STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2005
v	No. 256560 Isabella Circuit Court
STEPHEN DOUGLAS BANFIELD, Defendant-Appellant.	LC No. 03-000907-FH

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree retail fraud, MCL 750.356c. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent sentences of fifty-eight months' to twenty years' imprisonment for both convictions. We affirm.

I

This case stems from a charge of retail fraud involving two vacuum cleaners returned to a Kmart store in Mt. Pleasant on two separate dates. Defendant presented defaced receipts and was given $279.99 and $279.98 in cash. During one incident the UPC label on the vacuum cleaner box indicated that it was priced at $79.99. The service clerk called her manager because the number did not match the receipt and observed defendant removing this UPC label to reveal another label. The manager then returned $279.98 in cash to defendant. Defendant was seen leaving with an older gray-haired man in a white Pontiac Bonneville. Other acts evidence from returns or attempted returns at five other Kmart stores indicated that defendant acted in concert with an older gray-haired man apparently named James Hodge and revealed significant details about the mechanics of an apparent scheme including evidence that defendant used fake UPC labels and defaced receipts.

The prosecution also introduced other acts evidence that Kmart stores returned exactly $279.98 in cash on fifty-nine separate occasions to an individual presenting a Michigan driver's license beginning with the same nine digits as defendant's driver's license. During this same time frame defendant applied for four temporary paper driver's licenses, valid for ninety days. Additionally, the prosecution presented evidence that Kmart stores returned exactly $279.98 in cash on over two hundred separate occasions to an individual presenting a Michigan driver's license beginning with the same nine digits as Hodge's driver's license.

II

Defendant first argues that the trial court erred when it allowed the introduction of certain MRE 404(b) evidence and that the prosecutor committed misconduct in certain remarks related to the other acts evidence. We disagree.

This Court reviews the admission of similar acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Similarly, this Court reviews a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). An abuse of discretion exists when an unprejudiced person, considering the facts upon which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998). Finally, we review claims of prosecutorial misconduct de novo to determine if the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if such evidence is (1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial apart from propensity, and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the evidence under MRE 403.[1] *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993). "Relevant other acts evidence does not violate MRE 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *Id.* at 65. Here, the prosecution offered the other acts evidence for a proper purpose, to show identity, system in doing an act, preparation, scheme, or absence of mistake or accident.

The evidence was clearly relevant to proving defendant had a common scheme or plan and meets the standard of proof required for admission of other acts evidence as established in *VanderVliet*. The evidence introduced was of similar misconduct and was logically relevant to show that the charged acts occurred because the uncharged misconduct and the charged offenses are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. *People v Sabin*, 463 Mich 43, 63; 614 NW2d 888 (2000). "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan revealed need not be distinctive or unusual." *Id*. at 65-66, quoting *People v Ewoldt*, 7 Cal 4th 380 403; 867 P2d 757 (1994).

First, the other acts taking place in Alma, Michigan; Gaylord, Michigan; Utica, Michigan; and Dewitt, New York were logically relevant to proving the charged offense apart from showing propensity. The prosecution offered adequate evidence to demonstrate that the other acts occurred. Four eyewitnesses identified defendant and testified that they witnessed five other acts taking place in Alma, Gaylord, Utica, and Dewitt.

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[1] MRE 403 provides in relevant part that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

Additionally, the acts were sufficiently similar to the charged offense to be relevant. In the charged offense defendant returned a vacuum cleaner to Kmart, used a damaged receipt, stated he was returning it for his mother, and left in a white Bonneville with an older gray-haired man. The other acts evidence from these four stores shows that defendant returned, attempted to return, or purchased a vacuum cleaner, presented a damaged or incomplete receipt, stated he was making the return for his mother, and either arrived or left the scene in a white Bonneville accompanied by an older gray-haired man.

Moreover, the evidence is clearly relevant to show defendant's common plan, scheme or system. The other acts evidence was relevant to demonstrating that defendant tampered with UPC labels showing that on one occasion defendant placed a fake UPC label on an expensive vacuum and attempted to purchase it for the lower price. It also showed that on another occasion defendant tampered with a vacuum box in the parking lot and then returned the same vacuum with a fake UPC label indicating that the vacuum was worth $329.00 when the true value of the vacuum was only $79.99. This evidence demonstrated the mechanics of the scheme and was logically relevant to proving that the charged acts occurred.

Next, the evidence of returns associated with defendant's and Hodge's driver's licenses was logically relevant to proving he committed the charged offense. Contrary to defendant's suggestion, there was sufficient evidence to conclude that defendant committed the acts. The prosecution presented evidence that Kmart stores returned exactly $279.98 in cash on fifty-nine separate occasions to an individual presenting a Michigan driver's license beginning with the same nine digits as defendant's driver's license. And two of the returns went to an individual presenting a driver's license that exactly matched defendants. During this same time frame defendant applied for four temporary paper driver's licenses, valid for ninety days. The evidence supports a reasonable inference that defendant altered his temporary license by changing the final three digits and presented this altered paper license when making a return.

Additionally, although Hodge was not charged for his involvement in the Mt. Pleasant incidents, there was enough evidence for a reasonable jury to conclude that defendant acting with Hodge was involved in the returns associated with Hodge's driver's license. Hodge or a man matching Hodge's description was witnessed accompanying defendant during all five of the other acts incidents presented at trial, in addition to one of the two incidents in Mt. Pleasant which resulted in the instant charges. The evidence is more than sufficient to infer that defendant was acting with Hodge in perpetrating a scheme to defraud Kmart. Moreover, the prosecution presented evidence that Kmart stores returned exactly $279.98 in cash on over two hundred separate occasions to an individual presenting a Michigan driver's license beginning with the same nine digits as Hodge's driver's license. The court did not abuse its discretion when it concluded that the jury could reasonably find that there was a preponderance of evidence to link defendant to the returns committed by Hodges. *VanderVliet*, *supra* at 68-69 n 20.

Additionally, the other acts are sufficiently similar to the charged offense to be relevant. Like the charged offense, the returns were all from Kmart for approximately $279 and a random sample of ten of these returns revealed that all ten were vacuum cleaner returns. It can be inferred that defendant either failed to present a receipt or presented a damaged receipt on each occasion because trial testimony indicated that Kmart only records driver's licenses if the receipt was damaged or missing. Accordingly, the other acts were relevant to proving defendant acted

with a common scheme or plan to defraud Kmart by failing to present a receipt or presenting a damaged receipt.

Defendant asserted in opening and closing arguments that he was duped by Hodge and that Hodge was the kingpin in the operation. In *Crawford*, *supra* at 392-393, our Supreme Court accepted the "doctrine of chances" to determine if MRE 404(b) evidence satisfied the probative value prong of relevance. "Where material to the issue of mens rea, ... [the "doctrine of chances"] rests on the premise that 'the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently.'" *Id*. at 393, quoting Imwinkelried, Uncharged Misconduct Evidence, § 3:11, p 45. Here, the volume of returns evidenced by the data linked to defendant's and Hodge's driver's licenses rebuts any suggestion by defendant that he innocently returned the vacuum at Hodge's request.

Further, we conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to defendant. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the trier of fact. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). Here, the other acts evidence related to the incidents in Alma, Michigan; Gaylord, Michigan; Utica, Michigan; and Dewitt, New York was highly probative, provided significant evidence regarding the mechanics of defendant's scheme to defraud Kmart, and clearly outweighed any prejudicial effect.

However, evidence of returns linked to defendant by his and Hodge's driver's license numbers carried a greater risk of prejudice. These returns resulted in losses to Kmart of nearly $100,000, while the losses associated with the charged offenses were only $600. While there was a risk that the jury would give the evidence undue weight, the evidence was significantly probative of defendant's scheme. Accordingly, it cannot be said that the trial court abused its discretion in making this determination. *Sabin*, *supra* at 67. The determination of whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to a contemporaneous assessment of the presentation, credibility and effect of the testimony. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).

Because the other acts evidence was properly admitted under MRE 404(b), reference to it during the prosecutor's opening statement did not deprive defendant of a fair trial or constitute prosecutorial misconduct.

III

Defendant also objects to the prosecutor's indication in opening statement that defendant was associated with fraudulent returns totaling $100,000 when in fact the evidence indicated that the returns only totaled $90,000. But defendant did not object to the opening statement on this ground. Therefore, we review this claim only for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

This argument is completely without merit. The prosecution introduced evidence that approximately $16,000 in returns were associated with defendant's driver's license number and that approximately $90,000 in returns were associated with Hodge's driver's license number. Accordingly, it was not prosecutorial misconduct to reference $100,000 of total returns when in fact the prosecution introduced evidence supporting the statement.

IV

Next, defendant also objects to the prosecutor's reference in his opening statement to returns at a Meijer store. Again, defendant did not object to the opening statement on this ground. Therefore, we review this claim only for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763. During his opening statement the prosecutor did refer to a Meijer's store, but is manifest that the prosecutor intended to refer to Kmart and merely misspoke when he referenced Meijer on this occasion. Any jurors who even took note of the fleeting reference to Meijer would have realized that it was a mere misstatement. We conclude that the misstatement did not constitute plain error affecting defendant's substantial rights.

V

Next on appeal, defendant argues that the trial court erroneously scored offense variables (OV) 12, 13, 14 and 16. Defendant also argues that that *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), mandates reversal. We disagree.

As related to the scoring of OV 12, OV 14 and OV 16, this Court reviews a trial court's factual findings at sentencing for clear error. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004). Moreover, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.* Thus, this Court reviews a scoring issue to determine whether the sentencing court properly exercised its discretion and whether the evidence properly supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

As to the scoring of OV 13, this Court reviews defendant's claim under a plain error standard because defendant's challenge to this scoring was not preserved below. *Kimble*, *supra* at 309. To obtain relief for an unpreserved error, a defendant must show plain error that affected the defendant's substantial rights. *People v Carines*, *supra* at 763. In addition, the defendant must show that the error resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity, or public reputation of the judicial proceeding. *Id*.

