STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN MICHAEL MORGAN,

Defendant-Appellant.

UNPUBLISHED
July 28, 2000

No. 219848
Kent Circuit Court
LC No. 98-003017-FH

Before: Doctoroff, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of receiving and concealing stolen property in excess of $100, MCL 750.535; MSA 28.803, and was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a term of 5 to 15 years' imprisonment. Defendant appeals as of right. We affirm.

This case arises from the burglary of a Grand Rapids area home in January 1998, during which numerous items of jewelry, among other things, were taken. Approximately three weeks after the burglary, defendant was apprehended shortly after selling certain of these items to a local pawnshop. A subsequent search of defendant's home uncovered numerous other items taken during the burglary. Additional items were also recovered from various pawnshops and jewelry stores throughout the Grand Rapids area, with defendant being identified as the individual who had brought and sold these items to those stores.

On appeal, defendant first argues that the trial court erred in ruling that the statements he made to the police before his arrest were voluntarily made, and in admitting the statements into evidence. Specifically, defendant contends that his statements were rendered involuntary and inadmissible due to promises of leniency made by the interrogating officer. We disagree.

When assessing claims of error concerning a trial court's decision following a *Walker*[1] hearing, appellate courts review the record de novo and make an independent determination of the voluntariness of the challenged statements. *People v Cheatham*, 453 Mich 1, 29-30; 551 NW2d 355 (1996). However, the trial court's findings of fact following the hearing will not be disturbed by the reviewing court unless the findings are clearly erroneous. *People v LoCicero (After Remand)*, 453 Mich 496, 500; 556 NW2d 498 (1996). The trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Launsburry*, 217 Mich App 358, 362; 551 NW2d 460 (1996).

Under certain circumstances a promise of leniency may render the custodial statements of a defendant involuntary and thus inadmissible as evidence at his trial. *People v Conte*, 421 Mich 704, 751, 761-762; 365 NW2d 648 (1984). Such statements will be considered inadmissible only where the defendant was likely to have reasonably understood the statements as a promise of leniency and relied upon that promise in making the disputed statement. *Id*. at 750. However, "the mere pledge to note defendant's cooperation in a police report, without more, [cannot] reasonably be considered a promise of leniency." *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997).

Here, the testimony was conflicting with respect to what was said by the officer during questioning. The interrogating officer testified that he merely told defendant that if defendant cooperated during the interview, the officer would include that fact in his report and that, based upon prior history, such cooperation is generally considered by the prosecutor when making charging decisions. Defendant, on the other hand, testified that the officer promised leniency when he told defendant that, if he cooperated, "everything's going to go all right for you." While defendant's testimony contradicted that of the officer, where, as here, a determination of voluntariness was largely dependent on the credibility of witnesses, the Court should defer to the trial court's findings. *Id*. at 123-124; *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). In finding defendant's statements to be voluntary and hence admissible at trial, the trial court apparently found the officer's version of the events to be more credible than defendant's version of the events. We find no error in the trial court's findings.

Defendant next argues that the trial court abused its discretion in admitting, under MRE 404(b), evidence of a 1988 incident wherein several items of stolen jewelry, as well as sales receipts indicating that several of these items had been pawned at jewelry stores, were found during a search of defendant's home. We disagree. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). On appeal, defendant does not dispute the relevancy of the testimony at issue, nor the propriety of the purpose for which such testimony was

[1] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

offered. Rather, defendant argues that based upon the age of the other acts evidence, the trial court abused its discretion in finding that the evidence was not more prejudicial than probative.

The balance between probative value and the potential for unfair prejudice required to be undertaken before admission of other acts evidence under MRE 404(b) "requires nothing more than the balancing process described in MRE 403." *People v Starr*, 457 Mich 490, 498; 577 NW2d 673 (1998). Within the confines of MRE 403, the idea of prejudice denotes a situation in which there exists a danger that the jury will give evidence possessing only marginally probative value undue or preemptive weight in deciding the case before it. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Here, however, the disputed evidence was more than just marginally probative.

To establish defendant's guilt of the charged crime, the prosecutor was required to show that defendant knew the items found in his possession were stolen. *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993). As noted by the trial court, the circumstances surrounding the 1988 incident were significantly similar to those in the instant case to establish a "way of doing things," i.e., a modus operandi, and were thus highly probative on the contested issue of guilty knowledge.

Moreover, while the amount of time which had elapsed between the prior incident and the instant offense certainly has some impact on the probative value of that evidence in establishing such guilty knowledge, that impact is severely lessened when considered in light of the prosecutor's unrebutted allegation that defendant had spent a substantial portion of that time incarcerated. Similarly, inasmuch as the testimony concerning defendant's involvement in the 1988 incident was limited to the fact that stolen items similar to those possessed by defendant in the instant matter were found at his home, without mention of the details surrounding the theft of those items or any further involvement by defendant, the potential for prejudice arising from the testimony was minimized. Furthermore, any prejudicial effect was limited by the trial court's two instructions to the jury to consider the disputed evidence solely for the "narrow purpose" of determining whether defendant possessed knowledge that the items found in his possession were stolen. *People v Miller (On Remand)*, 186 Mich App 660, 663; 465 NW2d 47 (1991).

We therefore conclude that the trial court did not abuse its discretion in admitting evidence of defendant's involvement in the 1988 burglary.

Affirmed.

/s/ Martin M. Doctoroff
/s/ David H. Sawyer
/s/ Mark J. Cavanagh