S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 25, 2012
v ROBERT MARTIN NOWAK, Defendant-Appellant.	No. 305738 Oakland Circuit Court LC No. 2010-233544-FC

Before: JANSEN, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Defendant Robert Martin Nowak appeals as of right from his jury-trial conviction of first-degree murder, MCL 750.316(1)(a). The trial court sentenced defendant to life imprisonment without parole. We affirm.

Defendant first argues that there was insufficient evidence to establish the elements of first-degree murder beyond a reasonable doubt. We review de novo a defendant's challenge to the sufficiency of the evidence. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). We review the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.* '"Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), citing *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

The elements of first-degree murder are an intentional killing with premeditation and deliberation. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). Premeditation and deliberation require sufficient time for the defendant to take a second look and may be inferred from the circumstances surrounding the killing, including the defendant's conduct after the killing. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Additionally, the nature and the number of the victim's wounds may support a finding of premeditation and deliberation, especially where there are multiple violent blows, because the time required to inflict multiple blows affords the defendant sufficient time to take a second look. *People v Unger*, 278 Mich App 210, 231; 749 NW2d 272 (2008).

Viewing the evidence in a light most favorable to the prosecution, we conclude that there was more than sufficient evidence to convict defendant of first-degree murder. The evidence supported a finding that defendant, knowing that the victim was highly intoxicated and in need of

a ride home, lured the victim away from a bar to a private location: most likely defendant's father's nearby industrial shop. Defendant then teased and tortured the victim with a sharp object, stabbing him in the cheek and likely holding a knife to his throat, and then picked up another blunt object and struck the victim in the head 18 times. The victim was quickly incapacitated by these multiple blunt-force injuries and died quickly. Then defendant sodomized him and castrated him with a very-sharp object. Defendant took the victim to the parking lot of another industrial shop and laid him out to display the castration, leaving him to be found early on a Monday morning.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to show premeditation and deliberation. Defendant teased, tortured, and wounded the victim with a sharp object and, thus, had sufficient time to take a second look before he struck the victim with another blunt object. Defendant also had time between the 18 blows to the victim's head, most of which likely occurred after the victim had been incapacitated, to take that second look. See *id*. Finally, the dumping and display of the victim's mutilated body at another location showed that defendant acted with deliberation. Accordingly, because there was sufficient evidence for a rational trier of fact to find defendant guilty of first-degree murder beyond a reasonable doubt, the trial court did not err in denying defendant's motion for a directed verdict.

Next, defendant argues that the trial court erred in allowing the admission of other-acts evidence under MRE 404(b). We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

> To admit evidence under MRE 404(b), the prosecutor must first establish that the evidence is logically relevant to a material fact in the case, as required by MRE 401 and MRE 402, and is *not* simply evidence of the defendant's character or relevant to his propensity to act in conformance with his character. The prosecution thus bears an initial burden to show that the proffered evidence is relevant to a proper purpose under the nonexclusive list in MRE 404(b)(1) or is otherwise probative of a fact other than the defendant's character or criminal propensity. Evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. . . . Any undue prejudice that arises because the evidence also unavoidably reflects the defendant's character is then considered under the MRE 403 balancing test, which permits the court to exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. [*Id.* at 615.]

The prosecutor in this case sought to admit the other-acts evidence to establish a common plan or scheme, intent, and identity, and the trial court admitted the evidence for these purposes. Defendant contends that the other acts are too dissimilar to the present case to be admissible for the purposes offered by the prosecution. When other-acts evidence is offered to prove identity, a trial court "should insist upon a showing of a high degree of similarity in the manner in which the crime in issue and the other crimes were committed." *People v Golochowicz*, 413 Mich 298, 325; 319 NW2d 518 (1982). Similarly, when offering other-acts evidence for the purpose of a common plan or scheme, "there must be 'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the

individual manifestations.'" *People v Smith*, 282 Mich App 191, 196; 772 NW2d 428 (2009), quoting *People v Sabin (After Remand)*, 463 Mich 43, 64-65; 614 NW2d 888 (2000). "A high degree of similarity is required—more than is needed to prove intent, but less than is required to prove identity—but the plan itself need not be unusual or distinctive." *Id.*, citing *Sabin*, 463 Mich at 65-66. "Where other-acts evidence is offered to show intent, the acts must only be of the same general category to be relevant." *People v McGhee*, 268 Mich App 600, 611; 709 NW2d 595 (2005). "The more often a defendant acts in a particular manner, the less likely it is that the defendant acted accidently or innocently, and conversely, the more likely it is that the defendant's act is intentional." *Id.* (internal citation omitted).

We conclude that the trial court did not abuse its discretion by admitting the other-acts evidence. The other-acts evidence was logically relevant to the proper purposes offered by the prosecution under MRE 404(b): identity, common plan or scheme, and intent. See *Mardlin,* 487 Mich at 615. Admittedly, this case does have qualities distinguishing it from defendant's assaults of LW and SG that would cause reasonable people to disagree on whether the other acts were sufficiently similar to be logically relevant to the purposes for which they were offered; nevertheless, a trial court's decision on a close evidentiary question is not an abuse of discretion. *Sabin*, 463 Mich at 67. The other-acts evidence in this case was from two women: LW and SG. Before the victim's death, defendant had physically assaulted LW and SG. The assaults were unprovoked. Defendant beat both LW and SG on their heads—repeatedly with blunt objects. The assaults occurred in the morning when LW and SG were vulnerable and alone with defendant. Furthermore, the assaults occurred in close proximity to places very familiar to defendant: (1) SG at a home that she shared with defendant and (2) LW at a shop owned by defendant's father where defendant worked and lived. Finally, defendant's assaults of LW and SG both had sexual or romantic elements, which included defendant's rape of SG. The present case shares many of these characteristics. The victim was last seen in the early morning in a position of vulnerability—very intoxicated and alone—within close proximity (one-quarter mile) to defendant's father's shop. The victim's body was found less than one-quarter mile from the shop. He had been physically assaulted and had repeated blunt-force injuries to the head. Moreover, defendant's DNA matched DNA from a rectal swab taken from the victim.[1] Accordingly, the other-acts evidence had logical relevance distinct from an impermissible character inference: it was relevant to establish defendant's identity as the perpetrator of a crime committed in a manner highly similar to defendant's other assaults and that defendant deliberately inflicted the victim's injuries in accordance with a common plan or scheme of inflicting blunt-force head injuries to control his victims and forcefully accomplish his sexual objectives.

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[1] DNA evidence presented at trial established that defendant is the one who sodomized the victim after his death, as only one in 22.91 trillion people would have the same DNA profile as defendant, and there are only seven billion people in the world. The evidence of defendant's infliction of blunt-force trauma upon others after his sexual advances were rejected serves to connect defendant to the victim's death by blunt-force trauma before being sodomized and, as such, is highly relevant and admissible with respect to the identity of the murderer.

Furthermore, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See MRE 403. Because of the lack of evidence regarding defendant's involvement in the killing of the victim, this evidence was highly probative of defendant's actions. See *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998) ("Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury."). Although defendant's DNA was found in the rectal swab of the victim, there was no other evidence of defendant's involvement in the victim's death. But for this other-acts evidence, defendant could have persuasively argued that he sodomized a dead body but was not involved in the victim's death. Moreover, the trial court gave the jury a limiting instruction detailing the proper utilization of the other-acts evidence, and there is a strong presumption that jurors follow the instructions of the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, we conclude that the trial court did not abuse its discretion in admitting this other-acts evidence.

Defendant also argues that the trial court erred by not allowing the jury to know of his acquittal in the rape of SG. We conclude that defendant has abandoned this issue because he failed to raise it in his statement of questions presented and gives it only cursory treatment with no citation to supporting legal authority. See *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004); *Unger*, 278 Mich App at 262. In any event, defendant's argument lacks merit. A failure to apprise a jury of a defendant's acquittal pertaining to other-acts evidence is not erroneous. *People v Bolden*, 98 Mich App 452, 460-462; 296 NW2d 613 (1980). The majority of federal circuit courts of appeals follow the same rule.[2] See *United States v Gricco,* 277 F3d 339, 353 (CA 3, 2002) (discussing how federal circuits consider judgments of acquittal to be inadmissible to rebut inferences that may be drawn from admitted evidence). The rationale behind this rule is that "the first jury did not find that [the] defendant did not commit the crime, only that the people had not proved that he had beyond a reasonable doubt." *Bolden*, 98 Mich App at 460-461, quoting *People v Oliphant*, 399 Mich 472, 498 n 14; 250 NW2d 443 (1976). When offering other-acts evidence, if the prosecutor sufficiently shows that the defendant probably committed the other acts, "the jury should not be confused by the additional information of an acquittal which could mislead them into believing that the defendant absolutely did not commit the prior similar acts." *Id.* at 461.

Affirmed.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Jane M. Beckering

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[2] Although decisions of lower federal courts are not binding on this Court, we may consider them as persuasive authority. *People v Jackson*, 292 Mich App 583, 595 n 3; 808 NW2d 541 (2011).