STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 21, 2011
v	No. 296302 Alger Circuit Court
MARLENA DEE NEVAREZ, Defendant-Appellant.	LC No. 2009-001872-FH

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

Marlena Dee Nevarez worked nights at a Citgo gas station in Munising. When her shift ended, she routinely deposited the evening's proceeds at a nearby bank. One snowy night in January 2009, Nevarez reported to police that a tall man clothed in snowmobile attire had robbed her at gunpoint as she walked to the bank. But when the investigating officer found neither footprints nor snowmobile tracks at the scene of the alleged crime, he turned his suspicions toward Nevarez. Further inquiry revealed that Nevarez had repeatedly shortchanged the Citgo by giving away merchandise or inaccurately ringing up sales. The prosecutor presented this evidence and more to a jury, which convicted Nevarez of larceny from a building and filing a false report of a felony. Nevarez appeals as of right, contending that the trial court improperly admitted the evidence of her other crimes. We affirm.

Nevarez placed a 911 call from the Citgo at 10:03 p.m. on January 17, 2009. She informed the dispatcher that as she walked with the night deposit on her way to the bank, "some guy came up with a gun behind me and told me if I didn't give him the f***ing money, b***h, he called me, that he was going to shoot me." Nevarez described her assailant as "really, really tall," wearing a yellow and black snowmobile jacket and a black helmet. She located the scene of the crime as the parking lot of a Family Dollar store, near an alley between the Harvest House and the Corktown Bar.

Sergeant Dale Boerema of the Munising Police Department happened to be in the room when the 911 dispatcher received Nevarez's call, and Boerema immediately drove to the Family Dollar parking lot. Boerema saw no tracks or other sign of the snowmobiler, so he proceeded to the Citgo. Nevarez again pinpointed the location of the robbery as an alley leading from the Family Dollar parking lot to the Harvest House. Nevarez recalled that her assailant had run from the parking lot toward Elm Street, where she claimed to have lost sight of him. Boerema

returned to the crime scene and looked carefully for tracks in the snow that substantiated Nevarez's story, but found none. Boerema estimated that 12 minutes elapsed between Nevarez's 911 call and his second search for footprints.

Boerema then returned to the Citgo with more questions for Nevarez. Nevarez explained that she had expected Roy Maxon to drive her from the Citgo to the bank, but when he "couldn't make it at the last minute," she decided to walk. After Nevarez reiterated her description of the robber, Boerema suggested that it sounded "a little bit like Greg Bennett," who Boerema had seen inside the Citgo around 8:00 that evening. Boerema knew that Nevarez and Bennett were friends, and Nevarez revealed that she and Bennett "were staying together at Scotty's Motel," about seven blocks distant from the Citgo. Boerema interviewed Bennett at the motel and looked around his room, but found no snowmobile clothing. A few days later, Boerema talked with Maxon, who denied having made any arrangement to drive Nevarez to the bank on the night of the alleged robbery. Maxon revealed that Nevarez subsequently left a message on his cell phone, instructing him to tell the police "that I was supposed to be her ride the day that the alleged robbery happened and that just to let them know, you know, to say that I had forgotten or couldn't do it or whatever."[1]

Weeks later, Boerema reviewed the Citgo's video surveillance recording of the night of the robbery. The tape revealed that Bennett had visited the Citgo several times that evening. His last visit occurred at 9:10 p.m., but at 9:12 p.m., Bennett left the store. Nevarez walked outside approximately 28 seconds later. Nevarez and Bennett spent around three minutes outside, and they reentered the Citgo at 9:16 p.m., within 20 seconds of one another. Bennett finally departed at 9:20 p.m., and Nevarez set out for the bank at 9:56 p.m. She returned to Citgo about seven minutes later to call the police. After reviewing the surveillance recording, Boerema refocused his attention on Bennett. Boerema learned that two days after the robbery, Bennett had paid probation fines and costs that he owed Dickinson County. When a detective interviewed Bennett, he admitted that Nevarez had given him the money to pay his fines and costs.

The prosecutor charged Nevarez with larceny in a building, MCL 750.360, and falsely reporting a felony, MCL 750.411a(1)(b). Before trial, the prosecutor filed a notice of intent to introduce evidence of other wrongful acts committed by Nevarez at the Citgo pursuant to MRE 404(b). The prosecutor averred that Citgo surveillance recordings depicting Nevarez's commission of several small thefts showed an "absence of mistake or accident." According to the prosecutor, evidence that Nevarez "stole repeatedly from her employer in the hours and days before losing the night deposit to an alleged armed robber, is relevant because it renders less likely the possibility that the night deposit was lost as a result of a non-culpable event." Nevarez objected that the evidence would confuse the jury and was "more prejudicial than probative." The trial court allowed the evidence, finding it relevant regarding "the absence of mistake."

At trial, Bennett recounted that, around January 17, 2009, Nevarez had stayed with him for two nights at Scotty's Motel, and she had paid some of the motel bill. During their time together, Bennett shared with Nevarez that he needed money to pay outstanding fees and costs

[1] At trial, the prosecutor played the voicemail message for the jury.

and rent. On the evening of the claimed robbery, Bennett recalled visiting the Citgo several times, making a final appearance there at Nevarez's request. Shortly after Bennett arrived, Nevarez suggested that they go outside to have a cigarette. While they smoked, Bennett and Nevarez "knelt down below the window, and she handed me something and told me to put it away, that she had pulled out from under her jacket." Bennett assumed that they knelt down "to try to avoid the line of sight from the camera inside Citgo." When Bennett returned to the motel, he discovered that Nevarez had passed him a bank bag containing between five and six hundred dollars. Bennett hid the money under his mattress. Nevarez showed up in his room about 15 or 20 minutes after Boerema's visit. Bennett retrieved the money from under his mattress and gave it to her. Nevarez handed him two or three hundred dollars, ran outside to give her mother a share, then returned to the room and "hung out" with Bennett.

Two witnesses who worked in "surveillance" for Citgo testified that in-store surveillance recordings documented that Nevarez had committed several small thefts in the course of her January 17, 2009 shift, and similar thefts on two previous dates. On January 17, 2009, Nevarez placed cigarettes into a customer's bag without scanning them into the register and undercharged others for their merchandise. On earlier dates, Nevarez gave away a bag of groceries, cigarettes and gasoline, and falsified bottle return records. Nevarez had been suspended after the first series of thefts were discovered, and returned to work less than two weeks before she reported the armed robbery.

Nevarez testified on her own behalf, asserting that she and Bennett were "a couple," and had planned to move together to Iron Mountain. Nevarez identified Bennett as the parking lot robber, and claimed that he subsequently confessed his misdeed during a telephone call. According to Nevarez, Bennett robbed her because he needed the money "and he didn't know any other way to get it."

Nevarez contends that the trial court deprived her of a fair trial by admitting evidence of her thefts from the Citgo. We review for an abuse of discretion a trial court's ultimate decision to admit evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). To the extent that an evidentiary ruling "involves a preliminary question of law," we consider this legal question de novo. *Id*. MRE 404(b)(1)[2] 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

[2] According to MRE 404(b)(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.

with her 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 knowledge, preparation, scheme, plan, system of doing an act, or lack of accident or mistake in committing a charged crime; (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. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003). "That the prosecution has identified a permissible theory of admissibility and the defendant has entered a general denial, however, does not automatically render the other acts evidence relevant in a particular case." *Sabin*, 463 Mich at 60. The trial court still must find that the evidence qualifies as material (i.e., related to a fact "at issue" "in the sense that it is within the range of litigated matters in controversy"), and that it has probative force (i.e., "any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence"). *Id.* at 56-57, 60 (internal quotation omitted).

The surveillance footage recorded on the evening of the alleged robbery depicted Nevarez closing the store and leaving with a bank deposit bag in hand. A Citgo surveillance witness testified that Nevarez "followed the procedure right up until the time she left," and appeared to have placed something from the store's safe into the bank deposit bag. Thus, viewed in the abstract, the surveillance recording corroborated Nevarez's version of events. Evidence that Nevarez had previously been suspended on the basis of surveillance footage demonstrated her acute awareness that the cameras recorded every move she made, and supported Bennett's testimony that Nevarez instructed him to kneel down outside the store to avoid video detection. Consequently, the evidence explaining Citgo's detection of Nevarez's prior misconduct tended to establish that she had formulated a plan to circumvent the video cameras, and prepared to commit the larceny by making it appear for the camera that she was leaving the store with a bank deposit bag.[3]

This evidence also satisfied the balancing inquiry incorporated in MRE 403. The other acts evidence had a high level of probative value with respect to Bennett's veracity and Nevarez's employment of a highly specific plan to commit and get away with the larceny, and this probative value was not substantially outweighed by any danger of unfair prejudice. Unfair prejudice arises only 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) (internal quotation omitted). Because the other acts evidence had strong probative force, the trial court did not abuse its discretion in finding no substantial danger of unfair prejudice.

[3] "Where the proponents' theory is not that the acts are so similar that they circumstantially indicate that they are the work of the accused, similarity between charged and uncharged conduct is not required." *People v VanderVliet*, 444 Mich 52, 69; 508 NW2d 114 (1993).

But even if Nevarez could show that the trial court abused its discretion by admitting the other acts evidence, she has not shown a probability that, but for the challenged testimony, the jury likely would have acquitted her. "[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) (footnote omitted), quoting MCL 769.26. The defendant bears the burden of demonstrating that a preserved, nonconstitutional error resulted in a miscarriage of justice. *Id*. at 493-494; see also *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Bennett's testimony, as well as the absence of footprints or other tracks at the alleged crime scene, amply evidence Nevarez's guilt.[4] In light of this evidence, it does not affirmatively appear to us more probable than not that a different outcome would have resulted absent the admission of the other acts evidence.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher

[4] Indeed, in some situations "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Michalic v Cleveland Tankers, Inc*, 364 US 325, 330; 81 S Ct 6; 5 L Ed 2d 20 (1960).