

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SANFORD BRYCE CHANDLER,

Defendant-Appellant.

UNPUBLISHED

February 1, 2005

No. 250745

Livingston Circuit Court

LC No. 02-012933-FH

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant Sanford Bryce Chandler appeals of right from his jury trial convictions for arson of a dwelling house, MCL 750.72, conspiracy to commit arson of a dwelling house, MCL 750.72, burning insured property, MCL 750.75, solicitation to commit arson of a dwelling house, MCL 750.72, and witness intimidation, MCL 750.122. Defendant was sentenced to 6 to 20 years for the arson convictions, 6 to 10 years for the burning insured property conviction, 3 to 5 years for the solicitation conviction, and 6 to 10 years for the witness intimidation conviction. We affirm.

Defendant owned a landscaping business, but was experiencing financial problems and had fallen behind on paying his bills. He also owned a house, which he and a friend, Tye Kaye, were remodeling. Defendant solicited and hired Kaye and another friend, Nathan Robbins, to burn down the house so that he could collect the insurance money. Robbins and Kaye burned the house down in the middle of the night while defendant was in Las Vegas. The parties stipulated that the house was burned by an act of arson.

At trial, Tye Kaye was called as a witness, but refused to testify, invoking his right against self-incrimination under the Fifth Amendment. Defendant's counsel stated on the record numerous grounds for why Kaye had legitimate reasons for asserting his Fifth Amendment rights. Thereafter, defendant's counsel expressly agreed with the trial court that the witness was unavailable under the rules of evidence, but objected to the admission of Kaye's preliminary examination testimony because there was not a similar motive to develop the testimony.

Defendant first argues that Kaye's preliminary examination testimony should not have been admitted at trial. This Court reviews the trial court's decision to admit evidence for an abuse of discretion. *People v Adams*, 233 Mich App 652, 656; 592 NW2d 794 (1999).

The admission of Kaye's testimony is governed by MRE 804, the relevant portion of which states:

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant –

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

* * *

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. . . .

Our Supreme Court recognizes that a witness "is unavailable who cites the Fifth Amendment as a justification for not testifying." *People v Meredith*, 459 Mich 62, 66; 586 NW2d 538 (1998). Thus, as defendant's counsel agreed to before the trial court, Kaye was unavailable under MRE 804(a)(1). We agree with the prosecution that defendant extinguished any error on this particular issue by expressly agreeing with the trial court's conclusion that Kaye was unavailable. *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001).¹

At Kaye's preliminary examination, defense counsel cross-examined Kaye twice. Defendant, therefore, "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." MRE 804(b)(1); see also *Meredith*, *supra* at 66-67 (Under MRE 804(b)(1), defendant in a drug case had both the "opportunity" and a "similar motive" to develop a drug courier's testimony after the courier refused to testify under the Fifth Amendment; thus, the courier's preliminary examination testimony was properly admitted). Thus, Kaye's testimony at the preliminary examination constitutes former testimony under MRE 804(b)(1).

¹ Defendant's contention that Kaye cannot be unavailable because the judge did not order him to answer questions after he invoked the Fifth Amendment privilege is without merit. As noted, defendant has forfeited that issue by expressly agreeing that Kaye was unavailable. *Riley*, *supra*. Defendant also erroneously argues that, for assertion of the privilege to be valid, the witness must assert an objectively reasonable basis for that assertion. Here, defendant's counsel stated numerous reasons why Kaye had validly asserted his Fifth Amendment rights, thus obviating the need for him to make his own assertion.

Finally, defendant argues that his rights were violated under the Confrontation Clause by the admission of Kaye's former testimony under MRE 804. However, our Supreme Court has ruled that MRE 804(b)(1), as a firmly rooted hearsay exception, possesses sufficient indicia of reliability so as not to violate the Confrontation Clause. *Meredith, supra* at 67-70. The Supreme Court has joined many federal jurisdictions by holding that "evidence properly within the former testimony hearsay exception is, by definition, not vulnerable to a challenge based upon the Confrontation Clause." *Id.* at 70.

Defendant next argues that the trial court improperly admitted the other acts evidence under MRE 404(b). Under *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114, amended 445 Mich 1205 (1993), there are four factors necessary for the admission of other acts evidence. First, the prosecutor must offer the prior bad acts evidence under something other than a character or propensity theory. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b). *Id.* Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *Id.* Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. *Id.* The evidence at issue will be considered individually with respect to these four requirements.

The first prong was met because the other acts evidence was not offered under a propensity theory. The prosecution sought the admission of evidence of defendant's gambling habits and his involvement in the drug trade in order to show a motive for burning down the house. The prosecution also sought the admission of evidence of insurance fraud, involving water damage regarding the same house involved in the present case, in order to show a common scheme or plan.

These are proper purposes for admitting evidence. MRE 404(b)(1). The evidence was directly relevant to showing defendant's motive and scheme – that is, it "was relevant for a reason other than to prove a theory linking character to conduct." *People v Houston*, 261 Mich App 463, 469; 683 NW2d 192 (2004). And both the burning of the home and the fraudulent scheme to obtain insurance proceeds for that same home are characterized by a common design. See *Knox, supra* at 510; *People v Sabin (After Remand)*, 463 Mich 43, 63-66; 614 NW2d 888 (2000).

The second prong was met because the evidence was relevant under MRE 401 and MRE 402. The relevance of proffered evidence "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." *Knox, supra*. The existence and severity of defendant's financial problems are more probable with the other acts evidence admitted than they would be without the evidence.

The third prong is met because, under MRE 403, the proffered evidence is probative of defendant's motivation to commit arson and to defraud the insurance company without being "substantially" outweighed by a risk of "unfair" prejudice. See MRE 403. Proffered evidence is unfairly prejudicial if "there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury." *Elezovic v Ford Motor Co*, 259 Mich App 187, 207; 673 NW2d 776, spec pan den 259 Mich App 801; 677 NW2d 378 (2003), lv granted 470 Mich 892; 683 NW2d 144 (2004). No such danger exists here because the evidence was not

marginally probative. Moreover, the other acts evidence was not so inflammatory as to inflame the jury's passions, leading to the allocation of undue weight.

The fourth prong is met, as defendant did not request a cautionary instruction. A trial court has no duty to give a limiting instruction, absent a request or objection. *Rice, supra* at 444.

Finally, we reject defendant's assertion that resentencing is required under the US Supreme Court decision in *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). See *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Affirmed.

/s/ Kathleen Jansen

/s/ Christopher M. Murray

/s/ Pat M. Donofrio