STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 1999
v	Nos. 209127;209296 Cass Circuit Court
DARNELL DEVON JOHNSON, Defendant-Appellant.	LC Nos. 97-009134 FC; 97-009226 FC

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions in this consolidated case. In Docket No. 209127[1], defendant was convicted of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b); two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278; and felony-firearm, MCL 750.227b; MSA 28.424(2). In Docket No. 209296[2], defendant was convicted of conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), and attempted armed robbery, MCL 750.529; MSA 28.797.

This case arises from an attempted armed robbery of the Hilltop Laundry in Jones, Michigan, during which gunshots were fired, one person was killed and two persons sustained gunshot wounds. The prosecutor presented evidence that defendant conspired with Jon Sherwood to rob the Hilltop Laundry while armed; that defendant intentionally shot a customer in the head, killing her instantly; and, that defendant proceeded to shoot two additional customers who sustained nonfatal injuries.

In his first issue on appeal, defendant contends that the trial court abused its discretion by admitting evidence of his alleged involvement in the armed robbery of a Speedway gasoline station ("Speedway") in Indiana that occurred one hour after the charged offenses. We disagree. The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford,* 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). The trial court's

decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

In general, other acts evidence may not be used to establish a defendant's character to show his or her propensity to commit the charged offense. *Crawford, supra* at 385. However, under MRE 404(b)(1), other acts evidence may 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.

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994), the Michigan Supreme Court clarified the standard for admission of prior bad acts evidence:

> 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.

Although other act evidence is not admissible if the only theory of relevance is that it shows the defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question, "[r]ule 404(b) permits the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory." *Id.* at 62-63, 65 (emphasis in original).

Here, the bad acts evidence was relevant and offered for proper purposes: to prove the perpetrator's identity; to prove defendant's scheme or plan; and, to prove the existence of an agreement with regard to the conspiracy charge. We reject defendant's contention that the evidence failed the logical relevance prong of the *VanderVliet* test. Specifically, defendant contends that: 1) the only evidence that defendant was present there was from the highly suspect testimony of Sherwood; and 2) the Speedway robbery had no special quality or circumstance making it logically relevant to prove defendant committed the charged offenses or to connect the two offenses. In making his contentions, defendant relies on the *VanderVliet* Court's reference to *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), which states that "*Golochowicz* identifies the requirements of logical relevance when the proponent is utilizing a *modus operandi theory* to prove *identity*." *VanderVliet, supra*, 444 Mich 66-67 (emphasis in original). These requirements are as follows:

> First, if there is no substantial proof that the defendant committed one of the similar acts, then the other acts evidence might not be logically relevant to prove that the defendant committed the present offense. Second, if the other act lacks a special quality or circumstance, then it is not logically relevant to prove that it must have been the defendant who perpetrated the present offense. Third, if the factfinder is not being asked to infer identity from the unique method of operation (and another permissible

> nonpropensity inference, such as actus reus, is not applicable), the factfinder is being asked to infer defendant's bad character from the other acts evidence. Finally, if the other act is not material to the case, e.g., the defendant does not deny he perpetrated the present offense, then it is not logically relevant to prove his identity. [*Id*. at 66 n 16.]

However, our Supreme Court cautioned that this approach "is not a 'conceptual template' to 'mechanically test' all misconduct evidence barring use of other permissible theories of logical relevance." *Id*. at 67.

As to defendant's contention that the only evidence placing him at the Speedway robbery was Sherwood's highly-suspect testimony, we conclude that testimony from an alleged co-conspirator, although suspect, meets the *Golochowicz* standard of substantial proof that defendant committed the similar act. Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Furthermore, other evidence suggested that defendant was with Sherwood that day, drove the vehicle that was identified by witnesses, and was taken into custody on the premises where the gun and the vehicle's license plate were found.

We also reject defendant's contention that the two crimes were not connected. Although no one was shot at the Speedway robbery, the evidence reveals that the Hilltop perpetrator demanded money as did the Speedway robber, the same gun was used in both incidents, both perpetrators wore a hood and covered their faces, both shot an initial bullet into the air or ceiling, a getaway car with a driver waiting was parked down the street, and a black and a white male were involved in each incident, which occurred within an hour's time. A showing of distinctive similarity between other acts and the charge at issue is not required in every instance where Rule 404(b) evidence is proffered. *Vandervliet, supra* at 69, 70 n 23. "Where the proponents' theory is not that the acts are so similar that they circumstantially indicate that they are the work of the accused, similarity between charged and uncharged conduct is not required." *Id.*, 69 (footnote omitted). Here, although the similarity of the misconduct may have been relied on, the prosecutor also relied upon this evidence to show defendant's identity. Under the facts in this case, the trial court did not abuse its discretion in allowing the Speedway robbery evidence because it was logically relevant.

Finally, defendant contends that the trial court erred in allowing the Speedway robbery evidence because its slight probative value was outweighed by its highly prejudicial nature. We disagree. As discussed above, the Speedway robbery evidence was relevant and presented for a proper purpose under MRE 404(b). "Prejudice inures when marginally probative evidence would be given undue or preemptive weight by the jury." *Rice, supra* at 441. Here, it cannot be said that the proffered evidence was only marginally probative. Accordingly, we conclude that the trial court did not abuse its discretion when it allowed evidence of the Speedway robbery.

Next, defendant contends that his felony murder conviction should be vacated on jurisdictional grounds. Specifically, defendant contends that the trial court did not have jurisdiction to try defendant on the felony murder charge, because the examining magistrate bound defendant over for trial on that charge but found no probable cause for the predicate offense of armed robbery. Defendant further contends that the failure to be bound over on the predicate felony during the first preliminary

examination could not be cured by the subsequent finding of probable cause on conspiracy to commit armed robbery and attempted armed robbery, and the binding over of defendant at a later preliminary examination. The circuit court's analysis of the bindover process is reviewed de novo. *People v Tower*, 215 Mich App 318, 320; 544 NW2d 752 (1996). This Court reviews a magistrate's determination of whether there was probable cause to believe that the defendant committed the offense charged for an abuse of discretion. *Id.*

A prosecutor is without jurisdiction to proceed in the circuit court by filing an information against defendant unless the examining magistrate determines that a crime has been committed and there was probable cause to believe defendant guilty thereof. *People v Dochstader*, 274 Mich 238, 244; 264 NW 356 (1936). See also *People v Johnson*, 427 Mich 98, 106-107; 398 NW2d 219 (1986) (Boyle, J.). In *Tower, supra* at 319-320, this Court explained the standards for binding over the accused:

> A defendant must be bound over for trial if evidence is presented at the preliminary examination that a crime has been committed and there is probable cause to believe that the defendant was the perpetrator. There must be some evidence from which each element of the crime may be inferred. Probable cause that the defendant has committed the crime charged is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that the accused is guilty of the offense charged. [Citations omitted.]

"At this stage, the prosecutor is not required to prove each element beyond a reasonable doubt. However, there must be some evidence from which these elements may be inferred." *People v Coddington*, 188 Mich App 584, 591; 470 NW2d 478 (1991) (citations omitted).

In *People v Warren*, 228 Mich App 336, 346-347; 578 NW2d 692 (1998), lv gtd 460 Mich 851 (1999), this Court delineated the elements of first-degree felony murder:

> (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result, (3) *while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548.* [Emphasis in original.]
>
> MCL 750.316; MSA 28.548 provides in relevant part:
> (1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:
>
> * * *
>
> (b) Murder committed in the perpetration of, or attempt to perpetrate . . . robbery . . . .

The underlying or predicate felony is an essential element of a felony-murder charge. *People v Cotton*, 191 Mich App 377, 387; 478 NW2d 681 (1991). The issue at hand, whether defendant was properly bound over for this crime, first depends on whether evidence was presented at the preliminary examination to support these elements. Second, a question of law exists as to whether if such elements were found, must defendant be bound over on the predicate felony to be properly bound over on the felony murder charge.

Establishing attempted robbery meets an element of felony murder. MCL 750.316(1)(b); MSA 28.548(1)(b). The elements of armed robbery include: "(1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) the defendant must be armed with a weapon described in the statute." *People v Johnson*, 215 Mich App 658, 671; 547 NW2d 65 (1996). The essential elements of an attempt are "a felonious intent to commit the crime, and an overt act going beyond mere preparation toward the commission of the crime." *People v Gardner*, 13 Mich App 16, 18; 163 NW2d 668 (1968). In addition, the defendant must fail to consummate the offense attempted. *People v Bauer*, 216 Mich 659, 661; 185 NW 694 (1921). Here, at the June 27, 1997 preliminary examination, the prosecutor presented evidence that the victims were confronted by a man, identified as defendant, who wielded a gun and demanded money. This evidence supports the crime of attempted armed robbery where there was no evidence presented that the man was successful in taking any property. The evidence established that a victim was shot in the head and killed. Thus, the elements of felony murder were met.

Defendant cites no authority in support of his argument that a defendant must be bound over for the predicate felony in order to be bound over for felony murder. Although the magistrate did not find probable cause with regard to the charges of conspiracy to commit armed robbery and armed robbery, the magistrate bound over defendant on the charges of assault with intent to commit murder, felony-firearm and felony murder. Because "a defendant must be bound over for trial if evidence is presented at the preliminary examination that a crime has been committed and there is probable cause to believe that the defendant was the perpetrator," *Tower, supra* at 319-320, and because the record reflects that there is "some evidence from which each element of the crime may be inferred," *id.*, that being attempted robbery as the underlying felony, we conclude that it was proper for the district court to bind over defendant on the felony murder charge.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski

[1] Cass Circuit Court Case No. 97-009134 FC.

[2] Cass Circuit Court Case No. 97-009226 FC.