Ten points should be assessed for OV 12 if "[t]hree or more contemporaneous felonious criminal acts involving other crimes were committed." MCL 777.42(1)(c). OV 12 also provides, that a felonious criminal act is contemporaneous if the act occurred within twenty-four hours of the sentencing offense and the act has not and will not result in a separate conviction. MCL 777.42(2)(a).

The prosecution offered evidence at the sentencing hearing indicating that three cash refunds were given to individuals presenting a Michigan driver's license beginning with the same nine digits as defendant's driver's license number on October 10, 2002, at a Kmart store in Bay City, Michigan and two separate Kmart stores in Saginaw, Michigan. As noted above, there is significant evidence linking defendant to these returns, including evidence that nine digits of his driver's license number matched the driver's license number used by the person making the returns, evidence that defendant obtained several temporary paper licenses which could be easily altered, evidence that returns were for the exact same amount as the returns defendant was

convicted for, $279.98, and evidence that the returns were geographically proximate to sentencing offenses, approximately fifty miles apart. Finally, all of the returns occurred on October 10, 2002, the same day as one of the offenses of which defendant was convicted. Because there is record evidence adequately supporting the score, the trial court cannot be said to have abused its discretion in scoring OV 12. *Hornsby*, *supra* at 468.

Defendant argues that OV 13 should have been scored at five points because he had not committed any crimes against persons. In addition to the two charged offenses and the other acts evidence, defendant's presentence investigation report indicates that defendant was convicted of controlled substance offenses and several crimes against property including convictions for first-degree retail fraud in 2000, shoplifting in 2001, and theft in 2002. We find it was not plain error to assess ten points under OV 13 because OV 13 allows the court to assess ten points for "a pattern of felonious criminal activity directly related to membership in an organized criminal group." MCL 777.43(1)(d). There are significant facts which would allow the court to determine the existence of such a group, particularly that defendant told investigating officers that he was aware of a vacuum cleaner scam and implicated Hodge and an individual named Sandy further suggesting that defendant was only a "small fish."

OV 14 requires the court to assess ten points if the offender "was a leader in a multiple offender situation." MCL 777.44(1). OV 14 also provides that "the entire criminal transaction should be considered when scoring this variable" and "[i]f 3 or more offenders were involved, more than 1 offender may be determined to have been a leader." MCL 777.44(2). At trial, a state police forensic computer analyst testified that she recovered several images of a Kmart receipt for a vacuum cleaner on defendant's computer. At sentencing the prosecution offered that Hodge readily admitted his guilt and stated that defendant introduced him to the scheme and showed him how to do it. This evidence supports the proposition that defendant was the leader of the scheme. Accordingly, the court did not abuse its discretion by assessing ten points under OV 14.

OV 16 requires the court to assess ten points for property obtained where "[t]he property had a value of more than $20,000.00." MCL 777.46(1). OV 16 also provides "[i]n multiple offender or victim cases, the appropriate points may be determined by adding together the aggregate value of the property involved, including property involved in uncharged offenses or charges dismissed under a plea agreement." MCL 777.46(2). At sentencing, a Kmart district loss prevention manager testified that she linked defendant's driver's license number to $25,000 in returns to Kmart stores. Additionally, as noted there is evidence that defendant and Hodge participated in the same criminal enterprise. Accordingly, the court could consider the "aggregate value of the property involved, including property involved in uncharged offenses" in this multiple offender situation. MCL 777.46(2). The court did not abuse its discretion by assessing ten points under OV 16.

Finally, we reject defendant's argument that *Blakely* mandates reversal because points were scored for OV 12, OV 13, OV 14 and OV 16 based on uncharged acts because *Blakely* does not apply to sentences imposed in Michigan. *People v Wilson*, 265 Mich App 386, 399; 695 NW2d 351 (2005).

VI

Defendant argues that the trial court inappropriately required defendant to pay restitution for losses associated with both his and Hodge's driver's license numbers. We disagree.

Because defendant failed to challenge the restitution award he must show plain error that affected his substantial rights. *Carines*, *supra* at 763-764. In addition, defendant must show that the error resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity, or public reputation of the judicial proceeding. *Id*. MCL 780.766(2) provides that "the court shall order . . . that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction." An award of restitution, if disputed, must be proven by a preponderance of the evidence. MCL 780.767(4). The court is to consider the amount of the victim's losses as a result of the offense when determining an award of restitution. MCL 780.767(1).

Here, the trial court ordered defendant to pay restitution in the amount of $98,370.02. This amount was based on testimony offered during sentencing that showed the first nine digits of defendant's and Hodge's driver's license numbers were linked to refunds from Kmart totaling $98,370.02. As noted above, there was significant evidence linking defendant to Hodge and the returns associated with both of their driver's license numbers. It was not plain error to conclude that defendant's course of conduct resulted in a loss to Kmart of $98,370.02. Accordingly, the court did not commit plain error with regard to the restitution order.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Alton T. Davis