testified that on September 19, 2010, at about 1:00 a.m., she saw Perry place a food order at a computer kiosk, go to the counter speak with Mills' supervisor, and then "rush" out of the food court without his food. Someone else returned to pick up the order. Mills kept Perry's receipt, which had his name on it, and provided it to Southfield Police Detective Mark Ryder.

Mills later identified Perry in a photographic array. When interviewed, Perry gave Vann's name to Detective Ryder. Mills identified Vann in a different photographic lineup. In an interview with Detective Ryder, Vann stated he was not sure where the North Park Towers Apartments were and denied involvement in the crimes. Also, at trial, Vann's mother and a family friend testified that Vann was at his mother's house at the time of the crimes.

On September 21, 2010, Mills wrote a statement about Perry coming to the casino on September 19, 2010. On cross-examination, Perry's defense counsel questioned Mills about her written statement: particularly, that Mills saw Perry "rush" out of the food area. When asked what she meant by "rushed," Mills answered, "I don't know if I can say what my supervisor told me, but that's the information I got from my supervisor." Mills went on to testify that her description of Perry rushing was made on the basis of both what she saw *and* what her supervisor told her. Perry's defense counsel questioned Mills, asking, "So now it's what you saw and what you were informed of?" On redirect examination, the prosecution moved to have the September 21, 2010 written statement admitted as a prior consistent statement to rebut the inference that Mills' trial testimony was a recent fabrication. The trial court admitted the statement over Perry's objections.

Also relevant to this appeal, during Vann's interview, Detective Ryder asked if Vann had a gun and then stated, "According to Alex [Perry] you carried it [a gun] a lot." Before trial, the trial court struck this statement. At trial, Perry denied that Vann carried a gun. In response, the prosecutor referred Perry to a statement he made to Detective Ryder, in which he stated, "I've known him [Vann] for carrying a gun." Perry continued to testify that he never said Vann carried a gun. Vann moved for a mistrial on the basis of Perry's testimony. The trial court denied the motion. Vann now appeals.

II. HEARSAY: PRIOR CONSISTENT STATEMENT

A. STANDARD OF REVIEW

Vann argues that he was denied a fair trial because Mills' September 21, 2010 written statement was improper hearsay. We review a trial court's decision to admit evidence for an abuse of discretion.⁶ If evidence is admitted in error, "[t]he effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error."⁷

B. LEGAL STANDARDS

Hearsay is an out-of-court statement offered to establish the truth of the matter asserted, and is generally inadmissible unless it falls into a hearsay exception.⁸ "Prior consistent statements are not generally admissible as substantive evidence."⁹ A prior consistent statement is not excluded as hearsay if

[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive^[10]

When a statement is offered as a prior consistent statement, the party offering the statement must establish four requirements:

(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.^[11]

C. APPLYING THE STANDARDS

Here, there is no dispute that the first requirement is met. The second requirement, however—that there was an express or implied charge of recent fabrication—is disputed. Vann

⁶ *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000).

⁷ *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

⁸ MRE 801(c); MRE 802.

⁹ *People v Smith*, 158 Mich App 220, 227; 405 NW2d 156 (1987).

¹⁰ MRE 801(d)(1)(B).

¹¹ *Jones*, 240 Mich App at 707.

claims that defense counsel never challenged Mills' testimony as a recent fabrication. Conversely, the prosecution contends that defense counsel challenged Mills' testimony about Perry rushing out of the food court as a fabrication. However, even if Perry challenged Mills' trial testimony as a recent fabrication, the third requirement is not met because there is no indication that the written statement was consistent with the challenged in-court testimony.¹² Thus, we conclude that the trial court erred in admitting the written statement as a prior consistent statement on that basis.

To the extent that the prosecution argues that the testimony was challenged with respect to Mills' description of Perry "rushing" in the food court area, Mills' testimony on direct examination was that Perry placed his order, went directly to the counter, and left without waiting for his food. By questioning Mills about what she meant by "rushing," Perry's defense counsel did not imply in any way that Mills fabricated her testimony. Thus, the written statement also could not properly be admitted as a prior consistent statement on this basis.

We hold that the trial court abused its discretion when it admitted Mills' written statement as a prior consistent statement because Mills' testimony was not challenged as a recent fabrication. Even if it was challenged, the written statement was not consistent with the challenged testimony.

However, "in the context of the untainted evidence," it is not "more probable than not that a different outcome would have resulted without the error."¹³ Mills identified Vann as one of the men who robbed her and took her car and as the man who pointed a gun at her. The area where the robbery took place was well-lit at the time of the crimes. Mills provided a description of Vann, and identified Vann in a photographic lineup. This evidence was "untainted" by the challenged written statement related to when Mills subsequently saw Vann in the food court and on the basis of the challenged evidence, it is not "more probable than not that a different outcome would have resulted without the error."¹⁴ Thus, the error does not require reversal.

III. MISTRIAL

A. STANDARD OF REVIEW

Vann argues that the trial court abused its discretion when it denied his motion for mistrial. This issue was preserved on the grounds that the testimony on which the mistrial motion was premised violated the trial court's preliminary order, was highly prejudicial, and was improper impeachment.¹⁵ We review the trial court's decision on this part of Vann's argument for an abuse of discretion.¹⁶ A trial court should grant a mistrial "only for an irregularity that is

¹² *Id.*

¹³ *Lukity*, 460 Mich at 495.

¹⁴ *Id.*

¹⁵ *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000).

¹⁶ *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999).

prejudicial to the rights of the defendant and impairs his ability to get a fair trial.”¹⁷ We also review for an abuse of discretion a trial court’s decision to admit evidence.¹⁸

However, this issue is unpreserved to the extent that Vann argues that he was entitled to a mistrial on the basis of improper MRE 404(b) evidence.¹⁹ We review unpreserved arguments for plain error affecting substantial rights.²⁰

B. PRELIMINARY ORDER

Vann argues that the prosecutor’s questioning of Perry regarding whether Vann carried a gun violated the trial court’s ruling on a motion in limine. Before trial, the trial court granted Vann’s motion to redact from his interview Detective Ryder’s statement that “[a]ccording to Alex [Perry] you carried it [a gun] a lot.” Thus, the trial court’s decision on the motion in limine regarded a statement Detective Ryder made during *Vann’s* interview. The section of stricken testimony was not referenced in the portion of testimony that Vann now challenges. Instead, the challenged testimony is in regard to *Perry’s* statements to Detective Ryder during *his* interview. Although both statements concern whether Vann carried a gun, the portion of testimony challenged as a basis for a mistrial does not refer to the stricken hearsay statement in Vann’s interview with Detective Ryder. In fact, the challenged testimony does not refer to Vann’s interview at all. There is no indication that the trial court’s ruling on the motion in limine had any impact to exclude statements in *Perry’s interview* or presentation of any evidence that Vann carried a gun. The trial court’s ruling addressed only Detective Ryder’s statement in *Vann’s interview*. Thus, Vann’s argument that the challenged testimony is a basis for a mistrial because it violated the trial court’s ruling on the motion in limine is not persuasive.²¹

C. IMPROPER CHARACTER EVIDENCE

Vann also argues that a mistrial was warranted because the testimony being challenged was improper character evidence “of other crimes, wrongs, or acts [that] is not admissible to prove the character of a person in order to show action in conformity therewith.”²² MRE 404(b) “limits the use of logically relevant evidence *only* when” the evidence provides an inference regarding a defendant’s character from “defendant’s prior misdeeds” and the purpose of the evidence is to show that the defendant acted “in conformity therewith.”²³

¹⁷ *Id.* at 513-514.

¹⁸ *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005) (citation omitted).

¹⁹ *Nash*, 244 Mich App at 96.

²⁰ *Id.* at 96-97.

²¹ See *Bauder*, 269 Mich at 179 (citation omitted).

²² MRE 404(b).

²³ *People v VanderVliet*, 444 Mich 52, 63-64; 508 NW2d 114 (1993).

Here, the prosecutor read the portions of Perry's interview during which Perry stated, "I've known him [Vann] for carrying a gun," and where Perry agreed that Vann had "little man's syndrome." Perry acknowledged what was said in the interview. However, he testified at trial that he never said Vann carried a gun.

We conclude that the challenged evidence is not propensity evidence. Perry denied saying that Vann carried a gun and there was no evidence that Vann had a gun similar to the one used in the crime. Moreover, the evidence was relevant on a non-character theory. "Evidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense."²⁴ Possession of a similar weapon can be relevant to identity.²⁵ Here, there was evidence that Vann was known for carrying a gun, which was probative of identity. But we acknowledge that there was no evidence that the gun was similar to the one used in the charged offense. Thus, the probative value was minimal. Regardless, the challenged statement was relevant.²⁶ Because the statement was relevant and not offered only to show propensity, MRE 404(b) was not violated.²⁷

Vann also argues that a mistrial was warranted on the basis of evidence that during Perry's interview Vann was characterized as having "little man's syndrome." Vann's vague argument appears to challenge this evidence under MRE 404(b), arguing a mistrial was warranted on the basis of the improper admission of this evidence. The challenged evidence, however, was not "[e]vidence of other crimes, wrongs or acts," but rather was simply a characterization by witnesses of Vann's personality. Thus, we hold that MRE 404(b) was not implicated.

Additionally, we conclude that the prosecution properly used Perry's interview to impeach Perry pursuant to MRE 613(a). "When a party attempts to impeach a witness or refresh the witness' memory with a prior inconsistent statement made by that witness, a proper foundation must be laid by questioning the witness concerning the time and place of the statement and the person to whom it was allegedly made."²⁸ "Once a foundation is properly laid and the witness either admits or denies making the statement, the witness may be impeached by proof of that statement."²⁹ Perry testified at trial that Vann did not carry a gun. The prosecutor then referenced Perry's interview with Detective Ryder. The prosecutor asked Perry if he had read the transcript of the interview, showed him the transcript, and Perry remembered the interview. The prosecutor read a portion of the interview, including Perry's statement, "I've

²⁴ *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989).

²⁵ *Id.* at 582-583.

²⁶ MRE 401.

²⁷ *VanderVliet*, 444 Mich at 65.

²⁸ *People v Rodriguez*, 251 Mich App 10, 35; 650 NW2d 96 (2002).

²⁹ *People v White*, 139 Mich App 484, 488; 363 NW2d 702 (1984).

known him [Vann] for carrying a gun.” When the prosecutor again asked Perry if Vann had a gun, Perry denied saying Vann had a gun. The prosecutor questioned Perry about a prior statement as provided by MRE 613. The prosecutor laid a proper foundation concerning the prior statement.³⁰ Perry was properly impeached by his prior statement because he testified that Vann did not have a gun.³¹

D. HIGHLY PREJUDICIAL EVIDENCE

Vann further argues that Perry’s statements that Vann carried a gun and that Vann has “little man syndrome” were highly prejudicial. We disagree. MRE 403 provides that marginally probative value of evidence must be “substantially outweighed” by the danger of unfair prejudice to be excluded. Relevant, probative evidence may be excluded under MRE 404(b) if MRE 403 is violated.³²

During trial, Perry maintained that he never said Vann carried a gun and, if believed by the jury, this testimony could have been helpful to Vann. Further, the trial court determined that this evidence did not violate MRE 403, and this is a determination best left to the trial judge.³³ Although marginally relevant, the challenged testimony had probative value that was not substantially outweighed by the danger of unfair prejudice and was admissible under MRE 404(b).³⁴ Thus, a mistrial was not warranted on the basis of improper MRE 404(b) evidence. Moreover, because Vann has not shown that the trial court abused its discretion when it denied a mistrial on the basis of the challenged evidence being admitted in violation of MRE 403,³⁵ Vann has not established there was an “irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.”³⁶

We affirm.

/s/ Christopher M. Murray

/s/ William C. Whitbeck

/s/ Michael J. Riordan

³⁰ *Rodriguez*, 251 Mich App at 34-35.

³¹ *White*, 139 Mich App at 488.

³² *VanderVliet*, 444 Mich at 74.

³³ *People v Blackston*, 481 Mich 451, 481; 751 NW2d 408 (2008)

³⁴ *People v Aguwa*, 245 Mich App 1, 7; 626 NW2d 176 (2001).

³⁵ *Ortiz-Kehoe*, 237 Mich App at 513-514.

³⁶ *Id.* at 513-514.