

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT FITZGERALD PORTIS,

Defendant-Appellant.

UNPUBLISHED

December 12, 2006

No. 264831

Wayne Circuit Court

LC No. 05-004637-01

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of armed robbery, MCL 750.529. Pursuant to MCL 769.12, defendant was sentenced as a fourth habitual offender to 30 to 60 years' imprisonment. We affirm.

Defendant argues that the trial court denied him his right to a fair trial when it admitted evidence of a prior robbery, of which defendant was acquitted, which had facts too dissimilar to the charged offense to show a common scheme or plan under MRE 404(b). We review a trial court's decision to admit evidence pursuant to MRE 404(b) for a clear abuse of discretion. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant argues that, over his objection, the trial court improperly admitted evidence of the armed robbery of Richard Snyder, for which defendant had been acquitted. Defendant contends that, because the evidence was too dissimilar to show defendant's common scheme or plan, it showed only defendant's criminal propensity, and was therefore inadmissible as improper character evidence under MRE 404(b). We disagree.

Under MRE 404(b), evidence of other crimes is inadmissible to show the defendant's criminal propensity, but it is admissible for other purposes, such as proving that the defendant had a common scheme or plan. In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), our Supreme Court articulated a four-part test for admitting prior bad acts evidence under MRE 404(b): (1) the evidence must be offered for a proper purpose under MRE 404(b), (2) the evidence must be relevant under MRE 402 as enforced through MRE 104(b), (3) the probative value of the evidence must not be substantially

outweighed by unfair prejudice, and (4) the trial court may, upon request, provide a limiting instruction to the jury.

The prosecution initially bears the burden of demonstrating the relevance of the evidence to prove a fact within one of the exceptions to MRE 404(b). *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. MRE 401; *Crawford*, *supra* at 387. A fact is material where it is in issue or within the range of litigated matters in controversy. *People v Ackerman*, 257 Mich App 434, 439; 669 NW2d 818 (2003). All relevant evidence is admissible, unless otherwise excepted by the state or federal constitutions or other court rules. MRE 401; MRE 402; *Vandervliet*, *supra* at 60-61.

Prior bad acts evidence is logically relevant where the bad act and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan or scheme that the defendant used to commit the charged offense. *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). To establish that the defendant had a common scheme or plan, there need not be an impermissibly high level of similarity between the prior act and the charged offense and the evidence need not possess distinctive or unusual features; it need only show something more than the defendant's criminal propensity. *People v Knox*, 469 Mich 502, 509-511; 674 NW2d 366 (2004); *People v Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002).

In this case, the evidence provided a sufficient factual nexus between the prior robbery and the robbery of semi-truck driver, Nancy Petty, to support an inference that defendant used a common plan or scheme in committing the charged offense. Snyder testified that he was a van delivery driver from Ohio. When defendant approached him, he was parked at a restaurant off the interstate in the vicinity of Eastern Market. Defendant tapped on Snyder's window and proceeded to tell Snyder that his car was broken down and needed a new serpentine belt. After garnering Snyder's sympathy, Snyder let defendant in his van under the pretense that defendant needed a ride to a service station to get a new belt. Then, defendant directed Snyder to an alley, where he put his hand in his pocket and feigned having a weapon to rob Snyder of his money and other items. Petty had an out-of-state truck route that she had completed prior to defendant approaching her at 2614 Riopelle, next to Eastern Market. Defendant told Petty that his car was broken down, his wife and children were stranded, and he needed a new serpentine belt. Preying upon Petty's sympathies, defendant complained of the cold to gain entry to her truck whereupon he proceeded to rob her by pretending to have a gun in his pocket.

Snyder's and Petty's robberies exhibit striking similarities: (1) both victims had out of state truck routes, (2) the robberies occurred in a six-month period and in close proximity to Eastern Market, (3) both times defendant used a story concerning a broken serpentine belt, (4) both times defendant preyed on his victims' sympathies to gain entry to the vehicles where he then robbed them, and (5) both times defendant pretended to have a weapon hidden in his pocket. The two robberies do not exhibit unusual or distinctive features, but this is not required. *Hine*, *supra* at 253.

In light of these similarities, the evidence of Snyder's robbery makes it highly probable that defendant had a scheme to target out-of-state truckers who routinely made deliveries in the area of Eastern Market. Specifically, it appears that defendant lured his targeted victims with the

serpentine belt story, garnered his victims sympathy to gain entry to their vehicles, and then robbed them by pretending to have a weapon hidden in his pocket. The trial court opined that the parties had confirmed, off the record, that defendant systematically preyed on out-of-state truckers because he knew such robberies were harder to prosecute. While the robberies did occur at different times of the day and defendant had an accomplice in Snyder's robbery, there need not be an impermissibly high level of similarity between the robberies because the evidence shows defendant's common scheme or plan. *Id.*; *Knox, supra* at 509.

Defendant also contends that the probative value of the evidence was diminished to such a degree that it was unfairly prejudicial under MRE 403. We disagree. Evidence is unfairly prejudicial where there is a risk that marginally probative evidence will be given undue or preemptive weight by the jury. *Crawford, supra* at 398. Although this risk is increased in the context of prior bad acts evidence, *id.*, the trial court is still in the best position to gauge the effect of such testimony, *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).

The evidence here, which demonstrates defendant's common scheme or plan, is highly probative. The jury was aware of defendant's acquittal in Snyder's robbery,¹ and the trial judge gave a limiting instruction cautioning the jury not to infer that defendant had a bad character or that he had acted in conformity with such a character. This instruction protected defendant's right to a fair trial. We cannot conclude that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice under MRE 403. See *People v Smith*, 243 Mich App 657, 674-675; 625 NW2d 46 (2000).

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra

¹ The fact that a prior charge resulted in acquittal does not preclude introduction of evidence of the prior criminal act under MRE 404(b). See *People v Oliphant*, 399 Mich 472, 495-499; 250 NW2d 443 (1976); *People v Gibson*, 219 Mich App 530, 533; 557 NW2d 141 (1996).