

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARRETT LLOYD DIXON,

Defendant-Appellant.

UNPUBLISHED

May 22, 2007

No. 269323

Jackson Circuit Court

LC No. 05-006810-FH

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree retail fraud, MCL 750.356c, and was sentenced as an habitual offender, third offense, MCL 769.11, to a prison term of three to twenty years. He appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of shoplifting a home entertainment system from a store on April 30, 2005. He challenges the admission of evidence relating to a separate July 30, 2005, incident in which he allegedly stole DVDs from the same store. Before trial, the prosecution argued, and the trial court agreed, that the evidence was admissible under MRE 404(b) to establish defendant's identity because during the latter incident, a store employee recognized him as the perpetrator in the earlier incident.

This Court reviews a trial court's decision regarding the admissibility of other-acts evidence for a "clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). The abuse of discretion standard "acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). When a trial court chooses one of these principled outcomes, it does not abuse its discretion. *Id.*; *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MRE 404(b)(1) precludes the admission of evidence of other crimes, wrongs, or acts "to prove the character of a person in order to show action in conformity therewith." "Where, however, the evidence also tends to prove some fact other than character, admissibility depends upon whether its probative value outweighs its prejudicial effect, taking into account the efficacy of a limiting instruction in cushioning the prejudicial effect of the evidence." *Crawford, supra* at 385.

To be admissible under MRE 404(b), other-acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, i.e., “something other than a character or propensity theory,” (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Here, the prosecution sought to establish that the cashier identified defendant as the perpetrator not only at trial but also on July 30, and that the person she identified on July 30 was indeed defendant. She testified that she recognized and identified defendant on July 30, and to corroborate this, the prosecution presented independent evidence showing that defendant was indeed the person who the cashier recognized on July 30. Specifically, testimony was presented that the individual in the store on July 30 took DVDs, entered a vehicle that was tracked to a particular location, and that some of those DVDs were recovered from a porch where defendant was present. Explaining and establishing the cashier’s identification of defendant, as well as explaining the circumstances of defendant’s arrest, constituted proper noncharacter purposes for admission of the evidence.

With respect to relevance, this Court inquires whether the evidence was material and probative. *Crawford, supra* at 388. A “material” fact is one that is “of consequence” to the action. *Id.* at 388-389. The elements of an offense are always material. *Id.* at 389. Defendant’s identity as the perpetrator was material. Evidence is probative when it “tends 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.” *Id.* at 389-390 (citation omitted). For purposes of MRE 404(b), the evidence must be probative of something other than the defendant’s propensity to commit the crime. *Crawford, supra* at 390. Evidence of the circumstances surrounding defendant’s taking of the DVDs on July 30 and his apprehension with them was probative of his identity as the perpetrator of the earlier crime, not because of his propensity to shoplift, but because the circumstances established that defendant was the person who the cashier identified on July 30 as the perpetrator of the earlier incident.

With respect to balancing the danger of unfair prejudice and the probative value of the evidence, the Court in *Crawford, supra* at 398, explained:

Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. In the context of prior bad acts, that danger is prevalent. When a juror learns that a defendant has previously committed the same crime as that for which he is on trial, the risk is severe that the juror will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he “did it before he probably did it again.” *People v Johnson*, 27 F3d 1186, 1193 (CA 6, 1994). Because prior acts evidence carries with it a high risk of confusion and misuse, there is a heightened need for the careful application of the principles set forth in MRE 403. *Id.*

Because the other-acts evidence concerned commission of essentially the same crime as the offense charged, admission of the evidence presented the danger that the jury would use the evidence for an improper purpose, i.e., to suggest that because defendant shoplifted from the store on July 30, he probably did it on April 30 as well. With regard to the probative value, the

evidence was relevant insofar as it helped establish that defendant was the person who the cashier identified in the store on July 30. The trial court determined that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence, and it took steps to minimize any unfair prejudice by twice instructing the jury concerning the limited, proper use of the evidence.

A trial court's decision on a close evidentiary question is ordinarily not an abuse of discretion. *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005). While admission of the evidence concerning all of the circumstances of the July 30 incident may be arguable and exclusion of some of that evidence might be deemed a reasonable and principled outcome, the court's ruling that the evidence was necessary for the jury to understand the circumstances of the identification was a close question and did not rise to the level of being an unreasonable and unprincipled outcome. Accordingly, we cannot conclude that the trial court abused its discretion.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff