

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID TYRONE POWELL,

Defendant-Appellant.

UNPUBLISHED

July 16, 1999

No. 209784

Oakland Circuit Court

LC No. 97-152556 FH

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of malicious destruction of property in excess of \$100, MCL 750.377a; MSA 28.609(1). He was sentenced to five to fifteen years' imprisonment as a fourth habitual offender, MCL 769.12; MSA 28.1084. He appeals as of right and we affirm.

Defendant first argues that the trial court abused its discretion in excluding a prior criminal act by a third person, Willie Rambus. The prosecutor sought to exclude evidence of Rambus' prior conviction in 1988, where he broke into the same victim's house using a shovel to gain entry into the back door. Rambus and the victim had been involved in an "on-again, off-again" relationship for several years. The present case involved breaking the windows of the victim's Chevrolet Blazer and the picture window of her house. Initially, identity was not an issue in this case because the victim told the police that defendant had broken the windows and another witness (the victim's sister) also told the police that defendant broke the windows. However, these two witnesses changed their testimony at trial and claimed that Rambus broke the windows. When identity thus became an issue, the trial court ruled that the victim could not testify regarding Rambus' prior conviction, since the victim's sister also identified Rambus as the perpetrator at trial. Moreover, because Rambus died before trial, Rambus was unavailable to be cross-examined by the prosecution. Therefore, Rambus' 1988 conviction was not admitted.

A trial court's determination regarding an evidentiary issue is generally reviewed for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). In order to admit evidence of a prior criminal act to prove identity, the crimes must be distinctive, unique, peculiar, or special to warrant the conclusion that a signature crime has been committed by the same person. *People v Perry*,

172 Mich App 609, 619; 432 NW2d 377 (1988). The mere fact that the prior act and the present case involved the use of a shovel is insufficient to find a signature crime. *Id.* Moreover, identity was not really the issue at trial, rather, credibility was. Specifically, the victim and her sister identified defendant as the perpetrator to the police, but testified that Rambus was the perpetrator at trial. This was so noted by the trial court when it ruled to exclude the evidence of Rambus' prior conviction. Therefore, we cannot conclude that the trial court abused its discretion in excluding evidence of Rambus' prior conviction.

Defendant also argues that the trial court punished him for exercising his right to a jury trial by sentencing him to a term five times the amount defendant would have received if he pleaded guilty. In sentencing defendant, the trial court cited defendant's commission of perjury and his extensive criminal history. Both factors are permissible sentencing considerations. *People v Hansford (After Remand)*, 454 Mich 320, 325; 562 NW2d 460 (1997); *People v Houston*, 448 Mich 312, 324; 532 NW2d 508 (1995). There is absolutely no indication that the trial court sentenced defendant to a higher sentence because exercised his right to a jury trial. Accordingly, the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Jeffrey G. Collins

/s/ Kathleen Jansen

/s/ Helene N. White