

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS LOVELL GREGORY,

Defendant-Appellant.

UNPUBLISHED

December 30, 1997

No. 199774

Washtenaw Circuit Court

LC No. 96-005909-FH

Before: McDonald, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3), and receiving and concealing stolen property in excess of \$100, MCL 750.535; MSA 28.803. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12; MSA 28.1084, to concurrent enhanced terms of life imprisonment for the home invasion conviction and ten to sixty years' imprisonment for the receiving and concealing conviction. Defendant appeals as of right. We affirm.

Defendant's home-invasion conviction arises out of a break-in that occurred at 1321 Traver Street in Ann Arbor. Traver Street is located in the area of Broadway Street and Pear Street. Erika Block and Hillary Ramsden resided at 1321 Traver Street at the time of the break-in. On March 4, 1996, Block and Ramsden left their residence at approximately 10:30 a.m. At approximately 1:30 p.m., Block was notified by her credit union that a Darlene Tiller was attempting to cash a check drawn on Block's account. Because Block had not written the check, the check was confiscated by the credit union. At approximately 8:30 p.m., Ramsden arrived at 1321 Traver Street. Approximately two hours later, Ramsden discovered that a rear window at 1321 Traver Street had been broken and that property was missing from the residence.

Tiller lived at 1508 Broadway Street, apartment C-2. The police, who had been investigating a series of break-ins in the Broadway area, executed a search warrant for Tiller's apartment on March 7, 1996, at approximately 9:30 a.m.. When the police arrived, Tiller and another man were present in the apartment. During the search, the police found property stolen from 1321 Traver Street in the

apartment's bedroom. The police also found defendant hiding in the bedroom closet. Defendant's wallet was found in the bedroom's nightstand and contained defendant's driver license listing the apartment's address as defendant's residence. Defendant's wallet also contained two calling cards, one in Ramsden's name and one in the name of Ramsden's business. Other property taken during previous break-ins at neighboring residences located at 1410 Broadway Street, 1314 Broadway Street and 1303 Pear Street was also found in the apartment's bedroom.

At trial, the prosecutor was permitted to introduce under MRE 404(b) evidence of the prior break-ins at 1410 Broadway Street, 1314 Broadway Street, 1303 Pear Street, as well as a prior break-in at another area residence located at 1427 Broadway Street. These break-ins occurred between December, 1995, and February, 1996. In each case, a rear window of the residence was broken. In each case, the residents were not home at the time of the break-in. In three of the four cases, the break-in occurred during the daytime.¹ Either the same day as the break-in or shortly thereafter, defendant sold property stolen from the residence to a pawn shop.

I

On appeal, defendant first raises an issue with respect to the trial court's denial of defendant's request for a continuance. We note that during the cross-examination of police officer Greg Stewart, defense counsel asked Stewart whether Stewart was aware of two break-ins that allegedly occurred during July, 1996, in the same area as the charged offense in this case but after defendant had been incarcerated. Stewart testified that he had been on vacation during July and was unaware of any such break-ins. At the close of the prosecution's case, defense counsel requested a continuance for the purpose of obtaining a witness from the Ann Arbor Police Department in order to ascertain whether such break-ins had occurred. Counsel contended that evidence of break-ins occurring while defendant was incarcerated would tend to cast some doubt on the "origination of the series of B&E's that occurred while he was not incarcerated." The trial court denied defendant's request because it was made almost at the end of the trial and there was no connection between defendant and any of the alleged subsequent break-ins. On appeal, defendant argues that the trial court's ruling denied him his constitutional right to present a defense.

The decision whether to grant a continuance in a criminal trial is committed to the sound discretion of the trial court. *People v Bailey*, 169 Mich App 492, 499; 426 NW2d 755 (1988); see also MCR 2.503(C). In determining whether a trial court abused its discretion in denying a continuance, this Court considers four factors: (1) whether the defendant was asserting a constitutional right; (2) whether the defendant had a legitimate reason for asserting the right; (3) whether the defendant was guilty of negligence, and; (4) whether prior continuances of trial were not at the defendant's behest. *People v Hill*, 88 Mich App 50, 57; 276 NW2d 512 (1979). Finally, even if the trial court's denial of a continuance constituted an abuse of discretion, this Court will not reverse unless the defendant demonstrates that he was prejudiced by the denial. *Id.*

In this case, defendant asserts the constitutional right to present a defense. Defendant sought the continuance for the legitimate reason of attempting to secure evidence allegedly tending to establish his innocence. Arguably, defendant was not guilty of negligence in attempting to obtain this information

where defense counsel stated below that he believed Detective Stewart would have had this information because Stewart was in charge of break-ins occurring in the relevant area and that he (counsel) had been unaware that Stewart was on vacation in July. We note that there was no discussion below concerning whether prior continuances, if any, had been granted.

However, defendant was directly connected to the break-in at 1321 Traver Street as well as the series of prior break-ins that occurred in the area of Broadway Street, Pear Street and Traver Street. We conclude, as did the trial court, that evidence of subsequent break-ins having no similar connection to defendant was not relevant or was of such marginal probative value that defendant is unable to demonstrate that he was prejudiced by the trial court's denial of a continuance.

II

Next, defendant argues that the trial court erred in admitting evidence of the four prior break-ins. Specifically, defendant contends that the evidence was not admissible under MRE 404(b) because there was no "special quality" linking the prior break-ins to the break-in at 1321 Traver Street.

This Court reviews the trial court's admission of evidence under the abuse of discretion standard. *People v McMillan*, 213 Mich App 134, 137; 539 NW2d 553 (1995). In order for evidence of prior acts to be admissible under MRE 404(b), the evidence first must be relevant to an issue other than character. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Second, the evidence must be relevant to an issue or fact of consequence at trial. *Id.* Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *McMillan*, *supra* at 138. And fourth, the trial court may, upon request, provide a limiting instruction to the jury. *Id.*

In order to be admissible under MRE 404(b), the prior act must bear a striking similarity to the charged act only if the similarity is relied upon. *VanderVliet*, *supra* at 67. For instance, there must be a "special quality" linking the prior act to the charged offense where the proponent of the evidence is utilizing a modus operandi theory to prove identity. *Id.* at 66; *McMillan*, *supra*.

In this case, the prosecutor sought to introduce the evidence of the four prior break-ins for the purpose of proving defendant's identity as the perpetrator who broke and entered 1321 Traver Street. Identity is a proper non-character purpose for which evidence of prior acts may be introduced. MRE 404(b). In comparing the present and prior offenses, we note that in every case the perpetrator entered the residence by breaking a rear window at a time when no one was present in the residence. In three of the four prior cases, the breaking and entering occurred, like this case, during the daytime.² In every case, defendant soon attempted to dispose of some of the stolen property. Specifically, in each of the four prior instances, defendant sold property stolen from the residence to a pawn shop either the same day as the break-in at that residence or shortly thereafter. In the present case, defendant's girlfriend attempted to pass a check stolen that day from 1321 Traver Street. An inference was raised at trial that defendant was the person who forged the check. When arrested by the police, defendant was in possession of property stolen during three of the four prior break-ins as well as property stolen from 1321 Traver Street. And finally, all of the break-ins were committed in an area close to defendant's

residence. We conclude that there were special circumstances linking the prior break-ins to the charged offense in this case. Cf. *McMillan, supra*. Accordingly, we find no abuse of discretion in the admission of this evidence. *Id.*

III

Finally, defendant raises an issue involving the sufficiency of the evidence of second-degree home invasion. The general issue raised by defendant is the sufficiency of the evidence of identity. As phrased by defendant, the specific argument is that the evidence that defendant was in possession of property stolen from 1321 Traver Street was not sufficient evidence from which the jury could have found beyond a reasonable doubt that defendant was the thief. As will be shown below, we believe that this argument somewhat misses the mark.

In reviewing the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. As relevant to this case, the elements of second-degree home invasion are (1) the breaking and entering (2) of a dwelling (3) with the intent to commit a felony or larceny in the dwelling. MCL 750.110a(3); MSA 28.305(a)(3). Unexplained possession of stolen property is some evidence that the possessor is guilty of theft and may permit an inference that the possessor is the thief. *People v Benevides*, 71 Mich App 168, 174-175; 247 NW2d 341 (1976). However, unexplained possession of stolen property, unaccompanied by other facts or circumstances, will not sustain a conviction for breaking and entering. *Id.*; see also *People v Hutton*, 50 Mich App 351, 357; 213 NW2d 320 (1973); *People v McDonald*, 13 Mich App 226, 236; 163 NW2d 796 (1968).

In this case, defendant was not convicted of larceny. Thus, the question is not simply whether the evidence was sufficient to permit the jury to find beyond a reasonable doubt that defendant was the thief. Rather, defendant was convicted of second-degree home invasion, which requires proof of breaking and entering. Thus, we believe that the question is whether sufficient other evidence, in addition to the evidence of possession, was introduced from which the jury could find beyond a reasonable doubt that defendant broke and entered 1321 Traver Street with the intent to commit larceny therein.

The additional facts or circumstances that have justified a finding that the possessor of stolen property was guilty of breaking and entering include (1) facts relating directly toward placing the accused at or near the scene of the crime; (2) facts indicating that the defendant's possession of the stolen property was in relatively close time proximity to the breaking and entering, and; (3) facts bearing on the defendant's conduct as indicative of a consciousness of guilt. *People v Wood*, 99 Mich 620, 623; 58 NW 638 (1894); *Benevides, supra* at 175; *Hutton, supra* at 359; *People v Moore*, 39 Mich App 329, 332; 197 NW2d 533 (1972).

In this case, there is no question but that defendant was in possession of property stolen from 1321 Traver Street only three days after the break-in at that address. We believe that this evidence permits the inference that defendant was the thief. In addition, defendant was discovered in possession

of the stolen property at a location near and convenient to the scene of the crime. When discovered, defendant was hiding from the police. It was unlikely that Tiller could have forged the check stolen from Block, but defendant refused to comply with a subsequent court order requiring him to provide handwriting samples that could have then been compared to the handwriting on the check. Finally, evidence was presented indicating defendant had been involved in four prior break-ins in the same area as 1321 Traver Street. Viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant was the actor who broke and entered 1321 Traver Street with the intent to commit larceny therein.

Affirmed.

/s/ Gary R. McDonald

/s/ Henry William Saad

/s/ Michael R. Smolenski

¹ In the fourth case it could not be determined whether the break-in occurred during the daytime or nighttime because the residents were on vacation at the time of the break-in.

² See note 1, *supra*.