STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 19, 2010
v	No. 292193 Lapeer Circuit Court
BILLEY JAMES CHOATE, Defendant-Appellant.	LC No. 07-009405-FH

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to eight to 20 years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant initially urges this Court to vacate his conviction on the ground that the prosecutor failed to prove that the crime occurred in Lapeer County, and that the circuit court thus lacked jurisdiction to convict him of the crime. The Lapeer County Prosecutor charged defendant with an August 4, 2006 breaking and entering of a residence located at "7720 Burnside Road, Brown City, Lapeer County." Several witnesses confirmed at trial the address where the break in occurred, but no witnesses specifically testified that the residence sat within Lapeer County. Defense counsel moved for a directed verdict, alleging that "there is no evidence submitted that this crime occurred in Lapeer County." The trial court denied the defense motion, explaining as follows:

> The testimony was that on several occasions the testimony was that the specific address of the break-in was 7720 Burnside Road, Brown City, Michigan, Lapeer County. Again, there's a Brown City mailing address but it is within the County of Lapeer. The victims themselves never said Lapeer County. They continued to refer to Burnside Road and their address.
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> I believe the officer did indicate that he went out to the Burnside Road address in the County of Lapeer but the Court will take judicial notice that 7720 Burnside Road is within the County of Lapeer and not within Sanilac County, so your motion for improper venue is considered and denied for a directed verdict.

This Court reviews for an abuse of discretion a trial court's decision whether to take judicial notice of adjudicative facts. *Freed v Salas*, 286 Mich App 300, 341; 780 NW2d 844 (2009).

The Michigan Rules of Evidence sanction judicial notice of facts when the fact "judicially noticed . . . is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201(b). The trial court inaccurately recalled the trial testimony, which did not specifically note that 7720 Burnside Road was situated in Lapeer County. But the trial court acted within its discretion when it took judicial notice of the county in which 7720 Burnside Road is situated, namely Lapeer County, because the county within which the break in took place is readily and accurately ascertained by resort to atlases or maps, "sources whose accuracy cannot reasonably be questioned." MRE 201(b); *Freed*, 286 Mich App at 341. However, the trial court did not satisfy the requirement in MRE 201(f) that "[i]n a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed."

Yet any error relating to the proof of venue at defendant's trial or the trial court's neglect to inform the jury of its taking of judicial notice regarding the situs of the crime remains subject to harmless error evaluation, according to the Michigan Supreme Court's decision in *People v Houthoofd*, ___ Mich ___; ___ NW2d ___ (Docket Nos. 138959, 138969, decided July 31, 2010). In *Houthoofd*, the Supreme Court found that none of the acts comprising the defendant's charged crimes had taken place in Saginaw County, the situs of the defendant's trial. *Id*., slip op at 9-16. The Supreme Court next considered "whether statutory venue error in criminal prosecutions is subject to a harmless error analysis under MCL 769.26." *Id*., slip op at 16. In pertinent part, the Supreme Court, analyzed the nature of the improper venue:

> . . . [W]e must first examine whether statutory venue error is a constitutional error in order to determine the applicable standard of review. In *People v Lee*[, 334 Mich 217, 225; 54 NW2d 305 (1962),] this Court recognized that "[i]n the absence of any limitation by constitutional provision, it seems to be generally recognized that the power of a State legislature to fix the venue of criminal prosecutions in a county or district other than that in which the crime was committed is unrestricted." . . . The Court noted that there was no explicit venue mandate in the Michigan Constitution of 1908. . . . and this omission carried over to the . . . 1963 Constitution[]. *Thus, Michigan's constitution only requires that a defendant's constitutional right to a fair and speedy trial before an impartial jury be preserved, and does not require that the jury trial be in the county where the crime occurred; as a result, statutory venue error is not a constitutional error*. [*Houthoofd*, slip op at 17-19 (footnotes omitted, emphasis added), citing Const 1963, art 1, § 20.][1]

[1] To the extent that the instant defendant premises his venue-related claim of error on provisions of the United States Constitution, "'By the provisions of the Federal Constitution, criminal trials must take place in the State and district wherein the crime was committed, but it was long ago determined that these provisions apply only to prosecutions in Federal courts.'" *Lee*, 334 Mich
(continued…)

Given that the defendant in *Houthoofd* had preserved his claim of venue error, slip op at 17, the Supreme Court scrutinized as follows whether the error warranted reversal of the defendant's convictions:

> This Court has held that the standard of review for preserved nonconstitutional error places the burden on the defendant to establish a miscarriage of justice under a "more probable than not" standard in order to warrant reversal. This generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. Defendant has not established prejudice for the witness intimidation or solicitation charges. With respect to the witness intimidation charge, defendant has proffered no argument that it is more probable than not that the outcome of the trial would have been different had he been prosecuted in another county, nor has he shown that he was deprived of a fair trial by an impartial jury. With respect to the solicitation charge, defendant argues that he was prejudiced because the prosecutors in Arenac County had declined to prosecute him on that charge. However, this is not the same as arguing that it is more probable than not that the outcome of the case would have differed had he been tried in Arenac County. MCL 769.26 requires a miscarriage of justice in order to warrant reversal. Defendant received a fair trial before an impartial jury, and it cannot be argued that there was a miscarriage of justice simply because the trial was in Saginaw County. *Therefore, defendant has not meet his burden of proof to establish that, more probably than not, there was a miscarriage of justice by trying him for witness intimidation and solicitation to commit murder in Saginaw County. Thus, we hold that lack of proper venue is subject to a harmless error and that the venue error did not undermine the reliability of the verdicts. Accordingly, defendant did not suffer a miscarriage of justice and his convictions for witness intimidation and solicitation to commit murder should not be vacated.* [*Id*., slip op at 20-21 (footnotes omitted, emphasis added).]

The Supreme Court additionally highlighted that the "defendant's convictions should not be vacated because the Legislature has provided, in MCL 600.1645, that '(n)o order, judgment, or decree shall be void or voidable solely on the ground that there was improper venue.'" *Id*., slip op at 21.

In this case, defendant on appeal offers no argument or suggestion that the purportedly improper venue in Lapeer County either adversely affected his right to a trial by an impartial jury or otherwise prejudiced his right to a fair trial in any respect. Consistent with *Houthoofd*, slip op at 20-21, we conclude that any venue-related error in this case amounted to harmless error because defendant "has not meet his burden of proof to establish that, more probably than not, there was a miscarriage of justice by trying him" in Lapeer County.

(…continued)

at 224, quoting 14 Am Jur, pp 929-930, citing *Burton v United States*, 202 US 344; 26 S Ct 688; 50 L Ed 1057 (1906).

II

Defendant next avers that the prosecutor introduced insufficient evidence of his identity as the culprit of the charged home invasion. "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial." *Id*. at 400.

Although no physical or other direct evidence linked defendant to the August 2006 home invasion of 7720 Burnside Road, ample properly admitted circumstantial evidence supported his home invasion conviction. Steven Williams, his wife, and two sons moved into the rental home at 7720 Burnside Road in 2005. The trial testimony of Williams and his former wife, Denise Fleming, reflected that they shared a friendly relationship with defendant at the time of the home invasion. Williams and Fleming described that they had regular contact with defendant, whom Fleming had known for many years; Williams, Fleming, the children and defendant frequently spent time together, had cookouts, and helped each other with various tasks. Defendant thus had visited 7720 Burnside Road on multiple occasions. In the evening of Friday, August 4, 2006, Williams and Fleming drove north to Wolverine for the weekend. Before leaving, Williams and Fleming closed and locked the windows and doors of 7720 Burnside Road, and arranged for the children to stay with Williams's parents. According to Williams, only his parents, the landlord, his employer, and defendant and his then fiancée, Farrah Fleming, Denise Fleming's sister, knew of Williams's and his wife's planned trip to Wolverine.

When Williams and Denise Fleming returned to 7720 Burnside Road in the early evening of Sunday, August 6, 2006, they found the front door ajar. They called the police after further inspection revealed that almost the entire home and the garage had been ransacked. Williams catalogued at length the long list of equipment, tools, firearms, and other objects stolen from the residence. On August 6, 2006, Williams gave the police defendant's name as a potential suspect or person with knowledge of the home invasion. Williams explained that he could identify no enemies or other potential suspects, and that "just the way my house was broken into. . . . just that my house was went [sic] through a certain way that somebody knew what they were doing, they'd been there before, and they took specific items that in my opinion that . . . were easily . . . taken and gotten rid of." Williams later reiterated at trial that he suspected defendant because the "house was gone through a certain way and just the way my things had be [sic] taken and the way the house had be [sic] gone through just I had an indication that I guess maybe just a personal indication." Williams added that defendant had not appeared to pick up his fiancée's daughter as scheduled on Friday, August 4, 2006, before Williams and his wife went north, and that he had increased suspicions about defendant's involvement when defendant uncharacteristically failed to contact Williams or his family after the home invasion.[2] On August

[2] In Williams's words, "[W]e'd seen each other and heard from each other on a daily basis prior to that happening and I figured if you're as good friends as we were and as close as our families were that he might have wanted to stop by to see how we were doing and that never happened."

7, 2006, Farrah Fleming drove to 7720 Burnside Road to visit, and Williams spotted many tools belonging to him on the floor of her car. Farrah Fleming testified that she did not see defendant much over the course of the prior weekend, long stretches of which defendant spent away from their home.

Michigan State Police Trooper Steven Anthony Kramer recounted his trips to 7720 Burnside Road on August 6, 2006 and August 7, 2006. Kramer discovered on August 6, 2006 two "very faint" sets of double tire prints on the lawn, and "a boot print of some type" "on the back door which was kicked in to gain entry into the residence" and "in the garage on a piece of . . . board." However, Kramer never identified matches for either the tire or boot prints. Kramer dusted several areas of the residence and the garage for fingerprints and recovered some, but none of the fingerprints matched anyone identifiable. Kramer interviewed "the only neighbor that would have had a direct view of the residence," but gained no useful information from her. Kramer tried unsuccessfully on multiple occasions to contact defendant in the months after the home invasion. Michigan State Police Trooper Ted Stone ultimately interviewed defendant in the Lapeer County Jail in December 2006. Trooper Stone reviewed Trooper Kramer's reports before questioning defendant. Trooper Stone recited the following details from his interview:

> *Stone* Initially he just said he knew what I wanted to talk to him about or about the incident but that he didn't have anything to do with it.
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> * * *
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> We spoke about the fact that Trooper Kramer had been trying to get a hold of him for a while . . . . He indicated to me that he knew the police wanted to talk to him when they would pull into his driveway and he's [sic] look out his front window and then go back and hide in the house. He didn't want to speak to the police because he had warrants and didn't want to go to jail . . . .
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> He . . . made a comment, I don't believe I asked him a question but he made a comment he doesn't even own a pair of boots.
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> * * *
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> *Prosecutor*: Is that statement by Defendant in response to a question by you or did—
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> *Stone*: No, there was no question about that. . . .
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> * * *
>
> He basically just told me "I don't even own a pair of boots."
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> * * *
>
> I did ask him where he was the date of the incident and he told me he was at home.
>
> * * *

> . . . He had indicated, again without any prompting, that if his fingerprints were found in the home it's because he had been there before. Again, I didn't ask him about that.

The testimony reasonably tending to establish defendant's participation in the home invasion showed that (1) defendant was one of very few people who knew of Williams's and his wife's plans for a weekend getaway beginning on August 4, 2006; (2) defendant had a high degree of familiarity with 7720 Burnside Road and the wealth of equipment and tools stored there; (3) some of Williams's tools appeared in a car that defendant regularly drove; (4) defendant behaved distantly and differently toward Williams and his family on the weekend of August 2006 and thereafter; and (5) defendant later volunteered to the police his claim that he did not own any boots, which declaration reasonably suggests his knowledge that the home invader had left boot prints at 7720 Burnside Road. Standing in isolation, the facts enumerated above would not suffice to prove defendant's participation in the home invasion. However, viewing the evidence together, and "in a light most favorable to the people," drawing all reasonable inferences and making credibility choices in support of the jury verdict, we conclude that the evidence and inferences warranted the jury's reasonable finding beyond a reasonable doubt that defendant committed the early August 2006 home invasion at 7720 Burnside Road. *Nowack*, 462 Mich at 399-400.[3]

III

Defendant lastly challenges the propriety of the trial court's ruling to admit other acts evidence under MRE 404(b). This Court reviews for a clear abuse of discretion a trial court's decision whether to admit evidence. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

MRE 404(b)(1) prohibits the admission of evidence of a defendant's other acts or crimes when introduced solely for the purpose of showing the defendant's action in conformity with his criminal character. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). But evidence of a defendant's other acts or crimes qualifies as admissible under the following circumstances: (1) the prosecutor offers the evidence for a proper purpose under MRE 404(b)(1), including to prove the defendant's "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"; (2) the other acts evidence satisfies the definition of logical relevance within MRE 401; and (3) any unfair prejudice arising from the admission of the other acts evidence does not substantially outweigh its probative value, MRE 403. *Starr*, 457 Mich at 496; *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003).

Before trial, the prosecutor filed a motion to introduce under MRE 404(b) evidence that defendant had broken and entered a garage in 2007 and broken into an electronics store in 1989. The prosecutor theorized that the other acts evidence showed defendant's "preparation, common

[3] Defendant does not specifically contest the sufficiency of proof of the other mandatory home invasion elements. Nonetheless, our review of the record reveals substantial proof of the requisite first-degree home invasion elements. MCL 750.110a(2); *People v Wilder*, 485 Mich 35, 42-43; 780 NW2d 265 (2010).

scheme, plan or system in doing an act," specifically that defendant "forces entry into buildings that he knows for certain are unoccupied, with the intent to commit a larceny." The trial court granted the prosecutor's motion in part and denied it in part, reasoning in pertinent part:

