

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEHON SMELLEY,

Defendant-Appellant.

UNPUBLISHED

May 21, 1999

No. 205421

Recorder's Court

LC No. 93-005203

Before: Markey, P.J., and Holbrook, Jr., and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony (hereinafter "felony-firearm"), MCL 750.227b; MSA 24.424(2). Defendant was sentenced to consecutive prison terms of twenty-five to fifty years for the second-degree murder conviction and two years for the felony-firearm conviction.¹ We affirm.

This is the second time this case has been before this Court. Defendant's convictions stem from the shooting death of a fourteen year old boy. Defendant was driving a car that pulled up outside the victim's home late in the evening on April 23, 1993. The victim was outside playing basketball at the time. Defendant, another individual sitting in the car, and an individual located across the street in the area of a vacant home, began shooting at the victim. The victim was killed when a bullet fired from across the street struck him in the head. The prosecution tried defendant on the theory that he had aided and abetted in the murder.

Defendant was initially tried before a jury for first-degree murder, MCL 750.316; MSA 28.548, and felony-firearm. The jury found defendant guilty of second-degree murder and felony-firearm. This Court reversed defendant's convictions based on the trial court's failure to instruct on the cognate lesser included offense of intentional discharge of a firearm from a motor vehicle endangering the safety of another, MCL 750.234a; MSA 28.431(1). *People v Smelley*, unpublished opinion per curiam of the Michigan Court of Appeals, issued January 5, 1996 (Docket No. 175900). Defendant was retried in a bench trial before a different judge.

Defendant first contends that the trial judge presiding at the bench trial committed error requiring reversal when he concluded that he would admit certain bad acts evidence because he was bound by a prior evidentiary ruling of the trial judge who presided at the jury trial. While we agree that the bench trial judge erred in concluding he was bound by the prior ruling, *People v Daniels*, 192 Mich App 658, 670; 482 NW2d 176 (1991), we conclude that the error was harmless because the admission of the evidence was proper. See *People v Ramsdell*, 230 Mich App 386, 406; 585 NW2d 211 (1998).

The admission of bad acts evidence is governed by MRE 404(b). “Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith.” *People v VanderVliet*, 444 Mich 52, 65, 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). In other words, such evidence is legally relevant if it is offered for another purpose, “such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, or identity, or absence of mistake or accident when the same is material.” MRE 404(b)(1). In the present case, the challenged other acts evidence was used to support the prosecution’s aiding and abetting theory by showing that a gun defendant had previously used was the same gun that fired the fatal shot.² Therefore, MRE 404(b) was not implicated. *VanderVliet*, *supra* at 65. Further, we note that this was a bench trial, and the trial judge who sits as factfinder is presumed to know the limits on the use of such evidence. See *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). Accordingly, the second trial court’s admission of the bad acts evidence was proper.

Defendant also contends that defense counsel was ineffective for failing to object to the admissibility of the bad acts evidence. We disagree. Because the admission of the prior bad acts evidence was proper, such an objection would have been without merit. “Defense counsel was not required to raise a meritless objection.” *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Finally, defendant contends that the trial court’s imposition of a higher sentence than he received after his first trial was vindictive in that the court failed to cite facts occurring after the original sentence to warrant the higher sentence. We disagree. “A trial court’s imposition of a particular sentence is reviewed on appeal for an abuse of discretion...” *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). Such an abuse will only be “found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender.” *Id.*

In *People v Mazzie*, 429 Mich 29, 35; 413 NW2d 1 (1987), the Supreme Court held that where the defendant is resentenced to an increased sentence by the same judge, there is a presumption of vindictiveness. However, in the present case, defendant was sentenced following his second trial before a different judge. The *Mazzie* Court held that the presumption of vindictiveness is not invoked where the second sentence is imposed by a judge other than the judge who imposed the original sentence. *Id.* at 33.

Additionally, because the sentence is within the guidelines, it is presumed to be proportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). The record fails to show any circumstance that would undermine this presumption. *Id.* Accordingly, we find

no abuse of discretion by the trial court in sentencing defendant as it did.

Affirmed.

/s/ Jane E. Markey

/s/ Donald E. Holbrook, Jr.

/s/ Janet T. Neff

¹ The judgment of sentence indicates that due to defendant's previous incarceration following his earlier jury trial, defendant already fully served his felony-firearm sentence as of the second sentencing.

² In his opening argument at the bench trial, the prosecutor indicated that the challenged evidence would be used to establish identification through *modus operandi*. However, the prosecutor's closing argument focused solely on the issue of whether the other acts evidence tended to show that the fatal shot was fired from a gun that had previously been in defendant's possession. The trial court indicated in its findings of fact that it used the evidence to establish that defendant did have possession and control of the murder weapon prior to the shooting. Therefore, contrary to the prosecution's characterization, we do not believe that the evidence was actually used to establish defendant's involvement in the killing through his use of a distinct and unique *modus operandi*. However, even if we were to evaluate the admissibility of the evidence under the four-part test of *People v Golochowicz*, 413 Mich 298, 307-309; 319 NW2d 518 (1982), we would conclude that the evidence was properly admitted.