STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 9, 2018
v	No. 337443 Lenawee Circuit Court
JASON MICHAEL FLORES, Defendant-Appellant.	LC No. 15-017743-FH

Before: CAMERON, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] the trial court's order granting the prosecution's motion to use evidence of other acts under MRE 404(b). We reverse.

I. FACTUAL BACKGROUND

On October 25, 2016, an off-duty officer was eating at a restaurant in Adrian, Michigan, when he noticed defendant drinking alcohol in the restaurant. The officer recognized defendant and believed he was a parolee. After confirming with defendant's parole agent that defendant was on parole, the off-duty officer called the Adrian Police Department because defendant was prohibited from drinking while on parole. Two officers were dispatched to the restaurant, and they conducted a pat-down search. They found approximately 83 grams of cocaine in defendant's pocket.

Defendant was charged with possession with intent to deliver between 50 and 450 grams of cocaine, MCL 333.7401(2)(a)(*iii*), and possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*). The prosecution filed a motion to admit evidence under MRE 404(b) of two prior drug-related offenses. In both instances, defendant was arrested while in possession of more than 200 grams of cocaine. At the hearing on defendant's objection to the prosecution's notice of intent to use other acts evidence, two officers testified about the prior offenses.

[1] *People v Flores*, unpublished order of the Court of Appeals, entered July 7, 2017 (Docket No. 337443).

In 2009, a drug unit executed a search warrant at a house that was connected to suspected drug trafficking. The officers arrested defendant in a second-floor bedroom. While defendant did not have cocaine on his person, the officers found heroin, marijuana, cocaine, and packaging supplies throughout the house, including cocaine in the second-story bedroom. Defendant's charges were, however, dismissed as part of a plea bargain.

In 2013, the police executed a search warrant for defendant's residence based on a tip that he was in possession of a cocaine press, a device used to cut and mix cocaine with other agents or chemicals. Defendant was arrested away from his residence at the time of the search of the house. Defendant did not have cocaine on him at the time he was arrested, but the officers found over 400 grams of cocaine in the house and other packaging supplies. Defendant pleaded guilty in 2013 to possession with intent to deliver less than 50 grams of cocaine and maintaining a drug house.

The trial court granted the prosecution's motion to admit evidence of these prior drug-related incidents from 2009 and 2013, finding that the prior offenses were admissible under MRE 404(b) because they were factually similar to the current offense. On interlocutory appeal, defendant argues that the trial court erred because the evidence is inadmissible under MRE 404(b) and MRE 403.

II. MRE 404(b)

Defendant first argues that the prosecution's evidence is barred under MRE 404(b) because it constitutes inadmissible propensity evidence. We agree.

" 'The decision whether to admit evidence falls within a trial court's discretion and will be reversed only when there is an abuse of that discretion.' " *People v Jackson*, 498 Mich 246, 257; 869 NW2d 253 (2015) (citation omitted). An abuse of discretion by the trial court occurs where the trial court incorrectly interprets a rule of evidence, *id.*, and "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). This Court "review[s] such questions of law de novo." *Jackson*, 498 Mich at 257.

In order for evidence of other acts to be admissible under MRE 404(b), "the prosecutor must offer the 'prior bad acts' evidence under something other than a character or propensity theory." *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). 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.

Additionally, "the evidence must be relevant under MRE 402 . . . [and] the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403." *Id.* (citation and quotation marks omitted). In its notice of intent to use evidence of other acts, the

prosecution argued that the 2009 and 2013 offenses should be admitted under 404(b) because the evidence:

> is designed to show [d]efendant's scheme, plan, motive and intent, system in performing an act, and to further address any concerns that his behavior may have been accidental or deemed consensual, that he lacked the capacity to complete the proposed crime, that he lacked the intent to commit the proposed crime, or that the amount of cocaine that he possessed in the instant situation was for personal use.

The burden is on the prosecution to establish the relevance of the evidence of other acts. *Knox*, 469 Mich 509. " 'Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence.' " *Id.* at 509-510 (citation omitted). However, if the evidence is only relevant because it shows the defendant's character or propensity to commit the crime, then it must be excluded. *Id.* at 510.

Defendant is charged with possession with intent to deliver between 50 and 450 grams of cocaine, which requires (1) that the substance is cocaine, (2) that the cocaine amounted to between 50 and 450 grams, (3) that defendant was not authorized to possess the cocaine, and (4) that defendant possessed it knowingly and with the intent to deliver. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). The elements of defendant's lesser cocaine charge is effectively the same, except that the possession with intent to deliver less than 50 grams of cocaine charge requires "that the cocaine is in a mixture weighing less than fifty grams." *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992).

