# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 9, 1999 |
| v | No. 202918<br>St. Clair Circuit Court |
| BRANDON MICHAEL GALLIHER,<br><br>Defendant-Appellant. | LC No. 96-000070 FC |

Before: Markman, P.J., and Jansen and J.B. Sullivan*, JJ.

MARKMAN, P.J. (concurring):

I concur with the results reached by the lead opinion but write in order to elaborate briefly on several matters. First, I respectfully disagree that, to the extent the jury relied on evidence of the prior stabbing, "it could only have concluded that because defendant once stabbed a rival gang member (for an undisclosed reason), he must have intended to hurt someone when he committed the drive-by shooting." Instead, I believe that a reasonably intelligent jury likely would have evaluated the evidence in precisely the manner intended by the prosecutor, *to wit*, that in a trial in which defendant's state-of-mind in shooting in the direction of a rival gang member is at issue, evidence of the same person's willingness several weeks earlier to inflict serious physical injury upon another person associated with the same gang provides helpful context and is relevant in determining the truth of the matter in issue. While I agree with the lead opinion that this specific evidentiary purpose could have been set forth more explicitly by the prosecutor, I am not prepared to presume that the jury must, therefore, have necessarily considered the evidence for inappropriate purposes.[1] Rather, as a general matter, I prefer to presume that juries are capable of understanding their proper responsibilities. Ultimately, however, because I agree with the 'harmless error' analysis of the lead opinion, I find it unnecessary to finally resolve whether the prosecutor's failure, in the specific circumstances of this case, to expressly link the evidence to a proper MRE 404(b) purpose constituted error.

Second, because I agree with the lead opinion's 'harmless error' analysis, and because the prosecutor himself has conceded error in the admission of defendant's statement through codefendant

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Lee and Officer Seghi respectively that "I got the mother fuckers," I again join in the results reached by the lead opinion, including its conclusion that the statement was not properly admitted, even though I do not agree entirely with its specific analysis of the issues involved.

Finally, I do not join in the lead opinion's characterization of either the trial court or the prosecutor as "overzealous in [their] desire to assure conviction" in this case. While, in my judgment, each may have erred in certain respects at trial, I have no sense that either erred for such reason.

/s/ Stephen J. Markman

[1] *VanderVliet* seems to be in accord by establishing as part of its MRE 404(b) analysis only that the trial court "may, upon request" provide a limiting instruction to the jury. Obviously, therefore, the particular circumstances of a case, including the specific potential of evidence, if inadequately explained to the jury, for causing prejudice to a defendant will necessarily come into consideration. *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993).