

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

vs

ANDY T. NICKERSON,

Defendant/Appellant.

File No. 90-5607-AR
HON. PHILIP E. RODGERS, JR.

Dennis M. LaBelle (P24091)
Attorney for Plaintiff/Appellee

James M. Hunt (P24243)
Attorney for Defendant/Appellant

DECISION AND ORDER

Defendant-Appellant submits an Appeal from a jury finding in the 86th District Court that Appellant was guilty of two counts of Public Utility Fraud under \$500.00. The jury found that Appellant did use electrical current without measurement and consent, and that he prevented electric current from registering contrary to MCLA 750.282. Appellant requests that this Court set aside the verdict for the following reasons: (1) the trial court erred in allowing the similar acts testimony of William Thomas; (2) the trial court erred in refusing to grant an adjournment following the introduction of the Thomas testimony; and (3) the trial court erred when it denied Appellant's motion for directed verdict. Plaintiff-Appellee submits that no error was committed and requests this Court deny Defendant-Appellant's appeal.

The Court has reviewed the briefs and trial transcripts, together with the court file and finds no error has been committed by the trial court. Defendant-Appellant's appeal is denied.

Under MRE 404 (b) evidence of other crimes, wrongs or acts may be admissible to prove motive, opportunity, intent, preparation,

relevance or knowledge when the issue is material and the probative value is not outweighed by the potential for unfair prejudice to defendant. People v Engelman, 434 Mich 203; 453 NW2d 656 (1990); People v Golochowicz, 423 Mich 298; 391 NW2d 378 (1982).

The testimony of William Thomas was offered to show Appellant had the requisite knowledge of electricity based upon a prior incident where an electric meter was bypassed at his home. Lack of knowledge or ability to complete the offense was an issue raised by the defense. The Thomas testimony was used to show the ". . . relationship between the charged and uncharged offenses which supplies the link between them. . ." and was probative of the fact that Defendant did possess sufficient knowledge to reconnect the electric power following disconnection by the power company. Golochowicz, at p. 310. The record indicates this was the purpose for which the trial court allowed the Thomas testimony. (Transcript pp. 186-187).

The trial court properly conducted an inquiry, out of the presence of the jury, to assess the testimony and its materiality to the action. The Court also made a determination of the probative value versus prejudicial impact of the proffered testimony. (Transcript pp. 203-205). Id. 314. The People properly laid a foundation for admission of the testimony under MRE 404 (b) and addressed the safeguards established by People v Wilkins, 82 Mich App 260; 266 NW2d 781 (1976), as analyzed in Golochowicz, supra. There was no error in the introduction of this evidence.

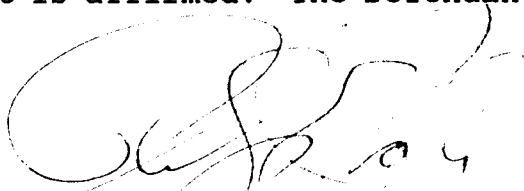
Adjournments are within the trial court's discretion. "There are no mechanical tests for deciding when a denial for a continuance is so arbitrary as to violate due process." People v Charles O Williams, 386 Mich 565, 575; 194 NW2d 337 (1972). The trial court was within its discretion when denying the adjournment, taking the nature of the incident and the age of the action under consideration. (Transcript p. 248). The trial court found no culpability on the People's part, and determined that the finding of witness Thomas was spontaneous.

It is within the trial court's discretion to determine whether an adjournment, long enough to allow an investigation, would weaken the jury's memory of all the testimony presented. (Transcript p. 248). The record indicates Defendant had sufficient opportunity to cross-examine William Thomas on the similar acts testimony (Transcript p. 194 and p. 197). The failure to grant an adjournment was neither error nor an abuse of discretion.

Under MCLA 750.282(6), in all prosecutions for public utility fraud, proof that the Defendant, other than a lessor, had control of or occupied the premises where the offense was committed, or received benefit of the electric current, is prima facie evidence of a violation. The Defendant was identified as the owner of the premises and the person to whom the electric service and meter were supplied. The trial court did not abuse its discretion when it denied the motion for directed verdict. The record indicates there is sufficient evidence to support a conviction. The jury found that the essential elements of the crime were proven beyond a reasonable doubt. People v Hampton, 407 Mich 354, 367; 288 NW2d 284. See, also, Jackson v Virginia, 443 US 307; 99 SCT 2781; 61 L Ed 2d 560 (1979). The trial court properly denied the motion following the close of all proofs. (Transcript pp. 320-321)

It is the opinion of this Court that the trial court did not err in allowing the similar acts testimony to be admitted. Nor was there an error in refusing to grant an adjournment. The proofs offered by the People provided sufficient evidence to support both a conviction and a denial of the motion for directed verdict. The decision of the trial court is affirmed. The Defendant's Appeal is denied.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 3/18/92