# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 21, 2009 |
| v | No. 285484<br>Oakland Circuit Court |
| MELVIN ROBERT MATSEY,<br><br>Defendant-Appellant. | LC No. 2008-218561-FH |

Before: Owens, P.J., and Servitto and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of breaking and entering an office building while intending to commit larceny, MCL 750.110. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 30 months to 20 years in prison. Defendant appeals as of right. We affirm, and decide this appeal without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court injected error requiring reversal by instructing the jury regarding the elements of guilt under an aiding and abetting theory. This Court reviews de novo any legal issues inherent in claims of instructional error. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, we review for an abuse of discretion the trial court's determination that a jury instruction applies to the facts of a case. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).

The testimony of several police offers revealed that after the triggering of an alarm at a Troy financial planning business office, they detected that someone had removed a screen from one office window and thrown a landscaping boulder into the office through the window. After speaking with the business owner, the police ascertained that someone had moved several LCD monitors inside the office. One officer testified that he lifted a fingerprint from the metal portion of the removed screen, and another officer, a fingerprint comparison expert, opined that the print on the screen matched the fingerprint of defendant's right index finger contained in a fingerprint database. A detective recounted that he interviewed defendant several months after the Troy break in, and that defendant denied spending time in Troy. A Farmington Hills police officer described that in a 2000 interview about break ins in that city, defendant suggested that a man named Willis had solicited him to participate in burglaries. The trial evidence reasonably supported a finding that defendant committed the Troy break in by himself. But the additional facts that the police found none of his fingerprints inside the office building and defendant's suggestion that someone else had committed the Troy break in reasonably gave rise to the

alternate theory that another person might at least have participated in the Troy break in. The trial court thus did not abuse its discretion by reading the jury aiding and abetting instructions.

Defendant also maintains that the evidence of his lone fingerprint did not suffice to prove his identity as the perpetrator of the break in. We review de novo sufficiency of the evidence challenges, viewing the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). Defendant does not challenge that the trial evidence otherwise adequately established a breaking and entering.

Fingerprint evidence alone may establish identity if "'the fingerprints corresponding to those of the accused . . . [are] found in the place where the crime was committed under such circumstances that they could only have been impressed at the time when the crime was committed.'" *People v Ware*, 12 Mich App 512, 515; 163 NW2d 250 (1968), quoting 28 ALR 2d 1154. Here, the police found defendant's fingerprint on the lone screen removed from the one office building window that someone smashed by throwing a large rock through the window into the office. Testimony by the business owner revealed that defendant did not work for the company, was not a business client, and did not work for a window washing company or a landscaping company that had serviced the building. According to the Troy detective who interviewed defendant, he offered no legitimate purpose for the presence of his fingerprint on the window screen. Because defendant's fingerprint was "found in the place where the crime was committed under such circumstances that [it] could only have been impressed at the time when the crime was committed," *id.*, a rational jury reasonably could have found beyond a reasonable doubt on the basis of the fingerprint evidence that defendant committed the breaking and entering.

Defendant lastly suggests that his counsel's failure to timely object to the MRE 404(b) evidence admitted at trial denied him the effective assistance of counsel. Defendant submits that the trial court improperly admitted the other acts evidence under MRE 404(b) because the other acts and the charged crime were not sufficiently similar, under the analysis in *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), and *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000).

To warrant the admission of evidence under MRE 404(b)(1), "the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory," "the evidence must be relevant under MRE 402 . . . to an issue of fact of consequence at trial," and as contemplated by MRE 403, any danger of unfair prejudice inherent in the admission of the evidence must not substantially outweigh its probative value. *Sabin*, *supra* at 55-56. "[T]he trial court, upon request, may provide a limiting instruction under MRE 105." *Id*. at 56.

The prosecutor offered evidence of defendant's 2000 Farmington Hills break ins "to establish the identity of . . . Defendant as the perpetrator of the [2007] crime [in Troy], and to establish the scheme, plan, or system the Defendant has i[n] committing the crime of breaking and entering," proper purposes under MRE 404(b)(1). Regarding the relevance of the proffered evidence, "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. "'To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual.'" *Id*. at 65-66, quoting *People v Ewoldt*, 7 Cal Rptr 4th 380; 867 P2d 757 (1994). "'Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense.'" *Sabin*, *supra* at 66, quoting *Ewoldt*, *supra* at 403.

A Farmington Hills police officer recounted that in 2000 he had helped investigate "a rash of business break-ins, where rocks were being thrown through glass windows and laptop computers were being taken." The officer testified that his surveillance team responded to a business alarm one specific evening, that other officers in his team spotted defendant walking down the highway in the proximity of the break in and detained him, and eventually defendant disclosed the location of his vehicle, which contained a "landscaping rock" and "shards of broken glass inside the vehicle." Like the 2000 break ins, defendant committed the 2007 Troy break in by locating a landscaping rock, gaining entry into an office by heaving the rock through a window, and entering the office to remove electronic equipment. Notwithstanding that the 2000 and 2007 break ins do not reflect a distinctive or unusual plan or scheme, their several similarities permitted the jury to logically infer that defendant employed a common plan, scheme or system in committing the crimes. The other acts evidence had high probative value toward establishing defendant's employment of a plan, scheme or system in breaking and entering, and we detect no danger of unfair prejudice that could substantially outweigh this significant probative value. MRE 403; *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, mod 450 Mich 1212 (1995). We conclude that the trial court properly admitting the other acts evidence.

Moreover, the trial court cautioned the jury with respect to the extent of its permissible consideration of the other acts evidence:

> You have heard evidence that was introduced to show that the defendant committed crimes for which he is not on trial. If you believe this evidence, you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show the defendant used a plan, system or characteristic scheme that he had used before, and whether the defendant committed the crime that he is charged with.
>
> You must not consider this evidence for any other purpose. For example, you must not decide that it shows the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct.

Because the trial court correctly admitted the other acts evidence, defense counsel was not ineffective for failing to lodge a meritless objection to its admissibility. *People v Petri*, 279 Mich App 407, 415; 760 NW2d 882 (2008).

Affirmed.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher