STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 14, 2013
v	No. 310341 Oakland Circuit Court
CALLEEN ELAINE TATUM, Defendant-Appellant.	LC No. 2011-237028-FH

Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted her jury-trial conviction of larceny in a building, MCL 750.360. She was sentenced as a second habitual offender, MCL 769.10, to 90 days in jail and two years' probation. We affirm.

Defendant argues that the trial court abused its discretion by allowing the prosecution to introduce evidence of her prior charge of larceny in a building. See MRE 404(b). Specifically, defendant argues that the prior larceny-in-a-building charge was not relevant to show a common plan, scheme, or absence of mistake. Further, defendant argues that even if the prior charge was offered for a proper purpose under MRE 404(b), the probative value of the evidence was substantially outweighed by the danger of undue prejudice. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Brown*, 294 Mich App 377, 385; 811 NW2d 531 (2011). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). Such evidence 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." MRE 404(b)(1). Three factors must be present for other acts evidence to be admissible: (1) the prosecutor must offer the "prior bad acts" evidence under something other than a character or propensity theory, (2) the evidence must be relevant under MRE 401 and 402, and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); see also

People v VanderVliet, 444 Mich 52, 74-75; 508 NW2d 114 (1993). Additionally, the trial court may, upon request, issue a limiting instruction to the jury pursuant to MRE 105. *Id.*

MRE 404(b) is a rule of inclusion, not exclusion. *VanderVliet*, 444 Mich at 65. Admission of relevant other acts evidence does not violate MRE 404(b) "unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *Id.* Evidence of prior acts showing a scheme, plan, or system is "logically relevant to show that the charged act occurred where the . . . misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). Further, "'the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed the plan in committing the charged offense.'" *Id.* at 66 (citation omitted).

The first factor was satisfied because the prosecution offered evidence of the prior larceny-in-a-building charge for the purpose of establishing motive, opportunity, preparation, scheme, and plan. At a pretrial hearing, the trial court decided to permit evidence of the prior charge on the grounds of "scheme, plan, system, or method used by [d]efendant to accomplish the theft at issue in this case." The court also determined that the evidence tended to show the "absence of mistake or accident." The prosecution did not offer the evidence of the prior charge for an improper purpose.

The second factor was also satisfied because the prior larceny charge was relevant for the purpose of showing a common plan, scheme, or system.[1] The main argument asserted by the prosecution at the hearing was that the factual circumstances underlying the prior larceny-in-a-building charge were so similar to defendant's actions in this case that the jury could infer a common plan or scheme. Specifically, the prosecution argued that in both instances defendant had created an environment of trust with a victim, allowing defendant to access property, and that defendant ultimately took advantage of that trust and stole from the victims when defendant's relationship with the victims ended. For purposes of MRE 401, the prior charge need only have some "tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The prior larceny charge was relevant to whether there was a common plan or scheme because it was factually similar to defendant's conduct in this case. Specifically, defendant was given access to property by Zora Pondell, defendant's former employer, and Larry Mullins, defendant's landlord, and defendant exploited that relationship of trust by stealing property when the relationship ended. Defendant's apparent common scheme of gaining the trust of a victim before stealing property entrusted to her by that victim satisfied the relevancy requirement.

[1] Defendant argues in her brief that the prior charge was not proper evidence of motive and opportunity. However, the trial court's grant of the prosecution's motion to admit the prior charge was limited to the purposes of scheme, plan, or system, and also lack of mistake.

The third factor was satisfied as well because the probative value of the evidence regarding the prior larceny charge was not substantially outweighed by the danger of unfair prejudice to defendant. Unfair prejudice is present when the evidence "'inject[s] considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock.'" *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994) (citation omitted). 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 Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003).

There was no special danger that the prior larceny charge would be given preemptive weight by the jury. Further, the prior larceny charge was more than marginally probative; it was the only evidence in existence that tended to show a common plan or scheme in connection with defendant's actions in this case. Defendant argues that the jury's question to the court during deliberations—namely, whether the prior larceny-in-a-building charge was merely a charge or resulted in a conviction—establishes that the jury gave improper weight to the evidence in violation of MRE 403. But the record does not support defendant's claim that the jurors gave any particular weight to the distinction between a prior charge and a prior conviction. And even if the jurors did give some weight to the distinction, it is within the discretion of the trier of fact to assign weight to the evidence as it sees fit. See *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Further, the trial court provided a limiting instruction concerning the prior charge, and later reread the limiting instruction in response to the jury's question. The limiting instruction directed the jury to only consider the prior charge for the purposes of a common plan or scheme, or lack of mistake, and not for the purpose of proving defendant's propensity. "[J]urors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The prior larceny charge was more than marginally probative of a common scheme or plan and did not pose any special danger of undue prejudice.

Even if the trial court erred in admitting the prior larceny charge into evidence, it does not affirmatively appear that the error was outcome determinative. See MCL 769.26; *People v Lukity*, 460 Mich 484, 495-96; 596 NW2d 607 (1999). There was significant, compelling evidence of defendant's guilt, altogether independent of the prior larceny charge. Defendant called a locksmith service, lied to the locksmith by telling him that the key to the vault room was lost, personally instructed the locksmith to drill out the locks to the vault room, and signed the resulting invoice. Later, three guns and a coin collection were found missing, with no sign of forced entry between the time defendant vacated the premises and the time Mullins went to check on the property. Defendant avoided Mullins's attempts to schedule a walk-through of the property that would have alerted Mullins to the theft. It does not appear that defendant or Alan Tatum ever complained to Mullins about any problems with mold. In sum, the jury could have found defendant guilty of larceny in a building even without hearing the evidence of defendant's prior charge.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra