

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT A. DONNER,

Defendant-Appellant.

UNPUBLISHED

June 26, 2014

No. 314665

Livingston Circuit Court

LC No. 11-020253-FH

Before: BORRELLO, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ from his conviction of entering without breaking with intent to commit larceny, MCL 750.111, receiving stolen property, MCL 750.535(7), and driving while license suspended, MCL 257.904. Defendant was sentenced as a habitual offender, fourth offense, to serve one year in jail for entering without breaking and for receiving stolen property, and 93 days in jail for driving while license suspended.²

In September 2011, Robert Krebaum and his sister-in-law Rachel Krebaum (his brother Jessie's wife) went to look at an abandoned house located at 7510 Mack Road in Deerfield Township. At the time, Rachel and Jessie Krebaum were residents of Tennessee and were interested in buying a home in Michigan. Both Robert and Rachel testified that they believed that the house was abandoned and had been taken by the bank in foreclosure. Scott Breckenridge testified that he had owned the house before losing it in foreclosure sometime in 2009 or 2010.

As Robert and Rachel approached the house, they noticed broken glass around the entryway door to the garage and noticed that the garage door was slightly ajar. They entered the garage and saw cabinets stacked up inside the garage. After they had gone a few steps into the house they heard a noise like a door slamming. They then got back to their car, and as they

¹ *People v Donner*, unpublished order of the Court of Appeals entered October 11, 2013 (Docket No. 314665).

² Defense counsel stipulated at trial that defendant was driving with a suspended license. Only the felony charges are at issue in this appeal.

began backing out of the driveway, they saw three men running from the house through the front door. Robert drove the car around the block and encountered one of the men whom he later identified in court as defendant. Robert testified:

I stopped the car next to him and I said, look, I'm not the police, I don't—I don't care what you guys are doing in there but you are the guys in there taking out the cabinets, right? And he said—He leaned up against the car window and he said, yeah, we're in there taking out the cabinets.

Rachel also testified that defendant had stated he was taking the cabinets.

Deputy Greg Thompson arrived on the scene in response to a 911 call. As he was investigating the scene, Thompson heard the front door slam on the other side of the house. He walked around the house and discovered an older man standing in front of the door. The man was later identified as Joseph Throneberg. He was carrying a brown leather bag which he handed to Thompson. Thompson patted him down and removed a “folding multi tool” from his front pocket. Thompson also found an LED flashlight in his back pocket. Thompson testified that on closer observation, the tool had shards of copper on it. Thompson searched the leather bag and found a tool for cutting copper pipe. Thompson also found a syringe and a spoon with a burn mark indicative of heroin use. Thompson radioed for backup, but before additional officers arrived, two men pulled into the driveway riding a black moped. The moped had been reported stolen in August 2011.

Thompson identified the driver of the moped as defendant and the rider as Michael Throneberg. Both men were arrested and patted down. When backup arrived, Thompson and two other officers “cleared the house” to make sure no one else was inside. Thompson testified that “the house was trashed, vandalized.” He explained that “there was just junk everywhere. Holes in the drywall, there was graffiti on the drywall, there were small little piles where it appeared that people had tried to start fires like in the middle of the house. . . . Inside the kitchen, the kitchen cabinets were removed.” Thompson discovered a stack of copper pipes on an air hockey table and additional pipe cutting tools like the one found on Joseph Throneberg. Throughout the house, the officers discovered that copper pipe had been removed from the walls and various appliances.

Defendant testified that he had bought the moped from a man who lived in the same apartment complex as his nephew. Defendant testified that in August, as he was helping his nephew move out of his apartment, he was approached by a man offering to sell him a moped. Defendant testified that he paid the man \$600 and he “signed the thing over.” The owner of the moped testified that his signature and his mother's signature had been forged on the title.

Defendant also testified that Michael Throneberg, who he had known for four years, had asked for defendant's help finding a place to live. Defendant stated that Michael Throneberg had told him that people were “out to get him” and that he needed to leave Detroit. Defendant told Michael Throneberg that he could not stay with him and his family, but that he did know of an abandoned house nearby.

Defendant was charged with entering without breaking with intent to commit larceny, receiving stolen property, and driving while license suspended. On February 2, 2012, the trial court held a hearing on defendant's motion to sever unrelated offenses. Defendant argued that the breaking and entering charge was factually unrelated to the charge of receiving the stolen moped, and that it would unfairly prejudice defendant to try them together. The prosecutor responded that the two felonies were separate counts, not separate charges, arguing that the crimes were related because the perpetrators used the stolen moped for transportation. The prosecutor also argued that it would be a waste of judicial resources to hold separate trials because all the facts were straight forward and there would be no chance of jury confusion. The prosecutor further stated that if the trial court granted the motion to sever, the prosecutor would move to admit evidence that defendant was in possession of a stolen moped under MRE 404(b) to show knowledge, identity, and intent.

The trial court denied the motion stating: "I am not persuaded that these charges should be severed. The moped was used or was part of—it was touching the B&E and I think that a jury can be properly instructed so as not to be confused." At the end of the trial, the court gave the jury this instruction: "These are separate crimes and the prosecutor is charging the Defendant with all of them. You must consider each crime separately in light of all the evidence in this case." Defendant was convicted as stated above and this appeal ensued.

On appeal, defendant asserts that the trial court abused its discretion by denying defendant's motion to sever the two felony offenses. Defendant contends that the juries for each of these unrelated offenses should not have heard evidence of the other, and that by allowing such evidence to be heard he was prejudiced and is entitled to a new trial. On appeal, the prosecutor relies on the same arguments presented to the trial court.

This issue was raised in and decided by the trial court on defendant's motion to sever unrelated offenses. It is therefore properly preserved for appeal. See *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006).

This appeal involves the issue of whether joinder is appropriate or whether severance is mandatory under MCR 6.120. Specifically, the issue is whether the two felony charges are "related" as that term is used in MCR 6.120(B)(1). On this issue, our Supreme Court has stated:

To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute "related" offenses for which joinder is appropriate. Because this case presents a mixed question of fact and law, it is subject to both a clear error and a de novo standard of review. [*People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009).]

The trial court's ultimate ruling on a motion to sever is reviewed for an abuse of discretion. *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *People v Smith*, 482 Mich 292, 327; 754 NW2d 284 (2008).

Joinder of offenses in a criminal case is governed by MCR 6.120. Subrule (C) provides that “[o]n the defendant’s motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).” Subrule (B) provides as follows:

(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

(a) the same conduct or transaction, or

(b) a series of connected acts, or

(c) a series of acts constituting parts of a single scheme or plan.

(2) Other relevant factors include the timeliness of the motion, the drain on the parties’ resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties’ readiness for trial.

While it is clear the moped in defendant’s possession was the same moped that had been stolen from Lake on August 23, 2011, the facts relating to defendant’s charge of receiving stolen property are not part of “the same conduct or transaction” involving the charge of entering without breaking with intent to commit larceny. The only facts in dispute were whether defendant knew or had reason to know the moped was stolen. See MCL 750.535. On the charge of entering with intent to commit larceny, the prosecutor had to prove that defendant had entered the house with the intent to steal items from it. Hence, we cannot find that these offenses arise from the same conduct. The prosecutor’s theory was that the stolen moped was used to facilitate stealing items from the house. However, this assertion is pure speculation, as there is no evidence that defendant’s possession of a stolen moped was part of such a scheme or plan to steal fixtures from an abandoned house. Indeed, it seems somewhat implausible to have used a moped to transport the large cabinets.

As previously stated, the trial court found that “[t]he moped was used or was part of—it was touching the B&E.” While it is possible that the theft of a vehicle could be considered part of “a series of connected act,” with a breaking and entering, the evidence of record in this case indicates that they have merely a temporal connection. Consequently, we cannot find record evidence sufficient to support the trial court’s finding that the requirements of MCR 6.120(B)(1) had been met.

On appeal, as in the trial court, the prosecutor argues that if the trials were severed she would have made a motion to include the stolen moped evidence under MRE 404(b). This argument is based on the discussion in *Williams* regarding the admissibility of evidence of other acts under MRE 404(b) as relevant to the question of joinder. *Williams*, 483 Mich at 237. On this issue, the *Williams* Court stated, “The admissibility of evidence in other trials is an important consideration because ‘[j]oinder of . . . other crimes cannot prejudice the defendant more than he would have been by the admissibility of the other evidence in a separate trial.’” *Id.*, quoting *United States v Harris*, 635 F2d 526, 527 (CA 6, 1980).

However, the prosecutor's argument presumes the admissibility of the stolen moped evidence under MRE 404(b). We cannot find such a presumption justified. There was no evidence of a common plan or scheme and the mere possession of stolen property does not indicate one. The prosecutor argues that the fact that defendant arrived at the scene of the entering without breaking riding the stolen moped established knowledge, motive, identity, and intent. We do not view this argument as persuasive, but rather as conclusory. Clearly, identity and motive were not at issue, and we cannot glean from the prosecutor's arguments on appeal how the fact that someone possesses stolen property establishes motive and intent, except through drawing the impermissible propensity inference.

Having found that the trial court erred in denying defendant's motion to sever, and having rejected the prosecutor's arguments to hold otherwise, we next turn to MCL 769.26 to determine whether reversal is justified as the error was outcome determinative. Again, we turn to our Supreme Court's decision in *Williams* for guidance:

Under MCL 769.26, a preserved, nonconstitutional error is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. Similarly, MCR 2.613(A) provides that an error is not grounds for disturbing a judgment "unless refusal to take this action appears to the court inconsistent with substantial justice." [*Williams*, 483 Mich at 243.]

Applying the standard in MCL 769.26, the trial court's error was not harmless because it likely affected the outcome of the trial. There was little physical evidence linking defendant to the entering with intent to commit larceny charge. Copper-cutting tools were found on Joseph Throneberg, but not on defendant. Defendant's home and vehicles were never searched and no evidence was presented indicating that defendant had possession of anything from the house. The only testimony indicating that defendant intended to take anything from the house was the statement of the Krebaums that defendant had responded affirmatively when asked if he was taking the cabinets. Defendant denied making this statement. Without physical evidence, defendant's credibility was essential to his defense. Accordingly, the outcome of the trial turned on whether the jury found defendant credible.

Similarly, the evidence that defendant knew or should have known that the moped was stolen was subject to whether the jury believed defendant. The evidence presented at trial is best described as equivocal. Defendant acknowledged that the missing ignition raised a suspicion of theft, but that concern was alleviated after the seller produced what appeared to be a legitimate title document. Additionally, defendant testified that he paid \$600 for the moped. Such a sum cannot be viewed as a ridiculously low price for a two-year-old moped with a missing ignition. Again, defendant's guilt or innocence on this charge depended entirely on whether the jury thought defendant was credible and honest. Hence, by trying the charges together, there was an unavoidable inference that defendant was someone who had a propensity to commit crimes. Such an inference adversely affected the outcome of the trial because defendant's guilt on both charges depended on his credibility.

In reaching our conclusions we are cognizant of the trial court's previously stated jury instruction: "These are separate crimes and the prosecutor is charging the Defendant with all of

them. You must consider each crime separately in light of all the evidence in this case,” and that: “It is well established that jurors are presumed to follow their instructions” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229, 234 (1998). However, this instruction does not directly address the danger of unfair prejudice that is present when unrelated charges are improperly joined. Hence, the dictates of MCR 6.120(C): “On the defendant’s motion, the court *must* sever for separate trials offenses that are not related as defined in subrule (B)(1).” (Emphasis added). As previously pointed out by this Court, in such instances, the danger is not that the jury will fail to understand that each charged crime is a separate offense; the danger is that the jury will infer that defendant has a propensity to commit crimes because he has been charged with multiple offenses. See *People v Mayfield*, 221 Mich App 656, 658; 562 NW2d 272 (1997).

Based on the record evidence presented, we find that the two felony charges against defendant were unrelated. Accordingly, the trial court was required to sever the charges for separate trials on defendant’s motion. MCR 6.120(C). By failing to do so, the trial court abused its discretion, and the error was not harmless because it was likely outcome determinative. MCL 769.26³

Because of our resolution of the joinder question, we need not address defendant’s issue concerning the sufficiency of the evidence.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Jane M. Beckering

³ Having found that the trial court was required to sever the trials under MCR 6.120 and that the error was not harmless under MCL 769.26, we do not address defendant’s argument that the failure to sever was a due process violation to which we must apply the “harmless beyond a reasonable doubt” test. See, *Chapman v California*, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967), *United States v Lane*, 474 US 438, 446 n 8; 106 S Ct 725; 88 L Ed 2d 814 (1986) and *Williams*, 483 Mich at 244-245.