STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2010
V	No. 294345 Wayne Circuit Court
ALI HUSSEIN AMINE, Defendant-Appellant.	LC No. 09-0100058-FH

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions for operating while intoxicated-third or subsequent offense (OWI), MCL 257.625(1) and (9)(c), and driving while license suspended, MCL 257.904(1).[1] Because the trial court did not abuse its discretion in admitting other acts evidence pursuant to MRE 404(b), we affirm. However, we remand solely for clerical correction of the judgment of sentence.

Defendant argues on appeal that the trial court improperly admitted other acts evidence of a prior OWI arrest. To determine if the trial court improperly admitted the evidence, this Court must review the trial court's decision for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). "Error in the admission of evidence is not grounds for reversal where the error was harmless." *Ullah*, 216 Mich App at 676.

[1] The judgment of sentence correctly identifies defendant's conviction as OWI, third offense, but erroneously indicates the relevant statutory citation as MCL 257.625(6)(d), which is nonexistent. Further, the judgment of sentence also correctly indicates defendant's conviction as driving while license suspended but incorrectly indicates the relevant statutory citation as MCL 257.904(1)(c) which is likewise nonexistent. Consequently, we remand solely for the ministerial purpose of correcting the judgment of sentence to reflect defendant's OWI, third offense conviction pursuant to MCL 257.625(1) and (9)(c) and his driving while license suspended conviction pursuant to MCL 257.904(1). MCR 6.435(A); MCR 7.216(A)(7).

The trial court admitted evidence of defendant's prior OWI arrest under MRE 404(b). MRE 404(b)(1) provides:

> 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, 74; 508 NW2d 114 (1993), the Court established a three-step process for trial courts to use to admit other acts evidence. The evidence must be relevant to an issue other than propensity, relevant under MRE 402 to a fact at issue at trial, and it must survive a MRE 403 balancing process determining if the danger of undue prejudice substantially outweighs the evidence's probative value. *Id.* at 74-75. In addition, "the trial court, upon request, may provide a limiting instruction under Rule 105." *Id.* at 75. "Where the only relevance is to character or the defendant's propensity to commit the crime, the evidence must be excluded." *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998).

The first step in determining the admissibility of other acts testimony is to analyze whether the prosecutor has articulated a non-character purpose for its admission. *Vandervliet*, 444 Mich at 74. The scope of MRE 404(b) "is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot." *People v Sabin (After Remand)*, 463 Mich 43, 64; 614 NW2d 888 (2000). It may also be used if "the defendant allegedly devised a plan and used it repeatedly to perpetrate separate but very similar crimes." *Id.* at 63 (internal editing marks and quotation omitted).

The prosecution's theory of relevance must not ask the jury to use the other act to make an inference about the defendant's character. *Sabin*, 463 Mich at 64 n 10. The theory must ask the jury to infer the existence of a common system based on the similarity between the prior act and the act charged. *Id.* "General similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Id.* at 64. Instead, 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." *Id.* at 64-65 (emphasis omitted). Alternatively stated, "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." *Id.* at 66 (citation omitted). The plan need not be rare or distinctive, but must provide support for the inference that defendant employed that plan in the charged offense. *Id.* The two incidents may, however, be dissimilar in some respects and still be admissible under MRE 404(b). *Id.* at 67.

The issue presented centers on how similar the prior OWI arrest is to the instant case. In both cases, defendant was intoxicated and sitting in the driver's seat of a car when the police arrived. In both cases, defendant denied that he had been driving the car, stated that the driver was someone close to him, and that person confirmed his explanation. In both cases, the car involved was registered to defendant's father. There are some differences. In the prior case, the

person who allegedly drove the car was actually in the passenger's seat, whereas, here, the alleged driver was not at the scene when the police arrived. In the previous case, defendant was stopped for not wearing a seat belt. In this case, police arrived because defendant's car hit a fire hydrant. Most notably, defendant's defense each time was that a different person had been driving. Because both his sister, in this case, and the friend, in the prior instance, corroborated defendant's story, the chain of relevance for admitting the evidence must include an inference that defendant is capable of convincing people to lie for him.

Despite slight differences between the two incidents, defendant's behavior in both incidents is substantially similar. He reacted to each situation—which was functionally the same because he was faced with the possibility of an OWI arrest—with the same defense. From the incidents' similarities, the jury was able to infer that his present defense was another manifestation of the common pattern defendant employs when discovered drunk behind the wheel of a car. Such an inference does not rely on character evidence, and thus, the trial court did not abuse its discretion in admitting the evidence under MRE 404(b). Defendant's brief even acknowledges "the similarity between the two incidents."

Moreover, weighing in favor of admitting the testimony is that "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Evidence that defendant has lied to a police officer in the past about whether he was the driver of a car presents a more intelligible narrative of the events that occurred. Defendant's sister, Samah Amine, and defendant's girlfriend, Ashley Ellis, gave testimony that was highly improbable and contrary to what Samah had initially told the police. Officer Brenton King's other acts testimony allowed the jury to put defendant's somewhat improbable version of events fully in context.

The second step of the *Vandervliet* analysis is a relevance test under MRE 402. *Vandervliet*, 444 Mich at 74. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible." MRE 402. In the prior incident, King observed defendant move from the driver's seat to the passenger's seat and claim to not be the driver. These facts are highly relevant in this case. If King's testimony is believed, he has personally witnessed defendant fabricating a defense that he was not driving the car while he was intoxicated. Because defendant makes essentially the same claim in the instant case, his prior scheme is relevant to rebut that defense.

Finally, otherwise admissible evidence will be excluded if its probative value is substantially outweighed by the risk of unfair prejudice. MRE 403. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001) (citation omitted). The trial court is in the best position to gauge the prejudicial effect of the testimony. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). MRE 105 provides that "[w]hen evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." MRE 105; see also *Vandervliet*, 444 Mich at 75. We presume juries follow instructions. *People v Dupree*, 486 Mich 693, 711; 788 NW2d 399 (2010).

Because the evidence was admissible for the purpose of establishing a plan or scheme, and the trial court's jury instruction narrowed the scope of the evidence to that purpose, the danger of unfair prejudice did not substantially outweigh its high probative value. The trial court instructed the jury to "use it to decide whether you think that . . . it tends to show that the defendant uses a plan, or scheme, or pattern," and to "not consider this evidence for any other purpose." The jury's focus was thus properly directed to compare defendant's defense at a prior incident with his defense in this case only for the purpose of assessing his defense.

Defendant asserts that the trial court could have done more to minimize the prejudicial effect of his prior OWI arrest. Both MRE 105 and *Vandervliet* specifically provide for the use of a jury instruction to minimize the prejudicial effect of certain evidence on the jury. Nothing in the record indicates that the trial court abused its discretion when instructing the jury as it did.

Affirmed and remanded for ministerial correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald