

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KEVIN ROBERT MACKIN,

Defendant-Appellee.

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UNPUBLISHED  
September 21, 2006

No. 268017  
Wayne Circuit Court  
LC No. 05-009694-01

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JASON THOMAS WOZNIAK,

Defendant-Appellee.

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No. 268018  
Wayne Circuit Court  
LC No. 05-009694-02

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KEVIN ROBERT MACKIN,

Defendant-Appellee.

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No. 269061  
Wayne Circuit Court  
LC No. 06-001526-01

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JASON THOMAS WOZNIAK,

No. 269062  
Wayne Circuit Court  
LC No. 06-001526-02

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

## I. Introduction

In Docket Nos. 268017 and 268018, the prosecution appeals on delayed application for leave granted the circuit court's order in Lower Court Docket Nos. 05-009694-01 and 05-009694-02 (the "694" cases) denying the prosecution's pretrial motion to present "other acts" evidence against defendants. In Docket Nos. 269061 and 269062, the prosecution appeals on leave granted the circuit court's order in Lower Court Docket Nos. 06-001526-01 and 06-001526-02 (the "526" cases) denying the prosecution's pretrial motion to join the ethnic intimidation charge, MCL 750.147b, brought against defendants in the 694 cases with the various charges brought against defendants in the 526 cases. These four cases were consolidated by this Court for purposes of appeal. We reverse the trial court's orders denying the prosecution's pretrial motion to present other acts evidence and denying the prosecution's motion to join the charges against defendants for one trial. We also vacate the trial court's order "holding in abeyance" the prosecution's motion to exclude certain hearsay testimony to allow the court the opportunity to admit the content of defendant Wozniak's statement to Joseph Wallace on July 5, 2005, should the prosecution "open the door" to that evidence.

## II. Background

In the early morning hours of July 4, 2005, defendants were arrested by Trenton police officers for burning a wooden cross on the front lawn of Wallace, an African-American, and his fiancée, Deanna Mallow, a Caucasian ("complainants"). Defendants were originally charged with ethnic intimidation, MCL 750.147b, and arson, i.e., preparation to burn property valued at over \$20,000, MCL 750.77(1)(d)(i) (felony arson), in the 694 cases. Following a preliminary examination in the district court, defendants were bound over solely on the ethnic intimidation charge. The prosecution sought the reinstatement of the felony arson charge but was denied by both the district and circuit courts. Accordingly, the prosecution subsequently filed a second complaint against defendants in the 526 cases, charging conspiracy to commit ethnic intimidation, MCL 750.157a, preparation to burn property valued under \$20,000 (and conspiracy to commit that offense), MCL 750.77(1)(a), and burning of personal property valued under \$20,000 (and conspiracy to commit that offense), MCL 750.74(1) (misdemeanor arson). The prosecution filed its interlocutory applications for leave to appeal based on the trial court's unfavorable evidentiary rulings and the court's denial of its motion to join the various charges against defendants raised in the two separate complaints into one trial.

Following defendants' initial preliminary examination regarding the ethnic intimidation charge, the prosecution filed a notice of intent to present "other act" evidence against defendants. Specifically, the prosecution sought to present evidence that a cross had also been burned on the complainants' front lawn in the early morning hours of July 3, 2005, and that defendant Wozniak returned to the complainants' house on July 5, 2005. However, the prosecution sought to

exclude the content of defendant Wozniak's statement to Wallace on July 5, 2005, as inadmissible hearsay. The circuit court found that the earlier cross burning incident was more prejudicial than probative and, therefore, excluded that evidence from trial. The circuit court also found that the contents of defendant Wozniak's statement should be admitted if the prosecution presented testimony regarding the fact of the July 5, 2005, visit in order to prevent the mischaracterization of the evidence. Therefore, the circuit court held the prosecution's motion to exclude hearsay in abeyance. However, the court determined that the fact of the July 5, 2005, visit was inadmissible as the prejudicial effect of that evidence also outweighed its substantive value. The prosecution challenges these rulings.

### III. Analysis

#### A. Evidentiary Rulings

##### i. Cross Burning on July 3, 2005

We review a lower court's decision whether to admit evidence for an abuse of discretion, *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998), and preliminary questions of law de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Generally, all relevant evidence is admissible, unless otherwise prohibited by law. MRE 402; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). 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 *Aldrich*, *supra* at 114. Otherwise stated, "evidence is admissible if it is helpful in throwing light on any material point." *Id.*

However, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*; see also MRE 403. This is not to say that evidence is inadmissible merely because it is prejudicial. *Waknin v Chamberlain*, 467 Mich 329, 334; 653 NW2d 176 (2002). "All evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995) (emphasis in the original). Unfair prejudice exists when there is a tendency that marginally probative evidence will be afforded undue or preemptive weight by the jury. *Lewis v LeGrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003).

Here, the prosecution sought to introduce evidence of the initial, July 3, 2005, cross burning to explain the intimidation aspect of defendants' actions and complainants' response to the cross burning on the following night.<sup>1</sup> One element of ethnic intimidation is the intimidation

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<sup>1</sup> The parties improperly frame this issue as one involving "other acts" evidence. However, as defendants note, the test for admissibility of other acts evidence is based on the assumption that the other acts were perpetrated by the defendant. MRE 404(b). Here, there is no evidence that defendants participated in the July 3, 2005, cross burning. Rather, there is evidence that the

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or harassment of another with malicious and specific intent. MCL 750.147b(1). As the circuit court noted, one act of burning a cross is sufficient to establish a defendant's intent to intimidate or harass another based on race or color. However, with regard to the evidence presented at trial, the jury is entitled to hear the "complete story" of the matter at issue. *Aldrich, supra* at 115. Review of the record shows that the charged incident is not the entire story.

The complainants had been intimidated and harassed in the exact same manner on the prior morning. After smelling smoke and seeing a smoldering six-foot-tall wooden cross in his yard, Wallace called the police who immediately came and took the remains of the cross into evidence; however, no possible suspects were in sight. On the following night, Wallace was beckoned to the front window by Mallow. A three to four-foot-tall wooden cross stood in their yard, partially burning and creating smoke. Again, Wallace contacted the police. Wallace then stood inside the doorway of his home and, upon seeing a shadowy figure approach the house from the street and douse the cross with lighter fluid, Wallace went outside, yelling obscenities at the person as the person ran away. Complainants then sat on the porch of their home awaiting the police. During that time, they saw a van drive slowly by their home several times. After the police arrived, the van again drove by the complainants' home. The police stopped the van, and ordered defendants to exit the vehicle.

The fact of the first cross burning helps to explain the complainant's reactions to the second cross burning, and therefore was relevant for that limited purposes. In particular, it sheds light on Wallace's action of maintaining a watchful observance of the scene from a distance while awaiting the arrival of the police and his angry reaction toward the person who returned to add more lighter fluid to the burning cross. Therefore, evidence of the first cross burning is relevant to material issues of this case. See *Aldrich, supra*.

Furthermore, the trial court may limit any prejudicial effect of this evidence by instructing the jury pursuant to MRE 105.<sup>2</sup> A carefully crafted limiting instruction would be sufficient to counterbalance any possibility for prejudice created by the evidence. *People v Martzke*, 251 Mich App 282, 295; 651 NW2d 490 (2002). Jurors are presumed to follow instructions, and it is presumed that instructions will cure most errors. *People v Abraham*, 256

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police were unable to find any possible suspects from the first cross burning. Because this is not an issue concerning other acts evidence, we disagree with the prosecution's argument that the proffered evidence is admissible under the *res gestae* exception to the general exclusion of other acts evidence. The prosecution relies on *People v Delgado*, 404 Mich 76; 273 NW2d 395 (1978), and *People v Sholl*, 453 Mich 730; 556 NW2d 851 (1996), to support this argument. However, we note that in these two cases there was no question that the other acts at issue were committed by the defendants. See *Delgado, supra* at 80 (presenting evidence that the defendant sold narcotics to an officer on a date prior to the date of the charged offenses); *Sholl, supra* at 740 (presenting evidence that the defendant had used marijuana on the evening of the alleged rape). Because there is no evidence of defendants' participation in the first cross burning, the *res gestae* exception does not apply.

<sup>2</sup> MRE 105 provides, "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

Mich App 265, 279; 662 NW2d 836 (2003). The trial court should remind the jury that the evidence of the first cross burning is presented to explain the complainant's responses to the subsequent cross burning, not to establish defendants' participation in the first cross burning or propensity to commit the crimes charged. Such an instruction will avoid the jury giving undue or preemptive weight to this evidence. See *Lewis, supra*. Accordingly, we conclude that the circuit court should have granted the prosecution's motion to admit evidence of the July 3, 2005, cross burning.

ii. Encounter with Defendant Wozniak on July 5, 2005

We also conclude that defendants should be allowed to elicit testimony regarding the content of defendant Wozniak's statement to Wallace on July 5, 2005, should the prosecution present evidence that defendant Wozniak returned to the complainants' house that day. Hearsay is generally inadmissible pursuant to MRE 802. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). The content of defendant Wozniak's statement, if elicited from Wallace, could be considered hearsay under certain circumstances because Wallace is not the declarant. However, the content of defendant Wozniak's statement could also be offered for a purpose other than proving the truth of the matter asserted, i.e., to rebut the inference that defendant Wozniak attempted to further harass and intimidate the complainants on July 5, 2005.<sup>3</sup> Thus, whether the content of defendant Wozniak's statement satisfies the definition of hearsay in MRE 801(c) depends on the circumstances at trial.

Furthermore, the admission of evidence that defendant Wozniak went to the complainants' house on July 5, 2005, absent the admission of the content of his statement, creates a "conceptual void regarding the events surrounding" this visit. *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993). If the jury was only informed that defendant Wozniak went to the complainants' house on the day following the charged event, they would likely reach the conclusion that defendant intended to further harass and intimidate the complainants. As noted by the trial court, this is a mischaracterization of the evidence. The admission of the fact without the context would be highly prejudicial to defendants in this case and would ultimately result in an unfair trial. Therefore, the trial court should have denied the prosecution's motion to exclude, rather than holding it in abeyance.

B. Joinder of Charges

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<sup>3</sup> Because the content of defendant Wozniak's statement can be admitted through Wallace's testimony without proving the truth of the matter asserted, we need not address the prosecution's argument that the statement should be excluded because it does not fall within the purview of the exclusions described in MRE 801(d). Additionally, we disagree with defendant Wozniak that the content of his statement is admissible under the "rule of completeness" as codified in MRE 106. MRE 106 provides, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." The challenged statement in this case was neither made in writing nor recorded. Accordingly, MRE 106 and "the rule of completeness" are inapplicable in this case.

The prosecution's final challenge pertains to the circuit court's denial of its motion to join the various charges brought against defendants in the 694 and 526 cases. In response to the prosecution's attempts to have the felony arson charge reinstated against them, defendants filed a motion for sanctions against the prosecutor. Defendants contended that the prosecutor's actions up to that time were vindictive and contradictory. Following the filing of the second complaint against them, defendants sought the dismissal of the additional charges based on prosecutorial vindictiveness. The trial court ultimately denied the prosecution's motion to join the charges and scheduled the trial on the ethnic intimidation charge one week before the scheduled hearing on defendants' motion to dismiss the additional charges against him.

We review a trial court's determination whether to join or sever charges against a defendant for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). MCR 6.120 provides for the permissive joinder or severance of criminal charges against a defendant as follows:

**(B) Postcharging Permissive Joinder or Severance.** On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.

(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

- (a) the same conduct or transaction, or
- (b) a series of connected acts, or
- (c) a series of acts constituting parts of a single scheme or plan.

(2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

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**(C) Right of Severance; Unrelated Offenses.** On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).

We find that joinder was "appropriate" in this case because the various offenses were "related." The charged acts were all based on the singular act of burning a cross in the complainants' yard on July 4, 2005. The circuit court was likely motivated to deny the motions to join the charges because the court already knew how it intended to rule in the later-scheduled

hearing on the motions to dismiss the charges in the 526 cases based on prosecutorial vindictiveness. However, should any charges survive in the 526 cases, the court would be required to conduct two identical trials with identical witnesses and identical testimony. Given that these two cases are based upon the same criminal episode, to not try these cases together would be a waste of judicial resources and the parties' resources. The trial court's decision was therefore outside the principled range of outcomes, and constituted an abuse of discretion. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Accordingly, the trial court should have granted the prosecution's motion for joinder and proceeded against defendants in one trial.

Reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Michael R. Smolenski

/s/ Deborah A. Servitto