STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
December 17, 2020
APPROVED FOR PUBLICATION
February 4, 2021
9:05 a.m.

v

No. 352937
Oakland Circuit Court
LC No. 2019-272265-FC

FLOYD RUSSELL GALLOWAY, JR.,

Defendant-Appellee.

Before: CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

The prosecution appeals by leave granted[1] the trial court's order excluding other-acts evidence the prosecution intended to introduce against defendant in his trial on the charge of first-degree premeditated murder, MCL 750.316(1)(a). We affirm.

I. BACKGROUND

This case arises from the disappearance and alleged murder of Danielle Stislicki on December 2, 2016. Defendant was previously convicted of assault by strangulation or suffocation, MCL 750.84(1)(b), assault with intent to commit sexual penetration, MCL 750.520g(1), and kidnapping, MCL 750.349, arising from a September 2016 incident in which he assaulted AT as she was jogging through a park. He was charged with Danielle's murder while serving 16 to 35 years' imprisonment on those convictions.

[1] *People v Galloway*, unpublished order of the Court of Appeals, entered April 22, 2020 (Docket No. 352937).

Defendant was the last person seen with Danielle. Defendant was acquainted with Danielle, as they had previously both worked in the MetLife building. Defendant had been a security guard there and he was known to seek out, or flirt with, Danielle. He had sent her flowers once. On the day she disappeared, December 2, 2016, Danielle had left work at about 5:00 p.m. She was seen in her workplace parking lot talking to defendant.[2] Defendant had the hood up on his vehicle, a Buick Regal, as if indicating that he had car trouble. Defendant was then seen in the passenger seat of Danielle's vehicle by her coworker as Danielle was leaving the parking lot and waiting to turn north onto Telegraph Road. Shortly after Danielle was seen with defendant, her cellphone communicated with the cellular tower nearest to defendant's home in Berkley. Danielle had made plans to go to dinner with her best friend, Sarah, that evening but failed to attend or respond to any communications. The next day, Sarah contacted Danielle's parents and they went to Danielle's apartment. Danielle's parents found Danielle's vehicle in its normal spot, along with her purse, identification, and credit cards. Danielle and her keys were missing. The police were called and Danielle was reported missing.

During the police investigation, defendant was questioned about Danielle. He told the police that he had worked every weekday in December, including December 2, 2016, from 3:00 p.m. to 11:00 p.m. He was noticeably shaking at the time. The police later determined that defendant had called in off for December 2, 2016, claiming to have a doctor appointment so he did not work on that day. Subsequently, the police executed a search warrant at defendant's house and noticed that a patch of carpet had recently been replaced in defendant's bedroom. DNA analysis of carpet adjacent to the replaced patch yielded "very strong support" for the hypothesis that Danielle was a contributor to the skin-cell DNA on the carpet. It was also discovered that, on December 4, 2016, defendant purchased a new comforter from Bed, Bath, and Beyond. Further, it was determined that Danielle's cellphone had communicated with towers on the route between defendant's house and Danielle's apartment at about 8:00 p.m. on the night she disappeared—about the same time security cameras captured a vehicle matching the description of Danielle's moving toward her apartment. The security camera footage at a Tim Horton's located about a 10-minute walk from Danielle's apartment showed defendant getting a coffee and using the business's phone at about 8:40 p.m. The police later found Danielle's keys and her Fitbit in the area between Danielle's apartment and the Tim Horton's. A cab driver testified that she picked defendant up at the Tim Horton's at about 9:00 p.m. and dropped him off at an apartment complex. That complex was located about 1,000 feet from Danielle's workplace parking lot, where defendant's vehicle had been parked. At 9:35 p.m. a vehicle matching the description of defendant's vehicle was captured on security cameras on the route to defendant's house. Ultimately, defendant was arrested and then bound over on the charge of first-degree premeditated murder of Danielle.

Before trial, the prosecution moved to introduce evidence that defendant had strangled and attempted to rape AT as she was jogging through the woods in a park about three months before Danielle disappeared. Defendant had allegedly laid in wait, hiding, and then attacked AT from behind, dragging her by the neck into the woods where he began to strangle her and punch her in

[2] On that day, defendant's cellphone had communicated with the cellular tower near the MetLife building at 11:14 a.m., and then communicated with the cellular tower in the Berkley area by 11:26 a.m. At 3:48 p.m. it was shown to be moving west toward the MetLife building.

the face. He wanted AT to go down by the water, which was a more isolated location, and have sex with him. Defendant had initially claimed that he was working on the day of that attack, but he was not. The prosecution argued that evidence of these acts against AT were admissible in this case for the proper purposes of motive, intent, preparation, and lack of mistake or accident. Further, the evidence was admissible to identify defendant as Danielle's killer. The prosecution also argued that there were striking similarities in each case so as to demonstrate a common scheme, plan or system. In that regard, the prosecution noted the substantially similar physical appearances of the women, as well as defendant's predatory conduct, defendant's assault in a manner that did not cause the emission of much body fluid, defendant's attempt to isolate his victims, and the use of work as an alibi in both cases. Defendant opposed the admission of the other-acts evidence, arguing that there were no similarities between the random attack of a stranger in a park and what is alleged in this case. Defendant and Danielle were friends. There was no evidence of sexual assault or strangulation here. And there was no evidence of stalking or predatory conduct in either case. Thus, defendant argued, evidence regarding the AT matter must be excluded as purely propensity evidence.

The trial court ruled that the other-acts evidence was inadmissible under MRE 404(b) because the circumstances of defendant's assault on AT were too dissimilar to defendant's alleged acts in this case to establish any nonpropensity purpose for admission. In particular, defendant's alleged conduct both before and after Danielle's disappearance bore no resemblance to his conduct toward AT, and therefore, did not help to prove his identity as Danielle's killer. Similarly, defendant's attack on AT was not probative of his motive or intent to harm Danielle because there was nothing tying the two incidents together. The court rejected the prosecution's argument that the preparation and opportunity were the same in both cases because defendant used work as an alibi for the crimes, holding that it was simple criminal planning and any probative value was substantially outweighed by the danger of unfair prejudice. Further, the court rejected the prosecution's argument that the attack on AT showed a common plan or scheme because there was no striking similarity between the two acts. "There is virtually nothing in common between the incidents." AT was a stranger who was a randomly chosen victim without evidence of stalking behavior, who defendant strangled and attempted to move to a secluded area for the purpose of sexual assault. In contrast, defendant and Danielle knew each other and he purportedly faked car trouble in the parking lot at her work—not a secluded area—and then was seen in Danielle's vehicle as she drove away. There are distinct differences in the prior acts and the charged offense such that the other-acts evidence is not probative of anything but to show that defendant might have a propensity to commit murder, and therefore, is inadmissible. In the alternative, the court concluded, even if it found that the other-acts evidence was offered for a proper purpose, the probative value of defendant's assault on AT was substantially outweighed by the risk of unfair prejudice under MRE 403, particularly because of the lack of similarity between the other acts and defendant's alleged conduct in this case. The prosecution sought leave to appeal, which was granted.

II. STANDARD OF REVIEW

A trial court's decision to exclude evidence is reviewed for an abuse of discretion, but preliminary legal issues of admissibility are reviewed de novo. *People v Bass*, 317 Mich App 241, 255; 893 NW2d 140 (2016) (citation omitted). A trial court abuses its discretion when it "chooses

an outcome that falls outside the range of reasonable and principled outcomes." *Id*. at 256 (quotation marks and citation omitted).

III. ANALYSIS

A. MRE 404(b)

The prosecution argues that evidence of defendant's prior assault on a victim "bearing a striking resemblance to Danielle" three months before Danielle disappeared is admissible for the proper purposes of showing defendant's motive, intent, lack of accident, identity, and common scheme, plan, or system; therefore, the trial court abused its discretion by ruling that such evidence was inadmissible. We disagree.

"The general rule under MRE 404(b) is that evidence of other crimes, wrongs, or acts is inadmissible to prove a propensity to commit such acts." *People v Denson*, 500 Mich 385, 397; 902 NW2d 306 (2017). But MRE 404(b)(1) provides, in relevant part:

> Evidence of other crimes wrongs, or acts . . . 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.

The admissibility of other-acts evidence under MRE 404(b) has long been governed by the test our Supreme Court outlined in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Under *VanderVliet*, the prosecution has the burden to establish the following:

> 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.]

Accordingly, when determining whether to admit other-acts evidence, the trial court must first look to whether "the prosecution has articulated a proper noncharacter purpose for admission of the other-acts evidence." *Denson*, 500 Mich at 398. Mechanically "*reciting* a proper purpose does not actually demonstrate the *existence* of a proper purpose . . . ." *Id*. at 400. Second, to decide if a proper purpose actually does exist the court must examine the logical relevance of the proffered evidence. *Id*. That is, the prosecutor must explain how, and demonstrate, that the other-acts evidence is logically relevant to the stated purpose without relying on an impermissible propensity inference. *Id*. at 402. "Other-acts evidence is logically relevant if two components are present: materiality and probative value." *Id*. at 401. For the other-acts evidence to be material, it must be related to a fact or issue of consequence in the determination of the case. *Id*. For that same evidence to have probative value, it must have a tendency to make the purported fact of consequence more or less probable than it would be without that evidence. *Id*. at 401-402. "The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material." *VanderVliet*, 444 Mich at 75.

"In evaluating whether the prosecution has provided an intermediate inference other than an impermissible character inference, we examine the similarity between a defendant's other act and the charged offense." *Denson*, 500 Mich at 402. "The degree of similarity that is required between a defendant's other act and the charged offense depends on the manner in which the prosecution intends to use the other-acts evidence." *Id*. at 402-403. When the prosecution's theory of relevance is particularly based on an alleged similarity, there must be a "striking similarity" between the other act and the charged to be admissible. *Id*. at 403. For example, when the theory of relevance of the other-acts evidence is to identify the defendant as the perpetrator of the charged crime considering the uncommon or distinctive similarity of the facts and circumstances of both the uncharged and charged offenses, there must be a high degree—or striking—similarity so as to "earmark [the charged offense] as the handiwork of the accused," i.e., the defendant's "signature." *People v Golochowicz*, 413 Mich 298, 310-312; 319 NW2d 518 (1982). But when the prosecution does not rely on such alleged similarity for its theory of relevance a "striking similarity" need not be shown. *Denson*, 500 Mich at 403; see also *People v Mardlin*, 487 Mich 609, 620-621; 790 NW2d 607 (2010). "Different theories of relevance require different degrees of similarity between past acts and the charged offense to warrant admission." *Id*. at 622. For example, when the other-acts evidence is "offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts 'are of the same general category.' " *VanderVliet*, 444 Mich at 79-80.

On appeal, the prosecution first argues that the trial court applied an incorrect legal standard. Specifically, the prosecution argues that other-acts evidence offered for a proper purpose is admissible even if it invites a character inference, and the trial court applied an unfounded rule that other-acts evidence offered for a proper purpose is inadmissible if it also invites a character inference. The prosecution's argument lacks merit. The trial court precisely stated in its opinion the correct legal standard from *Denson* and *VanderVliet*. More importantly, the trial court did not rule that the other-acts evidence was inadmissible under MRE 404(b) because it invited a character inference in spite of its proper purpose. Rather, the trial court ruled that the prosecution failed to establish a proper purpose. It ruled, in the alternative, that even if the prosecution had established a proper purpose under MRE 404(b), the threat of an unfair character inference still rendered the evidence inadmissible under MRE 403. Such a ruling is entirely consistent with the *VanderVliet* framework. See *Denson*, 500 Mich at 398, quoting *VanderVliet*, 444 Mich at 55. Therefore, the trial court applied the correct law to the facts of this case, and that application is reviewed for an abuse of discretion.

Next, the prosecution provides several different theories of admissibility under MRE 404(b)(1). The prosecution first argues in its brief on appeal that defendant's "attack on AT shows his motive behind luring Danielle away from her office and to his home and his intent thereafter—to sexually assault her." In that regard, the prosecution notes that defendant's statements to AT during the assault referenced sex as his goal, and he choked AT until she passed out. Likewise, the prosecution argues, in this case, Danielle's DNA was found in defendant's bedroom which suggested that he intended to, or did, also commit a sexual assault against Danielle. But defendant is charged in this case with first-degree premeditated murder and the fact that defendant assaulted AT does not tend to establish defendant's motive and intent to commit the crime of first-degree premeditated murder against Danielle. Simply stated, and as the trial court concluded, there is no intermediate fact linking the charged and uncharged acts. See e.g., *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). The prosecution also alleges that defendant's "attack on AT shows that Danielle's disappearance was no accident." In other words, the

prosecution argues, defendant's attack on AT was a "practice run" for his attack on Danielle. However, evidence of such a "practice run" only tends to establish defendant's motive for attacking AT, not his motive and intent to kill Danielle.

Next, the prosecution argues that the other-acts evidence is admissible to prove defendant's identity as Danielle's killer. Identity of the perpetrator is an element in every criminal case. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). But the trial court did not abuse its discretion in determining that the incidents involving AT and Danielle were too dissimilar to warrant admission for the purpose of showing defendant's identity as the common perpetrator. Our Supreme Court has instructed that, in addition to *Denson*, a reviewing Court "shall apply *Golochowicz* [413 Mich at 310-311] to determine whether the other-acts evidence [is] admissible to prove identity." *People v Chandler*, 502 Mich 879; 912 NW2d 859 (2018). "*Golochowicz* identifies the requirements of logical relevance when the proponent is utilizing a modus operandi theory to prove identity." *Id*., quoting *VanderVliet*, 444 Mich at 66.

> The *Golochowicz* test requires that (1) there is substantial evidence that the defendant committed the similar act (2) there is some special quality of the act that tends to prove the defendant's identity (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. [*People v Waclawski*, 286 Mich App 634, 673; 780 NW2d 321 (2009) (quotation marks and citation omitted).]

In this case, there is substantial evidence that defendant committed the attack on AT because he pleaded guilty to doing so. However, the prosecution has failed to identify "some special quality of the act" that tends to prove defendant's identity. See *id*. As stated earlier, the two cases, by the prosecution's own admission, do not show similar degrees or characteristics of preparation. The prosecution does not explain how the specific facts of each case give rise to recognizable shared elements of "stalking behavior" or isolation and asportation of the victim. In AT's case, defendant briefly hid in the woods before attacking her, whereas in this case, defendant allegedly stalked Danielle by developing an acquaintance with her, texting her, and leaving flowers on her desk. In AT's case, defendant attempted to drag AT against her will down to a nearby river, whereas in this case, he allegedly convinced Danielle to drive him back to his house miles away. Given those distinctions, the supposed similarities of stalking behavior or isolation and asportation are too abstractly stated to establish a meaningful connection between the two cases. Further, as the trial court held, the fact of strangulation was an insufficient link between the two cases. AT testified that defendant strangled her, whereas in this case, the medical examiner merely stated that the absence of bloodstains in defendant's bedroom could be consistent with strangulation, although he did not have enough information to determine the cause of Danielle's death more specifically "than that she was a victim of assault."

The prosecution's theory of admissibility rests ultimately on defendant's false claims that he was at work when the assaults occurred and the arguable similarity of physical appearance between AT and Danielle—because the prosecution's abstract formulations fail to identify any other specific factual similarities between the two cases. The trial court did not abuse its discretion in determining that defendant's work alibis did not distinguish him from a generic criminal. The abstractly-stated physical similarity between the victims, by itself, is insufficient to identify

defendant in any manner not incorporating the inferential chain that because defendant assaulted AT, he has a propensity to assault dark-haired white women, and therefore, he murdered Danielle.

Particularly instructive in this case is *People v McMillan*, 213 Mich App 134; 539 NW2d 553 (1995). In *McMillan*, this Court affirmed the trial court's admission of two prior assaults committed by the defendant. This Court, applying the *Golochowicz* test, reasoned:

> Both the prior and present acts involved the perpetrator's entry into a home when the woman was alone and the door was unlocked. Contrary to defendant's assertion, all three acts involved a struggle. In all three cases, the victims lived within walking distance of defendant's residence and, although each case involved the removal of clothing, sexual intercourse did not occur. There was violence against all the victims resulting in injuries above the waist, including the neck. Furthermore, after viewing the photographs of all three victims, the trial court concluded that the victims were similar in appearance. [*Id*. at 138.]

In this case, there are only two victims instead of three. The trial court was not persuaded by the alleged similarity of the victims' appearances. The incidents did not take place in similar locations at a similar distance from defendant's home. The incidents did not share idiosyncratic or unexpected conduct like the removal of clothing without sexual assault. There is no evidence that AT and Danielle shared similar injuries because Danielle's body was never recovered. The other-acts evidence is simply not admissible to prove defendant's identity under *Golochowicz*.

Finally, the prosecution argues that the other-acts evidence is admissible because it demonstrates a common plan, scheme, or system. "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). "There must be *such a concurrence of common features* that the charged acts and the other acts are logically seen as part of a general plan, scheme, or design." *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009). "A high degree of similarity is required—more than is needed to prove intent, but less than is required to prove identity—but the plan itself need not be unusual or distinctive." *People v Smith*, 282 Mich App 191, 196; 772 NW2d 428 (2009).

In this case, as the trial court concluded, evidence regarding the attack on AT was not sufficiently similar to support an inference that defendant's alleged premeditated murder of Danielle was the manifestation of a common plan or scheme. AT was a stranger jogging through the woods who defendant randomly chose and directly attacked from a hidden spot in the woods, stating that he wanted sex. To the contrary, Danielle was an acquaintance who defendant had known for some time and allegedly deceived by feigning car trouble in an open parking lot in front of witnesses and then allegedly killed in his own home. The prosecution's theory of a common plan seems to rely solely on the fact that Danielle was petite, dark-haired, and fair-skinned like AT, rather than on any similarity between the criminal acts. Therefore, the trial court did not abuse its discretion in determining that those abstract physical similarities between AT and Danielle did not persuasively establish a common scheme or plan.

In summary, the trial court did not abuse its discretion in excluding evidence of defendant's assault on AT under MRE 404(b) because "there is an insufficient factual nexus between the prior conviction and the present charged offense" to support any noncharacter theory of admission. See *People v Crawford*, 458 Mich 376, 395; 582 NW2d 785 (1998). The evidence of defendant's assault on AT is only relevant to show his character or propensity to commit the charged offense, and thus, is inadmissible.

B. MRE 403

The prosecution further argues that the trial court abused its discretion by ruling, in the alternative, that evidence of the prior assault was more prejudicial than probative under MRE 403 because the evidence was only prejudicial as far as it established defendant's identity as the perpetrator in this case, and any unfair prejudice could be cured by a limiting instruction. We disagree.

Because the other-acts evidence is inadmissible under MRE 404(b), this Court need not address the prosecution's argument that the trial court abused its discretion by, in the alternative, excluding the evidence under MRE 403. Nevertheless, the trial court did not abuse its discretion in determining that the probative value of defendant's assault of AT on any material issue in this case is substantially outweighed by the risk of unfair prejudice.

Our Supreme Court has clearly instructed that " 'Rule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony' by the trial judge." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008), quoting *VanderVliet*, 444 Mich at 81. It has further instructed:

> Assessing probative value against prejudicial effect requires a balancing of several factors, including the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. [*Blackston*, 481 Mich at 462.]

Here, the trial court determined that the prosecution was unable to establish a direct, nonpropensity pathway from defendant's assault of AT to his identity as the perpetrator in this case. There is direct evidence that defendant was the last person seen with Danielle on the day she disappeared, that Danielle's cellphone communicated with the cellular tower nearest to defendant's house shortly after defendant was seen in her passenger seat, that her DNA was found near a recently-replaced patch of carpet in his bedroom, that defendant's cellphone communicated with towers along the route to Danielle's apartment at the same time security cameras photographed a vehicle like Danielle's returning to her apartment, and that Danielle's keys and Fitbit were discovered between her apartment and the nearby Tim Hortons, from which defendant took a cab back to his car, stopping first to act as if he were entering an apartment building across the street.

The trial court did not abuse its discretion in determining that the probative value of defendant's dissimilar attack on AT is substantially outweighed by the risk of unfair prejudice. The other-acts evidence is not particularly probative given (1) the dissimilarity between the defendant's prior acts and his alleged conduct in this case, and (2) the abundance of admissible inculpatory evidence on the record. On the other side of the MRE 403 balancing test, the evidence strongly invites a prejudicial character inference. Furthermore, given the absence or weakness of any nonpropensity purpose for the evidence, a limiting instruction would not alleviate the risk of unfair prejudice.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro