

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH DAVID HILL,

Defendant-Appellant.

UNPUBLISHED

June 10, 2004

No. 246074

Berrien Circuit Court

LC No. 2002-402682-FC

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316, possession of a firearm during the commission of a felony, MCL 750.227b, and being a felon in possession of a firearm, MCL 750.224f. He was sentenced as a fourth habitual offender, MCL 769.12, to life imprisonment, without possibility of parole, for the first-degree murder conviction, a consecutive two-year term for the felony-firearm conviction, and six to twenty years' imprisonment for the felon in possession conviction. He appeals as of right, and we affirm.

This case involves the shooting death of DeMario Lowes. Defendant first argues that the trial court abused its discretion and denied him a fair trial when it admitted evidence that defendant committed an assault with intent to rob while armed against Lowes three days before defendant was alleged to have murdered Lowes. We review a trial court's decision to admit bad acts evidence for an abuse of discretion, *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

MRE 404(b) governs admission of evidence of bad acts. It provides:

(1) 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. It 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 testimony that defendant attempted to rob Lowes three days before Lowes' murder constitutes "evidence of other crimes." Accordingly, to be admissible under MRE 404(b), the

evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

Motive is a proper purpose for the admission of bad acts evidence. MRE 404(b)(1); *People v Jeffrey Johnson*, 113 Mich App 650, 660; 318 NW2d 525 (1982). Here, the evidence was offered to show that defendant had a motive to kill Lowes because Lowes' murder would prevent Lowes from testifying against defendant on any charge that defendant might face arising from the robbery. Accordingly, the evidence was introduced for a proper purpose. The evidence was relevant to that purpose because it directly supported the motive.

Further the requirement that there be "substantial evidence" that the defendant actually committed the bad act, *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), was satisfied. There was substantial evidence linking defendant to the robbery, including the eyewitness testimony of a former police officer, and the testimony of a fellow jail inmate attributing statements to defendant.

Nor was the probative value of the evidence substantially outweighed by the danger of unfair prejudice. Evidence is unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Here, the bad acts evidence was not merely marginally probative. Because the testimony that defendant attempted to rob Lowes three days before Lowes' murder was essential to establish the prosecution's theory that defendant killed Lowes to prevent him from testifying, its probative value was great. Further, it is unlikely that the jury gave the evidence that defendant attempted to rob Lowes undue or preemptive weight because it was evidence of a different type of crime, and because the evidence was not such that it would inflame a jury's passion or prejudice. Moreover, the trial court instructed the jury to consider the evidence of defendant's involvement in this other crime solely as tending to show motive, intent, and identity.

Defendant next argues that the prosecutor's use of defendant's girlfriend's hearsay statement to her friend implicating defendant in the earlier robbery, after the girlfriend denied making such a statement, amounted to prosecutorial misconduct that deprived him of a fair trial. We find no error requiring reversal.

Assuming the prosecutor improperly elicited denials to support introduction of the hearsay statement for impeachment purposes, the error did not affect the outcome of the trial. The trial court instructed the jury not to consider the hearsay for its truth. Further, if the jury did improperly consider the evidence as substantive evidence of defendant's involvement in an attempted robbery of Lowes, the evidence was merely cumulative of other evidence of his involvement. Former Benton Harbor police officer Jeff Sturgill testified at trial that he saw defendant flee the scene of the robbery and further testified that, moments after the attempted robbery, Lowes exclaimed that defendant tried to rob him. There was also evidence that during a conversation with fellow inmate Terrance Hunter, defendant himself admitted robbing Lowes.

Because the out-of-court statement Moore made to Butler that defendant robbed Lowes was cumulative in light of the other admissible evidence presented at trial, defendant has not shown that any misconduct on the part of the prosecutor deprived him of his substantial rights.

Affirmed.

/s/ Michael R. Smolenski

/s/ Helene N. White

/s/ Kirsten Frank Kelly