

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 25, 2011

v

MICHAEL CARR JASPER,

Defendant-Appellant.

No. 294496
Berrien Circuit Court
LC Nos. 2008-412460-FH,
2008-412461-FH,
2008-412475-FH

Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for third-degree fleeing and eluding, MCL 257.602a(3), operating while license suspended, MCL 257.904(1), resisting or obstructing a police officer, MCL 750.81d(1), possession of burglar's tools, MCL 750.116, and breaking and entering, MCL 750.110. We affirm.

Defendant was charged with the breaking and entering of East Main Diner in Niles Township. The evidence showed that the side entrance to the restaurant was a glass door that was broken out in the early morning of November 22, 2008. There were glass and loose coins on the ground by the door. The drawer to the cash register was on the floor. Rolls of coins and money were missing.

Also on November 22, 2008, there were breaking and entering offenses that occurred at Lenny's Mini Mart and Country Café. Defendant was not charged with these offenses. At Lenny's Mini Mart, the glass of the entrance door was shattered and the cash register was damaged. All the money from the register was gone. At Country Café, the glass was broken out of the back door. The tray to the cash register was on the ground and all the money was missing. The glass to the vending machines was also broken, but none of the money from these machines was gone. The police officers who investigated the various crime scenes testified that the method of entry at Lenny's Mini Mart and Country Café resembled the method of entry at the East Main Diner.

Before trial, the prosecution sent defendant notice that it intended to admit evidence of the breaking and entering at Lenny's Mini Mart and Country Café to identify defendant as the perpetrator of the East Main Diner offense. At trial, defense counsel objected to the evidence

concerning Lenny's Mini Mart and Country Café on the grounds that defendant was not on trial for these offenses and it would be unfairly prejudicial to admit the evidence for the jury. The prosecution argued the evidence was admissible under MRE 404(b)(1) because it demonstrated a system or pattern of criminal behavior. The trial court ruled the evidence was admissible.

The trial court did not abuse its discretion. When the prior-acts evidence is offered to establish identity through a system in doing an act, (1) there must be substantial evidence that the defendant committed the prior act sought to be introduced, (2) there must be some special quality of the act tending to prove the defendant's identity, (3) it must be material to the defendant's guilt, and (4) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982).

First, there was substantial evidence that defendant committed the breaking and entering offenses at Lenny's Mini Mart and Country Café. The police found glass shards throughout defendant's truck. They also recovered gloves and a hammer with glass shards on them. The security video from Lenny's Mini Mart showed the perpetrator wore gloves and glass doors at both Lenny's Mini Mart and Country Café had been shattered. Also, a gray sweatshirt was found in defendant's truck with a roll of coins in it. The owner of Lenny's Mini Mart testified that rolls of coins were missing from his gas station. This evidence supports a finding that defendant broke and entered the glass doors at Lenny's Mini Mart and Country Café.

Second, the prosecution also presented evidence that the breaking and entering offenses had a special quality that tended to identify defendant as the perpetrator. Each offense was committed in the early morning hours on the same day. All three locations are within close proximity to each other. The offenses were also committed in a similar fashion. A glass door was broken and the cash register was damaged at each location. In addition, money was missing from the cash register at each location. This evidence suggests that defendant committed each offense in a similar fashion on the same day.

Third, evidence of the other offenses was material to proving defendant's guilt in this case. Identity is always an element of an offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). The similarity of the offenses made it more probable that defendant was engaged in a system and pattern of breaking and entering that morning. The evidence pertaining to Lenny's Mini Mart and Country Café was thus material to the identification of defendant as the East Main Diner perpetrator.

Last, defendant was not unfairly prejudiced by the introduction of the evidence. Proffered evidence is unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury or when it would be inequitable to allow use of the evidence. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001), *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). "Whether other-acts evidence is more prejudicial than probative is best left to the contemporaneous assessment of the trial court." *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005).

The evidence of the breaking and entering offenses at Lenny's Mini Mart and Country Café was highly probative of defendant's identity. Moreover, the trial court was in the best

position to evaluate the evidence and determine its prejudicial effect on the jury. *McGhee*, 268 Mich App at 614. And, given the other evidence against defendant, including evidence found in his truck, we conclude that the admission of the evidence was not unfairly prejudicial under MRE 403. Moreover, the trial court gave the jury a limiting instruction concerning the use of the evidence admitted under MRE 404(b). Jurors are presumed to follow their instructions. *People v Abraham*, 256 Mich App 265; 662 NW2d 836 (2003).

Defendant also argues there was insufficient evidence presented at trial to support his convictions. In reviewing a claim of insufficiency of the evidence, we “view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). All reasonable inferences are drawn, and deference given, in support of the jury verdict and we will not interfere with the jury’s job of weighing the evidence or deciding the credibility of the witnesses. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

First, viewed in a light most favorable to the prosecution, there was sufficient evidence to support defendant’s conviction beyond a reasonable doubt for third-degree fleeing and eluding under MCL 257.602a(3).¹ Officer Scott Swanson was on patrol in a fully marked police car and was in uniform. He saw defendant’s truck with a headlight out. He began pursuit and observed the vehicle make a turn without use of a turn signal. Swanson activated his overhead lights. The vehicle accelerated and drove through several stop signs without stopping. Swanson then

¹ MCL 257.602a(3) provides, in relevant part:

(1) A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the motor vehicle, extinguishing the lights of the motor vehicle, or otherwise attempting to flee or elude the officer. This subsection does not apply unless the police or conservation officer giving the signal is in uniform and the officer's vehicle is identified as an official police or department of natural resources vehicle.

* * *

(3) Except as provided in subsection (4) or (5), an individual who violates subsection (1) is guilty of third-degree fleeing and eluding, a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$1,000.00, or both, if 1 or more of the following circumstances apply:

(a) The violation results in a collision or accident.

activated his siren. Eventually, the driver lost control of the vehicle, and the vehicle crashed into a tree and fence. Swanson recognized defendant during a subsequent foot chase. Based on this evidence, a rational trier of fact could conclude that defendant violated MCL 257.602a(3).

Sufficient evidence was also presented to support defendant's conviction for operating while licensed suspended, MCL 257.904(1).² After chasing defendant's truck and then pursuing defendant on foot, Swanson conducted a database search of the license plate number on the truck. The search indicated the vehicle was registered to defendant. Defendant's driving status was investigated and it was determined that his license was suspended. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant operated his truck with a suspended license in violation of MCL 257.904(1).

Additionally, sufficient evidence was presented to convict defendant of resisting and obstructing a police officer in violation of MCL 750.81d(1).³ Swanson testified that after

² MCL 257.904(1) provides:

(1) A person whose operator's or chauffeur's license or registration certificate has been suspended or revoked and who has been notified as provided in section 212 of that suspension or revocation, whose application for license has been denied, or who has never applied for a license, shall not operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state.

³ MCL 750.81d(1) provides, in relevant part:

(1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both.

* * *

(7) As used in this section:

(a) "Obstruct" includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.

(b) "Person" means any of the following:

(i) A police officer of this state or of a political subdivision of this state including, but not limited to, a motor carrier officer or capitol security officer of the department of state police.

defendant crashed his truck, he fled from the scene. Swanson pursued him on foot. Defendant jumped over several fences and ignored Swanson's repeated commands to stop running and get on the ground. Defendant's failure to abide by Swanson's command to stop running constitutes "obstruction" within the meaning of MCL 750.81d(7). Based on this evidence, a rational trier of fact could have found that the essential elements of assaulting, resisting or obstructing a police officer under MCL 750.81d(1) were proven beyond a reasonable doubt.

Further, viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to support defendant's conviction for possessing burglar's tools, MCL 750.116.⁴ As we noted earlier in this opinion, the police recovered gloves and a hammer from defendant's truck, and found glass shards on these items and throughout the truck. Glass was shattered and cash registers were damaged at East Main Diner, Lenny's Mini Mart and Country Café. Defendant had the hammer in his possession so that he could use it to break the glass doors in order to enter each location. *People v Wilson*, 180 Mich App 12, 14; 446 NW2d 571 (1989) ("To come within the statute, the tools must not only be adapted, that is, capable of being used in breaking and entering, but as well designed, that is, contrived or taken to be employed for such purpose."). Defendant's possession of the hammer, "coupled with the circumstances surrounding [] arrest, would warrant a jury's finding that the items were contrived and adapted for breaking and entering." *People v Murphy*, 28 Mich App 150, 156; 184 NW2d 256 (1970).

Finally, sufficient evidence was presented to support defendant's conviction for breaking and entering under MCL 750.110. "The elements of the offense of breaking and entering with intent to commit larceny are: (1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny therein." *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998). Based on the shattered side glass door, evidence recovered from defendant's truck, and the breaking and entering offenses at Lenny's Mini Mart and Country Café, a rational trier of fact could conclude that defendant used force to break and enter the East Main Diner. The fact that defendant targeted the coins in the register and the money in a drawer under the register, and the fact that defendant was identified fleeing from the area during a police chase suggests that defendant

⁴ MCL 750.116 provides:

Any person who shall knowingly have in his possession any nitroglycerine, or other explosive, thermite, engine, machine, tool or implement, device, chemical or substance, adapted and designed for cutting or burning through, forcing or breaking open any building, room, vault, safe or other depository, in order to steal therefrom any money or other property, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ the same for the purpose aforesaid, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years.

intended to commit a larceny. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). Given the totality of the circumstances, a rational trier of fact could conclude that defendant was guilty of breaking and entering pursuant to MCL 750.110.

Affirmed.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Kurtis T. Wilder