> In the case at bar the prior incident that occurred in 1989 of forcing entry into a building the defendant knows for certain is unoccupied, mirror the conduct at issue before this Court. In other words, the house was vacant at the time the alleged B and E took place. Hence, this Court finds this evidence is logically relevant to several issues other than establishing a propensity for wrongdoing and it is, therefore, admissible under MRE 404(b) as long as the evidence in question is not being used to show action in conformity with character it is admissible. . . . Again, in the case at bar similar act evidence was offered to show a plan or scheme to establish the absence of mistake. These are permissible purposes and since one cannot look into the human mind, what one intends must usually be deduced from what one does.
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> Furthermore, the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice. "Prejudice inures when marginally probative evidence would be give undue or preemptive weight by the jury."
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> * * *
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> The complained of actions established . . . defendant's modus operandi or pattern of action and the unlikeness [sic] of any coincidence or misrecollection on behalf of the immediate victim. Furthermore, although . . . Defendant may be prejudiced by the admission of this evidence, the Court will take great precautions by repeatedly instructing the jury concerning the proper consideration of other bad acts evidence and will give an instruction thereto.
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> However, this Court also finds that this alleged incident on January 14, 2007 has no relevance to the charge [in] th[is] case. Although the padlock on the building was found broken, it was not determined anything was missing and the police report does not indicate the neighbor observed anything in the open truck . . . Defendant was operating. Therefore, the Court will exclude any reference to the alleged incident that may have taken place on January 14, 2007.

With respect to evidence offered to prove the existence of a common plan, scheme, or system, the Michigan Supreme Court has explained as follows:

> Today, we clarify that 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. Logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot.

In describing the degree of similarity necessary to support the presence of a common plan, scheme, or system, the Supreme Court in *Sabin*, 463 Mich at 65-66, elaborated in relevant part as follows:

> In [*People v Ewoldt*, 7 Cal 4th 380, 402-403; 867 P2d 757 (1994),] the Supreme Court of California provided guidance for ascertaining the existence of a common plan used by the defendant to commit the charged and uncharged acts. As *Ewoldt* explains, the necessary degree of similarity is greater than that needed to prove intent, but less than that needed to prove identity.
>
> "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. For example, evidence that a search of the residence of a person suspected of rape produced a written plan to invite the victim to his residence and, once alone, force her to engage in sexual intercourse would be highly relevant even if the plan lacked originality. In the same manner, evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. 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."

The evidence of defendant's 1989 breaking and entering of the electronics retailer in the early morning hours and the facts surrounding the instant breaking and entering of 7720 Burnside Road share some marked similarities, primarily that defendant broke and entered in each case buildings that he knew were unoccupied. The list of similarities is not extensive and the record demonstrates some dissimilarities between the two robberies, including that one occurred at a retail establishment rather than a residence. However, if "reasonable persons could disagree on whether the charged and uncharged acts contained sufficient common features to infer the existence of a common system used by defendant in committing the acts," "the trial court's decision on a close evidentiary question such as this one ordinarily cannot be an abuse of discretion." *Sabin*, 463 Mich at 67. "We therefore conclude that the trial court did not abuse its discretion in determining, under the circumstances of this case, that the evidence was admissible under this theory of logical relevance." *Id*. at 67-68. Furthermore, the trial court did not abuse its discretion in finding no risk of unfair prejudice that substantially outweighed the probative value of the 1989 breaking and entering evidence. Given the probative value inherent in the other act evidence and the prosecutor's brief presentation of the other act evidence, which spanned a total of 10 transcript pages, the trial court correctly found minimal likelihood "that marginally probative evidence will be given undue or preemptive weight by the jury." *Ackerman*, 257 Mich App at 442 (internal quotation omitted).

Even assuming that the trial court abused its discretion when it deemed the 1989 breaking and entering relevant toward proving a common plan, scheme, or system employed by defendant in committing the home invasion of 7720 Burnside Road, it does not "'affirmatively appear' . . . more probable than not that the error was outcome determinative," *People v Lukity*, 460 Mich

484, 496; 596 NW2d 607 (1999), quoting MCL 769.26, in light of (1) the properly admitted evidence of defendant's guilt; (2) the brief presentation at trial of the other act evidence and the prosecutor's similarly brief closing argument references to the other acts evidence[4]; and (3) the trial court's cautionary instruction to the jury about the limited consideration it could give the other act evidence, specifically that it could consider the evidence only with respect to "whether . . . [it] tends to show that . . . Defendant used a plan, system, or characteristic scheme that he has used before or since," which instruction tracked CJI2d 4.11. *People v Knapp*, 244 Mich App 361, 380-381; 624 NW2d 227 (2001).

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher

[4] The prosecutor's closing argument references to the 1989 breaking and entering spanned about 2 transcript pages in total.