STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 5, 2009
v	No. 279699 St. Clair Circuit Court
FREDERICK JAMES MARDLIN, Defendant-Appellant.	LC No. 07-000240-FH

Before: Zahra, P.J., and O'Connell, and K.F. Kelly, JJ.

PER CURIAM.

A jury convicted of arson of a dwelling house, MCL 750.72, and burning insured property, MCL 750.75. He was sentenced to concurrent prison terms of 3 to 20 years' imprisonment for the arson of a dwelling house conviction and 1 to 10 years' imprisonment for the burning insured property conviction. He appeals as of right. We reverse defendant's convictions and remand for a new trial.

Defendant's convictions arise from a fire at his home on the afternoon of November 13, 2006. At the time of the fire, defendant was visiting his brother, who lived nearby. However, defendant had recently been at his house and was the only person who had been there that afternoon. Michigan State Police Detective Sergeant Michael Waite, an expert in the cause and origin of fires, investigated the scene and concluded that the fire originated from a love seat in the living room of defendant's home. Although testing failed to reveal the presence of an accelerant, Waite believed that charring on the front part of the loveseat and the quickness of the fire were consistent with the use of an accelerant. After ruling out possible accidental causes of the fire, Waite concluded that the fire was started by an intentional act.

At trial, the prosecution presented evidence that defendant and his family were having financial problems at the time of the fire. They were behind on their mortgage and several utility bills. The prosecution also presented evidence of previous fires involving property that defendant owned or possessed. Less than a year before the charged offense, on Easter Sunday, a fire occurred at defendant's house when a blanket was left on top of a kerosene heater, causing mostly smoke damage. The fire department was never contacted about that fire, but defendant did submit an insurance claim. In March 2001, a fire started in a van on defendant's property and spread to the nearby mobile home that defendant was living in. Although the van was covered by insurance, there was no insurance on the mobile home. In 1994, a fire caused damage to defendant's Ford Ranger truck. An insurance claim was submitted for the damage.

Evidence was also presented that a work vehicle that defendant used at a former job once caught fire while defendant was working. Defendant did not own that vehicle and, therefore, would not have collected any insurance proceeds.

Although defendant raises several issues on appeal, we conclude that reversal is required because the trial court abused its discretion in admitting the evidence of other fires.

The decision whether to admit or exclude evidence is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. However, preliminary questions of law, such as whether a rule of evidence precludes admissibility, is reviewed de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

The trial court admitted the evidence of the other fires under MRE 404(b)(1), which prohibits evidence of other crimes, wrongs, or acts to prove a defendant's character to show action in conformity therewith, but allows such evidence for other purposes to prove something other than the defendant's bad character. The logic behind this rule is that a jury should not convict a defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged. *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998).

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if the evidence is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice under MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The trial court, upon request, may provide a cautionary instruction regarding the limited use of any evidence admitted under MRE 404(b). *Id*. at 75.

In this case, the prosecutor sought to introduce evidence of the 2006 Easter fire at defendant's home, the 2001 vehicle fire that spread to defendant's mobile home, and the 1994 fire to defendant's Ford truck "to demonstrate a pattern of behavior, motive, scheme, plan, and system in doing an act." The trial court ruled that the evidence could be admitted for these purposes, as well as to prove lack of accident.

At trial, the court also allowed the prosecutor to introduce evidence of the fire involving defendant's employer's vehicle under MRE 404(b)(1). In addition, despite the prosecution's intent to offer the evidence of other fires as proof of defendant's motive, or a scheme, plan, or system in doing an act, and the trial court's pretrial decision to allow the evidence for these purposes, and to prove lack of accident, the trial court allowed the jury to consider the evidence for additional purposes at trial. The court instructed the jury that it could consider the evidence for the following purposes: (1) to determine whether defendant had a reason to commit the charged crime; (2) to determine whether defendant specifically intended to burn his residence; (3) to determine whether defendant acted purposefully and not by accident or mistake, or because he misjudged the situation; (4) to determine whether defendant had a plan, system, or characteristic scheme that he has used before or since; and (5) to determine who committed the offense. Thus, the court allowed the jury to consider the other fires as proof of (1) motive, (2) intent, (3) absence of mistake or accident, (4) a scheme, plan, or system in doing an act, and (5)

identity. We agree with defendant that the prosecution failed to establish the relevancy of the evidence to any of these purposes.

The prosecution has the initial burden of establishing the relevance of the proposed evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Id*., quoting *Crawford, supra* at 387; MRE 401. With respect to evidence offered under MRE 404(b)(1), our Supreme Court has cautioned:

> In order to ensure the defendant's right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else. The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized.
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> [T]he proffered evidence truly must be probative of something *other* than the defendant's propensity to commit the crime. If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded, notwithstanding its logical relevance to character. [*Crawford, supra* at 388, 390 (emphasis in original; footnotes omitted).]

Even if relevant, evidence may be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000). Unfair prejudice does not mean any prejudice, but refers to "the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *Pickens*, *supra* at 336-337.

Initially, we conclude that the evidence of the previous fires was not logically relevant to show a scheme, plan, or system in doing an act. In *Knox*, *supra* at 510-511, our Supreme Court discussed the rationale for allowing evidence of prior bad acts for this purpose:

> In *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000), this Court specifically examined the exception in MRE 404(b) for evidence showing a "scheme, plan, or system." We clarified that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Sabin*, *supra* at 63. We cautioned both that "[l]ogical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception of plot," and that "[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Id.* at 64.

In this case, defendant was charged with setting fire to his house. It was the prosecution's theory that the fire originated at a love seat in defendant's living room and was aided by an accelerant. The prior acts evidence showed that in the previous 12 years, four fires had occurred involving property that defendant either owned or possessed. Unlike the charged offense, however, two of the prior fires involved unexplained vehicle fires, one of which was owned by defendant's employer. A third fire also involved an unexplained vehicle fire that spread to a mobile home where defendant was living. The fourth uncharged fire involved the same house involved in this offense, but that fire mostly caused smoke damage. Nothing was shown about the circumstances of the prior fires to indicate that they were sufficiently similar to the charged offense to support an inference that they were manifestations of a common plan, scheme, or system. Indeed, most of the prior fires were unexplained. The only explanation offered was for the 2006 Easter fire, which occurred when a blanket was left on top of a kerosene heater. In sum, the characteristics of the previous fires are not sufficiently similar to the charged fire to establish that defendant acted according to a common plan, scheme, or system in starting the charged fire.

The evidence also was not relevant to prove absence of mistake or accident. The defense theory was that the fire was accidental. But without evidence showing how the prior fires started, or suggesting that they were the result of an intentional act, or even pointing to defendant as a cause of the fires, the evidence was not relevant to show that the charged offense was not the result of some mistake or accident. For the same reasons, the evidence was not logically relevant to prove defendant's intent. Without a showing that any of the previous fires were intentionally set, there was no basis to infer from the occurrence of those fires that the charged fire was intentional. *People v Yost*, 278 Mich App 341, 404; 749 NW2d 753 (2008).

The trial court also permitted the jury to consider the evidence of the previous fires to establish defendant's identity as the perpetrator of the charged offense. In *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998), this Court observed:

> Although the *VanderVliet* Court adopted a new test for admission of evidence under MRE 404(b), the four-part test of *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), remains valid to show logical relevance where similar-acts evidence is offered to show identification through modus operandi. *People v McMillan*, 213 Mich App 134, 138; 539 NW2d 553 (1995). The *Golochowicz* test requires that (1) there is substantial evidence that the defendant committed the similar act (2) there is some special quality of the act that tends to prove the defendant's identity (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. *Golochowicz, supra* at 307-309.

Although the evidence showed that there had been other fires involving property owned or possessed by defendant, the prosecutor failed to show either that defendant caused the previous fires, or that there was some special quality of the previous fires that tended to prove defendant's identity as the person who caused the charged fire. Thus, the prior acts evidence was not admissible to prove identity.

The prosecutor also argued that the evidence of other fires was admissible to prove defendant's motive. "Motive" is the "[c]ause or reason that moves the will and induces action. An inducement, or that which leads or tempts the mind to indulge a criminal act." *Yost, supra* at 406 (citations omitted). The prosecutor presumably was relying on the availability of insurance as defendant's motive for setting this fire. However, there was no showing that defendant caused the prior fires for the purpose of collecting insurance. Rather, the evidence showed that not all of the prior fire damage to property owned by defendant was even covered by insurance, and that defendant would not have received any insurance proceeds for the damage to his employer's vehicle. To the extent that the evidence of the other fires could be considered minimally probative of motive, it was substantially outweighed by the danger of unfair prejudice under MRE 403, especially considering that the prosecution was able to present other evidence of motive, e.g., defendant's financial hardship.

For these reasons, we conclude that the trial court abused its discretion in admitting the evidence of the other fires under MRE 404(b)(1). Furthermore, we are unable to conclude that this error was harmless. "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The evidence against defendant was not overwhelming. Although the prosecution's experts believed that the fire was set intentionally with the use of an accelerant, testing of samples collected from the scene failed to reveal the presence of an accelerant. The prosecutor relied substantially on the number of prior fires to argue that the charged fire must have been intentionally set by defendant. Considering the evidence as a whole, it is more probable than not that the evidence of the other fires affected the outcome. Thus, the erroneous admission of this evidence serves as an independent ground for reversal.

In light of our decision to reverse and remand for a new trial for the reasons explained above, it is unnecessary to consider defendant's remaining issues.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly