

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON DAVID SADOWSKI,

Defendant-Appellant.

UNPUBLISHED

July 23, 2020

No. 351607

Alger Circuit Court

LC No. 19-002369-FC

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

PER CURIAM.

Defendant, Jason David Sadowski, stands charged with open murder, MCL 750.318. In this interlocutory appeal, he appeals by leave granted¹ the trial court’s order granting in part the prosecutor’s motion in limine under MCR 404(b) to admit other-acts evidence. We reverse and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

The victim, defendant’s roommate, was found dead. The victim had severe facial injuries and had died of asphyxia as a result of bleeding. Text messages between the victim and defendant indicate that the victim had apparently decided to evict defendant from the victim’s house. When law enforcement met with defendant on the night the victim was discovered, defendant’s right hand was swollen and injured.

The prosecutor filed two motions in limine to introduce videos of jailhouse assaults by defendant that did not involve the victim in this case. The trial court admitted one of the videos, which depicted defendant assaulting another prisoner in jail who had antagonized defendant. In the video, defendant is seen punching and choking the victim, who fell unconscious. The victim regained consciousness quickly and told guards that he was okay. The prosecutor argued that the

¹ *People v Sadowski*, unpublished order of the Court of Appeals, entered February 3, 2020 (Docket No. 351607).

video was admissible to demonstrate defendant's method of causing harm to people, and how defendant reacts to being insulted.

II. STANDARD OF REVIEW

A trial court's decision to admit or exclude evidence will be disturbed only if the decision was an abuse of discretion. *People v Denson*, 500 Mich 385, 396; 902 NW2d 306 (2017). Whether a rule or statute precludes the admission of evidence is a preliminary question reviewed de novo. *Id.* The trial court's decision to admit evidence that is precluded by rule or statute is an abuse of discretion. *Id.*

III. ANALYSIS AND APPLICATION

Open murder may be charged at the information stage, and the jury then determines the degree of murder upon finding the defendant guilty. *People v Johnson*, 427 Mich 98, 108-109; 398 NW2d 219 (1986). First-degree murder occurs when the defendant kills someone with premeditation, while committing certain felonies, or when the victim is a member of law enforcement carrying out law enforcement duties. MCL 750.316. Second-degree murder includes all other murders. MCL 750.317. Murder is defined as the unlawful killing of an individual with malice aforethought. *People v Goecke*, 457 Mich 442, 463; 579 NW2d 868 (1998). "The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *Id.* at 463-464. Malice is defined as the intent to kill or inflict great bodily harm, or the reckless and wanton disregard of the likelihood that the defendant's behavior would cause those things. *Id.* at 464.

MRE 401 defines relevant evidence as "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 states, "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."

MRE 404(b)(1) provides:

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.

MRE 404(b)(1) reflects the general principle that other-acts evidence is impermissible for propensity purposes. *Denson*, 500 Mich at 397. This rule exists because of the fear that a jury would convict the defendant because of the defendant's bad character rather than because the evidence demonstrated that the defendant committed the crime beyond a reasonable doubt. *Id.* This rule exists so that the focus is on the case rather than the person. *Id.* at 398. However, MRE

404(b)(1) does not apply when the evidence is logically relevant and does not “involve the intermediate inference of character” *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). There is no rule of general exclusion of similar-acts evidence, because relevant similar-acts evidence does not violate MRE 404(b)(1) if it is not offered solely for propensity reasons. *Id.*

The Michigan Supreme Court has promulgated the following four-part test to determine whether other-acts evidence is admissible:

“First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.” [*Denson*, 500 Mich at 398, quoting *VanderVliet*, 444 Mich at 55.]

The first prong of this test for determining whether the evidence is admissible is whether the prosecution has presented a proper nonpropensity purpose for the evidence. *Denson*, 500 Mich at 398. MRE 404(b)(1) provides the following as examples of proper purposes for other-acts evidence: “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. . . .” The Court noted that the mere recitation of a proper purpose does not automatically make evidence admissible, because the second prong focuses on whether the prosecutor’s claimed purpose was more than a front to admit other-acts evidence. *Id.* at 400.

In *Denson*, the Court held that the proffered evidence was not material because it was not related to the defendant’s specific claim of self-defense. *Denson*, 500 Mich at 401. Unlike in *Denson*, the evidence in this case is material. The prosecutor claimed that this evidence demonstrates defendant’s method of hurting people and how he reacts to being disrespected. The method of carrying out the murder, and the defendant’s intent, are material to the open-murder charge. See *Goetze*, 457 Mich at 463 (listing the elements of second-degree murder, which include intent). In contrast to *Denson*, in this case defendant’s method and intent are central to the prosecution’s claim that defendant committed murder. Therefore, the video is theoretically material.

The second prong of the test for admission of other-acts evidence is whether the evidence is logically relevant. *Denson*, 500 Mich at 400-401. This is the “ ‘touchstone’ ” of admissibility for other-acts evidence. *Id.* at 401, quoting *People v Crawford*, 458 Mich 376, 388; 902 NW2d 306 (1998). Whether the other-acts evidence is logically relevant depends on whether the evidence is material and its probative value. *Denson*, 500 Mich at 401. Whether evidence is material depends on whether it is an issue “of consequence” that must be proven or disproven by the prosecutor. *Id.*, quoting *Crawford*, 458 Mich at 388. However, the other-acts evidence must be probative of the specific issues in the case. See *Denson*, 500 Mich at 401.

The second part of the second prong is whether the evidence is probative. *Id.* at 401-402. Evidence is probative when it satisfies MRE 401. In most circumstances, the threshold for evidence satisfying MRE 401 is minimal because MRE 401 states that evidence is relevant when it has “any tendency” to make a fact more or less probable. *Id.* at 402. However, when dealing

with other-acts evidence, the evidence must be probative of more than just propensity. *Id.* “Thus, although the prosecution might claim a permissible purpose for the evidence under MRE 404(b), the prosecution must also explain how the evidence is relevant to that purpose without relying on a propensity inference.” *Id.* A critical component of evidence being probative is the similarity between the other act and the charged offense. *Id.* This similarity is especially important when the prosecutor’s argument to introduce the evidence is based on the similarity of the other act to the case at hand. *Id.* at 402-403. In those cases, there must be a “striking similarity” between the other-acts evidence and the charged offense. *Id.* at 403.

In *Crawford*, the Court determined that the defendant’s past conviction for drug dealing was not admissible in his prosecution for possession of drugs because in the previous case he was caught in the act of selling drugs, while in the case at hand he was found with drugs in a secret compartment of a car that he had bought in the last 5 to 10 days before his arrest. *Crawford*, 458 Mich at 396-397. The Court determined that the prosecutor sought to draw the impermissible inference that the defendant had to know that he had drugs and intended to deliver them because, based on his past crime, the defendant was the kind of person who knowingly drove around with drugs and sold them. *Id.*

In *People v Knox*, 469 Mich 502, 512; 674 NW2d 366 (2004), the Court similarly determined that the defendant’s past acts of violence were different from the acts that were determined to have caused a two-year-old child’s fatal injuries, even though some of the past acts included domestic violence. The Court determined that the only use for the evidence was to argue that because the defendant had a bad character, he committed the murder. *Id.* at 513. The Court noted that the prosecutor’s argument that the defendant’s anger management issues led to the murder was an improper propensity argument. *Id.*

In *Denson*, the Court held that the defendant’s previous assault conviction and the case at issue were different because the earlier case involved a calculated assault related to a drug deal while the offense in the current case was allegedly a spontaneous reaction after finding the victim and the defendant’s daughter in a state of undress. *Denson*, 500 Mich at 406-407. The Court noted that the evidence of a completely different assault on a completely different person had no probative value other than to demonstrate that the defendant was the kind of person who assaults people. *Id.* at 407.

The video in this case is not admissible against defendant because there is not a striking similarity between the act portrayed in the video and the alleged murder. The prosecution seeks to use the video to demonstrate the similarity between the assault in the video and the alleged murder in this case for the purposes of demonstrating how defendant hurts people and reacts to being insulted. The victim in this case was murdered, and the victim lived with defendant. The victim in the assault on video was not someone whom defendant knew, and the assault occurred in a jail. The victim in the video was choked, while there is no direct evidence that the victim in this case was choked. In the video, the victim was drunk and approached defendant, who was lying on a cot, to verbally confront him, while the victim in this case and defendant exchanged texts. The victim in the assault video is not the victim in this case. The victim in the video returned to consciousness and told the jail guards that he was fine. The victim in the video does not appear to have been beaten to the point of being bloody. In contrast, the victim in this case died of asphyxiation from blood from multiple facial fractures. The defendant ceased repeatedly hitting

and choking the victim in the video once the victim passed out, although he did slap the victim one more time.

In *Denson*, the Court held that a planned assault and the self-defense assault were different, and that the only purpose of using a different assault on a different victim was to prove propensity. *Denson*, 500 Mich at 406-407. In this case, the two assaults are also different for the reasons discussed, and the prosecutor's argument that the video shows method and motive are unavailing because using the video to show that this is how defendant reacts and hurts people is a propensity argument. There is not a striking similarity between the video and this case, and therefore the other-acts evidence should not have been admitted by the trial court.

The third prong to consider is MRE 403 and whether the other-acts evidence is substantially more prejudicial than probative. *Denson*, 500 Mich at 398. In the context of other-acts evidence, the danger of unfair prejudice is high because there is a significant risk that the jury will use the evidence of the past crime to decide that if the defendant had committed the crime in the past then the defendant had committed the crime at issue. *Crawford*, 458 Mich at 398. Evidence is unfairly prejudicial "when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id.* In *Crawford*, the Court determined that the most powerful, if not the only, inference drawn from the evidence of the defendant's past conviction would be that because the defendant was guilty of the past drug offense, he was guilty of the charged offense at issue. *Id.* That risk significantly overshadowed the probative value of the evidence. *Id.* at 398-399.

In this case, the probative value of the video is low. Evidence is unfairly prejudicial "when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398. The evidence in this case is only marginally probative, and there is a risk that it would be given preemptive weight by the jury. The evidence is also marginally probative, at best, because the method of killing the victim does not appear to be seriously at issue. The main use of this evidence is to show that because defendant gets angry when he is insulted, he reacts with violence. That is a propensity argument. The prosecution's argument that the video is useful to demonstrate defendant's method of attacking someone and the defendant's reaction to provocation, to the extent that it is probative, is still substantially outweighed by the significant risk that the jury will conclude that because defendant has physically assaulted people in the past, defendant did it again with fatal results in this case.

IV. CONCLUSION

The trial court erred by granting the prosecutor's motion in limine to admit the video at issue because admission of the video violates MRE 404(b)(1) and MRE 403. Therefore, we reverse the trial court's order, and we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ Deborah A. Servitto