

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
November 10, 2011

v

JAMIE LEIGH SCHWEMIN,  
  
Defendant-Appellant.

No. 299936  
Emmet Circuit Court  
LC No. 2010-3217-FH

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Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of larceny in a building, MCL 750.360. Defendant was sentenced to six months in jail and two years probation. Defendant appeals as of right, and we affirm.

Defendant was hired to manage the clean up of the Harbor Springs home of Geri Black after the lower level had been flooded and the home abandoned by Black's tenant, Phil Hicks. All of Hicks's belongings were still in the home. Defendant took possession of many of these belongings, keeping some, selling some and giving others away. Defendant claimed that she received permission from both Black and Hicks to remove and dispose of the belongings. The prosecution asserted that defendant did not have permission to do so and that her actions constituted larceny in a building.

On appeal, defendant argues that her trial counsel was ineffective for failing to object to other acts evidence on the grounds that it was not admissible under MRE 404(b).<sup>1</sup> As defendant

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<sup>1</sup> MRE 404(b)(1) provides as follows:

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.

neither raised the issue in a motion for a new trial, nor requested an evidentiary hearing, review of defendant's argument "is limited to mistakes apparent from the [existing] record." *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

The other acts evidence that defendant says her attorney should have objected to consisted of testimony regarding defendant's role as property manager for Park Place Suites on Mackinac Island. Black testified she agreed to allow defendant to live at the Harbor Street house during the repairs and that in exchange defendant agreed to allow Black to stay at defendant's home in Park Place Suites. Subsequently, however, Black discovered that about \$16,000 in unauthorized charges had been made on her credit card to the Park Place Suites. The owner of Park Place Suites testified that defendant had no authority to allow Black to stay there and that it violated the lease. The owner further testified that defendant improperly retained rental deposits from other residents in her role as property manager.

To succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance failed to meet an objective standard of reasonableness, and that it is reasonably likely that the outcome of the trial would have been different if not for the error. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and defendant bears a heavy burden proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). This Court will not substitute its own judgment for counsel's judgment with the benefit of hindsight, *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

To be admissible under MRE 404(b), the bad acts evidence must be offered for a proper purpose, must be relevant, and must have a probative value that is not substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Evidence may be unfairly prejudicial if there is a risk that the jury will give it substantial weight disproportionate to its probative value. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).

A central issue in this case was the relative degree of credibility to be afforded defendant and Black regarding given the dispute whether Black gave defendant permission to remove the subject property from the Harbor Springs home. The testimony of the Park Place Suites owner regarding whether Black or defendant had accurately described the arrangement regarding the Mackinac Island property went directly to their comparative credibility. Similarly, the testimony went to defendant's "preparation, scheme, plan or system" and the absence of a unique mistake in her understanding of the scope of her authority as property manager. Thus, the evidence was admissible and defense counsel did not err by failing to raise a meritless objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Moreover, the trial court issued a limiting instruction to the jury, warning the jurors about improperly using the disputed evidence. The jury is presumed to follow those instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, any improper prejudice was minimized.

Affirmed.

/s/ Kathleen Jansen  
/s/ David H. Sawyer  
/s/ Douglas B. Shapiro