

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 9, 2013

v

DAVID WESLEY MORRISON,
Defendant-Appellant.

No. 301320
Wayne Circuit Court
LC No. 09-028443-FC

Before: BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, two counts of conspiracy to commit armed robbery, MCL 750.157a, carrying a concealed weapon (“CCW”), MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (second offense), MCL 750.227b. Defendant was acquitted of additional charges of first-degree felony murder, MCL 750.316(1)(b), three additional counts of armed robbery, and two additional counts of conspiracy to commit armed robbery. The trial court sentenced defendant to concurrent prison terms of 30 to 60 years each for the armed robbery and conspiracy convictions, two to five years each for the CCW and felon-in-possession convictions, and a consecutive five-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. BASIC FACTS

Defendant’s convictions arise from the October 10, 2009, robbery of the Golden Nugget pawnshop in Highland Park. A pawnshop customer was fatally shot during the offense and others were wounded. The prosecution alleged that defendant participated in the planning and commission of the robbery with Deangelo Griggs and George Thomas. It was defendant’s theory at trial that his participation in the offense was coerced by duress, namely, threats by Thomas, and that defendant was not involved in the planning of the offense.

Griggs pleaded guilty to second-degree murder, MCL 750.317, pursuant to a plea agreement whereby an original charge of first-degree felony murder was dismissed. Defendant and Thomas were thereafter tried jointly, but on the fourth day of trial Thomas pleaded guilty to all charges, including first-degree felony murder. Griggs and Thomas both testified in a manner that was supportive of defendant’s duress defense.

Before trial, the prosecutor moved to admit evidence of two prior robberies that defendant committed in 1997, one at a McDonald's restaurant in Southfield and one at a McDonald's restaurant in Redford. The two robberies took place only days apart. The prosecutor asserted that the prior robberies were evidence of defendant's pattern and "modus operandi." Both robberies were planned in advance with other accomplices and were "inside jobs" in that defendant relied on the assistance of a co-conspirator who previously worked at McDonalds and knew how each franchise operated. The robberies also involved a division of labor, in which one person controlled the robbery victims while the other stole property. The plans also involved use of a getaway car. The trial court concluded that the similarities between the McDonald's robberies and the pawnshop robbery were sufficient to admit the evidence. The court also determined that the probative value of the evidence outweighed the potential for unfair prejudice. Accordingly, the court granted the prosecutor's motion to allow the evidence.

At trial, over defendant's objection, the prosecution was permitted to introduce evidence relating to the two 1997 robberies. The trial court instructed the jury that the evidence could only be considered to determine whether defendant "specifically meant to commit the crimes he is charged with" or "used a plan, scheme or characteristic scheme that he has used before or since." The court cautioned the jury that it could not consider the evidence to "decide that it shows that the [d]efendant is a bad person or that he is likely to commit crimes" and that it "must not convict the [d]efendant here because you think he is guilty of other bad conduct."

Defendant was convicted and sentenced as outlined above. He now appeals as of right.

II. EVIDENCE OF DEFENDANT'S PRIOR CONVICTIONS

Defendant argues that the trial court abused its discretion in admitting evidence of the 1997 robberies. We disagree.

We review for an abuse of discretion a trial court's decision to admit evidence. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

MRE 404(b)(1) prohibits evidence of other crimes, wrongs, or acts "to prove the character of a person in order to show action in conformity therewith," but allows such evidence to be admitted "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."

To admit evidence under MRE 404(b), the prosecutor must first establish that the evidence is logically relevant to a material fact in the case, as required by MRE 401 and MRE 402, and is *not* simply evidence of the defendant's character or relevant to his propensity to act in conformance with his character. The prosecution thus bears an initial burden to show that the proffered evidence is relevant to a proper purpose under the nonexclusive list in MRE 404(b)(1) or is otherwise probative of a fact other than the defendant's character or criminal

propensity. Evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity. Stated another way, the rule is not exclusionary, but is inclusionary, because it provides a nonexhaustive list of reasons to properly admit evidence that may nonetheless also give rise to an inference about the defendant's character. Any undue prejudice that arises because the evidence also unavoidably reflects the defendant's character is then considered under the MRE 403 balancing test, which permits the court to exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice. . . ." MRE 403. Finally, upon request, the trial court may provide a limiting instruction to the jury under MRE 105 to specify that the jury may consider the evidence only for proper, noncharacter purposes. [*People v Mardlin*, 487 Mich 609, 615; 790 NW2d 607 (2010) (footnotes omitted).]

"Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; see also *People v Feezel*, 486 Mich 184, 197 n 6; 783 NW2d 67 (2010). MRE 401 requires two elements to establish relevance: materiality, i.e., whether a fact is of consequence to the action, and probative force, i.e., the tendency to make the fact more or less probable. *Feezel*, 486 Mich at 197; *People v Crawford*, 458 Mich 376, 388-389; 582 NW2d 785 (1998).

MRE 404(b)(1) specifically recognizes that evidence of prior bad acts may be admissible for a noncharacter purpose, such as to prove motive, intent, or identity, even though the same evidence might permit an inference about character. *People v Roper*, 286 Mich App 77, 92; 777 NW2d 483 (2009). The trial court must consider whether the evidence is offered for a proper purpose, rather than to show the defendant's propensity to act in conformance with a given character trait, whether the evidence is relevant to a consequential issue of fact, and whether the danger of unfair prejudice outweighs the probative value of the evidence. *People v Smith*, 282 Mich App 191, 194-195; 772 NW2d 428 (2009).

Defendant argues that the 1997 robberies were not relevant to any fact at issue because the 1997 offenses were not distinctively similar to the pawnshop robbery. When introduced to establish identity, evidence should be admitted only if the crime charged and the other crimes are "marked with special circumstances so uncommon, peculiar and distinctive as to lead compellingly to the conclusion that all were the handiwork of the defendant because all bore his or her distinctive style or 'touch.'" *People v Golochowicz*, 413 Mich 298, 325; 319 NW2d 518 (1982). However, we need not decide whether the similarities between the 1997 robberies and the charged pawnshop robbery support admission of the prior acts to prove identity where the prior acts were not offered for such a purpose; in fact, identity was not an issue at trial. The trial court had previously ruled that defendant's confession to his involvement was admissible at trial, leaving defendant to argue that he was compelled to participate under duress from his co-defendants. Thus, defendant's intent, not his identity, was at issue at trial.

The prosecutor established sufficient similarity between the 1997 robberies and the present offense for the prior acts to be probative of defendant's plan or intent, and to refute

defendant's defense of duress. "Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000) quoting with approval *People v Ewoldt*, 867 P 2d 757 (California, 1994). Also, in contrast to identity, prior bad acts offered to prove a pattern or practice are subject to a lower requirement of distinction or uniqueness, and acts offered to prove intent require even a lesser degree of similarity. See *Smith*, 282 Mich App at 195 ("A high degree of similarity is required [to show a pattern of conduct]—more than is needed to prove intent, but less than is required to prove identity—but the plan itself need not be unusual or distinctive.")

In the 1997 robberies, as in the pawnshop robbery, defendant acted in concert with a co-perpetrator who used his knowledge of the robbery locations to plan the robberies. The 1997 robberies also involved a plan in which one perpetrator removed money from a safe and cash register while the other used the threat of violence to subdue employees and customers. The prior robberies also involved use of a getaway car. Further, the trial court specifically found that any potential for unfair prejudice of the evidence did not substantially outweigh its probative value. MRE 403. The trial court minimized the potential for unfair prejudice by instructing the jury on the limited, permissible use of the evidence. See *Unger*, 278 Mich App at 235 (jurors are presumed to follow their instructions).

Moreover, the prior acts evidence was not the only evidence refuting defendant's duress defense. The testimony of James Newsom described two robbers working in concert. According to Newsom, Griggs ordered Newsom and Kevin Moore to lie on the floor and stood over them while another person searched them and removed Newsom's wallet. Newsom's wallet was later discovered in the police cruiser in which defendant was transported to the police station, thereby supporting the inference that defendant was the person who removed Newsom's wallet. The second man already had a gun when he and Griggs searched the employees, contrary to defendant's testimony that Griggs did not give defendant a gun until Griggs sent defendant to bring a customer to the back area. Moore similarly testified that the two robbers worked together, ordering him and other employees to lie on the floor in the back area. Defendant was carrying extra ammunition for the .38 revolver, contrary to Griggs's testimony that he gave defendant a gun, but not extra ammunition. The police officer who arrested defendant at the scene testified that defendant tried to get into the minivan with Thomas to flee, contrary to defendant's testimony that he was only pointing out Thomas to the police. Defendant ran from the police, suggesting consciousness of guilt and alliance with the other perpetrators. Under these circumstances, the prior acts evidence weighed against defendant's duress claim. The trial court did not abuse its discretion in admitting the evidence.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher