STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 3, 2004
v	No. 243484 Oakland Circuit Court
RONNIE RAY JOHNSON, Defendant-Appellant.	LC No. 2002-182867-FH

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant Ronnie Ray Johnson appeals by right from his convictions of retail fraud first degree, MCL 750.356c, and felonious assault, MCL 750.82, following a jury trial. The charges arose after defendant put two DVD players and a VCR into a shopping cart and walked past the cash registers toward the exit doors. Defendant claims that testimony regarding an alleged prior bad act was erroneously admitted and that the evidence was insufficient to prove his guilt. While the evidence may have been admissible it was improper to admit it as res gestae; however, we find that the other admissible evidence was sufficient and that the jury's findings of fact were not against the great weight of the evidence, despite defendant's argument to the contrary. Therefore, we affirm.

Defendant first argues that the testimony of a witness who claimed defendant shoplifted from the same store two days earlier was improperly admitted because it was prohibited by MRE 404(b). But defendant misunderstands the trial court's ruling. In admitting the evidence, the trial court stated that the evidence was useful to "explain the actions of the witnesses and that it goes to the identity of the person." The court further stated, "It is part of the res gestae more than it is 404(b), so the Court will call it res gestae in this event." Defendant provides no argument on appeal regarding why the evidence was not admissible as res gestae evidence, instead focusing solely on the testimony's inadmissibility as 404(b) evidence. Thus, the issue is waived. See *Campbell v Sullins*, 257 Mich App 179; 667 NW2d 887 (2003) (failure to address issue in question presented waives issue) and *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998) (failure to cite legal authority waives issue).

Nevertheless, because the evidence was not res gestae evidence, we feel it incumbent on us to correct the trial court's error. Res gestae witnesses are "eyewitnesses to the corpus delicti of a crime." *People v Rivera*, 114 Mich App 419; 319 NW2d 355 (1982). To be considered a res gestae witness, the eyewitness must see some "'event in the continuum of a criminal

transaction.'" *People v Johnson*, 113 Mich App 650, 662; 318 NW2d 525 (1982), habeas corpus proceeding 859 F2d 922 (CA6 1988), quoting *People v Hadley*, 67 Mich App 688, 690; 242 NW2d 32 (1976). The purpose of a res gestae witness's testimony is to "'aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense.'" *Id.*, quoting *Hadley*, *supra* at 690.

Aside from an exception that does not apply here (see *People v Browning*, 106 Mich App 516; 308 NW2d 264 (1981), recognizing that 404(b) evidence can be used to impeach a res gestae witness), res gestae evidence is admissible only where "a witness's contact with a defendant is reasonably contemporaneous with the crime and tends to show the state of mind with which a criminal act was done . . . ." *People v Williams*, 45 Mich App 630, 635; 207 NW2d 180 (1973). Our Supreme Court has explained:

> "It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the 'complete story' ordinarily supports the admission of such evidence. *State v Villavicencio*, 95 Ariz 199; 388 P2d 245 (1964); *People v Wardwell*, 167 Cal App 2d 560; 334 P2d 641 (1959); McCormick on Evidence (2d ed), § 190." [*People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), reh den 454 Mich 1211 (1997), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).]

Although the prosecutor relies on this passage from *Sholl* to support his argument that the evidence in question was res gestae evidence, this Court is not persuaded. In *Sholl*, the defendant was accused of rape, and the contested evidence was the defendant's alleged use of marijuana before the rape occurred. *Id.* at 731, 740. In determining that the drug use evidence was res gestae evidence, the Court relied on the fact that if defendant had used marijuana, his memory and his behavior could have been affected. *Id.* at 741. Further, the Court determined that the jury could make inferences about his conduct based on the fact that he was "in a setting where illegal drugs were being used." *Id.* Thus, the Court reasoned that the evidence was "'so blended or connected with the crime of which defendant [was] accused[,] that proof of one incidentally involve[d] the other or explain[ed] the circumstances of the crime.'" *Id.* at 742, quoting *Villavicencio*, *supra* at 201.

If that reasoning were extended to the case at hand, it would essentially eradicate the line between res gestae evidence and 404(b) evidence. In this case, the two acts at issue – the alleged February 7 shoplifting and the February 9 shoplifting – were not so "blended" or "connected" that the former involved or explained the latter. Nor was testimony regarding the first alleged incident testimony in which the witness attested to "some event *in the continuum of a criminal transaction*," *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989) (emphasis added) and *People v Baskin*, 145 Mich App 526, 530-531; 378 NW2d 535 (1985), or a fact "surrounding the alleged commission of the charged offense," *Johnson*, *supra* at 662.

In *Sholl*, there was an acute temporal connection between the two acts in question that

justified finding that the acts were inseparable. Here, though, there were two distinct and separate acts occurring independently of one another and separated in time. There was no continuum that would distinguish the scenario from 404(b) evidence, and the act in question did not follow "as an effect from a cause." See *Sholl*, *supra* at 742. Thus, because the first shoplifting incident was not res gestae evidence, it was 404(b) evidence.

MRE 404(b) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character "in order to show action in conformity therewith." MRE 404(b)(1). Of course, 404(b) evidence is admissible when offered to prove "motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ." *Id.*

Four steps have been established for a court to follow in determining the admissibility of 404(b) evidence:

> First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a "'determination must be made whether the danger of undue prejudice substantially outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403.'" Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), quoting *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), quoting advisory committee notes to FRE 404(b).]

If evidence is erroneously admitted under 404(b), a defendant must show that it is "more probable than not that the error was outcome determinative," *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). The evidence must be viewed in the light most favorable to the prosecution. *People v Knox*, 256 Mich App 175, 195; 662 NW2d 482 (2003).

Even if we were to agree with defendant that the evidence was not subject to the 404(b) exceptions and was thus erroneously admitted, defendant fails to address if or how admitting the evidence was not harmless error. In any event, we cannot conclude, given the other evidence presented, that it is more probable than not that the jury would not have convicted defendant had the evidence of the prior bad act been suppressed.

Defendant's arguments that the evidence was insufficient and that the jury's findings were against the great weight of the evidence also lack merit. The jury heard uncontested testimony from Colleen Bruen, a Target security officer, that as she tried to apprehend defendant and prevent him from leaving, he extracted a knife and wielded it at her. She testified that she was extremely frightened and that she thought she was in serious danger. The responding police officer testified that he found a knife of the description Bruen gave in the truck defendant was in. Defendant did not testify, and the evidence was uncontroverted. Viewed in the light most favorable to the prosecution, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, mod 441 Mich

1201 (1992), the evidence was sufficient for a reasonable jury to find defendant guilty of felonious assault.

Regarding the great weight of the evidence, defendant proffers only that he did not have a knife. Defendant did not testify at trial, and his counsel's arguments were not evidence. Thus, we cannot conclude that the jury made an erroneous finding of fact.

The same is true for the retail fraud conviction. To support his argument that the evidence was insufficient and that the verdict was against the great weight of the evidence, defendant states only that he was going to ask about layaway or pricing at the customer service desk and that he did not know why he was being apprehended and thus did not cooperate. Given that defendant did not testify, and given the evidence that was offered, it cannot be said that the evidence was insufficient or that the jury made erroneous findings of fact. The uncontested evidence presented showed that defendant put merchandise in his cart, walked past the cashiers, and was nearing the far edge of the customer service desk when he was stopped by security. The evidence also showed that defendant would not respond to the security personnel's questioning and instead ran out of the store and escaped. Thus, we find no error.

Affirmed.

/s/ Donald S. Owens
/s/ Bill Schuette
/s/ Stephen L. Borrello