

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 21, 2015

v

ROMERO MONTE THOMAS,

Defendant-Appellant.

No. 321489
Wayne Circuit Court
LC No. 13-009927-FC

Before: FORT HOOD, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions for armed robbery and felony-firearm. For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

On September 29, 2013, defendant entered a Dollar General store in Detroit, used a rifle to intimidate employees, and stole money from the cash registers and safe. Thereafter, the police arrested defendant and the prosecution charged him with, among other things: (1) armed robbery, MCL 750.529; and (2) felony-firearm, MCL 750.227b. Defendant chose to have a jury trial, and the Wayne Circuit Court empanelled a jury to hear his case.

During trial, the jury heard testimony from police officers and multiple Dollar General employees, some of whom were eyewitnesses to the September 29, 2013 robbery. The other Dollar General employees who testified worked at other store locations, and gave evidence on two separate, uncharged robberies defendant committed at their stores on July 21, 2013, and September 12, 2013. These witnesses stated that defendant (who they identified as the robber) used a similar method in these robberies when he: (1) used a gun to intimidate store employees during the robbery; and (2) ordered female employees to give him money from the cash registers. Defendant objected to the prosecutor's request to admit this testimony on the uncharged robberies under MRE 404(b), but the trial court overruled defendant's objection and admitted the testimony as evidence.

The jury subsequently convicted defendant of two counts of armed robbery pursuant to MCL 750.529, and one count of felony-firearm pursuant to MCL 750.227b. On appeal, defendant argues that the trial court erred when it admitted the witness testimony on the July 21 and September 12 robberies because: (1) the prosecution used the testimony to show that

defendant had a criminal propensity, a use that is prohibited under MRE 404(b); and (2) the testimony is unfairly prejudicial. The prosecution asks us to affirm defendant's convictions.

II. STANDARD OF REVIEW

A trial court's decision to admit evidence of "other crimes, wrongs, or acts" "will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion occurs "when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). "The decision upon a close evidentiary question by definition ordinarily cannot be an abuse of discretion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 303-304; 660 NW2d 351 (2003).

III. ANALYSIS

A. LEGAL STANDARDS

MRE 404(b) states that:

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.

When the prosecution offers evidence of other crimes committed by defendant, the court assesses its admissibility by determining whether: (1) the evidence is offered for a proper purpose under MRE 404(b); (2) the evidence is relevant; (3) the probative value of the evidence is not substantially outweighed by unfair prejudice under MRE 403. *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993). The trial court may also provide the jury with a limiting instruction on the use of the evidence if it so chooses. *Id.*

A "proper purpose" for the admission of evidence under MRE 404(b) is one that does not seek to identify defendant as a "bad man" and show his propensity to commit the offense. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). By contrast, it is permissible for the prosecution to introduce evidence of defendant's other crimes to show that defendant uses a certain "scheme, plan, or system" in the commission of his crimes. MRE 404(b). Common schemes, plans, or systems often show "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." *People v Sabin (After Remand)*, 463 Mich 43, 64-65; 614 NW2d 888 (2000).

Relevant evidence tends to "make a material fact at issue more probable or less probable than it would be without the evidence." *Crawford*, 458 Mich at 387. Evidence is only excluded as "unfairly prejudicial" under MRE 403 when the "probative value" of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading

the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403. “[I]t is only in unusual circumstances that a court should exclude relevant evidence under Rule 403.” *People v Uribe*, ___ Mich App ___; ___ NW2d ___, 2015 WL 2214706 (citation omitted). When it assesses whether the evidence’s probative value is substantially outweighed by unfair prejudice under MRE 403, a court performs a balancing test that looks to several factors, including:

. . . the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. [*People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).]

B. APPLICATION

Here, the trial court did not abuse its discretion when it admitted evidence that defendant robbed other Dollar General stores in Detroit on July 21 and September 13, 2013. The court properly noted that the prosecution used the testimony on defendant’s other robberies for a “proper purpose” under MRE 404(b): namely, to show that defendant had a common “scheme, plan, or system” to carry out his crimes. *VanderVliet*, 444 Mich at 55. In each robbery, defendant followed a similar routine: he robbed Dollar General stores in Detroit, used a gun to intimidate the store’s employees, targeted female cashiers, and ordered them to empty the cash registers. *Sabin*, 463 Mich at 64. And the record demonstrates that the prosecution did not use this testimony on the uncharged robberies to show that defendant had an immoral character or propensity to commit robbery—instead, it used the evidence to suggest that defendant hewed to a common “scheme, plan, or system” when he committed the charged crime.

The evidence that defendant perpetrated two other armed robberies is unquestionably relevant, because it tends to “make a material fact at issue”—whether defendant robbed the Dollar General store on September 29, 2013—“more probable or less probable than it would be without the evidence.” *Crawford*, 458 Mich at 387. Nor was the probative value of the witness testimony on the other robberies outweighed by the risk of unfair prejudice to defendant, because it: (1) did not delay defendant’s trial or take a long while to present; (2) was not needlessly cumulative; (3) tends to prove the fact that defendant committed the September 29, 2013 Dollar General robbery; (4) is important to the prosecution’s argument; (5) was not likely to confuse or mislead the jury; and (6) cannot be “proved in another manner without as many harmful effects.” *Blackston*, 481 Mich at 462.

Furthermore, the trial court, when it admitted the evidence of the other robberies committed by defendant, gave the jury a limiting instruction, and specified that the witness testimony on defendant’s separate criminal acts *could not* be used to show that defendant is a “bad person” or had a natural propensity to commit robbery. *VanderVliet*, 444 Mich at 55. Accordingly, and in light of the fact that admission of the testimony on the uncharged robberies

is a “close evidentiary question,”¹ the trial court did not abuse its discretion when it admitted the evidence. *Crawford*, 458 Mich at 383.

In any event, were we nonetheless to hold that the trial court erred when it admitted the witness testimony on the July 21 and September 12 robberies, the error would have been harmless. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The jury heard overwhelming evidence, in the form of eyewitness and in-court identification testimony, that defendant possessed a gun and robbed a Detroit Dollar General store on September 29, 2013—the crime with which defendant is charged. It is thus very unlikely “that a different outcome would have resulted” in defendant’s case absent the evidence of defendant’s other criminal acts, and his arguments to the contrary are without merit. *People v Gursky*, 486 Mich 596, 619; 786 NW2d 579 (2010).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Henry William Saad
/s/ Michael J. Riordan

¹ *Pena*, 255 Mich App at 303-304.