Defendant does not dispute the first three elements of the charged crimes, but he does specifically argue that he did not intend to deliver the cocaine. The prosecution seeks to introduce evidence of the two prior offenses in order to prove that defendant intended to deliver the cocaine found in his pocket. Beyond the fact that all three incidents involve the possession of cocaine, the prosecution gives little more than a generalized rationale regarding why the admission of this evidence is appropriate or relevant to the current charges. The prosecution claimed before the trial court that the factual similarities between defendant's past offenses and his current charges make the past incidents relevant and "serve to provide the probative force for the admissibility of the evidence to show that [defendant] knowingly possessed cocaine with the specific intent to deliver it." This is "a common pitfall in MRE 404(b) cases," where a trial court may lean toward admitting the evidence of a past act "merely because it has been 'offered' for one of the rule's enumerated proper purposes." *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998).

Defendant argues that the trial court erred when it admitted the evidence, holding that defendant's case was distinguishable from *Crawford*. This argument holds merit. In *Crawford*, the defendant was convicted of possession with intent to deliver cocaine after police officers discovered 100 grams of cocaine in defendant's car. *Id.* at 378-380. At trial, the prosecution was permitted to introduce evidence of the defendant's prior conviction for delivery of cocaine, where the cocaine in question was sold to an undercover officer. *Id.* at 381-382. In order to prove that the prior offenses were relevant to intent—a non-character purpose—the prosecution

invoked the "doctrine of chances" to establish the probativeness of the evidence. *Id*. at 392. The doctrine of chances "rests on the premise that the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently." *Id*. at 393 (quotation omitted). This is a fact-based analysis, and the circumstances that led to the separate incidents were taken into account when the Supreme Court decided *Crawford*. *Id*. at 395-397. Our Supreme Court concluded, however, that the events surrounding the past offense and the defendant's current offense were not factually similar, and thus, there was "an insufficient factual nexus between the prior conviction and the present charged offense to warrant admission of the evidence under the doctrine of chances." *Id.* at 395-396. Thus, in order to prove in this case that the prior offenses are probative of the fact that defendant intended to deliver the cocaine, the prosecutor must "make persuasive showings that each uncharged incident is similar to the charged offense and that the accused has been involved in such incidents more frequently than the typical person." *Id.* at 394 (quotation omitted). Whether the doctrine of chances will apply "depends on the similarity between the defendant's prior conviction and the crime for which he stands charged." *Id.* at 395.

As in *Crawford*, the facts in defendant's current case are not similar to the facts underlying the past offenses. In both 2009 and 2013, defendant was arrested after the police discovered cocaine in his house by way of a search warrant. On both occasions, the quantities of cocaine found were much larger than the quantity that the police discovered during the pat-down search of defendant. In 2009, officers confiscated heroin, marijuana, and cocaine, and in 2013, they confiscated approximately 400 grams of cocaine. The police also discovered drug-related paraphernalia that was indicative of narcotic sales, such as plastic baggies with the corners cut off and other drug packaging materials. Further, in the prior offenses, officers never found narcotics on defendant. In the instant case, the officers found approximately 83 grams of cocaine on defendant's person, and there is no evidence in the record that the cocaine was packaged separately consistent with narcotics sales. The officers did not find any more cocaine or drug trafficking implements, such as plastic baggies or excessive amounts of money, which could imply that defendant was engaged in the delivery of cocaine, rather than the simple possession of cocaine.

"General similarity between the charged and uncharged acts does not . . . by itself, establish a plan, scheme, or system used to commit the acts." *People v Sabin (After Remand)*, 463 Mich 43, 64; 614 NW2d 888 (2000). Because the circumstances surrounding defendant's prior cocaine-related incidents are fundamentally different than the circumstances in the present case, the prosecution cannot create a sufficient factual nexus to demonstrate a relevant non-character purpose to admit the evidence under MRE 404(b).[2] "MRE 404(b) effectuates the

[2] The trial court held that the instant case is identical to that in our unpublished opinion, *People v Northern*, unpublished opinion per curiam of the Court of Appeals, issued December 18, 1994 (Docket No. 195634). We note that because *Northern* is an unpublished case, it is not binding on this Court under the rule of stare decisis, MCR 7.215(C)(1). In *Northern,* this Court departed from the Supreme Court's analysis in *Crawford* because, "[i]n *Crawford*, the factual circumstances surrounding the two offenses were dissimilar . . . while in this case . . . the factual circumstances surrounding the instant offense and the previous offense were similar." *Northern*,

notion that other acts evidence must move through a permissible intermediate inference . . . [and] [a]bsent such an intermediate inference, the other acts evidence bears only on propensity and is inadmissible." *Jackson*, 498 Mich at 263-264 (citation and quotation marks omitted). The factual relationship between defendant's prior drug-related offenses and his current offenses is too remote for a jury to be able to "draw a permissible intermediate inference of the defendant's mens rea in the present case." *Crawford*, 458 Mich at 396. The prior incidents merely demonstrate "that the defendant has been around drugs in the past, and is, thus, the kind of person who would knowingly possess and intend to deliver large amounts of cocaine." *Id.* at 397. Any connection between the past incidents and the present charges can only be logically relevant if the fact-finder draws an intermediate inference regarding defendant's bad character, which is disallowed under MRE 404(b).

On appeal, the prosecution deviates from its arguments before the trial court, i.e., that defendant's previous offenses *are* similar to the instant charges, and instead argues that other acts evidence of intent does not mandate that the offenses be similar to each other. The prosecution claims that because identity is not at issue, "there need not be any similarity between the current offense and other acts." For support, it cites to *McGhee*, 268 Mich App at 611, for the proposition that "whether other-acts evidence is offered to show intent, the acts must only be of the same general category to be relevant." This argument fails. In *McGhee*, this Court followed *Crawford* and concluded that the past incident and the current incident were "very similar," holding that they "involved the same house and garage, both searches uncovered cocaine and marijuana, both searches uncovered illegal substances in the pocket of a jacket that was hanging in the house, and the 1992 search uncovered a shotgun while the 1998 search uncovered an empty gun box." *Id*. Our decision in *McGhee*, holding that the prior incident was similar to the current incident, is in line with *Crawford*, and therefore, the prosecution's argument lacks merit. The trial court abused its discretion when it held that evidence of the prior offenses was admissible under MRE 404(b).

III. MRE 403.

Defendant also argues that the other acts evidence is inadmissible under MRE 403. We agree.

Even if evidence is deemed admissible under MRE 404(b), that evidence "is then considered under the MRE 403 balancing test, which permits the court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." *People v Mardlin*, 487 Mich 609, 616; 790 NW2d 607 (2010) (quotation omitted). There is a high risk that a fact-finder will give an undue amount of weight to evidence of a prior crime of a similar nature, and thus, find that "the defendant is a bad person, a convicted

---

Id. at 3. The defendant's past and present convictions in *Northern* were both a result of the discovery of marijuana during two separate drug raids on the defendant's home, along with the discovery of digital scales, packaging materials, a police scanner, weapons, and pagers. *Id*. at 2. We find that the factual circumstances in the instant case are much closer to that of *Crawford* than *Northern*, and the trial court erred in deciding otherwise.

criminal, and that if he 'did it before[,] he probably did it again.' " *Crawford*, 458 Mich at 398 (citation omitted).

Because defendant's prior incidents both involved cocaine (along with other narcotics), and he is now being tried for another cocaine-related crime, it is difficult to posit that a fact-finder would not draw an impermissible conclusion between the two, despite the lack of similarity between defendant's prior offenses and his current charges. Although, "upon request, the trial court may provide a limiting instruction to the jury under MRE 105 to specify that the jury may consider the evidence only for proper, noncharacter purposes," *Mardlin*, 487 Mich at 616, we do not believe that there is an appropriate, noncharacter purpose for admitting the evidence of defendant's past offenses. Based on the nature of the evidence that the prosecution seeks to admit under MRE 404(b), a fact-finder could conclude that, because defendant was in possession of large amounts of cocaine in the past, and on one occasion was convicted of possession with intent to sell cocaine, he must also be guilty of possession with intent to deliver cocaine in the present case because officers discovered cocaine in defendant's pocket. Overall, the circumstances surrounding defendant's prior offenses are not factually similar enough to be relevant to the charges that defendant currently faces, and the evidence itself is unfairly prejudicial to defendant. Accordingly, defendant has demonstrated that the trial court abused its discretion by granting the prosecution's motion to admit evidence of the other acts.

Reversed.

/s/ Thomas C. Cameron
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher