STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES CRAIG CRISTINI,

Defendant-Appellant.

UNPUBLISHED
July 17, 1998

No. 188079
Macomb Circuit Court
LC No. 94-002485 FC

Before: Gribbs, P.J., and McDonald and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, mutilation of a dead body, MCL 750.160; MSA 28.357, and habitual offender, second offense, MCL 769.10; MSA 28.1082, and sentenced to 60 to 90 years' imprisonment. Defendant appeals his convictions as of right. We affirm.

Defendant's convictions arise out of the killing of James Scott Bussell, who died of blunt force injuries to his head after being repeatedly kicked by defendant in an auto body shop owned by Tayser Mona in the early morning hours of January 17, 1994. At trial, Mona was the key prosecution witness testifying pursuant to an agreement with the prosecutor following his convictions for mutilation of a dead body and habitual offender, fourth offense arising from his involvement in the incident. See *People v Mona*, unpublished opinion per curiam of the Court of Appeals, issued 9/30/97 (Docket No. 188075).

According to Mona, on January 16, 1994, defendant, Mona, and Bussell spent the late afternoon together at the Oakland Mall, purchasing merchandise with bad checks. Thereafter, the threesome went together in Mona's car to various places, including Mona's home. Defendant, Mona, and Bussell then went to "Tycoon's," a topless bar, where they stayed until closing time. After leaving the bar, between 2:00 and 3:00 a.m. on January 17, the threesome went together in Mona's car to his collision shop located on Dequindre just north of Nine Mile to make calls to several "escort services." Mona testified that while he was on the phone, he saw Bussell stand up and push defendant. In response, defendant hit Bussell in the face, causing Bussell to fall to the floor. At that point, Mona saw defendant, who was wearing cowboy boots, repeatedly kick Bussell in the head. When Mona asked

them to stop fighting, defendant ceased kicking Bussell, who was injured and lying on the floor. However, according to Mona, defendant again started kicking Bussell, about two or three times. After defendant sat down in response to Mona's request to stop hitting Bussell, defendant got up again and began kicking Bussell. Mona then went to the back of his shop to get some ice, returning with a rag with cold water on it. When Mona returned, defendant, who was standing over Bussell, told Mona that Bussell was dead. At that point, defendant again kicked Bussell very hard in the head. Subsequently, defendant asked Mona to let him use his car to move Bussell's body.

Thereafter, Mona assisted defendant in moving Bussell's body to his car and transporting the body to an alley near Seven Mile and John R in Detroit. Placing the body next to a dumpster, defendant poured lacquer thinner over the body and set it on fire. Mona and defendant then returned to the collision shop to clean up the blood stains on the floor and to destroy any evidence that might implicate them in Bussell's death. Next, Mona and defendant drove to a motel on Eight Mile and Dequindre, where they threw out a piece of carpeting that was used to wrap the deceased's body. As they drove along Eight Mile, Mona and defendant also tossed out the deceased's personal effects, bloody clothes, and rags through the car window.

According to Mona, he and defendant then went to a White Castle at Eight Mile and Gratiot, where defendant bought hamburgers to bring back to the shop for a final look. Then, defendant and Mona went to the Oakland Mall to retrieve Bussell's car. Mona testified that he then followed defendant driving Bussell's car to a gasoline station on Woodward and Eleven Mile Road to buy a gas can and gasoline. According to Mona, defendant went into the station, bought the gas can, and pumped the gas. After purchasing the gasoline, Mona followed defendant in Bussell's car to another location in Detroit. There, defendant poured gasoline into Bussell's car and set it on fire.

I

Defendant first contends he was denied a fair trial because the trial court improperly allowed evidence of prior unrelated assaultive behavior under MRE 404(b).

The decision to admit evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. This Court will find an abuse of discretion in an evidentiary matter where the court's ruling has no basis in law or fact. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995); *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Under MRE 404(b), 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. Such evidence may, however, be admissible when it is introduced for a proper purpose, such as to show a motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when material. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993); *Ullah*, *supra* at 674. In addition to determining whether the evidence is being introduced for a proper purpose, the trial court must determine whether the evidence is relevant under MRE 402 and whether the danger of unfair prejudice substantially outweighs the probative value of the evidence under MRE 403. *VanderVliet*, *supra*. Finally, upon request, the trial court shall instruct the jury that similar acts

evidence is to be considered only for the proper purpose underlying its admission. MRE 105; *VanderVliet*, *supra*; *People v Basinger*, 203 Mich App 603, 606; 513 NW2d 828 (1994). The Michigan Supreme Court recently reaffirmed the *VanderVliet* standard in *People v Starr*, ___ Mich ___; ___ NW2d ___ (Docket No. 107013, decided 6/2/98), sl op, pp 6-8.[1]

We note that *VanderVliet* clarified the rules governing similar-acts evidence treating MRE 404(b) as an "inclusionary," rather than as an "exclusionary," rule, replacing the apparently stricter standards previously set forth in *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), which was expressly limited to modus operandi cases to establish the identity. *VanderVliet*, *supra* at 66. As set forth in *Golochowicz* at 310-312:

> Where, as in this case, the only conceivable justification for admission of such similar-acts evidence is to prove the identity of the perpetrator, the link is forged with sufficient strength to justify the admission of evidence of the separate offense only where the circumstances and manner in which the two crimes were committed are "[s]o nearly identical in method as to earmark [the charged offense] as the handiwork of the accused. Here much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The [commonality of circumstances] must be so unusual and distinctive as to be like a signature." McCormick, Evidence (2d ed), § 190, p 449.
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> It will not suffice that the "like act" be simply another crime of the same general category or even of the same specific character. It will not do simply to show, for example, that the defendant committed another murder. That information is likely to be used by an ordinarily reasonable juror for the very purpose for which evidence of bad character is required to be excluded, to show that the accused is a bad person who has murdered before and to invite the inference that he probably did so in this case. It is the uniqueness and the distinctiveness with which both crimes were committed, combined with proof that the defendant committed the "like act", that is the key.
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> Consequently, if the trial court determines that there is substantial evidence that the defendant in fact committed the other or uncharged crime, it must then turn to the task of determining whether the manners or systems employed by the perpetrator of the uncharged crime and the crime in question were sufficiently "like" or "similar" and involved such distinctive, unique, peculiar or special characteristics as to justify an ordinarily reasonable juror to infer that both were the handiwork of the same person. If the trial court concludes the evidence is of that character, it may be admitted. If not, it is excluded.

Applying these principles to the instant case, we conclude the trial court abused its discretion in allowing into evidence defendant's prior assault convictions because they lacked any "special quality or circumstance" as to be like a "signature" of defendant. *VanderVliet*, 444 Mich at 66, n 1; *Golochowicz*, 413 Mich at 310-312. Here, the evidence of defendant's prior assault convictions "was not logically relevant to prove that it must have been the defendant who perpetrated the present offense." *VanderVliet*, *supra*. Further, it is clear that the danger of unfair prejudice substantially outweighed any probative value of the evidence under MRE 403. Moreover, throughout the trial, but particularly in opening statement and closing argument, the prosecutor used the "bad-acts evidence," which went beyond the three prior assault convictions allowed by the trial court at the pre-trial motion hearing, to argue that defendant had a propensity for assaulting people and that he acted in conformity with his character by fatally assaulting Bussell.

Although the trial court erred in failing to exclude the evidence, we believe the error was harmless. In *People v Mateo*, 453 Mich 203; 551 NW2d 891 (1996), the Court set forth two possible standards for preserved, nonconstitutional error involving the admission of evidence. "The first test assesses whether it is highly probable that the challenged evidence did not contribute to the verdict. The second test asks whether it is more probable than not, i.e., a preponderance of the evidence, that the error did not affect the verdict." *Id., p* 219. Under *Mateo*, "reversal is required only if the error was prejudicial. That inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." *Id* at 215. Recently, in *People v Gearns*, 457 Mich 170, 203-205, 207; 577 NW2d 422 (1998), the Court adopted "the highly probable standard as articulated in *Mateo"* and placed the burden of persuasion on the prosecution for showing that it is highly probable that the error did not contribute to the verdict.

Applying the highly probable test, we conclude the trial court's error in admitting the bad-acts evidence was harmless. Although there was no physical evidence that defendant killed the deceased, the prosecution's presentation of Mona's testimony, coupled with the testimony of other witnesses corroborating Mona's version of the events, showed that it is highly probable that the error did not contribute to the verdict.

First, although defendant's testimony also confirmed it, Mona's testimony that the threesome met at the Oakland Mall to purchase merchandise with bad checks was confirmed by a friend of the deceased, who observed the threesome together at 6:00 p.m. on January 16, 1994. Next, Mona's testimony that afterwards the threesome went to Mona's home was confirmed by his brother, who also corroborated Mona's testimony that they went to "Tycoon's." Although no employee of Tycoon's could remember seeing the threesome at the topless bar on the night in question, the testimony of the deceased's girlfriend that the deceased called her from a bar at around 12:15 a.m. on January 17, 1994, was consistent with Mona's testimony that they were at the bar until closing time.

Next, the telephone records of the escort service called by Mona corroborated his testimony that he was on the phone when defendant and the deceased began to fight in his body shop. While there was no physical evidence of defendant's participation in the murder, Mona's testimony that defendant killed the deceased by repeatedly kicking him in the head was consistent with the pathologist's testimony that the deceased died of several blunt force injuries to the head. In addition,

Mona's testimony that they transported the deceased's body to an alley near Seven Mile and John R in Detroit and that defendant set fire to the body next to a dumpster was corroborated by the garbage man who claimed to have seen three individuals starting a fire next to a dumpster, but only two individuals running to a vehicle parked in the alley.

Mona's testimony that he and defendant subsequently went to the Oakland Mall to retrieve the deceased's car was also corroborated by the security guard at the Oakland Mall. The security guard saw a vehicle matching the description of Mona's car and two individuals, one of whom he identified as Mona, and the other as a man with long bushy blonde hair, whom he could not identify but whose description was consistent with defendant's physical appearance at the time as confirmed by Detective Christian. Further, the security guard's testimony that both vehicles were driven away also corroborated Mona's testimony that he followed defendant driving Bussell's car to a gasoline station to purchase gas with which to set fire to the car. Very significantly, an employee on duty at the gas station, Charlene Ramsey, identified defendant as the individual that pumped the gas into the gas can. This testimony directly contradicted defendant's version, as supported by his alibi witnesses, that he was elsewhere at the time of the murder and the subsequent mutilation of the body. Finally, Mona's testimony that they drove to another location in Detroit and set fire to Bussell's car was confirmed by police and fire department reports of the fire.

Thus, in view of the strength and weight of the untainted evidence, we hold that the prosecution has shown that it was highly probable that the error in admitting the bad-acts evidence did not contribute to the verdict and that defendant was not prejudiced by the error.

II

Next, defendant claims reversal is required on the basis of prosecutorial misconduct. We disagree.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette,* 214 Mich App 336, 342; 543 NW2d 342 (1995). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW 2d 270 (1994). The goal of a defense objection to prosecutorial remarks is a curative instruction. *People v Stanaway,* 446 Mich 643, 687; 521 NW 2d 557 (1994); *People v Cross*, 202 Mich App 138, 143; 508 NW 2d 144 (1993). Appellate review is precluded unless an objection to the prejudicial effect of the prosecutor's comments could not have been cured by a timely instruction or the failure to review the issue would result in a miscarriage of justice. *Stanaway*, *supra*.

First, defendant contends the prosecutor injected irrelevant and prejudicial evidence that his brother, Michael Cristini, was in prison. After defendant and his alibi witnesses testified that they recalled the night of January 16, 1994 because it was the birthday of Michael Cristini, and that he was not present when they "toasted" him, the prosecutor, over defense objection, elicited testimony that he was in prison. Contrary to defendant's contention, the trial court did not abuse its discretion in allowing

the testimony because the jury was only informed about Michael Cristini's status as an inmate to explain his absence at the party. Moreover, even if there was an error in the admission of this testimony, it was harmless.

Next, no error occurred when the trial court allowed the prosecutor, over defense objection, to question defense witness Larry George regarding an outstanding warrant for disorderly conduct. However, even if this was considered an error, it would be considered harmless because George denied there were any warrants pending against him.

Further, any alleged prosecutorial misconduct regarding reference to defendant's prior convictions during his cross-examination was harmless error given that there was evidence showing that defendant had one conviction for issuing a fraudulent check on December 13, 1993 and another conviction for obtaining a controlled substance by fraud in 1989. Likewise, any alleged prosecutorial misconduct during cross-examination with respect to defendant's prior uncharged acts of fraud was harmless error insofar as defendant admitted that he engaged in these uncharged acts. Moreover, the evidence of these prior bad acts was admissible under MRE 608(b) for the purpose of attacking the credibility of defendant "as a specific instance of conduct probative of truthfulness or untruthfulness." *People v Haines*, 105 Mich App 213, 216 n 1; 306 NW2d 455 (1981).

There was also no error regarding defendant's claim that the prosecution deliberately misrepresented that he had been convicted of assaulting Robert Rizzo, Jr. First, defendant has not come forward with any evidence showing that the prosecutor intentionally misrepresented any material facts in this regard. Further, as the trial court properly recognized in denying defendant's motion for a new trial, the prosecutor's mistake was understandable in light of the fact that there was strong evidence supporting the claim that defendant assaulted Rizzo. In any case, the error, if any, was harmless.

As for the remaining claimed instances of prosecutorial misconduct, defendant's failure to object precludes appellate review because any prejudicial effect could have been cured by timely instruction and because the failure to review them would not result in a miscarriage of justice. *Stanaway*, *supra*.

III

Next, defendant argues the trial court clearly erred in refusing to suppress the identification testimony of Charlene Ramsey. We disagree.

The trial court's decision to admit identification evidence is reviewed for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Recently, in *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998), the Court observed:

> A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. . . . In *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973), we noted that an improper suggestion often arises when "the witness when called by the police or prosecution either is told or believes that the police

have apprehended the right person." Moreover, when "the witness is shown only one person or a group in which one person is singled out in some way, he is tempted to presume that he is the person." *Id.*

In this case, Officers Garwood and Bush were instructed to show a mug shot of defendant, and another of Mona, to employees of gas stations on Woodward Avenue between I-696 and 14 Mile Road. At the first gas station, Officers Garwood and Bush, without saying anything about why the police wanted to find defendant and Mona, showed the photographs to two employees, Malicia Christian and Charlene Ramsey. Christian recognized Mona's photograph and stated he was one of the men that patronized the gas station on January 17, 1994, but she did not recognize defendant as one of the customers. On the other hand, Ramsey recognized both photographs as pictures of the two men who came into the gas station on January 17, 1994 to purchase a gas can and gasoline. Following a pretrial hearing, the trial court properly denied the motion to suppress Ramsey's in-court identification because the photographic identification procedure was not so unduly suggestive that it gave rise to a substantial likelihood of misidentification. *Gray*, *supra*. As the trial court recognized:

> The question here surrounds the fact whether or not the conduct of the two detectives at the gas station was impermissibly suggestive. The Court said no, I don't think it was impermissibly suggestive in any way. You have to look at the totality of the circumstances. I think what the police did was proper, the police officers indicated that he (sic) didn't say anything with regard to why they wanted these guys. I think all they said was that do you know this person or was this person here. Did he obtain gas and so forth. And both of them indicated one or the other of the two gentleman's pictures that they gave them. And one identified the defendant that is being charged right now. None of them knew the circumstances, like I said. They could have been told, but their testimony is under oath and the Court must believe what they say at this juncture. And as I look at the whole thing, from the totality of the circumstances, the Court feels that this was proper, and the Court's going to allow it into evidence.

IV

Defendant also raises a series of issues in propria persona. First, defendant contends the pre-arrest delay in charging him with open murder and mutilation of a dead body was prejudicial in violation of his right to due process because the delay was intentional so as to enable the prosecutor to gain a tactical advantage, since the prosecutor did not want to try both defendant and Mona at the same time because a jury would not have believed Mona if he were charged as a principle in the murder. We find no merit to defendant's claim because he has failed to come forward with any evidence of substantial prejudice to his right to a fair trial and an intent by the prosecution to gain a tactical advantage by delaying his arrest. *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989). Although defendant argues that two witnesses, Mr. Danny Brusseau and Dr. Sawait Kanluen, were unavailable for trial as a result of the prosecutor's delay, there is no evidence whatsoever linking the pre-arrest delay with the absence of these witnesses at his trial.

VI

Next, defendant claims he was denied a fair trial because the prosecutor did not show due diligence in producing Brusseau and Dr. Kanluen at trial. Again, there is no merit to his claim.

Under the current res gestae statute, MCL 767.40a; MSA 28.980(1), the prosecutor's duty to endorse all res gestae witnesses on the information is replaced with a lesser duty to list the names of known witnesses on the information. *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995); *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989). If a prosecutor endorses a witness, he is obliged to exercise due diligence to produce that witness at trial regardless whether the endorsement was required. *People v Wolford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991); *People v Jackson*, 178 Mich App 62, 65; 443 NW2d 423 (1989). If a prosecutor fails to produce an endorsed witness, he may be relieved of the duty by showing that the witness could not be produced despite the exercise of due diligence. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). A trial court's determination of due diligence is a factual matter, and the court's finding will not be set aside unless it was clearly erroneous. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991); but see *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

Defendant raised this issue during trial and also in his post trial motion for a new trial. During the trial, a hearing was held to determine whether the prosecutor exercised due diligence in producing Brusseau, who had testified previously at Mona's jury trial and whom the prosecutor had listed as a potential witness at defendant's trial. After hearing testimony from Detective Christian, the trial court found that the prosecutor "endeavored to use every means available to him to try to find and locate Daniel Brusseau," but that Brusseau "somehow disappeared" and that the prosecutor did not act in bad faith. The trial court's findings were not clearly erroneous. As for the medical examiner, Dr. Kanluen, the trial court observed that he was served with a subpoena before he left on an overseas trip. In any event, we note that both parties stipulated to reading the testimony of Brusseau and Dr. Kanluen from Mona's jury trial into the record.

VII

Contrary to defendant's contention, the trial court did not abuse its discretion in allowing the prosecution to introduce evidence of defendant's flight to Florida and his use of an alias. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995); *People v Cutchall*, 200 Mich App 396, 397-401; 504 NW2d 666 (1993).

VIII

Defendant also argues he was denied a fair trial on the basis of prosecutorial misconduct in closing argument. Defendant's failure to preserve the issue by objecting to the prosecutor's closing argument precludes appellate review because an objection could have cured any error and failure to review the issue would not result in a miscarriage of justice. *Stanaway, supra* at 687.

IX

Finally, defendant argues he was denied a fair trial because the trial court refused to give the requested jury instruction on the material witness warrant on the erroneous belief that there was no statute for a material witness warrant in Michigan. Although the trial court appeared to err in concluding there is no statute governing the material witness warrant, MCL 767.35; MSA 28.975; *People v Burton*, 433 Mich 268, 276-277; 445 NW2d 133 (1989), any error in failing to give the requested instruction was harmless.

Affirmed.

/s/ Roman S. Gribbs
/s/ Gary R. McDonald
/s/ Michael J. Talbot

[1] In *Starr, supra*, the Court reversed this Court's decision and held the trial court did not abuse its discretion when it admitted testimony that the defendant sexually abused his half-sister over several years before abusing the victim in that case, his minor adopted daughter.