

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL FOUST RUSHLOW,

Defendant-Appellant.

UNPUBLISHED

May 28, 2009

No. 284569

Oakland Circuit Court

LC No. 2007-218013-FH

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of two counts of identity theft, MCL 445.65, for which he was sentenced as a fourth habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 3 to 20 years each. We affirm.

The victim's personal information was utilized on June 30 and July 1, 2007, to make credit purchases at Home Depot and Sears stores. A suspect was not identified until defendant was arrested in connection with another offense at a Staples store and the July 1 Sears receipt bearing the victim's name was found in defendant's possession. The jury viewed surveillance videos corresponding to the two transactions and determined that defendant was the person who committed the offenses.

Defendant argues that the trial court erred in admitting testimony regarding the incident at the Staples store, which defendant maintains was inadmissible under MRE 404(b). Because defendant did not challenge the admissibility of this evidence under MRE 404(b) at trial, this issue is not preserved. *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005); *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992). Accordingly, we review the issue for plain error affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004), *aff'd* 473 Mich 399 (2005).

Under MRE 404(b)(1), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show action in conformity therewith. Thus, if the sole purpose in offering the evidence is to show the defendant's propensity for particular conduct based on his character as inferred from other wrongful conduct, it is not admissible. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996). It is admissible, however, 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.” MRE 404(b)(1). However, not all “other-acts” evidence is subject to MRE 404(b) analysis. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). Evidence of other acts may be admissible under MRE 401 as substantive evidence without regard to MRE 404(b) if it does not operate through an intermediate inference of character. *Id.*

In this case, the jury was not asked to infer from some particular characteristic of the Staples incident that defendant was the person who committed the instant offenses. Rather, the evidence was offered to explain how the July 1 receipt issued to the victim was discovered in defendant’s possession, thereby connecting him to the charged offenses. It was that receipt and the video evidence that was utilized to prove that defendant committed the offenses. The fact that the evidence may not have been admissible for a proper purpose under MRE 404(b) is irrelevant; “[e]vidence that is admissible for one purpose is not inadmissible because its use for a different purpose is precluded.” *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995). Thus, there was no plain error in admitting this evidence. Further, there was no violation of the trial court’s ruling that defendant’s arrest for identity theft in connection with the Staples incident was not admissible.

Defendant also argues that the trial court erred in allowing Detective Barker to offer his opinion that defendant was the person depicted in the surveillance videos. Defendant preserved this issue by objecting below, MRE 103(a)(1), and thus the issue is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion occurs when the court selects an outcome that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

A lay witness may offer opinion testimony that is rationally based on the witness’s perception and is helpful to a clear understanding of his testimony, or to the determination of a fact in issue. MRE 701. Here, Barker’s opinion was based on his perception of the videographic evidence and was helpful to a determination of a fact in issue (i.e., defendant’s identity as the perpetrator). Thus, the trial court did not abuse its discretion in allowing the testimony.

Defendant lastly argues that the trial court erred in scoring offense variable (OV) 9 of the statutory guidelines. “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision “for which there is any evidence in support will be upheld.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). The interpretation and application of the sentencing guidelines present questions of law subject to de novo review on appeal. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

OV 9 takes into account the number of victims. MCL 777.39(1). It is to be scored at ten points if at least four persons were placed in danger of property loss. MCL 777.39(1)(c). If fewer than four persons were placed in danger of property loss, zero points are to be assessed. MCL 777.39(1)(d). The instructions state that “each person who was placed in danger of physical injury or loss of life or property” is counted as a victim. MCL 777.39(2)(a). Defendant does not dispute that there were four victims in all: the identity theft victim, a credit card company, and two retailers, but submits that there were only three victims for each offense: the

identity theft victim, the credit card company, and the retailer associated with each transaction. Thus, he argues that OV 9 should be scored at zero points. We disagree.

OV 9 is to be scored “only with respect to the specific criminal transaction that gives rise to the conviction for which the defendant is being sentenced.” *People v Chesebro*, 206 Mich App 468, 471; 522 NW2d 677 (1994). Thus, when scoring OV 9, the court cannot count persons unaffected by the transaction as victims, e.g., those who are victims of uncharged offenses. *People v Gullett*, 277 Mich App 214, 217-218; 744 NW2d 200 (2007). Rather, “only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered.” *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008). Because the criminal transaction at issue, the theft of the victim’s identity for personal financial gain, resulted in losses to four victims, OV 9 was properly scored at ten points.

Affirmed.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Jane E. Markey