STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 17, 2009
v	No. 280299 Kent Circuit Court
CHRISTIAN LEE HANSON, Defendant-Appellant.	LC No. 06-011174-FH

Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant Christian Hanson appeals as of right his jury trial convictions of burning a dwelling house, MCL 750.72, and burning insured property, MCL 750.75. We affirm.

Defendant first argues that the trial court abused its discretion by admitting other-acts evidence that was irrelevant and prejudicial. A trial court's admission of other-acts evidence is reviewed for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). In this case, the trial court admitted evidence that defendant shot his own car after the arson fire that burned his dwelling, attempting, unsuccessfully, to make it appear that someone was out to get him. In earlier statements to police, defendant had asserted that he was involved in a lawsuit against a former employer and that the arson may be related to the suit. Defendant further indicated to police that the tires of his vehicle had been slashed on nine to ten occasions, which was also possibly related to the lawsuit. The evidence concerning defendant's shooting of his own car was admitted by the trial court on a couple of theories, only one of which we need address. The trial court concluded, in part, that the other-acts evidence could be admitted to prove defendant's consciousness of guilt, similar to permissible evidence of flight. We agree.

MRE 404(b) provides:

> (1) 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.

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Court clarified the test to be utilized to determine the admissibility of other-acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

The list of proper purposes under MRE 404(b) is nonexhaustive. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). It is insufficient for the prosecution to merely recite a purpose for admission of the evidence. *People v Crawford*, 458 Mich 376, 386; 582 NW2d 785 (1998). The prosecution must also demonstrate that the evidence is relevant. *Id.* The offered evidence must not only be related to a fact that is of consequence, but it also "truly must be probative of something *other* than the defendant's propensity to commit the crime." *Id.* at 390. "If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded." *Id.*

We conclude that the evidence was offered for a proper purpose and logically relevant to show defendant's state of mind – consciousness of guilt – and was not introduced to show propensity. Evidence of (1) flight, *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995), (2) exculpatory statements later proven to be false, *People v Arnold*, 43 Mich 303, 305-306; 5 NW 385 (1880), (3) a defendant's efforts to influence or coerce the witnesses against him, *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981), and (4) attempting to procure false witnesses, *People v Ranes*, 58 Mich App 268, 272; 227 NW2d 312 (1975),[1] have all been admitted as relevant and probative evidence on a consciousness of guilt theory.

Although the language was drafted well over a century ago, the following statements by Justice Cooley in our Supreme Court's decision in *Arnold*, *supra* at 305-306, remain just as relevant today as they were in 1880:

> It was never doubted that the conduct of a suspected party, when charged with a crime, may be put in evidence against him, when it is such as an innocent man would not be likely to resort to. Thus, it may be shown that he made false statements for the purpose of misleading or warding off suspicion. Though these are by no means conclusive of guilt, they may strengthen the inferences arising from other facts. So it may be shown that the accused fled to escape arrest, or broke jail, or attempted to do so, or offered a bribe for his liberty to his keeper. These are familiar cases and rest in sound reason. But the case of deliberate fabrication of evidence, or of attempt in that direction, would seem to be still plainer . . . .

[1] Fabrication of evidence by bribery, spoliation, or similar conduct is admissible to show a consciousness of guilt. *Ranes*, *supra* at 272.

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> In [one case], anonymous letters written by defendant to mislead the officers were received as bearing upon his guilt. All these attempts to avoid a trial, to evade conviction by frauds upon the law, or to lead suspicion and investigation in some other direction by false or covert suggestions or insinuations, are so unlike the conduct of innocent men that they are justly regarded as giving some evidence of a consciousness of guilt. They do not prove it, but the jury are entitled to consider and weigh them in connection with the more direct evidence. [Citations omitted.]

We hold that attempting to create a false defense is evidence of a guilty conscience just as fleeing the jurisdiction to avoid arrest or procuring false witnesses to avoid conviction is evidence of a guilty conscience. Defendant fabricated evidence in a failed effort to mislead the police. An innocent man would not likely resort to suggesting to law enforcement officials that someone set fire to his home because he filed a lawsuit and then stage the shooting of his vehicle to make it appear as though this defense were true. We note that, had police not been able to connect the shooting of the car to a gun owned by defendant, defendant would most certainly have demanded admission of the evidence to deflect guilt away from him and toward an unknown perpetrator.

Additionally, the admission of the car shooting incident did not unfairly prejudice defendant. In *McGhee, supra* at 613-614, this Court observed:

> The third criterion is whether the danger of undue prejudice from the other-acts evidence substantially outweighed its probative value. All relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded. Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury. 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. [Citations and internal quotation marks omitted.]

Here, the challenged evidence was highly probative of defendant's identity as the perpetrator. It tended to show that defendant burned his house, as opposed to someone else, by proving his state of mind – consciousness of guilt. The other-acts evidence did not inject considerations extraneous to the merits of the case. There was no error in admitting the evidence.

Next, defendant argues that the trial court's instructions to the jury were erroneous and deprived him of a fair trial. This Court reviews claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). We must read jury instructions as a whole rather than extracted piecemeal to determine error, and even if the instructions are somewhat imperfect, "instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.* Defendant's instructional challenges could easily have been avoided by use of the standard criminal jury instructions; however, that being said, we find no basis warranting reversal. We have examined each one of the instructions

challenged by defendant and find that the trial court's self-styled instructions were sufficiently accurate in conveying the relevant legal principles to the jury and that, to the extent that they were somewhat imperfect and deviated from the standard instructions, the instructions still fairly presented the issues to be tried and protected defendant's rights. Reading the instructions as a whole, defendant was not deprived of a fair trial.

Finally, defendant argues that the prosecution committed misconduct requiring reversal by making improper comments about the burden of proof and defendant's Fifth Amendment right not to testify. We review preserved claims of prosecutorial misconduct de novo, *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001), to determine whether a defendant received a fair and impartial trial, *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). The defendant receives a fair and impartial trial so long as the misconduct did not result in prejudice. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

We have reviewed the challenged remarks and are particularly troubled by the following comments made by the prosecutor:

> He [defendant] gets arrested . . . . [He says] [s]omeone is out to get me. . . . But, then he doesn't give you the courtesy, the decency of coming up here and explaining why this happened. Why it didn't happen. Dispute it. Prove it didn't happen. Prove it wasn't him.

To effectuate a defendant's Fifth Amendment right not to testify, "no reference or comment may be made regarding [the] defendant's failure to testify." *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995), citing *Griffin v California*, 380 US 609; 85 S Ct 1229; 14 L Ed 2d 106 (1965); MCL 600.2159 ("A defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect."). When the prosecutor in the case at bar referred to defendant not having the decency or courtesy "of coming up here," it was clearly a reference to defendant's failure to take the stand, and this inappropriate remark was followed up by commentary lambasting defendant for not proving or disproving his position. The remarks were entirely improper.

Despite our dismay with the prosecutor, we are not prepared to hold that the offensive comments warrant reversal. The trial court instructed the jury to decide the case based only on the law and on all the evidence presented. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008) (jurors are presumed to follow their instructions). The trial court further explained that the lawyers' statements are not evidence. In addition, the trial court instructed the jury to presume defendant innocent until proven guilty beyond a reasonable doubt and not to use defendant's choice not to testify against him. Moreover, there was strong evidence of guilt. In sum, taking into consideration the entire record, we conclude that defendant received a fair and impartial trial, as he was not prejudiced by the improper remarks.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Stephen L. Borrello