

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 19, 2016

v

JOSHUA PAUL SALO,
Defendant-Appellant.

No. 325230
Oakland Circuit Court
LC No. 2014-251167-FH

Before: RONAYNE KRAUSE, P.J., and JANSEN and STEPHENS, JJ.

RONAYNE KRAUSE, P.J., (*concurring*).

I concur in the result and, generally, in the majority’s opinion. However, I respectfully disagree with the majority’s conclusion that the other acts evidence was not admissible to prove intent under MRE 404(b)(1).

As the majority correctly notes, MRE 404(b) provides:

(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.

On appeal plaintiff argues that the other acts evidence was offered for the purpose of showing defendant’s intent. The majority’s review concludes that the record contains no discussion of any intent argument and refuses to speculate as to whether the prosecutor made or the trial court accepted such an argument at the off the record conference. Although, “[t]he prosecution’s recitation of purposes at trial does not restrict appellate courts in reviewing a trial court’s decision to admit the evidence,” *People v Sabin (After Remand)*, 463 Mich 43, 59 n 6; 614 NW2d 888 (2000), I nevertheless find little, if any, speculation necessary to find the other acts evidence was offered for this purpose. As the majority notes, intent was a material issue in this case. Defendant claims that he entered the home to make amends with his family whereas the prosecution claims that defendant was present in the home to steal from the coin collection of his grandmother, Donnis Morris. In examination of Donnis, the prosecutor elicited testimony that

the defendant had previously been removed from the home after stealing from this same coin collection. In closing argument, the prosecutor then attempted to utilize this testimony to prove defendant again intended to steal from the coin collection: “What other reason do you have to go back to his grandmother’s house that he’s been kicked out of, other than with the intent to take something from her? That’s why she kicked him out in the first place.” Upon this record, I find enough proof to conclude that the prosecution offered the evidence, in pertinent part, for the proper purpose of proving defendant’s intent.

Still, even relevant other acts evidence offered for a proper non-propensity purpose is not admissible unless it is “sufficiently probative to outweigh the danger of unfair prejudice.” *People v Williams*, 240 Mich App 316, 322-23; 614 NW2d 647 (2000); MRE 403. The majority concludes that the other acts evidence was unnecessary to prove intent because a reasonable jury could infer defendant’s intent to steal from other evidence. The only evidence the majority cites for this proposition is that defendant entered the home through a side door, defendant was heard in Donnis Morris’ bedroom, and the shoebox containing the coin collection was found in the kitchen. Though a reasonable jury *could* infer from this evidence that defendant’s intent was to steal the coin collection, a reasonable jury need not so conclude as this evidence is also consistent with defendant’s claim that he was present to reconcile with his family and Donnis Morris’ testimony that she was responsible for much of the mess that occurred in the home.

Given the weakness of the other evidence offered to prove intent, I am therefore unable to conclude that the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. “The more often a defendant acts in a particular manner, the less likely it is that the defendant acted accidentally or innocently, and conversely, the more likely it is that the defendant’s act is intentional.” *People v McGhee*, 268 Mich App 600, 611; 709 NW2d 595 (2005) (citation omitted). Defendant’s grandmother testified that the last time defendant was in her home he stole a box of coins from under her bed. Brian Morris testified that he heard a loud noise come from Donnis’s room before he encountered defendant in the home. Donnis testified that she later found a shoebox of coins removed from under her bed. The evidence’s similarity to the charged conduct made it more probable that defendant’s intent was to steal from Donnis, not reconnect with her. The majority is correct that there is a danger that the jury would draw an impermissible propensity inference given the similarity between the other acts evidence and the intent element of the charged crime; however, it is that very similarity that makes the evidence highly probative of intent. In these circumstances, the probative value of the evidence was not substantially outweighed by the danger of undue prejudice. Accordingly, I would find the other acts evidence admissible to prove intent.

/s/ Amy Ronayne Krause