2019 IL App (2d) 170065-U
No. 2-17-0065
Order filed August 22, 2019

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PABLO MATIAS-CONCEPCION, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 05-CF-364 Honorable George J. Bakalis, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Birkett and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: Although the trial court erred in admitting other-crimes evidence for the purpose of showing *modus operandi*, as the other crime was insufficiently similar, the error was harmless, as the proper evidence was overwhelming.

¶ 2 Defendant, Pablo Matias-Concepcion, appeals his convictions of three counts of unlawful possession of stolen or converted essential parts of a vehicle (625 ILCS 5/4-103(a)(1) (West 2014)) and one count of possession of burglary tools (720 ILCS 5/19-2)(a) (West 2014)). He contends that the trial court erred in allowing evidence that he was previously charged with a

similar crime, which the court deemed relevant to show his *modus operandi*. We agree that the trial court erred in allowing the evidence, but we determine that the error was harmless.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged in connection with an August 10, 2014, burglary in which tires were taken. The State alleged that defendant committed the crimes with another person, Angel Ruiz. In May 2019, the State moved *in limine* to admit other-crimes evidence of a criminal trespass to property in Summit, Illinois (the Summit crime), that also involved Ruiz. In regard to the Summit crime, on February 15, 2012, at around 11 p.m., police investigated a report of suspicious persons walking along the fence line of Summit Auto. The police found Ruiz hiding behind a 1998 Chevrolet van registered to defendant and found defendant lying down inside the van. Ruiz was wearing soiled clothing and heavy-duty construction gloves. A Hurricane hydraulic jack belonging to Summit Auto, which the State argued could be used for stealing tires, and a plastic laundry basket containing assorted vehicle parts were found inside the van. Ruiz and defendant were charged with criminal trespass to property, theft, and an alcohol violation.

¶ 5 The present case arose from a burglary at Juliano's Truck Repair in Wood Dale in which a witness, in the early morning hours, reported seeing two people arrive in a van and begin rolling tires toward it. The witness later identified them as defendant and Ruiz. The State alleged that defendant and Ruiz cut through a chain-link fence to access an open storage yard. A blue tarp was laid over the opening, hiding it. When officers searched the area, they found 10 truck tires leaning against a building. The tires had been stolen from vehicles in the storage yard. Police also found a 2000 GMC van that was registered to Ruiz. Police found two more stolen truck tires in the van, along with bolt cutters, a lug wrench, and a long flat screwdriver. No one

was apprehended at the scene. Instead, defendant and Ruiz were arrested after the witness identified them in photo arrays. Defense counsel told the court that he was putting forward an identification case.

¶ 6 The court found that the Summit crime was admissible to show *modus operandi* because both crimes involved both defendant and Ruiz being in a van at an auto location late in the evening and because, in the Summit crime, they were in possession of a hydraulic jack, which could be used for removing tires. The court denied the State's motion to present evidence of another incident, in which defendant and Ruiz were found in an industrial area near a trucking facility that had experienced recent thefts but they were not charged with any crimes.

¶ 7 At trial, Oscar Belmonte, a forklift driver at Yamato, a company in Wood Dale near Juliano's Truck Repair, testified that he slept in his car behind a dumpster in the parking lot with his employer's permission. On August 10, 2014, Belmonte arrived around 1 or 1:30 a.m. and shortly after saw a white van pull up to the side of the building next door. Belmonte had a good view of two males who exited the van. There were lights on the Yamato building and the building next door but no street lights in the parking lot. When the men exited the van, they took out a bucket of tools, plus additional tools. They walked past Belmonte's car, coming within five to six feet of it, and returned 15 minutes later to get more tools, including bars and what appeared to be wire cutters. They then passed again within five to six feet of Belmonte's car. After about 20 minutes, they reappeared, each rolling a tire that they put in the van.

¶ 8 Belmonte called 911 and told the dispatcher his observations and gave a detailed description of the men. He then turned on his car, including his headlights, illuminating the men heading toward him. One man had a bar in his hand and the other bent down to pick something up. Belmonte drove off before they could reach him, and he had a clear and unobstructed view

of the men as he drove off. As he was leaving the area, Belmonte encountered a Wood Dale police officer who told him to wait nearby. Belmonte left after waiting 60 to 90 minutes, reasoning that the police could contact him because they had his cell phone number.

¶ 9 The next day, a Wood Dale detective contacted Belmonte, and Belmonte provided a written statement. Belmonte told the detective that he was "a hundred percent sure" that he could identify the men. He said that he had "a good visual" of them each time they walked by his car and that he was leaning back so he could see them without being seen. When he turned on his car he also had a "good visual of them." Belmonte was shown two photo lineups and, in "[n]ot even a minute," he identified defendant and Ruiz. Belmonte gave investigators detailed descriptions of the men including their facial features, clothing, and approximate weights. He identified defendant in both the photo array and in court as the passenger in the van and Ruiz in the photo array as the driver. On August 20, 2014, defendant came to the Wood Dale police station to speak to officers and arrived with Ruiz.

¶ 10 On cross-examination, Belmonte admitted that he had smoked cannabis the night of the incident, but he said that he felt sober. Belmonte did not mention in his written statement that he saw the men take tools from the van. He denied telling an investigator that he was unable to get a good look at the men because he had ducked down in his car. Belmonte reiterated that he had a "good visual" of the men "the whole time." He said that, since it had been two years, his memory might not be as good, but upon seeing defendant in court he remembered him clearly. The defense also questioned Belmonte about details he omitted from the written statement. Belmonte stated that he told all of the details to investigators. He was also cross-examined about minor inconsistencies or uncertainties in his descriptions of the mens' clothing, such as whether a shirt was white or gray and the color of a hoodie. Belmonte confirmed that he had a "clear and

unobstructed view of the parking lot next door," that he provided descriptions of the men to the 911 dispatcher, and that the lights on the buildings were functional.

¶ 11 Various officers testified about their investigation of the scene and the lighting. One detective observed trucks that had been put up on jacks and had the tires removed. Tools found in the van included a bucket full of jack stands, lug wrenches, and a flat-blade screwdriver. Also included were a bolt cutter that could cut the fence, a very large heavy-duty lug wrench suitable for removing tires, and bottle jacks. That same detective stated that it took Belmonte only around 10 seconds to identify defendant and Ruiz in photo arrays, even though the detective had informed Belmonte that the suspects might not be shown in the photos. A receipt from 2014 with the name "Pablo Matias" was also found in the van. The detective stated that Belmonte gave him descriptions of the mens' heights, weights, and clothing but did not describe facial features or say that he illuminated them with his headlights. The detective could not recall if Belmonte said that they came within six feet of his car, but Belmonte did say that they were very close. Another investigator testified that Belmonte told him that he did not see the men's faces well, because he ducked down in his car to avoid being seen, but Belmonte also told him that he got a good look at their faces later on and was confident in his identification.

¶ 12 A lieutenant with the Summit Police Department testified about the Summit crime. That testimony took approximately 21 pages of the record, which has approximately 217 pages of testimony overall. The lieutenant testified consistently with the facts provided at the hearing on the motion *in limine* but added that the van was backed up to the fence and there were no cuts in the fence, no blue tarp, and no tires present. Immediately before that testimony, the jury was instructed that it could consider the offense only for the limited purpose of considering the issues of *modus operandi* and identity. That instruction was given again before deliberations.

¶ 13 The jury found defendant guilty. Defendant moved for a new trial, arguing that the court erred when it allowed evidence about the Summit crime. The court denied the motion and sentenced defendant to 36 days in jail and 24 months of probation. He appeals.

¶ 14 II. ANALYSIS

¶ 15 Defendant contends that the trial court erred when it allowed evidence of the Summit crime to show *modus operandi*, arguing that the crimes were not sufficiently similar and that the error was not harmless given doubts about Belmonte's identification of him.

¶ 16 Other-crimes evidence is inadmissible if it is used to show a defendant's propensity to commit crimes. *People v. Heard*, 187 Ill. 2d 36, 58 (1999). However, it may be admitted for other purposes, such as proving a defendant's *modus operandi*, intent, motive, or absence of mistake. *People v. Pikes*, 2013 IL 115171, ¶ 11. Even where used for a permissible purpose, other-crimes evidence should not be admitted if its prejudicial effect substantially outweighs its probative value. *Id.* The danger of other-crimes evidence is that, because of its persuasiveness, it might convince a jury to convict the defendant simply because he is a bad person. *People v. Thingvold*, 145 Ill. 2d 441, 452 (1991).

¶ 17 " 'Modus operandi, or "method of working," refers to a pattern of criminal behavior so distinct that separate crimes are recognized as the work of the same person.' " *People v. Boand*, 362 Ill. App. 3d 106, 125 (2005) (quoting *People v. Colin*, 344 Ill. App. 3d 119, 127 (2003)). In cases not involving *modus operandi*, general areas of similarity will suffice for other-crimes evidence to be admitted for a purpose other than propensity. *People v. Wilson*, 214 Ill. 2d 127, 141 (2005). But, where the prosecution offers other-crimes evidence to establish *modus operandi*, a higher degree of similarity is required. *Id.* at 140. Thus, to establish *modus operandi*, the State must show a " 'high degree of identity' " between the facts of the

crime charged and the other offense. *People v. Cruz*, 162 Ill. 2d 314, 349 (1994) (quoting *People v. Illgen*, 145 Ill. 2d 353, 373 (1991)). The offenses "must share such distinctive common features as to earmark both acts as the handiwork of the same person." *Illgen*, 145 Ill. 2d at 373. There must be some clear connection creating a logical inference that, if the defendant committed the former crime, he must have committed the crime charged. *Boand*, 362 Ill. App. 3d at 125.

¶ 18 However, even where other-crimes evidence is offered to prove *modus operandi*, some dissimilarity between the crimes will always exist. *People v. Taylor*, 101 Ill. 2d 508, 521 (1984). Thus, "[a]lthough there must be a strong and persuasive showing of similarity between the crimes, it is not necessary that the crimes be identical for the other crime to be admitted into evidence to prove *modus operandi*." (Internal quotation marks and citations omitted.) *Colin*, 344 Ill. App. 3d at 127. "Where common features may be insufficient to raise the inference of *modus operandi* on an individual basis, the combination of such features may reveal a distinctive combination so as to suggest the work of the same person." *Id.* "The test is not one of exact, rigorous identity, as some dissimilarity will always exist between independent crimes [citation]; rather, it is the similarity of the conduct as a whole, not the uniqueness of any single factor, which is the key to establishing *modus operandi*." *Id.*

¶ 19 The *modus operandi* exception to the general ban of other-crimes evidence has also been described as follows:

> " 'Most gas station armed robberies involve the use of a pistol to relieve an attendant of all the money in the cash register. Evidence of a series of gas station robberies committed by a masked man who, while armed with a pistol, forces attendants to empty their cash registers would not qualify for admission in order to show *modus operandi*,

> even though every armed robbery was committed in identical fashion. There would be no distinctive features to the methodology uncommon to most gas station holdups. However, if this same armed robber repeatedly demanded all of the Fritos that the station had on hand, instead of its cash, the robberies would take on a distinctive feature to suggest that they were the work of the same individual. Authorities would know that they were dealing with the Frito Bandito, and upon his arrest, the prosecution would be armed with all the robberies to prove his identity in the crime charged.' " *People v. Lenley*, 345 Ill.App.3d 399, 410-11 (2003) (quoting *People v. Wilson*, 343 Ill. App. 3d 742, 756 (2003) (Kuehn, J., dissenting)).

The admissibility of evidence rests within the trial court's discretion and the trial court's decision will not be disturbed absent an abuse of that discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 20 To demonstrate a pattern of behavior so distinctive that it forms a *modus operandi*, the crimes must share distinctive features that are not common to most offenses of the same type. See *Wilson*, 343 Ill. App. 3d at 750. For example, defendant relies heavily on People *v. Allen*, 335 Ill. App. 3d 773 (2002), in which similar crimes were not similar enough to establish a *modus operandi*. There, the defendant followed a 14-year-old girl in his purple truck as she walked home from school in Springfield. *Id.* at 774-75. The defendant exited his truck, told the girl to "come here," then put a knife to her throat. *Id.* at 775. He put her in his truck, told her that he would not hurt her, and ultimately dropped her off near her house. *Id.* The State introduced evidence that, nearly 10 years earlier, the defendant committed a similar crime in Springfield in which he followed a 19-year-old woman walking home from work. *Id.* at 376. He pulled up behind her in a maroon and silver sedan, put a knife to her throat, ordered her to get in

the car, and told her that he would not hurt her. *Id.* The defendant then drove the woman to a wooded area where he sexually assaulted her and ultimately let her go. *Id.*

¶ 21 The court in *Allen* held that the two crimes were too dissimilar to establish a *modus operandi*. *Id.* at 781. The court noted that there were no distinctive characteristics about the abductions that would show that they were the work of the same person. *Id.* Instead, the court found that "most of the similarities [were] general in nature, *i.e.*, using a knife to force an individual who is walking alone into a vehicle." *Id.* The court also noted that the offenses were substantially dissimilar because one case involved a sexual assault while the other did not. *Id.*; see also *People v. Howard*, 303 Ill. App. 3d 726, 731 (1999) (coincidence that the victims were white male college professors robbed near the same busy street and the defendant approached each from behind and used the same profanity was not sufficient for the other crime to be admissible to show *modus operandi*, because those features were common in many robberies).

¶ 22 In *People v. Richee*, 355 Ill. App. 3d 43, 57 (2005), another case relied on by defendant, the First District held that evidence of two prior burglaries was improperly admitted to show *modus operandi* in a murder case. In each case, the defendant was an "insider" with more than ordinary access to the crime location, and he masked each crime scene by leaving false leads for the police. However, the crimes were different, the defendant used different means to gain access to the establishments at issue, the locations differed significantly, and different items were removed from each crime scene. *Id.*; see also *People v. Connors*, 82 Ill. App. 3d 312, 318 (1980) (car thefts committed four hours and six blocks apart at night, with the defendant telling the victims " '[d]on't make me shoot you' " were not distinctive enough for the other crime to be admissible to show *modus operandi*).

¶ 23 In contrast, in *People v. Miller*, 254 Ill. App. 3d 997 (1993), there was sufficient similarity between the crimes to establish *modus operandi*. There, the defendant was charged with residential burglary after he and his accomplices posed as repairmen and stole money from an elderly woman's house. *Id.* at 998-99. The trial court admitted evidence that the defendant and his accomplices had performed two similar burglaries. *Id.* at 1000-02. The appellate court noted that all of the burglaries occurred in the same town, in the apartments of elderly women, within a four-month period. *Id.* at 1013. Critically, in each case, the defendant and his accomplices "entered the apartment under the guise of doing some kind of repair work," then distracted the victim while another accomplice took the money. *Id.* The court stated, "While we acknowledge that access to a residence is often gained by posing as a repairman, we do not think that the similarities in this case are of the type common to most residential burglaries." *Id.*

¶ 24 Likewise, in *People Littleton*, 2014 IL App (1st) 121950, relied on heavily by the State, crimes involving the robbery of elderly women were sufficiently similar to show *modus operandi*. There, an elderly woman arrived home from a grocery store and, as she was retrieving groceries from her car, a man wearing a dark jacket with a hood grabbed her throat and snatched her purse from her shoulder. He pulled her out of the car and pushed her to the ground before fleeing. *Id.* ¶ 8. To establish *modus operandi*, the trial court allowed evidence that the defendant committed five other crimes in which he targeted women in their sixties, seventies, or early eighties who were traveling alone, and the First District affirmed. In each case but one, the victim had traveled to a grocery store on Chicago's southwest side or in a nearby suburb and, in each case, the defendant approached the woman at her home, often while she unloaded groceries from her car. Also in each case, the defendant knocked the woman to the ground, took the woman's purse, and fled. *Id.* ¶ 39. The court noted some differences, such as that one woman

was returning from a bakery instead of a grocery store and some were returning on foot instead of in a car, but also noted that some dissimilarities will always exist. Overall, the court found an "unmistakable" pattern of defendant finding elderly women traveling alone from geographically similar stores, knocking them down, and taking their purses. *Id.* ¶ 40; see also *People v. King*, 384 Ill. App. 3d 601, 607 (2008) (crimes shared distinctive elements in that the defendant lay in wait near female victims' homes, attacked them in their garages or nearby parking areas as they arrived home, and within minutes of each attack called one of two women on his cell phone); *People v. Haley*, 2011 IL App (1st) 093585, ¶ 58 (in both instances at issue the defendant had been out drinking and then, in the early morning hours, pushed fisherman from behind into the water at Montrose Harbor and then laughed).

¶ 25 Here, the similarities between the crimes are not as strong as those in *Littleton* and other cases in which there was a particularly distinctive commonality that showed that the crimes were the handiwork of the same wrongdoer. Meanwhile, the similarities are stronger than in *Allen* and *Richee*. Ultimately, however, the similarities are still lacking in distinctive enough features to cross the threshold necessary for the Summit crime to be admissible to show *modus operandi*. The similarities were generally things that would be common to any theft of automotive parts from an auto shop yard. For example, that Ruiz and a van were involved in both crimes is not a particularly distinctive feature, especially when the vans were different, with one registered to Ruiz and the other to defendant, and a van would be normally useful when stealing larger automotive parts. Both crimes took place at night, but most such crimes would. Both locations had fences, but a fence would be expected at such an establishment. Hence these are not distinctive features uncommon to the crime in general. While the State notes the presence of a Hurricane hydraulic jack in the Summit crime, no Hurricane hydraulic jack was present in the

crime at issue; bottle jacks were present, but there was no clear testimony as to their specific use or similarity to a Hurricane hydraulic jack. Meanwhile, there were significant differences in the locations, items taken, and the means of entry. Thus, the trial court erred when it allowed the evidence of the Summit crime.

¶ 26 The State argues that the error was harmless because Belmonte clearly identified defendant as the perpetrator. However, defendant argues that, based on the impeachment of various aspects of Belmonte's identification, the error was not harmless. We agree with the State that the error was harmless.

¶ 27 " 'The erroneous admission of evidence of other crimes carries a high risk of prejudice and ordinarily calls for reversal.' " *People v. Clark*, 2015 IL App (1st) 131678, ¶ 65 (quoting *People v. Lindgren*, 79 Ill. 2d 129, 140 (1980)). "However, where the error is harmless beyond a reasonable doubt, reversal is not required." *Id.* "In deciding whether the admission of other-crime evidence is harmless beyond a reasonable doubt, we must ask whether the other-crime evidence was 'a material factor in [the defendant's] conviction such that without the evidence the verdict likely would have been different.' " *Id.* (quoting *People v. Cortes*, 181 Ill. 2d 249, 285 (1998)). " 'If the error is unlikely to have influenced the jury, admission will not warrant reversal.' " *Id.* (quoting *Cortes*, 181 Ill. 2d at 285).

¶ 28 For example, in *Allen*, the error in admitting the other-crimes evidence was harmless. *Allen*, 335 Ill. App. 3d at 782. First, the jury was instructed to limit its consideration of the other-crimes evidence to the issues of *modus operandi* and state of mind, reducing the likelihood that the jury considered the other crimes as evidence of propensity. Second, the victim identified the defendant in a photographic lineup, an in-person lineup, and in court. The victim also gave a detailed description of the defendant's pickup, which bolstered her identification. Finally, the

evidence of the other crime was limited to the victim such that the court did not allow a trial within a trial. *Id.*; see also *Clark*, 2015 IL App (1st) 131678, ¶ 66 (error harmless when the evidence against the defendant was overwhelming; the victim saw the defendant three separate times in daylight, took the defendant's license plate number, identified the defendant in a photo array, and was not significantly impeached or undermined).

¶ 29 Here, Belmonte repeatedly stated that he had a clear view of defendant, he was 100% certain in his identification of defendant, he gave a description of defendant to the 911 operator and to investigators, and he identified defendant both in a photo array and in court. Belmonte also identified Ruiz, who was the registered owner of the van. Moreover, Belmont's identification was corroborated by evidence that defendant later came to the Wood Dale police station with Ruiz, creating a connection between defendant and Ruiz that was independent of Belmonte's identification. Finally, a receipt belonging to defendant was found inside the van. While defendant argues that Belmonte's identification was impeached, the impeachment was not significant in the context of his testimony as a whole. Thus, the evidence against defendant was overwhelming. Meanwhile, the testimony about the Summit crime took only 21 pages of the record such that it was not a primary focus of the trial or a trial within a trial. The jury was then instructed that it could consider the Summit crime only for the limited purpose of considering the issues of *modus operandi* and identification. Thus, as in *Allen*, the error was harmless.

¶ 30 III. CONCLUSION

¶ 31 The trial court erred when it allowed evidence of the Summit crime to establish *modus operandi*. However, that error was harmless. Accordingly, the judgment of the circuit court of Du Page County is affirmed.

¶ 32 Affirmed.