# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL WATKINS,

Defendant-Appellant.

UNPUBLISHED
March 24, 1998

No. 198826
Muskegon Circuit Court
LC No. 96-039035-FC

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Before: Markey, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of arson, MCL 750.72; MSA 28.267. The trial court sentenced defendant to concurrent sentences of twelve to twenty-five years' imprisonment for each assault conviction and twelve to twenty years' imprisonment for the arson conviction. He appeals as of right. We affirm.

I

Defendant first argues that his warrantless arrest was not supported by probable cause. In reviewing a claim that a police officer lacked probable cause to arrest, the trial court must determine whether facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspect has committed a felony. *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983); *People v Harper*, 365 Mich 494, 500-501; 113 NW2d 808 (1962). We review for an abuse of discretion the trial court's determination that probable cause existed. *People v Wirth*, 87 Mich App 41, 44; 273 NW2d 104 (1978).

Defendant argues that he was not witnessed or identified as being present at the scene of the fire, had no criminal history, and his behavior toward the investigating officers was consenting and cooperative. He then asserts that, unlike the defendants in *People v Myshock*, 116 Mich App 72; 321 NW2d 849 (1982), and *People v Holbrook*, 154 Mich App 508; 397 NW2d 832 (1986), there was no probable cause to arrest him. Based on the facts known to the arresting officers at the time of defendant's arrest, a person of reasonable prudence and caution could determine that defendant had

committed a felony. *Oliver, supra*. The investigating officers observed a set of footprints leading to Lopez' house indicating that a person walked with a normal stride up to the northeast corner of the house and a set of tracks leading away from the house with a longer stride, indicating that the person had run away from the house. After speaking to the victims and examining the fire damage, Fire Marshall Grabinski determined that the fire was caused by a firebomb comprising an accelerant poured into a brown glass bottle and thrown through a window into Lopez' living room. When questioned, three of the victims, namely Lopez, Gilbert and Krogel, all stated that their only enemy was defendant.

Based upon this information, the investigating officers went to defendant's house to question him about the fire. When they first arrived, they observed tire tracks in defendant's drive that were similar to those seen in the snow outside Lopez' house. Additionally, there were two cars in the driveway, one of which was covered in snow while the other was not, indicating that it had been driven recently. Defendant's car was warm to the touch and the falling snow was melting on contact. There were footprints alongside the car that were similar in characteristics to those seen outside Lopez' house.

When defendant answered the door, Fire Marshall Grabinski introduced everyone and informed him that they were investigating a fire. Defendant invited them in, answered a few questions, and stated that he came home at 9:00 p.m. and had not left since that time. After a few minutes, Grabinski informed defendant of the location of the fire and defendant got angry and upset. Defendant consented to allowing the accelerant-detecting dog in to determine whether any accelerant was present in the house, and the dog "hit" at the garbage bag containing a piece of paper towel with red lamp oil on it. There was a partially full bottle of the red lamp oil against the wall and, although the accompanying lamp appeared to be untouched, the half-full bottle looked like it had been recently moved.

When asked to see the shoes and clothing that he had worn earlier in the evening, defendant produced a set of eight-inch-high boots with a knobby sole and a pair of Levi's. The sole of the boots did not match the prints observed in the snow, and the boots were dry. Grabinski asked defendant if he had any other shoes that they could examine, and defendant led them to his closet where Grabinski spotted a set of dress shoes underneath an ironing board. Those shoes exhibited the same characteristics as the prints found in the snow and the soles were wet, as was the floor where the shoes had been sitting. When Grabinski asked defendant why the shoes were still wet at 4:00 a.m. if defendant had been back in the house since 9:00 p.m., defendant began to anger. Grabinski testified that defendant's hostility gave them probable cause to arrest defendant and transport him to the sheriff's department.

Additionally, defendant's statements to the investigating officers and fire marshall were inconsistent. This Court has held that equivocation and lying by a suspect may raise reasonable suspicions to the level of probable cause. *People v Mitchell*, 138 Mich App 163, 169; 360 NW2d 158 (1984) ("[i]n a setting in which bloodstains were apparent and the carpeting had just been hosed down, this response must have indicated either guilty knowledge or an intent to hide the guilt of another. The possibility that some innocent explanation might exist does not deprive an officer of probable cause to arrest"), aff'd 428 Mich 364; 408 NW2d 798 (1987). Given the surrounding circumstances of footprints, tire tracks, a warm car that the investigating officers believed was recently driven, wet shoes matching the observed footprints, wet clothing, and accelerant found in the house, in combination with

defendant's statements that he had not been outside the house and other inconsistent statements, the possibility that some innocent explanation of these coincidences might exist did not deprive the officers of probable cause to arrest. Defendant's equivocation, agitation, and lying were also sufficient to raise reasonable suspicion to the level of probable cause. Accordingly, the facts known to the arresting officers at the time of arrest were sufficient to justify defendant's warrantless arrest.

II

Defendant next argues that there was insufficient evidence to support his conviction for assault with intent to murder and arson. Due process requires the prosecution to introduce sufficient evidence to justify a trier of fact in its conclusion that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

We believe that the evidence the prosecution presented at trial was sufficient to support defendant's conviction for arson and assault with intent to kill. Lopez' testimony demonstrated defendant's ability to carry out the threats he made against her in addition to his propensity for violence and abuse. Defendant repeatedly threatened Lopez when she would not terminate his child support obligation, and the situation worsened when she was involved with other men. Lopez testified that defendant vandalized her home, got into fights with her boyfriends, beat and kicked her when she attempted to take her son back, and threatened to shoot her and "blow her head off." Defendant's phone calls and letters indicated that he was watching her home and was constantly aware of where she and her son were when they were not at home.

Krogel testified that defendant threatened him several times before the fire and stated that he would "send his boys over." Defendant was familiar with Krogel's car, so he would have been aware that Krogel was at Lopez' house on the night of the fire. Krogel stated that he was intimidated by defendant's actions and continued threats, and that that was the reason that he terminated his relationship with Lopez and moved out of her house.

We also find that there was sufficient testimony to support a jury verdict that the fire was intentionally caused by a flaming bottle filled with accelerant thrown through the window of Lopez' home. The origin of the fire was consistent with the premise that a firebomb was thrown through the window where the footprints in the snow led to the house and then indicated someone running away from the house. Krogel, who was sleeping on the couch in the living room, was awakened by shattering glass and the sight of orange flames coming through the window. The investigating officers found debris from the glass on the love seat and on the floor in the location where the window was broken. Brown glass from the bottle was mixed in with that debris. Officers also found accelerant in defendant's kitchen, in a partially empty bottle, on a paper towel that had been thrown in the garbage, and on the jeans that contained defendant's wallet and keys and which he had worn the night of the fire. Notably, defendant also had brown bottles, similar to the glass found at the scene of the fire, in his home.

In sum, all of the circumstantial evidence pointed to defendant as the one who threw the firebomb into Lopez' home that night. Combined with the consistent testimony about defendant's constant threatening behavior and the carrying out of those threats of violence on certain occasions, the prosecution provided sufficient evidence from which a jury could conclude that defendant had the intent to murder the occupants by setting fire to Lopez' house.

III

Third, defendant argues that the trial court erred in allowing the prosecutor to use a generic bottle of lamp oil to demonstrate the appearance of the bottle found in defendant's home. The decision whether to admit evidence is within the sound discretion of the trial court and we will not disturb it on appeal absent an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Defendant objects to the prosecution's use of a new bottle of lamp oil as any sort of demonstrative evidence. Defendant argues that the use of a different bottle of oil from that found in defendant's kitchen was highly prejudicial to the defense. Although the police failed to seize the actual bottle of lamp oil suspected to have been used as the accelerant for the firebomb that burned Lopez' home, the trial court did not err in allowing the prosecution to produce the new bottle. This is especially true when the prosecution used it for identification purposes, i.e., only as a sort of visual aid, and the trial court never admitted it into evidence. Indeed, the actual bottle of lamp oil, if it had been seized, could have been displayed to the jury and entered into evidence as a piece of "real" or "original" demonstrative evidence that was suspected to have played a direct role in the construction of the fire bomb. See McCormick, Evidence (3d ed), § 212, p 668. Further, McCormick lends authority for the premise that the "duplicate" bottle of lamp oil that was similar to the one depicted in the photograph of defendant's kitchen floor could properly be used for demonstrative purposes.[1] McCormick also notes that although all jurisdictions allow the use of demonstrative items to illustrate and explain oral testimony, there is some diversity of opinion on whether these exhibits may be offered as full exhibits. *Id.* That is not an issue in this case, however, because the trial court did not admit this bottle of lamp oil into evidence as a full exhibit.

Accordingly, we find that the use of this bottle of lamp oil for demonstrative purposes was proper in the context of these facts. The new bottle of oil merely gave a physical form to what the witness was describing in his oral testimony. The trial court therefore did not abuse its discretion in allowing the prosecution to display this bottle.

IV

Finally, defendant argues that the trial court erred in allowing the prosecution to introduce letters and tape recorded telephone conversations between defendant and Lopez because they were highly prejudicial and inflamed the passions of the jury. The admissibility of prior bad acts evidence is within the trial court's discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). This Court therefore reviews a trial court's decision to admit such evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

At trial, the prosecution sought to introduce a package of letters from defendant to Lopez, some of which threatened her, her boyfriends, and her son, and others of which professed defendant's continued love for her and his desire to reestablish the relationship. There was one letter from late 1993, three letters from early 1994, two letters from the summer of 1994, two letters from late 1994, two letters from the summer of 1995 and two letters from late 1995 but before the fire was set. Defendant objected only to the letters that were written before the summer of 1995, arguing that they were too remote in time to bear any relevance to the case. Accordingly, the only issue preserved for appeal is whether the letters written before the summer of 1995 were too remote in time to have been properly admitted. Additionally, defendant did not object to the admission of the tape recorded conversations that he claims on appeal the trial court erroneously admitted. This issue is therefore unpreserved. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545-546, 553; 520 NW2d 123 (1994).

Defendant's argument with respect to the letters written before the summer of 1995 was limited to the position that their remoteness in time, combined with the fact that they tended to show some evidence of motive to kill the victims, created testimony that was more prejudicial than probative. Defendant concludes, without supporting authority, that the letters do not meet the requirements of MRE 403 that permits the admission of relevant testimony if the probative value of the evidence is not substantially outweighed by its prejudicial effect.

MRE 404(b) governs the admission of prior bad acts. It provides:

> 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.

Use of bad acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of a conviction based on a defendant's history of misconduct. *People v Golochowicz*, 413 Mich 298, 308-309; 319 NW2d 518 (1982).

To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Defendant does not dispute that use of these letters to show motive and intent is a proper purpose under MRE 404(b). Defendant argues, without citation to authority, that the probative value of the letters admitted is outweighed by the prejudice created due to the letters' remoteness in time to the offense.

This Court has held that testimony about prior assaults is not overly prejudicial such that it outweighs the probative effect of otherwise admissible bad acts evidence. *People v Morris*, 139 Mich

App 550, 556-557; 362 NW2d 830 (1984). This Court allowed evidence of a prior act that occurred at least several years before the murder with which the defendant was charged in *People v Doyle (On Remand)*, 129 Mich App 145, 149-151; 342 NW2d 560 (1983), rejected on other grounds *People v Williams*, 422 Mich 381; 373 NW2d 567 (1985). Additionally, our Supreme Court allowed evidence of prior acts dating back approximately six years before the crime charged in *People v Fleish*, 306 Mich 8, 11; 9 NW2d 905 (1943). In that case, our Supreme Court held admissible evidence of other instances where the defendant, in a stolen property prosecution, had previously purchased stolen property in order to prove that the defendant knew the property in question was stolen when he received it. *Id*. Those prior acts "extended from the year 1940 to 1942, and testimony of one such offense occurring in 1936 was permitted." *Id*. The Court held that "if it was [sic] error to admit evidence of such acts occurring in 1936 and 1942 because of remoteness to the offense charged, as respondent contends, it cannot be said to have been prejudicial in this case and grounds for reversal." *Id*. Thus, although our Supreme Court did not specifically state that the remoteness in time required the exclusion of such evidence, at the very least it held this to be insufficient to warrant reversal.

Given the wealth of other evidence indicating that defendant made previous threats toward Lopez, her son, and her boyfriends, and given the other evidence in this case, we believe that these letters were not so prejudicial as to outweigh the probative effect. Accordingly, the trial court did not abuse its discretion in admitting the defendant's letters into evidence.

Affirmed.

/s/ Jane E. Markey
/s/ Richard Allen Griffin
/s/ William C. Whitbeck

[1] As set forth in McCormick, *supra*:

> Demonstrative evidence, however, is by no means limited to items which may properly be classed as "real" or "original" evidence. It is today increasingly common to encounter the offer of tangible items which are not themselves contended to have played any part in the history of the case, but which are instead tendered for the purpose of rendering other evidence more comprehensible to the trier of fact. . . . If an article is offered for these purposes, rather than as real or original evidence, its specific identity or source is generally of no significance whatever. Instead, the theory justifying admission of these exhibits requires only that the item be sufficiently explanatory or illustrative of relevant testimony in the case to be of potential help to the trier of fact.