

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRENT S. NELSON,

Defendant-Appellant.

UNPUBLISHED
December 3, 1999

No. 209418
Oakland Circuit Court
LC No. 97-153509 FH

Before: Jansen, P.J., and Saad and Gage, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of possession of a fraudulent financial transaction device, MCL 750.157n(2); MSA 28.354(14)(2). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to five to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in permitting the prosecutor to delete an important witness from its witness list without first seeking permission of the court. A trial court's decision to permit amendment to the witness list is reversible only for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995).

A review of the record reveals that the trial court effectively granted the prosecutor permission to amend his witness list by deleting a witness, defendant's former roommate, Deantrick Johnson. At hearings prior to trial, the parties argued whether Johnson qualified as a *res gestae* witness and whether the prosecutor could simply delete Johnson from its witness list. The trial court determined that Johnson was not a *res gestae* witness, a finding we cannot characterize as clearly erroneous, *People v Hatch*, 156 Mich App 265, 267; 401 NW2d 344 (1986), and that the prosecutor had no obligation to call Johnson. Thus, even assuming that the prosecutor was required to seek the court's permission to delete Johnson's name from its witness list, the prosecutor received such approval. The court observed that defendant could subpoena Johnson, and ordered that the prosecutor cooperate with defendant in attempting to serve Johnson. Although the prosecutor failed to locate Johnson, the prosecutor made reasonable efforts to discover his whereabouts. MCL 767.40a(5); MSA 28.980(1); *People v Gadowski*, 232 Mich App 24, 36; 592 NW2d 75 (1998). Contrary to defendant's assertions, the

prosecutor had no obligation to establish his due diligence in searching for Johnson. In conclusion regarding this issue, we find no error in any respect.

Defendant next argues that the trial court improperly admitted evidence of defendant's criminal history. The decision whether bad acts evidence is admissible is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Character evidence and evidence of bad acts are admissible if the evidence is offered for a proper purpose, is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205; 520 NW2d 338 (1994). A proper purpose is one other than to show the defendant's propensity to commit the crime charged. *Id.* at 74. Thus, the evidence cannot be offered for the sole purpose to show that the defendant has a criminal propensity, but must be offered to demonstrate some relevant, noncharacter theory. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996).

The prosecutor in this case offered evidence of defendant's prior convictions to show that defendant specifically intended to defraud ABC Warehouse, that he knew that the items in his possession were meant to defraud, and that no possibility existed that defendant acted by accident or mistake.¹ This Court has held that when a defendant asserts the defense of accident or mistake, his intent becomes a material issue at trial. A defendant's prior acts then become probative of his intent, even when those acts constitute separate, unrelated crimes. *People v Cobb*, 82 Mich App 167, 170; 266 NW2d 451 (1978). Here, defendant placed his intent in issue by claiming that in presenting the fraudulently obtained credit account number, he had no intention of purchasing the television. The prosecution therefore acted properly in introducing evidence of defendant's prior conduct to show that defendant could not have been mistaken and that the use of the account number could not have been accidental. *Cobb, supra*. While defendant argues that the prior convictions involved no distinguishing, similar circumstances, the prior convictions, which included two charges of false pretenses, an attempted larceny by false personation and fraud by wire, contain the very essential element of the charged offense, that being fraudulent intent. See *Crawford, supra* at 391-397 (To establish a defendant's knowledge and intent by invoking the doctrine of chances requires some similarity between the defendant's prior convictions and the crime for which he stands charged.); *People v Doyle (On Remand)*, 129 Mich App 145, 151; 342 NW2d 560 (1983) ("The similarity of other acts to show that the act on trial was not inadvertent, unintentional, accidental, or done without guilty knowledge does not require as great a similarity with the other bad acts as those instances where a common scheme, plan, or design is sought to be proved."), rejected in part on other grounds, *People v Williams*, 422 Mich 381; 373 NW2d 567 (1985). Given that defendant's previous crimes and the instant offense all involved defendant's attempts to obtain certain items through the presentation of fraudulent information, we find sufficient similarity from which the jury could draw a permissible inference of defendant's intent or lack of accident in this case, and that defendant's prior convictions were not "mere character evidence masquerading as evidence of 'knowledge' and 'intent'." *Crawford, supra* at 396, 397. Because this evidence was highly probative of defendant's intent, and because the trial court provided a limiting

instruction, we conclude that the evidence's probative value was not substantially outweighed by any danger of unfair prejudice. MRE 403. Thus, we find no abuse of discretion in the trial court's admission of this evidence of defendant's prior crimes. *Crawford, supra* at 383.

Defendant next asserts that the trial court improperly failed to order discovery with respect to the criminal histories of the prosecutor's witnesses. Before trial, defendant moved for discovery of the prosecutor's witnesses' criminal histories. On ascertaining that defendant had not yet made any effort to obtain this information, the trial court required that defendant do some of the investigative work himself. The court indicated that if defendant was unsuccessful in this endeavor, it would revisit the issue. Defendant never subsequently gave any indication that he had encountered some difficulty in gathering the criminal histories. Defendant's brief on appeal fails to describe what efforts he undertook to obtain the information, whether he was successful, or how any failure to obtain the information prejudiced him. Therefore, the issue is unpreserved. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997) (A party may not merely announce a position and leave it to us to discover and rationalize the basis for the claim.). Furthermore, given the lack of information provided, we cannot conclude that our failure to consider this issue will result in manifest injustice. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

Lastly, defendant claims that the trial court erred in failing to give a jury instruction regarding specific intent. This Court reviews jury instructions in their entirety to determine if error requiring reversal has occurred. The instructions must include all elements of the charged offense and must not exclude material issues, defenses and theories, if evidence supports them. Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Defendant contends that because the crime charged involved an intention to defraud or cheat, the trial court should have given the specific intent instruction, CJI2d 3.9. In *People v Bartlett*, 231 Mich App 139; 585 NW2d 341 (1998), this Court addressed the same issue presented here, whether the trial court erred in failing to instruct the jury pursuant to CJI2d 3.9 when one of the elements of the crime involved the defendant's "knowing" conduct. *Id.* at 160. This Court declined to resolve whether the crime involved constituted a specific or general intent crime, and focused less on the category of crime than on the jury instructions as a whole. *Id.* at 161-162. The Court concluded that because the jury was instructed that to find the defendant guilty it would have to conclude that the defendant acted knowingly, the jury was adequately instructed regarding this element despite the fact no specific intent instruction was given. *Id.*

In this case, MCL 750.157n(2); MSA 28.354(14)(2) requires that the defendant "knowingly possesses a fraudulent or altered financial transaction device." The learned trial judge instructed the jury that for defendant to be found guilty of possession of a fraudulent financial transaction device, the jury must find that defendant knowingly obtained possession of the fraudulent transaction device and intended to defraud or cheat someone. Because these

instructions explained the requisite state of mind for the crime, they adequately protected defendant's rights, and we find no error in the trial court's refusal to read CJI2d 3.9. *Daniel, supra*.

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Hilda R. Gage

¹ The prosecutor also proffered defendant's prior crimes to establish his identity by showing that defendant's instant crime constituted a part of a scheme or plan to defraud. We agree with defendant's contention that the prosecutor failed to establish that defendant's prior crimes and the instant case involved such distinctive, unique, and peculiar or special characteristics as to justify an ordinarily reasonable juror to infer that all were the handiwork of the same person. *People v Golochowicz*, 413 Mich 298, 312; 319 NW2d 518 (1982). Furthermore, to the extent that the prosecutor offered the evidence to prove "[t]hat the defendant had a reason to commit the crime," the record does not contain an explanation of any connection between the prior crimes and defendant's motive in the instant case. Because we conclude, however, that evidence of defendant's prior crimes was relevant to other permissible purposes, our findings in these respects are not dispositive of this issue.