STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 29, 2010
v	No. 291721 Lapeer Circuit Court
SCOTT PHILIP LARKIN, Defendant-Appellant.	LC No. 08-009736-FH

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Defendant was found guilty by a jury of breaking or entering a vehicle causing damage, MCL 750.356a(3), and was sentenced as a fourth habitual offender, MCL 769.12, to 2-½ to 10 years' imprisonment. He appeals as of right. We affirm.

Defendant was convicted of the April 2008 breaking and entry of a Jeep Grand Cherokee and the theft of a purse from inside. The Jeep was owned by an employee of the Lapeer Regional Hospital and was parked in the employee area of the hospital parking lot. Surveillance tape from a security camera that continually panned the parking lot showed defendant and his pickup truck next to the Jeep but did not capture the Jeep's window being smashed or the purse being taken. During the investigation of the B&E, it was discovered that defendant worked at a local auto parts business. When questioned about the incident, defendant acknowledged being the one on the videotape but claimed he was in the parking lot to ask directions while making a delivery. The stolen purse was discovered the next day in the dumpster of a business that was along the route of defendant's deliveries.

At trial, a retired Michigan State Police trooper testified, as permitted by the ruling of the trial court at a pretrial hearing, regarding other similar acts involving defendant. Specifically, the trooper testified about numerous incidents in 2002 in which defendant used a steel punch to smash the windows of vehicles that were parked in "out of the way places" and took purses or other items from inside. The purses were normally discarded near the sites of the B&Es but with the money or ATM cards missing. With the trial court's permission, the prosecutor also read redacted portions of a transcript in which defendant pleaded guilty to a vehicle B&E. But the court prohibited the prosecutor from introducing evidence of a 1982 vehicle B&E in which a stereo and speakers were stolen. The trial court instructed the jury on the charged offense and provided a limiting instruction concerning the other acts evidence.

On appeal, defendant first argues that the prosecution did not present sufficient evidence to satisfy the due process standard of proving his guilt beyond a reasonable doubt of breaking or entering a vehicle causing damage, MCL 750.356a(3). We disagree.

In a claim concerning sufficiency of the evidence, this Court reviews de novo the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 420-421; 646 NW2d 158 (2002); *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended on other grounds by 441 Mich 1201 (1992).

Satisfactory proof of the elements of the crime can be shown by circumstantial evidence, and the reasonable inferences arising from that evidence. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences fairly can be drawn from the evidence and the weight to be accorded to those inferences. *Hardiman*, 466 Mich at 428. The jury may make its decision on inferences based on the facts presented. *Id*. An inference may be properly based on another inference so long as the inferences remain reasonable. *Id*. at 425-428. The "rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends upon another reasonable inference; rather the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt." *Id*. at 425-426, quoting *Dirring v United States*, 328 F2d 512, 515 (CA 1, 1964).

Defendant argues there was insufficient proof, even when the evidence is viewed in a light most favorable to the prosecution, to permit the jury to conclude beyond a reasonable doubt that he was the one who broke into the Jeep and stole the purse from inside. The thrust of defendant's argument is that his mere presence in the vicinity of the crime scene does not amount to sufficient evidence that he committed the crime, especially since there was no evidence as to when the crime occurred. We hold, however, that the series of still photographs taken from a video surveillance camera provided ample circumstantial evidence that defendant was the perpetrator of the crime. Defendant admitted to being the person near the Jeep in the photos. No other persons were seen in the immediate area of the break-in. Taken in sequence, the surveillance photos showed (1) defendant's truck parked north of the Jeep and defendant standing near the passenger side of the Jeep, (2) defendant past the Jeep and moving toward his truck, (3) the truck parked directly in front of the Jeep with the driver's door open and defendant again at the passenger side of the Jeep, facing the truck, and (4) defendant near the open door of the truck. A fifth photo showed the location of the hospital in relation to the places defendant made deliveries on April 16, 2008, as well as the location of the business where the purse was found in a dumpster. As the prosecution noted, those locations were in a geographic line with each other and the auto parts dealer that employed defendant. Although there was no direct evidence of defendant's involvement in the B&E, such as fingerprints, the photos permitted a reasonable inference that he had the opportunity to smash the Jeep's window and remove the purse. *Hardiman*, 466 Mich at 422, 430. Because the jury could "reasonably draw the inferences that it did," the evidence, considered with those inferences, was "sufficient to establish defendant's guilt beyond a reasonable doubt." *Id*. at 430-431. And even though the police did not interview any construction workers who were in a different area of the parking lot, "the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but merely introduce evidence sufficient to convince a reasonable jury in the face of

whatever contradictory evidence the defendant may provide." *People v Nimeth*, 236 Mich App 616, 623; 601 NW2d 393 (1999).

Finally, the "bad acts" evidence permitted under MRE 404(b), which showed that defendant acted in accordance with past practices or schemes used in similar B&Es, provided further evidence to support his conviction.[1] Evidence of defendant's other bad acts, when taken in conjunction with the surveillance photos and testimony by witnesses with respect to his activities on the day of the incident, was sufficient to permit the jury to conclude beyond a reasonable doubt that defendant committed the instant B&E. *Hardiman*, 466 Mich at 429.

Defendant next argues that the trial court reversibly erred in admitting evidence of his prior bad acts under MRE 404(b). We disagree.

This Court reviews the trial court's admission of prior acts evidence under MRE 404(b) for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). The Court will reverse the defendant's conviction only when there has been a clear abuse of that discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). "However, decisions regarding the admission of evidence frequently involve preliminary questions of law, *e.g.*, whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo." *Lukity*, 460 Mich at 488.

MRE 404(b)(1) sets forth the standards for the admission of other acts evidence and provides as follows:

> Evidence of other crimes, wrong, 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, 65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), our Supreme Court held that, in general, MRE 404(b) is a rule of inclusion, and "prior bad acts" are only excluded from evidence if "offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." To be admissible, the evidence must (1) be offered for a proper purpose, (2) be relevant, and (3) "its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense." *People v Magyar*, 250 Mich App 408, 413-414; 648 NW2d 215 (2002), citing *VanderVliet*, 444 Mich at 74-75.

[1] As discussed *infra*, admission of this evidence was proper under MRE 404(b).

In the instant case, the prosecutor sought permission at the pretrial hearing to admit evidence of (1) a 1982 matter in which defendant had pleaded guilty to breaking or entering into a vehicle for the purpose of stealing a stereo and speakers, (2) a series of vehicle break-ins in 2002 for which defendant was currently on parole, and (3) a transcript of defendant's guilty plea related to one of the 2002 incidents. The prosecutor stated that a police trooper had investigated possibly hundreds of different B&Es from automobiles involving defendant and, although the trooper would not be asked to testify to all of the investigations, the prosecutor wanted to admit evidence of several incidents for the purpose of showing a common scheme or plan. The trial court ruled to allow evidence of the 2002 vehicle B&Es as well as a redacted version of the guilty plea transcript, but excluded evidence of the 1982 vehicle B&E.

Defendant argues that the type of crime at issue and the methods allegedly used by him in the past were too common to establish a scheme or plan and were not "unusual" enough to establish a "signature" that would identify him as the perpetrator of the charged crime. Defendant pleaded not guilty to the charged offense, thus putting all of the elements of the crime, including the question of the identity of the perpetrator, at issue. *Crawford*, 458 Mich at 389; *VanderVliet*, 444 Mich at 78; *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976) (holding that identity is an "essential element" of a criminal prosecution). The identity of the perpetrator may be inferred through a common scheme, plan, or intent, or "modus operandi." *VanderVliet*, 444 Mich at 66-67. Under these circumstances, "the jury focuses on the defendant's modus, not predisposition, to infer that the same person committed both acts." *Id*. at 67 n 18. Because defendant was not seen breaking the window of the Jeep or holding the purse, nor was the purse or any of its contents found with defendant, the identity of the perpetrator was at issue in the case, making evidence of defendant's prior acts highly probative.

VanderVliet supplanted the test set forth in *People v Golochowicz*, 413 Mich 298, 308-309; 319 NW2d 518 (1982), for admissibility of evidence under MRE 404(b), although this Court has held that the *Golochowicz* test remains valid when a prosecutor seeks to introduce evidence of other acts to show identification through modus operandi. *People v Smith*, 243 Mich App 657, 670; 625 NW2d 46 (2000); *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998). *Golochowicz* set forth the "general rule" that

> if the evidence of the accused's identity as the perpetrator of the crime in question is strong or essentially uncontroverted, there is no need for evidence of other crimes to prove identity, which evidence is only circumstantial at best. On the other hand, if evidence of the identity of the criminal actor is weak and tenuous, revelation that he has committed an unrelated similar crime may, by reason of its tendency to distract the jury from the identification issue, tempt it to compromise or ignore that critical element of the case while focusing on the clearer proof of the defendant's other misconduct. The dangerous result may well be, and indeed is likely to be, the jury's conclusion that whatever the strength of the identification evidence in the case, the defendant is demonstrably a bad person and should be imprisoned anyway.
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> It is, at least in part, for those reasons that the trial court, when similar-acts evidence is offered to prove *identity*, should insist upon a showing of a high degree of similarity in the manner in which the crime in issue and the other crimes were committed. [*Id*. at 325 (emphasis in original).]

Later cases acknowledge, however, that *VanderVliet* modified the "high degree of similarity" standard for other acts evidence. "[E]vidence 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." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). See, also, *People v Knox*, 469 Mich 502, 511; 674 NW2d 366 (2004) (rejecting an interpretation of *Sabin* that "would have required an impermissibly high level of similarity between the proffered other acts evidence and the charged acts").

In the case at bar, there was substantial evidence that defendant committed the prior bad acts that were introduced into evidence. Defendant pleaded guilty to, and was on parole for, a 2002 breaking or entering offense in Saginaw County, and the jury in this case heard portions of a transcript of that plea. In addition, the jury heard testimony from a retired state trooper who had been involved in the surveillance and arrest of defendant for similar B&Es in which women's purses had been stolen from vehicles.

In terms of similarities of the crimes, the incidents all involved vehicle windows being smashed quickly, apparently by an unobtrusive object like a window punch, and the thefts of small objects of value, such as purses or wallets, from within. The crimes tended to occur in parking lots of institutional business and "out of the way" places like funeral homes, churches and, as in this case, a hospital. Defendant would enter a parking lot and move about, "casing" the vehicles until a valuable item was spotted. Cash or ATM cards were removed from the purses or wallet and were discarded near the sites where the incidents took place. While each circumstance in itself may be, as defendant argues, too common to establish any type of scheme or "signature," when viewed together, the offenses present a similar pattern or special quality of the bad act tending to prove defendant's identity. *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998); *Smith*, 243 Mich App at 670.

In terms of the third prong of *Golochowicz*, or the relevance factor in *VanderVliet*, these factors are highly material to the determination of defendant's guilt in the instant case. *Smith*, 243 Mich App at 670. As in *Ho*, there were no eyewitnesses in the instant case to testify that defendant was seen breaking into the Jeep and either removing or carrying away the purse from inside. The nature of the video captured in the hospital parking lot shows that defendant was twice near the vehicle, but does not demonstrate definitively that he committed the act. The evidence of defendant's prior acts showed that he had committed similar offenses in areas and under conditions like those of the instant crime. The prior acts evidence was "logically relevant" because it had the "tendency to prove who committed the charged offense" in the hospital parking lot. *Smith*, 243 Mich App at 674. The evidence permitted an intermediate inference that defendant entered the hospital parking lot not only to ask for directions but to look for valuable articles left in vehicles. This, in turn, permits an ultimate inference that, having found an opportunity, defendant was the person who smashed the Jeep's window and took the purse from inside.

Defendant argues this evidence was more prejudicial than probative, and that his "mere presence" in the parking lot near the Jeep was not enough to support his conviction. Although the trial court did not provide detail on how it balanced the probative value of this evidence with its prejudicial effect, it stated that it did so under *VanderVliet*. Furthermore, the "Supreme Court

has never required the trial court[] to make this determination on the record." *Smith*, 243 Mich App at 675, quoting *People v Vesnaugh*, 128 Mich App 440, 448; 340 NW2d 651 (1983).

Finally, the trial court "cushioned" the prejudicial effect of evidence of defendant's prior B&Es by instructing the jury that the evidence could only be considered to determine that defendant used a plan, system, or characteristic scheme, and not for any other purpose, such as showing that he was a bad person and therefore likely to commit the crime. The trial court also noted that the question of prior conduct had been raised with the jury during voir dire and that the defense had the opportunity to question and caution prospective jurors about convicting defendant on the basis of past actions. Further, the record indicates that the trial court considered other evidence in the case, such as the hospital parking lot photographs, in determining whether to permit introduction of the similar acts evidence under MRE 404(b). These measures demonstrate that the trial court appropriately balanced the probative value of the evidence against the danger of unfair prejudice and found that the latter did not outweigh the former. See *Ho*, 231 Mich App at 187.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald