STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED July 13, 2010
v	No. 295880 Jackson Circuit Court
WILFRED MARTIN HADLEY, Defendant-Appellee.	LC No. 09-005026-FC

Before: TALBOT, P.J., and FITZGERALD and DAVIS, JJ.

PER CURIAM.

The prosecutor appeals by leave granted the order granting defendant's motions to exclude the preliminary examination testimony of eyewitness Misty Mae Hafley at trial and permitting the admission of evidence of Hafley's prior bad acts under MRE 404(b). We reverse.

At the preliminary examination, Hafley testified that on January 3, 2009, she and defendant were at the home of Georjean Hadley and her husband, with their children and several adult friends. Throughout the evening, defendant, Hafley and the other adults liberally consumed alcohol. After the children were asleep in a back bedroom of the home, an argument arose between defendant and Georjean in another room. When Hafley emerged from the children's room, she positioned herself between defendant and Georjean in an attempt to intercede in what had escalated into a physical altercation. During this confrontation, defendant shot Georjean with a handgun, killing her. Hafley hid the gun within the home at defendant's request. The police arrested both defendant and Hafley. During three subsequent interviews with police, Hafley provided different versions of the events of that night. Hafley admitted at the preliminary examination that all of these versions were false. After two days in jail, Hafley was released when she told police that defendant shot Georjean.

Subsequently, defense counsel asserted he was not apprised of past incidents involving Hafley demonstrating her propensity to wield a gun when under stress and intoxicated until after the preliminary examination was concluded. Such an assertion is somewhat suspect as both the proffered witnesses indicate defendant was physically present and involved in two of the incidents and arrived shortly after the third incident and discussed the event with several individuals. Defendant sought to admit testimony regarding Hafley's prior acts pursuant to MRE 404(b). At the evidentiary hearing, Dawn Near, a friend of defendant and Hafley, testified that on two previous occasions in 2008, Hafley became intoxicated and agitated. Each time, she wielded a handgun and threatened to harm the subjects of her frustration. Another friend,

Shirley Ballinger, testified that Hafley previously spent the night at Ballinger's residence after Ballinger ended a relationship with her boyfriend. At Ballinger's request, Hafley taught her to load a .22 rifle. In the middle of the night, when a neighbor knocked on the front door, Hafley responded by wielding the rifle and threatening to shoot. Defense counsel argued that such evidence was admissible under MRE 404(b) because it implied that Hafley shot Georjean and had a motivation to lie to the police to avoid her own prosecution for the offense.

After the trial court appointed her an attorney, Hafley asserted her Fifth Amendment right to silence. As a result, the prosecutor sought to introduce Hafley's preliminary examination testimony at trial based on her unavailability. Defendant's counsel objected, asserting that his motivation for cross-examining Hafley had changed since the preliminary examination in light of the new evidence elicited from Near and Ballinger. Defense counsel indicated that his trial strategy had altered and that his focus was now on proving Hafley's culpability rather than merely impeaching her credibility. As such, defense counsel argued that her prior testimony was rendered inadmissible. The trial court conducted an evidentiary hearing, and granted defendant's motion to introduce evidence of Hafley's other bad acts through the testimony of Near and Ballinger and precluded the use of Hafley's preliminary examination testimony at trial. This appeal ensued.

On appeal, the prosecutor argues that Hafley's preliminary examination testimony is admissible pursuant to MRE 804(b)(1). We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion exists if the trial court's decision falls "outside the principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "However, decisions regarding the admission of evidence frequently involve preliminary questions of law," which we review de novo. *Lukity*, 460 Mich at 488. "[I]t is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id.*

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801. "Hearsay is not admissible except as provided by [the Michigan Rules of Evidence]." MRE 802. An exception to this exclusionary rule involves "former testimony" defined by MRE 804(b)(1) as: "Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

Citing *United States v DiNapoli*, 8 F3d 909, 912, 914-915 (CA 2, 1993) with favor, in *People v Farquharson*, 274 Mich App 268, 278; 731 NW2d 797 (2007), this Court set forth a "nonexhaustive list of factors in determining whether the prosecution had a similar motive to examine a witness at a prior proceeding":

> (1) whether the party opposing the testimony "had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue"; (2) the nature of the two proceedings-both what is at stake and the applicable burden of proof; and (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and available but forgone opportunities).

There can be no legitimate dispute that Hafley became unavailable as a witness when she asserted her Fifth Amendment right to silence, *People v Meredith*, 459 Mich 62, 65-66; 586 NW2d 538 (1998), and that her preliminary examination testimony qualifies as former testimony in accordance with the exception delineated in MRE 804(b)(1). *Id.* at 66-67; *People v Adams*, 233 Mich App 652, 656-659; 592 NW2d 794 (1999). Further, the record is clear that defendant fully exercised the opportunity to cross-examine Hafley at the preliminary examination. The only remaining factor to be addressed is whether defendant had a similar motive to develop Hafley's testimony at the preliminary examination and at trial.

Defendant's primary motivation at the preliminary examination was to impugn or call into question Hafley's credibility. Although defense counsel now contends that his motivation has changed from undermining Hafley's credibility to demonstrating her culpability, this constitutes a distinction without a difference. At trial, defendant will only be able to suggest Hafley's culpability by impeaching her credibility. There are no witnesses testifying that Hafley fired the fatal shot. Defense counsel impliedly acknowledged this when he stated that proving Hafley fired the gun "would allow the jury to fully understand why she's lying to cover her butt," and when he argued that showing Hafley's culpability would reveal her motive for lying and serve to seriously undermine her credibility. Consequently, the focus of defense counsel's cross-examination of Hafley has not altered. The prior bad acts evidence has merely provided him with additional ammunition to pursue the same objective. Therefore, we reverse the trial court's ruling precluding the admission of Hafley's preliminary examination testimony at trial.

The prosecutor also argues that the other-acts evidence to be supplied through the testimony of Near and Ballinger is inadmissible under MRE 404(b)(1) because it is being offered to show Hafley's propensity to behave in a certain manner. MRE 404(b)(1) governs the admissibility of other crimes, wrongs or acts:

> 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.

To be admissible under MRE 404(b)(1), prior bad-acts evidence must be offered to prove "something other than a character to conduct theory[.]" *People v Hawkins*, 245 Mich App 439, 447-448; 628 NW2d 105 (2001), citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Specifically:

> Prior bad acts evidence is admissible if: (1) a party offers it to prove "something other than a character to conduct theory" as prohibited by MRE 404(b); (2) the evidence fits the relevancy test articulated in MRE 402, as "enforced by MRE 104(b)"; and (3) the balancing test provided by MRE 403 demonstrates that the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is offered[.] [*Id.*]

Thus, relevant other-acts evidence violates MRE 404(b) when it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. *People v Ortiz*, 249 Mich App 297, 304; 642 NW2d 417 (2001). This rule applies even when a defendant seeks to introduce other-acts evidence of a witness. *People v Catanzarite*, 211 Mich App 573, 579-580; 536 NW2d 570 (1995). Further, for prior acts evidence to be admissible to show identity, it is necessary for the proponent of the evidence to establish:

> (1) there is substantial evidence that the defendant committed the similar act (2) there is some special quality of the act that tends to prove the defendant's identity (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. [*People v Waclawski*, 286 Mich App 634, 673; 780 NW2d 321 (2009), quoting *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998), citing *People v Golochowicz*, 413 Mich 298, 307-309; 319 NW2d 518 (1982).]

While sufficient evidence existed to demonstrate that Hafley committed the prior acts, there is no evidence that the prior acts are "similar" to the circumstances or events that transpired on January 3, 2009. In the prior instances, Hafley brandished a gun without actually discharging it when intoxicated and angry or frightened. In the circumstances of this case, there is no evidence that places the gun in Hafley's hand until after defendant shot the victim. The proffered prior acts evidence cannot place the gun in Hafley's hand at the time of the shooting without impermissibly allowing the trier of fact to stray into the realm of speculation, conjecture and propensity. In other words, for the trier of fact to conclude that Hafley might have fired the fatal shot, the trier of fact is required to infer that, because Hafley brandished a weapon on three previous occasions when drunk and in a stressed or agitated state, that she likewise did so in this instance with fatal consequences. This does not comprise a sanctioned or valid use of prior acts evidence as prior acts evidence is not admissible to demonstrate that a person acted in conformity with a propensity. *People v Crawford*, 458 Mich 376, 397; 582 NW2d 785 (1998); *Catanzarite*, 211 Mich App at 579.

Similarly, there is no special quality associated with Hafley's prior acts that is also present in the events of January 3, 2009, that would permit a reasonable inference that Hafley fired the fatal shot. Because admission of the proffered prior acts only invites speculation and reliance on propensity, the evidence bears no relevance on the issues of Hafley's opportunity, scheme, plan or system in doing an act.

Reversed. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Alton T. Davis