

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RONALD RICE,

Defendant-Appellee.

UNPUBLISHED
December 4, 2008

No. 285904
Oakland Circuit Court
LC No. 08-219968-FC

Before: Gleicher, P.J., and Kelly and Murray, JJ.

PER CURIAM.

The prosecution appeals by leave granted from the trial court's order denying its motion to admit other acts evidence pursuant to MRE 404(b). We affirm.

I. Facts

Defendant was charged with delivery of a controlled substance (fentanyl) causing death, MCL 750.317a.¹ At the preliminary examination, Jeffrey Poole testified that defendant had been his heroin supplier. In October 2006, Poole's friend, Lisa Meyer, gave Poole money to purchase heroin and Poole then contacted defendant to purchase the drugs. Poole drove to defendant's location and picked him up. Defendant then directed Poole to drive to where defendant's drug suppliers were located in Detroit. Once they arrived at the desired location, defendant got out of the car and gave the suppliers Poole's money in exchange for what Poole understood to be

¹ The charged offense, MCL 750.317a, provides as follows:

A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person in violation of section 7401 of the public health code, 1978 PA 368, MCL 333.7401 [stating that "a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance"], that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.

Fentanyl is a schedule 2 controlled substance. MCL 333.7214(b).

heroin. Defendant then got back into the car and handed the drugs to Poole. Poole later delivered a portion of the drug, which was actually fentanyl and not heroin, to Meyer. Meyer was found dead in her bedroom the next day. Meyer's cause of death was elevated levels of fentanyl in her system. Defendant was bound over as charged.

Prior to trial, the prosecution moved to admit evidence of four subsequent drug sales by defendant to two different persons. Two of those transactions took place in November 2007 and involved instances of defendant selling heroin to Poole, who was acting as a police informant. The other two transactions occurred in July 2007 and involved a different informant. The prosecution argued that these subsequent transactions provide evidence of defendant's identity, knowledge of the controlled substance, and intent to deliver. Defendant countered that the evidence's prejudicial effect outweighed its probative value because the acts were too remote and occurred subsequent to the charged offense. The trial court ruled in favor of defendant.²

II. Standard of Review

The prosecution claims that the trial court erred in denying its motion to admit other acts evidence. "The decision whether [other acts] evidence is admissible is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). When conducting such a review, we keep in mind that "close 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 [judges] would have ruled differently." *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995) (citation omitted). "A trial court abuses its discretion when it fails to select a principled outcome from a range of reasonable and principled outcomes." *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007). Further, "[a] trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005).

III. Analysis

The prosecution argues that the trial court abused its discretion by denying the prosecution's motion to admit other acts evidence. We disagree. To be admissible under MRE 404(b),³ other acts evidence generally must satisfy three requirements: (1) it must be offered for

² After the court's ruling, the prosecution filed a motion to clarify the court's order. In their supporting brief, the prosecution argued that statements defendant made during one of the drug transactions are admissible as admissions and statements against interest, and therefore could be brought into evidence without reference to the underlying drug transaction. The trial court agreed and granted the prosecution's order. However, the lower court file includes neither a copy of this order nor a ruling on the record at the hearing, although the lower court docket entry indicates that the court granted the order.

³ MRE 404(b)(1) governs the admission of other acts evidence and provides:

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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 Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). Relevant evidence is that which tends to make a material fact more or less probable. *McGhee, supra* at 610. "Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *Id.* at 614.

Here, the prosecution sought to introduce the evidence for the proper purposes of showing defendant's identity, knowledge, and intent. The court denied the prosecution's motion on the record, stating as follows:

Based on what you're saying the purpose of it is and distinguishing the case, distinguishing the facts of this case from the cases cited and how exactly it happened here, the prosecutor's motion will be denied.

The phrasing of the court's ruling makes it difficult to discern its reasoning. However, when read in conjunction with the attorneys' arguments at the motion hearing it is plain that the court agreed with defendant's argument. Specifically, defendant argued that the evidence should not be admitted because the present matter is distinguishable from cases where other acts evidence showing identity was permitted. In those cases, the other acts evidence that was admitted involved drug transactions that occurred prior to the underlying offense, rather than subsequent to the underlying drug offense. Further, the court seems to have excluded the evidence on the basis that its probative value is substantially outweighed by its unfair prejudice, because of, as defense counsel argued, the manner in which the police collected the evidence, i.e., using Poole, a person who has an interest in assisting them, as a controlled buy informant. Thus, while the court's reasoning is somewhat unclear, we cannot conclude that it failed to select an outcome outside the reasonable and principled range of outcomes. *Kahley, supra* at 184. While it is true that MRE 404(b)(1) permits the admission of other acts evidence subsequent to the charged offense, it was reasonable for the court to deny the prosecution's motion on the basis that the drug transactions lacked probative because they occurred subsequent to, rather than prior to, the charged offense and, what little probative value the evidence did have, was outweighed by its potential to unfairly prejudice defendant.

With respect to identity, the prosecution did not proffer evidence showing that there was some special quality or circumstance inherent in the transactions that would connect defendant to the transaction at issue. *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998). The fact

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Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of 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, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

that Poole allegedly called defendant, picked defendant up in his car, and then drove together to meet defendant's drug dealer in the November 2007 transactions, merely creates a similarity between the charged offense and the subsequent acts and is likely no different than many other such transactions in the City of Detroit. Thus, while these subsequent drug deals are certainly relevant to proving defendant's identity, their probative value is not great. Without some other special identifying characteristic of defendant during these transactions, or some other special circumstance linking the charged offense with the uncharged transactions, *id.*; *VanderVliet, supra* at 66 n 16, we find that the trial court did not abuse its discretion because it was reasonable to conclude that the evidence's probative value is substantially outweighed by its potential to cause unfair prejudice to defendant.

We reach the same conclusion with respect to the prosecution's argument that the other acts evidence should have been admitted as evidence of defendant's intent and knowledge. Again, the alleged acts are relevant evidence of defendant's intent and knowledge because the subsequent acts and the charged offense are similar and of the same general category. See *VanderVliet, supra* at 79-80; *McGhee, supra* at 612; *Crawford, supra* at 395 n 13. However, it was reasonable for the trial court to view the probative value of the other acts evidence as lacking. The transactions in July and November 2007 occurred well after the offense at issue. It can be said, then, that the logical relevance of these events is weak: it would require the jury to infer that defendant had the same intent and knowledge during the alleged commission of the crime charged as he had over a year later during the alleged drug transactions in 2007 while acting as a police informant. In other words, the jury would be required to impute to defendant both knowledge and intent that defendant may not have had at an earlier point in time, on the basis of subsequent actions. Had the other acts evidence occurred prior to the crime at issue, then the evidence's probative value would have been much stronger, see *McGhee, supra* at 611-614, and may not have been substantially outweighed by any unfair prejudice to defendant.

Accordingly, we conclude that the trial court did not clearly abuse its discretion when it denied the prosecution's motion to admit other acts evidence pursuant to MRE 404(b)(1). *Crawford, supra* at 383. Although we affirm the trial court at this point in the proceedings, the prosecution is not precluded from raising the defendant's alleged subsequent drug transactions later at trial should defendant's identity, intent, or knowledge, or other proper purpose under MRE 404(b)(1) become a contested issue of fact at trial. Our Supreme Court has noted that "[t]he probative value of other acts evidence and its true potential for prejudice is often unclear until the proofs are actually presented." *VanderVliet, supra* at 90. Thus, the trial court is free to, and may reconsider its decision at any point during trial, should it decide, in light of the evidence presented, that the other acts evidence is necessary to allow the jury to fully understand the issues. *Id.* at 90-91.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly