STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 17, 2016
v	No. 326222 Muskegon Circuit Court
EMMANUEL MOORE, Defendant-Appellant.	LC No. 14-064918-FH

Before: RIORDAN, P.J., and SAAD and MARKEY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree home invasion, MCL 750.110a(3); domestic assault, MCL 750.81(2); and assault and battery, MCL 750.81(1). He was sentenced as a fourth habitual offender, MCL 769.12, to 4½ to 20 years' imprisonment for the second-degree home invasion conviction and to time served for the assault convictions. We affirm defendant's convictions, but remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

In the early morning hours on April 20, 2014, Cheryl Day received several phone calls from defendant as she was driving back to her residence in Muskegon Heights, Michigan. Defendant and Day had been dating, but they were no longer doing so in April 2014. During the calls, defendant "sounded like he was a little intoxicated" and asked Day for a ride to his father's house. When Day declined, defendant seemed upset to Day. After speaking with defendant, she "felt a little uneasy," so she contacted her brother, Carlton Reid, and asked him to accompany her home.

Upon arriving at Day's house, she and Reid entered through the front door. Shortly after, they heard a "loud bang" from inside the house. As they walked toward the kitchen to investigate, they saw defendant, who was visibly intoxicated, coming up the stairs from the basement, walking with a limp. Day "freaked out," questioned defendant regarding his presence in her home, and demanded that he leave. Defendant refused to comply and blamed Day for his injured leg. Defendant and Reid then began to argue, and Day asked defendant, once again, to leave. When defendant pulled a knife, Reid pushed defendant onto a loveseat and ran out the front door. Defendant chased after Reid, still carrying the knife, and Day followed the two men out of the house.

Once outside, defendant, still armed with the knife, chased Reid "around the car." During the chase, defendant acted in an erratic and threatening manner, saying to Reid, "I'm gonna kill you." Eventually, Reid ran down the street, leaving Day with defendant.

While they were alone, defendant repeatedly asked Day for a ride, but she refused. Defendant then chased Day around the car. Ultimately, Day was able to convince defendant to give her the knife. After relinquishing it, he still chased Day around the outside of the car. Eventually, Day was able to escape when defendant fell to the ground during the chase. Day then ran and caught up with Reid, who had already called the police.

Defendant was arrested and charged with first-degree home invasion, domestic assault, and assault with a dangerous weapon. A jury found him guilty of second-degree home invasion, domestic assault, and assault and battery.

He now appeals as of right.

II. OTHER ACTS EVIDENCE UNDER MRE 404(B)

Defendant first argues that the trial court abused its discretion by admitting prior bad act testimony under MRE 404(b). In particular, the court admitted evidence regarding an incident that occurred approximately 10 days before the events giving rise to defendant's charges in this case. At that time, defendant threatened a stranger on the street with a large "stick" or tree limb because he believed that the individual had stolen his coat.

We agree that the trial court erred in admitting the evidence, but find the error harmless.

A. STANDARD OF REVIEW

We "review[] for an abuse of discretion the trial court's decision to admit or exclude evidence." *People v Lane*, 308 Mich App 38, 51; 862 NW2d 446 (2014). "[A] trial court abuses its discretion when its decision falls outside the range of principled outcomes or when it erroneously interprets or applies the law." *Id*. (footnotes omitted). However, "[w]e review de novo the preliminary questions of law surrounding the admission of evidence, such as whether a rule of evidence bars admitting it." *Id*. "[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) (quotation marks omitted), quoting MCL 769.26.

B. ANALYSIS

Evidence of a defendant's "other crimes, wrongs, or acts" is generally inadmissible to demonstrate a defendant's propensity to act in conformity with those acts. MRE 404(b)(1); *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, other acts evidence may be admissible for other, noncharacter purposes, such as to establish "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[.]" MRE 404(b)(1); *Starr*, 457 Mich at 495-496. As such, evidence regarding other crimes, wrongs, or acts is admissible under MRE 404(b) if (1) it is offered for a proper, noncharacter purpose, (2) it is relevant to a factual issue of

consequence at trial, and (3) the probative value of the evidence is not substantially outweighed by the potential for unfair prejudice under MRE 403. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), citing MRE 104(b), MRE 402, MRE 403, MRE 404(b), and *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In addition, upon the admission of other acts evidence, the trial court may, upon request, provide a limiting instruction to the jury under MRE 105. *Sabin*, 463 Mich at 56.

Here, the prosecution proffered the evidence to prove a lack of accident or mistake, intent, and a common scheme. However, the mere "[m]echanical recitation" of noncharacter purposes for the admission of prior act evidence "is insufficient to justify admission under MRE 404(b)." *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). Rather, under the second prong of the test, the prosecution must demonstrate that the prior act evidence is relevant to a noncharacter purpose by "explaining how the evidence relates to the recited purposes." *Id*. Stated differently, to establish relevance, the prosecution must establish "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."[1] *Id*. at 387. "If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference [which is probative of an ultimate issue in the case], the evidence must be excluded, notwithstanding its logical relevance to character." *Id*. at 390-391. See also *People v Mardlin*, 487 Mich 609, 615-616; 790 NW2d 607 (2010) ("Evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under [MRE 404(b)(1)] *only* if it is relevant solely to the defendant's character or criminal propensity."). "The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material." *Sabin*, 463 Mich at 69.

The proffered prior act evidence was not relevant to proving lack of accident or mistake, as lack of accident or mistake is not an element of any of the charges against defendant,[2] and he

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[1] Likewise, MRE 401 provides, " 'Relevant evidence' [is] evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[2] Defendant was charged with first-degree home invasion, domestic assault, and assault with a dangerous weapon (felonious assault). However, he was convicted of second-degree home invasion (a lesser included offense of first-degree home invasion), domestic assault, and simple assault and battery (a lesser included offense of assault with a dangerous weapon). See MCL 750.110a(2), (3); MCL 750.81(1), (2); MCL 750.82. See also *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010) (stating the elements of first-degree home invasion); *People v Crews*, 299 Mich App 381, 392-395; 829 NW2d 898 (2013) (discussing the elements of second-degree home invasion); *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007) (stating the elements of assault with a dangerous weapon); *People v Avant*, 235 Mich App 499, 506 n 2; 597 NW2d 864 (1999) (stating the elements of criminal assault); *People v Reeves*, 458 Mich 236, 240; 580 NW2d 433 (1998) (defining a battery); *People v Cameron*, 291 Mich App 599, 614; 806 NW2d 371 (2011) (stating the elements of domestic violence or assault).

never claimed lack of accident or mistake as a defense. Thus, it was not a factual issue of consequence at trial. See *Sabin*, 463 Mich at 69. Further, given the numerous differences between defendant's prior bad act and the charged offenses, we cannot conclude that his prior bad act falls within "the same general category of the charged offense[s]" or is "sufficiently alike to support an inference of criminal intent," so that the incident would be relevant to demonstrate an absence of accident or mistake. See *Mardlin*, 487 Mich at 622-623 (quotation marks and citations omitted).

The evidence also was not relevant to proving defendant's intent. The defense contended, in its opening statement and closing argument, that defendant genuinely believed that he had a right to be present in Day's house and that he acted in self-defense because he believed that Reid possessed a weapon. Accordingly, the prosecution contends that defendant "asserted a claim of right or something akin to this" and used a weapon to assert that right during both incidents. However, it is clear that the factual relationship between the charged crime and the incident that took place ten days before trial is "simply too remote for the jury to draw a permissible intermediate inference of the defendant's mens rea in the present case." *Crawford*, 458 Mich at 396.

Further, the evidence was not relevant to proving a common scheme, plan or system. "[S]omething more" than "mere similarity" between the charged and uncharged conduct is required to prove a common scheme, plan, or system: there must be "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." *Sabin*, 463 Mich at 64-65 (quotation marks, citation, and emphasis omitted). Accordingly, "[t]o 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 (quotation marks and citation omitted). Here, the circumstances of the charged acts and the alleged prior bad act, and the manner in which each was committed, are strikingly different and contain no common features aside from the fact that an assault was involved in each incident. At most, this reveals the existence of similar spontaneous acts, which is insufficient to establish relevance on the basis of a common scheme, plan, or system. See *id*.

Thus, to the extent that the other acts evidence was relevant to establishing defendant's guilt, it was only relevant based on forbidden inferences of bad character, which are specifically prohibited by MRE 404(b). See *id*. at 397.

Even if we were to conclude that the other acts evidence "had some logical relevance distinct from the impermissible character inference," *Crawford*, 458 Mich at 397, the limited probative value of the evidence was substantially outweighed by the danger of unfair prejudice, see MRE 403; *Sabin*, 463 Mich at 55-56. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398; see also *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005) ("This unfair prejudice 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.") (quotation marks and citations omitted). Given the tenuous factual relationship between defendant's prior bad act and the charged conduct in this case, as well as the minimal probative value of the prior act evidence,

such a danger existed in this case, as it appears that the only inference that the jury was likely to make from the prior act evidence was an impermissible propensity inference. See *People v Knox*, 469 Mich 502, 512-513; 674 NW2d 366 (2004); *Crawford*, 458 Mich at 398-399.[3] As such, improper extraneous considerations likely "overshadowed any legitimate probative value" that the evidence may have had. *Crawford*, 458 Mich at 398. Moreover, the trial court's limiting instruction did not cure this prejudice. See *id*. at 399 n 16 (noting that when there is, in fact, *no* proper purpose for the prior acts evidence admitted by the trial court, a limiting instruction is really "not limiting at all"). Thus, even if it could be considered arguably relevant, the evidence of the earlier event should have been excluded under MRE 403.

