

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMEL JOEY MASON, a/k/a ERIC JAMES
PIERCE,

Defendant-Appellant.

UNPUBLISHED
February 20, 2001

No. 220082
Monroe Circuit Court
LC No. 98-029371-FH

Before: Bandstra, C.J., and Griffin and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering, MCL 750.110; MSA 28.305. Defendant was sentenced to three to ten years in prison. We affirm.

First, defendant contends that the evidence pertaining to the cocaine found in the white Cadillac was inadmissible under MRE 404(b)(1) and MRE 403. Defendant argues that the evidence was inadmissible under MRE 404(b)(1) because another person's bad acts should not have been used to prove any of the elements of the breaking and entering charge against defendant. MRE 404(b)(1) states as follows:

(b) Other crimes, wrongs, or acts.

(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.

This Court has held that evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if the 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; and (3) sufficiently probative to outweigh the danger of unfair prejudice. *People v Williams*, 240 Mich App 316, 322-323; 614 NW2d 647 (2000). In order to ensure the

defendant's right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else. *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized. *Id.*

This evidence was presented for a proper purpose. The evidence pertaining to the cocaine did not concern a bad act committed by defendant, and the evidence was not being offered to show the criminal propensity of defendant to establish that defendant acted in conformity therewith, but rather, as proof of defendant's motive for breaking and entering. *People v King*, 215 Mich App 301, 306; 544 NW2d 765 (1996). Hence, there was no character issue regarding the admission of this evidence.

Although this evidence was presented for a proper purpose, MRE 404(b)(1) also requires that the evidence be relevant and that its probative value outweigh the danger of unfair prejudice. *Crawford, supra* at 388; *Williams, supra* at 322-323. Logical relevance is determined by the application of MRE 401 and MRE 402. MRE 401 states as follows:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

MRE 402 provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

Defendant was convicted of breaking and entering pursuant to MCL 750.110; MSA 28.305, which defines breaking and entering as follows:

A person who breaks and enters, with intent to commit a felony or a larceny therein, a tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat, ship, or railroad car is guilty of a felony, punishable by imprisonment for not more than 10 years.

This Court has articulated the elements of breaking and entering as follows: (1) the defendant broke into a building; (2) the defendant entered the building; and (3) at the time of the breaking and entering, the defendant intended to commit a larceny therein. *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998). Breaking and entering is a specific intent crime. *Id.* at 660.

In the instant case, the prosecutor argues that the evidence regarding the cocaine found in the car was admissible to show defendant's intent and motive. Defendant asserts that this evidence was not relevant. Based on the following facts, the evidence pertaining to the cocaine found in Kenneth Lyons' car was relevant to proving the essential element of intent and motive. Pursuant to a traffic stop of Lyons, the police impounded his vehicle at Star Towing on Victory Road and later discovered 599.1 ounces of cocaine inside of boots located in Lyons' car. That

same evening, the police received a call inquiring about where the car was impounded. Later that same evening, defendant and two other individuals were escorted off the Star Towing property located on Telegraph. In the early morning hours of the next day, defendant and the two other men were arrested after they broke into the Star Towing building on Telegraph and their gray Cadillac was impounded. The police found a receipt in the gray Cadillac with Lyons' name on it, and defendant asked to speak with a detective about the boots found in Lyons' car.

It is well established in Michigan that all elements of a criminal offense are in issue when a defendant enters a plea of not guilty. *Crawford, supra* at 389. Further, because the prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless whether the defendant specifically disputes or offers to stipulate to any of the elements, the elements of the offense are always in issue and, thus, material. *Id.* Moreover, the truth-finding function of our legal system is best served when as much evidence as possible relevant to the charged crime is submitted to the finder of fact, and the prosecutor has a duty to the public to present all such evidence of a crime that he obtains. *People v Stevens*, 461 Mich 655, 668; 610 NW2d 881 (2000). Although defendant told the detective that the reason why he broke into Star Towing was to retrieve a car and to be paid \$250, the evidence regarding the cocaine shows that defendant could have broken into Star Towing to get the cocaine out of the vehicle. Therefore, this evidence was relevant within the meaning of MRE 401.

Also, defendant argues that the evidence was unduly prejudicial pursuant to MRE 403. This is also the third prong of MRE 404(b)(1). MRE 403 provides:

Although relevant, evidence may be excluded if its probative value 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.

Because the probative value of the evidence in relation to defendant's motive and intent was not substantially outweighed by the danger of unfair prejudice, this evidence was admissible under MRE 403 and MRE 404(b)(1). Further, since there was evidence that defendant broke into Star Towing in an attempt to earn \$250, the jury could have decided that this was sufficient to show that defendant had formed the specific intent necessary to support defendant's conviction on the charge of breaking and entering. Thus, the admission of the evidence, even if erroneous, does not require reversal, especially where the erroneous admission of the testimony was not outcome determinative. *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000). Therefore, given that the trial court gave a limiting instruction and in light of the other evidence presented at trial, the trial court did not abuse its discretion when it admitted this evidence. *People v Peach*, 174 Mich App 419; 437 NW2d 9 (1989).

Next, defendant argues that the trial court abused its discretion when it sentenced defendant to three to ten years in prison. The principle of proportionality requires that a sentence be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). A sentence that violates the principle of proportionality constitutes an abuse of discretion. *Milbourn, supra* at 636; *Oliver, supra* at 98. Permissible factors that may be considered by the court when imposing sentence include the

severity and nature of the crime, the circumstances surrounding the criminal behavior, the defendant's attitude toward his criminal behavior, the defendant's social and personal history, and the defendant's criminal history, including subsequent offenses. *Oliver, supra* at 98.

In the instant case, the sentencing guidelines recommended a minimum sentence range of zero to twelve months. While departures from the guidelines are permitted, they are subject to careful scrutiny on appeal. *People v Crear*, 242 Mich App 158, 170; 618 NW2d 91 (2000). A departure from the recommended range indicates a possibility that a sentence may be disproportionate, although the primary consideration must be whether the sentence reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320, 532 NW2d 508 (1995); *Crear, supra* at 170. When a court departs from the guidelines because of the special characteristics of the offense or the offender, it must specifically explain those characteristics. *Crear, supra* at 170; *People v Stone*, 195 Mich App 600, 608; 491 NW2d 628 (1992). Although a court may depart from the guidelines range based on factors already considered in the guidelines calculations, such deviations must be made with caution. *Crear, supra* at 170.

The trial court provided sufficient and valid reasons to justify its departure from the sentencing guidelines recommendation. First, defendant told his probation officer that he was too busy selling drugs to participate in programs that would have allowed defendant to obtain his GED and an opportunity for job placement. Second, defendant used an alias and was generally uncooperative during the police investigation. Third, the trial court considered defendant's breaking and entering to be unique, specifically noting the fact that defendant was part of a group of people assembled within hours to retrieve drugs from a recently impounded vehicle and that the vehicle contained 599.1 grams of cocaine. Finally, the trial court considered defendant's prior contact with the legal system as a juvenile in Lucas County. Thus, the record in this case shows that the trial court considered the severity and nature of the crime and the circumstances surrounding the criminal behavior, which are proper criteria for imposing sentence. *People v Rice (On Remand)* 235 Mich App 429, 446; 597 NW2d 843 (1999). Based on this information, the trial court decided that it was necessary to depart from the sentencing guidelines recommendation. Defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender, and the trial court did not abuse its discretion in sentencing defendant. *People v Nelson*, 234 Mich App 454, 464; 594 NW2d 114 (1999).

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Jeffrey G. Collins