

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT LEWIS,

Defendant-Appellant.

UNPUBLISHED

July 26, 2002

No. 230201

Kent Circuit Court

LC No. 00-01348-FH

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of unarmed robbery, MCL 750.350, and uttering and publishing, MCL 750.249. The trial court sentenced defendant as a fourth-time felony offender to six to forty years' imprisonment for the unarmed robbery conviction and three to twenty-five years' imprisonment for the uttering and publishing conviction. We affirm.

Defendant first argues that the trial court abused its discretion and denied him a fair trial when it allowed testimony that defendant was identified in an on-the-scene show-up as the perpetrator of an unarmed robbery two days after the instant armed robbery occurred. We disagree.

The admissibility of other-acts evidence is reviewed for abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists when "an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made." *People v Underwood*, 183 Mich App 784, 786; 459 NW2d 106 (1990). Reversal is appropriate only if "it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

Other-acts evidence is admissible pursuant to MRE 404(b) provided (1) it is offered for a proper purpose; (2) it is relevant; and (3) its probative value is not substantially outweighed by unfair prejudice. *Crawford, supra* at 385. With regard to proper purpose, MRE 404(b) is read expansively, limited only by the requirement that evidence be offered for some purpose other than showing a defendant's criminal propensity. *People v Martzke*, ___ Mich App ___; ___ NW2d ___ (Docket No. 235836, issued 5/10/02). Other-acts evidence "must be relevant under Rule 402, as enforced through Rule 104(b), to an issue or fact of consequence at trial." *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). Even if the other-acts evidence is proper and relevant, it must be viewed in light of MRE

403 to determine if its probative value is substantially outweighed by the risk of unfair prejudice. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). This danger is heightened where the other-acts evidence involves the same bad act as the crime for which the defendant is charged. *Crawford, supra* at 398.

In the instant case, the Toys-R-Us robbery was offered for the proper purpose of establishing identity and showing a scheme, plan, or system in doing an act. The other-acts evidence was relevant in that it was related to “an issue or fact of consequence at trial.” *VanderVliet, supra* at 74. Defendant had denied involvement, thus making identity a “fact of consequence at trial.” Defense counsel acknowledged that identification was a key issue.

In using *modus operandi* to prove identity, more than just a similarity must exist between the charged offense and the other acts. Both must bear “such unique, uncommon, and distinctive characteristics as to suggest the handiwork or signature of a single actor, the defendant.” *People v Golochowicz*, 413 Mich 298, 319; 319 NW2d 518 (1982).¹ Defendant argues that at best the two robberies share similarities to one another, not the common distinguishing characteristics that would constitute a signature. In *Golochowicz*, the defendant was on trial for murder. Evidence from another murder was introduced to help establish the identity of the murderer. In both murders, the victim had been strangled; the defendant was seen in possession of the victims’ property shortly after the murder; and the defendant sought to sell the victims’ possessions. However, significant differences existed between the two murders. One murder involved bloodless strangulation; in the other, the victim was strangled and left lying in blood. In one instance, only a television and stereo were stolen; in the other, the perpetrator took a wide array of household goods. Even so, the court concluded that it was a “close question” whether adequate common distinguishing characteristics existed between the two murders to qualify under MRE 404(b):

[C]lose questions arising from the trial judge's exercise of discretion on matters concerning the admission of evidence do not call for appellate reversal because the reviewing justices would have ruled differently. Reversal is warranted only if the resolution of the question by the trial court amounted to an abuse of discretion. The decision upon a close evidentiary question by definition ordinarily cannot be an abuse of discretion. [*Golochowicz, supra* at 322.]

In the instant case, there were sufficient common elements between the D & W and the Toys-R-Us robberies. Both involved robberies using force but no weapon. Both robberies took place at night in parking lots of retail establishments. Both victims were women, and the objects taken were purses. In both instances, the assailant jumped into the passenger’s side of a small, light-colored vehicle with at least three letters of the license plate the same. The assailants in both instances wore similar clothing and were of similar appearance.

¹ The *Golochowicz* rule for application of MRE 404(b) was limited in *VanderVliet* but was still recognized as setting the proper standard when “the proponent is utilizing a *modus operandi* theory to prove identity.” *VanderVliet, supra* at 66.

Finally, the probative value of the other-acts evidence in the instant case was not substantially outweighed by the risk of unfair prejudice. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *Ortiz, supra* at 306. This danger is greater where the other-acts evidence involves the same bad act as the crime for which the defendant is charged. *Crawford, supra* at 398. But the fact that the other-acts evidence is identical to the crime charged does not mean that the other-acts evidence cannot be used. Heightened attention must be given to insure the legitimate probative value of the evidence. *Id.* In *People v Layher*, 238 Mich App 573, 586; 607 NW2d 91 (2000), *aff’d* 464 Mich 756; 631 NW2d 281 (2001), this Court found no abuse of discretion where the probative value of the other-acts evidence was directly relevant to a fact of consequence to the action and the jury received an appropriate limiting instruction. The evidence from the Toys-R-Us robbery has strong probative value for establishing defendant as the person who robbed Beeman. Although Joanne Steele did not see her assailant’s face just before the assault, she saw a man standing beside a near-by car with its trunk open. She later identified defendant as that man. Immediately after the assault, she saw a man run to that car, shut the trunk, and get into the passenger’s side. The car was the same size and color as the car involved in the D & W robbery, and the first three letters of the license plates on both cars coincided. The court twice gave a limiting instruction to the jury about the Toys-R-Us robbery evidence: once after Joanne and Jasmine Steele testified and again during final jury instructions.

Assuming *arguendo* that the other-acts evidence was improperly admitted, reversal is warranted only if “it is more probable than not that the error was outcome determinative.” *Lukity, supra* at 484. In the instant case, substantial circumstantial evidence linked defendant to the D & W robbery: he cashed a check from Beeman’s checkbook the day after the robbery, and the night of the robbery Beeman’s cell phone was used to place five calls to a woman defendant had listed on his jail record as a contact person. Defendant first denied, but then admitted, that on the night of the D & W robbery, he was with Robert Flakes, who owned the car involved in that robbery. That defendant and Flakes have significantly different physical characteristics casts doubt on defendant’s attempt to blame both robberies on Flakes.

Defendant also argues that he was deprived of his right to counsel at a pre-trial identification. Since defendant failed to preserve this issue below, it is reviewed for plain error. *Ortiz, supra* at 313. “The reviewing court should reverse only when the defendant is actually innocent or the error affected the fairness, integrity, or public reputation of judicial proceedings.” *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

An on-the-scene identification carried out prior to the initiation of adversary judicial proceedings does not raise a constitutional issue. *People v Winters*, 225 Mich App 718, 721; 571 NW2d 764 (1998). The constitutional right to counsel attaches only at the initiation of such proceedings. *Kirby v Illinois*, 406 US 682, 688; 92 S Ct 1877; 32 L Ed 2d 411 (1972). In the instant case, judicial proceedings had not been initiated against defendant at the time of the show-up. The Michigan Supreme Court, however, has stated: “[B]oth before and after commencement of the judicial phase of a prosecution, a suspect is entitled to be represented by counsel at a corporeal identification or a photographic identification. . . .” *People v Jackson*, 391 Mich 323, 338; 217 NW2d 22 (1997), overruled on other grounds by *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999), citing *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973). In *Winters*, this Court noted: “[o]f particular importance to our analysis is

the fact that in *Anderson*, the Supreme Court, in dicta, recognized that the absence of counsel at an eyewitness identification procedure may be justified where there is a prompt, on-the-scene corporeal identification within minutes of the crime.” *Id.* at 726, citing *Anderson, supra* at 187, n 23. Based on those dicta, this Court concluded: “Therefore, we hold that it is proper and does not offend the *Anderson* requirements for the police to *promptly* conduct an on-the-scene identification.” *Winters, supra* at 727, emphasis added. In *Winters*, the on-the-scene corporeal identification, made within minutes of a shooting, was held “not only reasonable, but necessary police practice.” *Id.* at 728. In *People v Libbett*, ___ Mich App ___; ___ NW2d ___ (Docket No. 227619, issued 5/14/02), two black men, identified only as one being taller than the other, stole a car. When the police stopped the car some time later, there were four men in the car. The victim made an on-the-scene identification at approximately 2 a.m., an hour and fifty-four minutes after the car theft and twenty minutes after the police stopped the suspects. In response to defendant’s claim that the on-the-scene identification was not prompt and inherently suggestive, this Court stated:

When presented with four black males with no greater description than one was taller than the other, it was reasonable for the police to have [the victim] attempt to identify whether two of the four individuals were actually the perpetrators. Therefore, the on-the-scene identification was conducted as promptly as was reasonable under the circumstances, and did not violate defendant’s rights. [*Libbett, supra*, slip op at 9.]

In the instant case, Joanne Steele testified that “less than half an hour” elapsed between the time she was assaulted and the time she was taken for the on-the-scene identification of defendant. We conclude that the identification was “conducted as promptly as was reasonable under the circumstances.” *Id.* Defendant was not unfairly denied counsel at the show-up.

Although acknowledging there is authority in Michigan to support the admissibility of prompt on-the-scene identifications, defendant argues he retains an independent constitutional basis for challenging an identification procedure before the initiation of adversary judicial proceedings when the procedure is so unnecessarily suggestive and conducive to irreparable mistaken identification as to amount to denial of due process. Defendant argues that show-ups have been widely condemned as “the most grossly suggestive identification procedure now or ever used by the police”; and that the totality of the circumstances present in the instant case militate against admitting an on-the-scene show-up as MRE 404(b) evidence. Defendant further argues that there was no need in the instant case for an immediate identification and that the circumstances under which the identification took place were highly suggestive.

In *Winters*, this Court stated:

Such on-the-scene confrontations are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance. Whatever the perceived problems of on-the-scene confrontations, it appears to us that prompt confrontations will, if anything, promote fairness by assuring greater reliability.” [*Winters, supra* at 727. Citation omitted.]

For this Court, the primary concern with regard to on-the-scene identifications is that they be promptly carried out, not that a prompt identification is required. Thus, in *Winters*, although the

victim made the on-the-scene identification after being shot and while waiting for an ambulance, there was no indication the victim was in imminent danger of death. This Court found no error, concluding that the “on-the-scene corporeal identification, within minutes after the shooting occurred, was not only reasonable, but necessary police practice.” *Id.* at 728-729. Defendant’s claim that the show-up in which Joanne and Jasmine Steele identified him was not immediately necessary is without merit. The record shows that defendant was kept in the police cruiser until Joanne and Jasmine Steele arrived. Then he was taken out of the cruiser and a light was shined on him. That he was the only one present accords with the nature of a show-up. A light was shined on him because it was dark. This situation was no more suggestive than *Libbett, supra*. Defendant’s claim is denied.

Affirmed.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Donald S. Owens