Nevertheless, we conclude that defendant is not entitled to reversal because the error was harmless. See *Lukity*, 460 Mich at 495-496. The untainted evidence—namely, the testimony of Day and Reid—provided overwhelming support for the jury's finding that defendant was guilty beyond a reasonable doubt of second-degree home invasion, domestic assault, and assault and battery. Thus, it is not "more probable than not" that the error affected the outcome of the trial. See *id*. at 495.

III. JUDICIAL FACT-FINDING

In a supplemental brief, defendant argues that we should remand this case for resentencing because the trial court scored offense variables ("OVs") 1 and 4 based on facts not found by the jury beyond a reasonable doubt or admitted by defendant, and these facts were used to increase the mandatory minimum sentence imposed for his convictions in violation of the Sixth Amendment. We agree.

A. STANDARD OF REVIEW

Defendant did not object to the trial court's scoring of the offense variables on the basis of improper judicial fact-finding. Thus, this issue is unpreserved and reviewed for plain error affecting substantial rights. *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015).

B. ANALYSIS

In *Lockridge*, the Michigan Supreme Court held that Michigan's sentencing guidelines previously violated the Sixth Amendment to the extent that they "*require[d]* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables . . . that *mandatorily* increase[d] the floor of the guidelines minimum sentence range[.]" *Id*. at 364. Stated differently, a Sixth Amendment violation occurred when the "facts admitted by a defendant or found by the jury verdict were insufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced." *Id*. at 395. Thus, in order to remedy the Sixth Amendment violation, the Court held that Michigan's sentencing guidelines are now advisory, but sentencing judges

[3] Notably, the prosecution's closing arguments in this case specifically encouraged the jury to draw such an impermissible inference.

remain required to consult the guidelines and "take them into account when sentencing." *Id.* at 391 (quotation marks and citation omitted). "[A]ll defendants [sentenced on or before July 29, 2015,] (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by [a] violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry." *Id*. at 395.

Here, defendant challenges the trial court's assessment of 15 points for OV 1, MCL 777.31(1)(c),[4] and 10 points for OV 4, MCL 777.34(1)(a).[5] We agree that the trial court's scoring of those variables was not supported by the jury's verdict, as none of defendant's convictions required a finding that he used a knife or other dangerous weapon during the incident or that Day or Reid suffered psychological injury requiring professional treatment.[6] We also agree that defendant did not admit facts that would support these scores. Thus, it is clear that 25 out of the 40 points assessed for defendant's OV score were assessed solely based on judicially found facts. Without this judicial fact-finding, defendant's OV score would have been 15 points, and the minimum range calculated under the sentencing guidelines would have been 29 to 114 months instead of 43 to 172 months. See MCL 777.64; MCL 777.21(3)(c). Thus, defendant's minimum sentence range was actually constrained by the Sixth Amendment violation. See *Lockridge*, 498 Mich at 395.

Accordingly, because the trial court did not impose an upward departure sentence in this case, defendant is entitled to "a remand to the trial court for further inquiry." See *id.* This further inquiry is performed through a "*Crosby*[7] remand," during which the trial court must determine whether it "would have imposed a materially different sentence but for the constitutional error. If the trial court determines that the answer to that question is yes, the court shall order resentencing." *People v Stokes*, 312 Mich App 181, ___; ___ NW2d ___ (2015) (Docket No. 321303); slip op at 9 (quotation marks and citation omitted); see also *Lockridge*, 498 Mich at 395-399.

> [O]n a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in

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[4] Under MCL 777.31(1)(c), a trial court shall assess 15 points if "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon."

[5] Under MCL 777.34(1)(a), a trial court shall assess 10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim."

[6] See MCL 750.110a(3); MCL 750.81(1); MCL 750.81(2). See also *Crews*, 299 Mich App at 392-395 (discussing the elements of second-degree home invasion); *Avant*, 235 Mich App at 506 n 2 (stating the elements of simple criminal assault); *Reeves*, 458 Mich at 240 (defining a battery); *Cameron*, 291 Mich App at 614 (stating the elements of domestic violence or assault).

[7] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

> some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by [MCR 6.425], if it decides to resentence the defendant. Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the circumstances existing at the time of the original sentence. [*Stokes*, 312 Mich App at ___; slip op at 9, quoting *Lockridge*, 498 Mich at 398 (alterations in original; block quote omitted).]

Thus, we remand for execution of the *Crosby* procedure so that the trial court may determine whether resentencing is necessary in this case.

IV. CONCLUSION

The trial court's admission of testimony regarding defendant's prior bad act was harmless given the overwhelming evidence against him. However, defendant has established that a *Lockridge* error occurred in this case. Thus, remand is required so that the trial court may implement the *Crosby* remand procedure and determine whether resentencing is warranted.

We affirm defendant's convictions, but remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Jane E. Markey