STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 11, 2012
v	No. 305356 Oakland Circuit Court
DAVID SCOTT REESE, Defendant-Appellant.	LC No. 2011-236011-FH

Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree fleeing and eluding a police officer, MCL 257.602a(3). The trial court sentenced defendant as a fourth habitual offender to 76 months to 30 years' imprisonment. We affirm.

Defendant first argues that the district court erred when it bound him over for trial and the circuit court erred when it denied his motion to quash/dismiss because Officer Jamie Hill was not acting within the lawful scope of his duties when he initiated the traffic stop that defendant fled. "This Court reviews for an abuse of discretion both a district court's decision to bind a defendant over for trial and a trial court's decision on a motion to quash an information." *People v Fletcher*, 260 Mich App 531, 551-552; 679 NW2d 127 (2004).

A defendant is bound over for trial after the preliminary examination if the district court determines a felony has been committed and there is probable cause to believe that the defendant committed it. MCL 766.13; *People v Yost*, 468 Mich 122, 125-126; 659 NW2d 604 (2003). Probable cause exists when there is evidence "'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief' of the accused's guilt on each element of the crime charged." *People v Yamat*, 475 Mich 49, 52; 714 NW2d 335 (2006), citing *Yost*, 468 Mich at 126. The district court may use circumstantial evidence and make reasonable inferences when determining if probable cause exists. *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009); *People v Greene*, 255 Mich App 426, 444; 661 NW2d 616 (2003).

The elements of fleeing and eluding were set forth in *People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999):

> (1) the law enforcement officer must have been in uniform and performing his lawful duties and his vehicle must have been adequately identified as a law

> enforcement vehicle, (2) the defendant must have been driving a motor vehicle, (3) the officer, with his hand, voice, siren, or emergency lights must have ordered the defendant to stop, (4) the defendant must have been aware that he had been ordered to stop, (5) the defendant must have refused to obey the order by trying to flee from the officer or avoid being caught, which conduct could be evidenced by speeding up his vehicle or turning off the vehicle's lights among other things, and (6) some portion of the violation must have taken place in an area where the speed limit was thirty-five miles an hour or less, or the defendant's conduct must have resulted in an accident or collision, or the defendant must have been previously convicted of certain prior violations of the law as listed in MCL 750.479a(3)(c).

During the bindover determination and in his motion to quash, defendant challenges only the first element of the crime of fleeing and eluding.

The right against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11; *People v Corr*, 287 Mich App 499, 506; 788 NW2d 860 (2010). A search and seizure without a warrant is usually unreasonable, unless the search falls within one of the various exceptions to the warrant requirement. *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011). In *Terry v Ohio*, 392 US 1, 21, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court held that the Fourth Amendment permits an officer to make a brief investigative stop without a warrant, commonly called a "*Terry* stop." See, also, *People v Steele*, 292 Mich App 308, 314; 806 NW2d 753 (2011). A *Terry* stop allows police to conduct a brief investigative stop of a motor vehicle based on a reasonable, articulable suspicion that the person is engaged in criminal activity. *Id*. at 314.

"In determining the reasonableness of an investigatory stop, the court must consider whether the facts known to the officer at the time of the stop would warrant an officer of reasonable precaution to suspect criminal activity." *Steele*, 292 Mich App at 314. The determination "must be founded on a particularized suspicion, based on an objective observation of the totality of the circumstances, that the person stopped has been, is, or is about to be involved in criminal wrongdoing." *People v Chambers*, 195 Mich App 118, 121-122; 489 NW2d 168 (1992). The conclusion is drawn from an officer's reasonable inferences based on the facts in light of his training and experience. *Steele*, 292 Mich App at 314. Deference should be given to the experience of law enforcement officers. *Id*. An officer's reasonable suspicion may be based on information obtained from another officer. *Chambers*, 195 Mich App at 122. Fewer foundational facts are necessary to justify the stop of a moving vehicle than are required for a house, and a stop also requires fewer foundational facts than both a stop and search. *Steele*, 292 Mich App at 315; *People v Christie (On Remand)*, 206 Mich App 304, 308-309; 520 NW2d 647 (1994).

In this case, Hill had reasonable suspicion to stop defendant's vehicle and was thus acting within the lawful scope of his duties when he attempted to stop defendant. Hill testified at length at defendant's preliminary examination. Hill testified that he was working in the early morning hours of November 16, 2010, and that there had been a number of commercial break-ins in Royal Oak that night. At approximately 5:55 a.m., the police dispatcher advised that there was a commercial alarm activated at 914 East 11 Mile, at Young's Chinese Restaurant. When the call

went out, Hill responded to the alarm and found that the window was broken out of the door and someone had tampered with the cash register. Hill testified that, because sometimes suspects stay in the area after committing crimes, he left Young's Chinese Restaurant within minutes and started checking for suspects down the street.

Within five minutes, Hill noticed defendant's turquoise van in the parking lot of a Mobil gas station about six blocks away from the latest break-in. Because there was very light traffic, Hill noted that it was one of the only vehicles in the area. Hill pulled into the gas station parking lot and ran the license plate of the van and determined that it was registered to defendant. While he was running the information, Hill saw defendant dressed in a black knit cap, a black jacket, and blue jeans, walk out of the gas station and over to his van. With regard to how defendant was dressed, Hill stated that, based on his training and experience, defendant's style of dress was significant because when people commit crimes at night, they often dress in dark-colored clothing.

While defendant pumped gas into his van, Hill used the computer in his police cruiser to search for more information on defendant, the registered owner of the vehicle. The descriptive information and picture were consistent with defendant's appearance. Hill also learned that defendant was a convicted felon and had spent time in prison. Hill asked his dispatcher to further investigate defendant. At this point, defendant had gotten into his van and started it up. Defendant turned left to go north on Campbell and proceeded to 11 Mile. As Hill followed defendant onto the roadway, the dispatcher advised him that defendant was on parole for a lengthy history of commercial breaking and entering convictions.

Based on Hill's observations, the early morning time and lack of traffic, defendant's close proximity to the latest break-in location, the fact that Hill encountered defendant within only a matter of minutes from the latest commercial alarm, and defendant's history of commercial breaking and entering convictions, Hill had a reasonable, articulable suspicion sufficient to justify the investigatory stop of defendant's vehicle. As such, the district court properly bound defendant over for trial and the circuit court properly denied defendant's motion to quash and dismiss. Defendant is not entitled to relief on this issue.

Defendant next asserts that the trial court erred when it admitted evidence at trial regarding defendant's past breaking and entering convictions without a proper prosecutorial MRE 404(b) motion to allow "modus operandi" evidence. The issue having been raised in a motion in limine, defendant has preserved this issue. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). A trial court's ruling on evidentiary issues is generally reviewed for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996).

Generally, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1); see, also, *People v Biggs*, 202 Mich App 450, 452; 509 NW2d 803 (1993). One exception to MRE 404(b)(1) is the "res gestae exception." *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983). "Normally the facts and circumstances surrounding the commission of a crime are properly admissible as part of the res gestae." *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979). Evidence of a defendant's other criminal acts that are blended with or connected to the crime for which the defendant is charged is generally admissible to explain the

circumstances of the crime charged so that the jury can hear the "complete story." *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978); see, also, *Robinson*, 128 Mich App at 340. In the circumstances of this case, Hill's testimony that his dispatcher advised him that defendant was on parole for numerous past breaking and entering convictions was relevant to Hill's continuing investigation and decision to pursue and ultimately attempt to stop defendant, and therefore, the evidence was admissible pursuant to MRE 401 and MRE 402, independent of MRE 404(b).

Defendant also contends that the trial court erred when it denied defendant's motion for directed verdict, when it was clear after the prosecutor's case was presented that the traffic stop leading to the chase was not supported by probable cause and therefore Hill was clearly not acting within the lawful scope of his duties during the stop. In considering a trial court's decision on a motion for directed verdict, this Court reviews the record de novo to determine whether the evidence, when viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proven beyond a reasonable doubt. *People v Parker*, 288 Mich App 500, 504; 795 NW2d 596 (2010).

This argument is essentially the same argument as defendant raised in his first issue on appeal except it is based on Hill's trial testimony rather than his preliminary examination testimony. However, like the preliminary examination, the only witness at trial was Hill, and Hill's trial testimony was wholly consistent with his preliminary examination testimony, save for a few additional details he provided at trial concerning his observation that defendant appeared to be looking at Hill and waited an excessive amount of time to pull out of the gas station driveway. Hill testified that he thought it suspicious that defendant waited an inordinate period of time to pull out of the driveway and onto the road because traffic was clear. Hill also thought it was suspicious that defendant looked at him and Hill believed that defendant was waiting to see where Hill was going to go before defendant proceeded. As discussed above, the totality of the facts and circumstances in this case were sufficient to provide Hill with reasonable suspicion that defendant was involved in the string of commercial breaking and entering crimes that occurred that night. Further, because the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proven beyond a reasonable doubt, and sufficient facts justified an investigatory stop, the trial court did not err when it denied defendant's motion for directed verdict. *Parker*, 288 Mich App at 504.

Finally, defendant argues that the trial court erred when it scored defendant's sentencing guidelines, specifically Offense Variable (OV) 9. "This Court reviews de novo the application of the sentencing guidelines but reviews a trial court's scoring of a sentencing variable for an abuse of discretion." *People v Harverson*, 291 Mich App 171, 179; 804 NW2d 757 (2010). "'Scoring decisions for which there is any evidence in support will be upheld.'" *Id*. at 179-180, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Under MCL 777.39, a trial court must score 25 points for OV 9 when "[t]here were 10 or more victims who were placed in danger of physical injury or death, or 20 or more victims who were placed in danger of property loss." MCL 777.39(1)(b). MCL 777.39(2)(a) further provides, "Count each person who was placed in danger of physical injury or loss of life or property as a victim." OV 9 is scored only on the basis of the defendant's conduct during the sentencing offense. *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009). Here, the

trial court scored 25 points for OV 9 after the jury found defendant guilty of third-degree fleeing and eluding a police officer, MCL 257.602a(3). Hill testified that defendant began to flee on Stephenson and then continued onto I-75 southbound at very high rates of speed, reaching a top speed over 105 mph. Hill testified that defendant made several erratic lane changes and pushed traffic. After only a few minutes of the ensuing chase, the police called off the chase because it was too dangerous. At trial, the prosecutor showed the police dashboard camera video of the high-speed chase. During sentencing, the trial court stated, "I believe we viewed the video twice during trial. And it's a miracle no one was killed or seriously injured. I will score OV 9 at 25 points." After watching the video of the high-speed chase, not once but twice, the trial court was clearly and unequivocally certain that, based on the number of cars it saw on the video, "[t]here were 10 or more victims who were placed in danger of physical injury or death, or 20 or more victims who were placed in danger of property loss." MCL 777.39(1)(b). Because there is evidence supporting the trial court's scoring decision, we do not disturb it. *Harverson*, 291 Mich App at 179-180.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens