

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ALEXANDER AVDIA, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

ALEXANDER AVDIA, a/k/a Aleksander Abdija,

Respondent-Appellant.

UNPUBLISHED

October 12, 2001

No. 222877

Macomb Circuit Court

Family Division

LC No. 98-047038-DL

Before: Sawyer, P.J., and Griffin and O’Connell, JJ.

GRIFFIN, J. (*dissenting*).

I respectfully dissent. I would hold the trial court committed error requiring reversal by admitting evidence that respondent had started a prior fire. MRE 404(b). I would reverse and remand for a new trial.¹

Although still controversial, it is now well established that at the adjudicative phase of a juvenile delinquency proceeding, “[t]he Michigan Rules of Evidence and the standard of proof beyond a reasonable doubt apply at trial.” MCR 5.942(C). See also *In re Winship*, 397 US 358, 365-367; 90 S Ct 1068; 25 L Ed 2d 368 (1970); *People v Hana*, 443 Mich 202, 211, n 31; 504 NW2d 166 (1993); *In re Weiss*, 224 Mich App 37, 42; 568 NW2d 336 (1997).

At trial, it was the prosecutor’s theory that on November 27, 1998, between 7:00 p.m. and 7:15 p.m. respondent intentionally set a fire in the corner of the Macomb County College classroom of the Italian Cultural Center of Warren. To establish respondent’s guilt of the offense, the prosecution introduced evidence that respondent had previously started a fire outside the cultural center on the bocci courts:

Q (Assistant Prosecutor). Can you tell me, you said you have seen this young man before at the Italian Cultural Center, is that correct?

¹ I agree with the majority’s disposition of respondent’s other issues.

A (*Maria Boggess*). Yes.

Q. Have you seen him light fires there before?

A. Yes.

Q. Can you tell me what he lit fire to previously?

A. They put a bunch of –

Mr. Faller (defense counsel): Objection, relevancy, your Honor. *We're discussing this act, this time, not fire acts – not prior acts.*

The Court: The objection is overruled, Mr. Faller.

BY MS. MELLOS:

Q. So, what had he lit fire to before?

A. We have bocci courts and they put piles of paper or whatever they could find and started it on fire inside the court and me and another of my customers we went out and stomped it out and they ran out through the field.

Q. This is the young man that set fire to that?

A. Yes.

Q. You're absolutely sure?

A. Yes. [Emphasis added.]

The much litigated rule of evidence that governs the admissibility of prior acts or other acts evidence is MRE 404. This rule of evidence provides in pertinent part:

(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

* * *

(b) *Other crimes, wrongs, or acts.*

(1) 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.

(2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

Our Supreme Court in *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), reiterated that the admissibility of other acts evidence under MRE 404 is governed by the standards articulated in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993):

In *VanderVliet*, *supra* at 74-75, we adopted the approach to other acts evidence enunciated by the United States Supreme Court in *Huddleston v United States*, 485 US 681, 691-692; 108 S Ct 1496; 99 L Ed 2d 771 (1988). That approach employs the evidentiary safeguards already present in the rules of evidence. First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a “determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403.” *VanderVliet*, *supra* at 75, quoting advisory committee notes to FRE 404(b). Finally, the trial court, upon request, may provide a limiting instruction under MRE 105.

In the present case, the prosecution successfully admitted into evidence respondent's prior act of setting a fire. Contrary to MRE 404(b)(2), the prosecution did not provide reasonable notice in advance of trial of its intent to introduce such evidence or its rationale for offering the evidence. Following respondent's objection, the prosecution articulated no limited purpose for the admission of such evidence. Instead, following its admission, the prosecution argued that the fact respondent had started a prior fire was circumstantial evidence that he committed the charged offense of arson.²

While some view *Sabin*, *supra*, as an open invitation for the admission of all character and prior act evidence under the guise that on appeal it could be characterized as something else, the *Sabin* Court did not overrule its prior decision in *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998). On the contrary, our Supreme Court in *Sabin* distinguished *Crawford* and

² In her closing argument, the assistant prosecutor noted that the fire was not accidental and respondent was seen running out of the building shortly before it was discovered. The assistant prosecutor then stated: “You also heard testimony that she [Maria Boggess] has seen him in the Italian Cultural Center before lighting fires. This is circumstantial evidence.”

ostensibly followed its holdings. In particular, in *Sabin, supra* at 57, n 5 and 59, n 6, the Supreme Court stated:

In *Crawford, supra* at 388, this Court stated that “[i]n order to ensure the defendant’s right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else. The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized.” Although strongly worded, one should not construe *Crawford* as creating a heightened standard of relevance for other acts evidence. Rather, *Crawford* recognizes that determining the admissibility of other acts evidence is often difficult. The trial court must ascertain whether the proffered theories of logical relevance apply under the circumstances of a particular case.

* * *

In *Crawford, supra* at 386, n 6, this Court emphasized that the prosecution bears the burden of articulating a proper purpose for the admission of prior acts evidence under MRE 404(b). *Crawford*, however, should not be read as imposing a heightened requirement for establishing the theory of admissibility or suggesting that the prosecution’s failure to identify at trial the purpose that supports admissibility requires reversal. The requirement under MRE 404(b)(2) that the prosecution provide notice of the general nature of the other acts evidence and rationale for admitting the evidence is designed to ensure that the defendant is aware of the evidence and to provide an enlightened basis for the trial court’s determination of relevance and decision whether to exclude the evidence under MRE 403. See *VanderVliet, supra* at 89, n 51. The prosecution’s recitation of purposes at trial does not restrict appellate courts in reviewing a trial court’s decision to admit the evidence.

Earlier, in *People v Allen*, 429 Mich 558, 566, 568-569; 420 NW2d 499 (1988), the Supreme Court explained the fundamental principles underlying MRE 404:

There can be little doubt that an individual with a substantial criminal history is more likely to have committed a crime than is an individual free of past criminal activity. Nevertheless, in our system of jurisprudence, we try cases, rather than persons, and thus a jury may look only to the evidence of the events in question, not defendant’s prior acts in reaching its verdict.⁵

⁵ This fundamental principle is the basis for MRE 404 . . .

* * *

A jury should not be allowed to consider the defendant’s guilt of the crime before it on the basis of evidence of his propensity for crime. Finding a person guilty of a crime is not a pleasant or easy assignment for a representative group of

twelve people. It is much easier to conclude that a person is bad than that he did something bad. Hence the appetite for more knowledge of the defendant's background and the slippery slope toward general "bad man" evidence.

This appetite presents three types of impropriety. First, that jurors may determine that although defendant's guilt in the case before them is in doubt, he is a bad man and should therefore be punished. Second, the character evidence may lead the jury to lower the burden of proof against the defendant, since, even if the guilty verdict is incorrect, no "innocent" man will be forced to endure punishment. Third, the jury may determine that on the basis of his prior actions, the defendant has a propensity to commit crimes, and therefore he probably is guilty of the crime with which he is charged. Beaver & Marques, *A proposal to modify the rule on criminal conviction impeachment*, 58 Temple L Q 585, 592-593 (1985). All three of these dimensions suggest a likelihood that innocent persons may be convicted.

The danger then is that a jury will misuse prior conviction evidence by focusing on the defendant's general bad character, rather than solely on his character for truth telling. [Footnote omitted.]

The majority concludes that respondent's counsel did not make a proper objection to the prior act evidence because the objection was based on the lack of relevancy rather than a violation of MRE 404(b). I disagree. Although the objection was inartful, it referenced relevancy, which is a factor under MRE 404(b), and also specified, "[w]e're discussing this act, this time, not fire acts – *not prior acts*." (Emphasis added.) Because the admissibility of prior acts is governed by MRE 404(b), defense counsel's objection, when viewed in context, addressed a 404(b) error. Accordingly, the objection is preserved. MRE 103(a)(1).

On appeal, the prosecution argues that the evidence of the prior fire *could have been* admitted at trial for the limited purpose of establishing respondent's identity. However, it was not. On the contrary, such a limited purpose was never articulated by the prosecutor at trial and the jury was not instructed to consider the prior act for only a limited purpose. Accordingly, the jury considered the evidence for *all* purposes. The prosecutor argued to the jury that the prior fire was circumstantial evidence of respondent's guilt. The logical inference of this argument was that because respondent committed the act before, he was likely to have done it again. The use of evidence to prove propensity to commit the crime, i.e., "to prove the character of a person in order to show action in conformity therewith," is impermissible. MRE 404(b)(1); *Crawford, supra*; *Allen, supra*.

In addition, whether respondent had committed a prior crime was only marginally relevant regarding the issue of identity. Maria Boggess testified that she identified respondent as being one of the two boys who were in the cultural center shortly before the fire because she recognized him as a boy who frequently was at the center and because of a positive identification she made from a class yearbook. Once the positive identification was made, there was no reason to advise the jury in detail regarding the prior fire incident other than to unfairly prejudice respondent. If respondent's involvement with a prior fire was probative of some other purpose "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an

act, knowledge, identity, or absence of mistake or accident,” MRE 404(b)(1), the prosecutor never articulated such a limited purpose.

The prejudice to respondent from the admission of the prior act evidence was substantial because it was used by the jury for all purposes. “Thus, juries exposed to prior conviction evidence [or other criminal act evidence] may decide on a defendant’s guilt upon the basis of the inference that prior criminal activity indicates guilt of a charged crime.” *Allen, supra* at 568, n 8. In my view, the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. *People v Starr*, 457 Mich 490; 577 NW2d 673 (1998).

Finally, the case against respondent was based entirely on weak circumstantial evidence.³ After careful review of the entire record, I conclude that the error was not harmless. Respondent has sustained his burden of establishing that it is more probable than not the inadmissible other acts evidence affected the jury’s verdict. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999).

I would reverse and remand for a new trial.

/s/ Richard Allen Griffin

³ I note that after the jury requested to be reinstructed regarding all instructions, one juror reported that it appeared the jury was deadlocked.