STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 13, 2013
V	No. 305509 Gogebic Circuit Court
DENNIS JOHN HAHN, SR., Defendant-Appellant.	LC No. 2010-000303-FC

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

GLEICHER, J., (*concurring in part and dissenting in part*).

The prosecutor charged that defendant killed Joel McFarlane after beating and robbing him, and then set fire to McFarlane's trailer. Abundant circumstantial evidence supported this theory. Accordingly, I concur with the majority's decision to affirm defendant's conviction and to remand for resentencing as required by MCL 777.21.

Despite my agreement with much of the majority opinion, I respectfully dissent from the majority's conclusion that the trial court properly admitted evidence that several months after the murder, defendant burglarized and set fire to an unoccupied vehicle. The majority holds that MRE 404(b) permitted the introduction of this "bad acts" evidence because it tended to prove the existence of a "common plan or scheme." According to the majority,

> [t]he other acts evidence . . . supported the finding that defendant utilized the common scheme or plan of covering up theft by starting fires with accelerants, and further supported the trial court's findings that there were similarities between the other acts and the charged conduct, such that the decision to admit this evidence did not constitute an abuse of discretion.

In my view, evidence of defendant's subsequent crime had nothing to do with a "scheme or plan," lacked any meaningful similarity to the charged offense, and logically demonstrated only the forbidden inference that defendant led a life of crime.

The trial court permitted two witnesses to testify concerning a theft coupled with an arson committed by defendant approximately two months after the charged offense. The witnesses described spending time with defendant on a deer-hunting expedition at a hunting camp near Black River Lake. The trio made trips "back and forth through town probably four to five times a day." On one such journey, the group drove to town to obtain "more alcohol for out at the

camp and stuff[.]" They encountered a parked car alongside a road and decided to break into it. Two of the confederates shattered the driver's side window and stole items from the car. They then drove back to the hunting camp to retrieve some gas cans. Upon their return to the burgled vehicle defendant dumped gas on a shirt, lit it, and threw it on the driver's seat. One witness quoted defendant as saying "that he wanted to light the car on fire." A jury convicted defendant of this arson, breaking and entering the vehicle, and receiving and concealing stolen property.

As described by the prosecutor's brief on appeal, the offense giving rise to the instant case "began as an incident of road rage [and] ended with murder." The "road rage" ignited when an inebriated McFarlane sideswiped defendant's car. Defendant gave chase, and McFarlane drove into a ditch. Defendant then extorted McFarlane's promise to pay for the damage to defendant's car by threatening to report McFarlane's drunk driving to the police. Defendant appeared at McFarlane's trailer expecting his payment and was told to come back later. On his second visit, defendant let himself into the trailer, stole money from McFarlane's wallet, confronted McFarlane, beat him, shot him, poured lighter fluid around the room, and set the trailer on fire. Defendant generally denied involvement in McFarlane's death or the fire. His defense centered on the contention that McFarlane had committed suicide, as the police had initially theorized.

At an evidentiary hearing, the prosecutor contended that evidence of the car arson was admissible under MRE 404(b) because it tended to show that defendant set the fire at McFarlane's trailer:

> The reason that I believe that these should be admissible, the short answer is that they're very probative of a material fact that's going to be at issue at the trial; and depending on which way you look at it, it's either going to be, did Mr. Hahn set a fire in the victim's home or did he not; or you could look at it as, did the victim set a fire to his own home or not. Either way you look at it, the fact that Mr. Hahn is, as I would term, a fire bug is relevant.

The majority holds the car-arson evidence sufficiently similar to the charged offense to qualify as a "common scheme or plan," and thereby admissible under MRE 404(b).

Michigan's MRE 404(b) jurisprudence emphasizes that where bad acts evidence tends to prove only a defendant's propensity to commit crime, the evidence should be excluded. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). Rather than advocating for admission based on propensity, the prosecutor must articulate and logically support a non-character inference linking the evidence to the ultimate issue. "If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded, notwithstanding its logical relevance to character." *Id*. at 390. Thus, admissible 404(b) evidence involves an "intermediate inference" other than the defendant's bad character. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993).

Bad acts evidence demonstrating a plan, scheme, or system in doing an act supplies such an intermediate inference. MRE 404(b). The intermediate inference in "plan" cases is that the defendant contemplated the commission of a certain crime and fashioned a method of accomplishing his goal. A series of somewhat similar spontaneous acts is not a plan. *People v*

Sabin (After Remand), 463 Mich 43, 65-66; 614 NW2d 888 (2000). In *Sabin*, 463 Mich at 66-67, the "plan" involved the sexual abuse of children in the defendant's custody and care. The Supreme Court explained that evidence of the defendant's "sufficiently similar" prior acts sufficed "to establish a definite prior design or system which included the doing of the act charged as part of its consummation." *Id*. at 63-64 (quotation and citation omitted). The Court emphasized that "[g]eneral 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. Rather, 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 (quotation, citation and emphasis omitted). A high degree of similarity is required—more "than that needed to prove intent, but less than that needed to prove identity," although the plan itself need not be unusual or distinctive. *Id*. at 65-66.

Underlying the notion of a "plan" or "system" is that the defendant had a specific objective in mind when he committed the wrongful act similar to the charged misconduct. In *Sabin*, the defendant "had a system that involved taking advantage of the parent-child relationship, particularly his control over his daughters, to perpetrate abuse." *Id*. at 66. Although the challenged evidence described a "different mode[] of acting" than the charged offense, the Supreme Court found sufficient similarities to justify the trial court's decision to admit the evidence. *Id.* at 67-68.

Here, evidence of the car-arson event did not logically suggest that defendant had a plan or scheme to rob, beat, and murder a victim, then set the victim's dwelling on fire. The car arson commenced with an act of spontaneous thievery followed by a return to the scene of the crime to set the car on fire. McFarlane's murder stemmed from an extortion scheme hatched after a car accident and was followed by a personal confrontation, physical violence, murder-by-shotgun, and a fire.[1] Evidence of the car-arson event did not support an intermediate inference that defendant planned or schemed to engage in the type of conduct that led to McFarlane's death.[2] Rather, the car-arson evidence supported an inference that defendant was the kind of person who steals and has a predisposition to commit arson; in other words, defendant is a thief and a "fire bug." These are precisely the inferences that MRE 404(b) forbids.

In my view, the prosecutor failed to articulate a tenable non-character theory of relevance for the car-arson evidence. The majority avoids the prosecutor's "firebug" label, presumably recognizing that the prosecutor's argument equated exactly with character. Instead, the majority finds a "plan" in a variety of highly dissimilar bad acts lacking any connecting thread. Defendant had no common goal in the crimes; he simply had a general desire to engage in

[1] That both events occurred in a "rural area" hardly qualifies as a unifying fact, given that the county in which defendant resides is predominantly rural.

[2] "[W]here the very act is the object of proof, and is desired to be inferred from a plan or system, the combination of common features that will suggest a common plan as their explanation involves so much higher a grade of similarity as to constitute a substantially new and distinct test." *Sabin*, 463 Mich at 65, quoting 2 Wigmore Evidence (Chadbourn rev.), § 304, pp 250-251.

criminal behavior. Absent any manifestation of a unifying design to his crimes, I respectfully submit that the evidence should have been excluded. Given the overwhelming evidence of his guilt, I acknowledge that this error was harmless.

/s/ Elizabeth L. Gleicher