# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee,<br><br>v<br><br>DANNY LEE KNOX, JR.,<br><br>Defendant-Appellant. | FOR PUBLICATION<br>April 8, 2003<br>9:05 a.m.<br><br>No. 226944<br>Kalamazoo Circuit Court<br>LC No. 98-000898-FC<br><br>Updated Copy<br>May 23, 2003 |

Before: Whitbeck, C.J., and Bandstra and Talbot, JJ.

BANDSTRA, J. (*concurring in part and dissenting in part*).

I disagree with the majority's conclusion that, under *People v Hine*, 467 Mich 242; 650 NW2d 659 (2002), the prior-bad-acts evidence here was admissible. I also disagree with the majority's more general conclusion that "*Hine* presents a formidable obstacle to reversing on the basis of a trial court's error in admitting prior-bad-acts evidence." *Ante* at ___. The prior-bad-acts evidence here should have been excluded under *Hine* and its predecessors. Applying a "plain error" analysis, I further conclude that defendant's conviction should be reversed.

## A. *Hine*

The majority correctly summarizes recent pre-*Hine* Supreme Court precedents, including *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998), and *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000). *Ante* at ___. Under those precedents, to be admissible, evidence of prior bad acts '"truly must be probative of something *other* than the defendant's propensity to commit the crime.'" *Ante* at ___, quoting *Crawford*, *supra* at 390 (emphasis in original).

*Hine* did nothing to undermine these precedents or this analysis.[1] Instead, *Hine* was a fact-specific application[2] of the rule that prior-bad-acts evidence that is probative of something

[1] If *Hine* was the radical departure from previous case law that the majority makes it out to be, it no doubt would have resulted in at least one dissenting or concurring opinion. The fact that no such opinion issued supports my conclusions regarding *Hine* as falling in line with previous decisions of the Supreme Court.

other than propensity is admissible. Specifically, the Supreme Court held "that the evidence was admissible to establish the common scheme, plan, or system of the defendant in perpetrating a *particular* type of physical assault." *Hine, supra* at 244 (emphasis added). That holding was consistent with the Court's reasoning that the injuries to the child victim (internal abdominal injuries/bruising and a bruise across the bridge of the nose) and the cause of her death (multiple blunt-force injuries) were "typical of" or "similar to" the injuries resulting from the assaults described in the other-bad-acts evidence (regarding the defendant's methods of "head-butting," forcefully kneeing and poking, and "fishhook" assaulting the witnesses). *Id*. at 244-253.

In so concluding, the Supreme Court disagreed with our Court's "view of the evidence" and resulting conclusion that "the degree of similarity between the other acts evidence and the charged conduct" was insufficiently established. See *id*. at 251, 253. Citing *Sabin*, the Court reasoned that "[t]he evidence of uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense" and that "[t]he trial court operated within the correct legal framework in determining the evidence admissible under *Sabin*." *Id*. at 253.

In addition to this direct and uncritical reliance on *Sabin*, the Supreme Court also cited with apparent approval the lower courts' reliance on *VanderVliet* and *Crawford*. *Id*. at 247, 249. I thus conclude that these precedents continue to provide binding guidance to us in analyzing the issue presented here.[3] Applying these precedents here, the other-bad-acts evidence was improperly admitted.

B. Anger

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(…continued)

[2] I might agree with the majority if its only conclusion was that *Hine* had misapplied the rule to the facts in that case. Such a misapplication, however, would not undermine the rule, which, as demonstrated below, remains intact.

[3] My primary concern is the majority's conclusion that *Hine* represents a radical departure from its predecessors. In addition, I do not share the majority's view that the Supreme Court broadened the rule requiring an appellate court to consider evidence in a light most favorable to the prosecutor by applying it to the prior-bad-acts-evidence question. Although *Hine* is not crystal clear in this regard, it seems, instead, that the Supreme Court's concern was that our Court's analysis in *Hine* was based on an erroneous conclusion that the evidence presented was insufficient to support the conviction, which resulted from the failure to use the "light most favorable" analysis. See *id*. at 250 (the Supreme Court concluded that our Court "erred" in stating "that there was 'precious little evidence that there was a criminal act'"), and 252 ("the Court of Appeals imposed a standard of a high degree of similarity between the other acts and the charged acts, apparently because it believed that the evidence presented to the trial court did not demonstrate any unlawful conduct"). Further, I find no import whatsoever in the Supreme Court's failure to consider whether the unfair prejudice of admitting the evidence outweighed its probative value under MRE 403. See *ante* at ___. That issue was apparently not part of the appeal, although it may have been among the "remaining arguments" of the defendant that were to be considered on remand. See *Hine, supra* at 253.

On appeal, the prosecutor has not, even at oral arguments, articulated a proper purpose for the evidence concerning Knox's anger. *Crawford*, *supra* at 390. Neither has the prosecutor argued how that evidence was logically relevant to a material issue at trial. *Id.* Rather, the prosecutor emphasizes that this evidence was only a "minor aspect" of the trial. This is tantamount to a tacit admission by the prosecutor that there was no legitimate basis to admit this evidence. Even though I have independently reviewed the evidence to determine whether the trial court erred in admitting it, these flaws in the prosecutor's arguments only make more compelling Knox's contentions that his anger, including his argumentative relationship with Kelley,[4] was not logically relevant to any fact at issue at trial.

In actuality, the logical relevance of the evidence that Knox has an anger problem is nonexistent. This is not a case like *Hine*; defendant's previous bursts of anger resulted in no act of any similarity whatsoever to that which killed the baby. Further, the record provides no basis to suggest that Knox was ever angry with the baby, or that he ever redirected his anger at Kelley to the baby or Kelley's other child. The witnesses at trial, including Kelley, all indicated that Knox was ecstatic at the baby's birth.

This prior-bad-acts evidence served the distinctly improper purpose of demonstrating that Knox must have abused the baby, resulting in the baby's death, because he had a bad character. See MRE 404(a). Indeed, at trial, the prosecutor specifically argued that Knox's anger-management problem was a plausible explanation for what happened to the baby on the night in question. The prosecutor did not use the evidence of Knox's anger for *any* other reason except to make this impermissible propensity argument. Accordingly, Knox has demonstrated that the trial court committed plain error when it admitted the evidence of his anger problems. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

C. Past Abuse

The majority concludes that the evidence that the baby had previously been abused was relevant to prove that the fatal injuries were not inflicted accidentally, a purpose that MRE 404(b) endorses as proper. I agree.

However, this was not the only purpose that the prosecutor advanced with this evidence. As pointed out by the majority, the prosecutor introduced evidence to convince the jury not only that the prior events were intentionally abusive but also that defendant was the abuser. Beyond the evidence described by the majority, I also note that the prosecutor stressed this theme in its closing argument to the jury. This case is thus like *Washington v Hofbauer*, 228 F3d 689 (CA 6, 2000), cited by defendant. There, evidence regarding the defendant's character "was admissible for certain limited purposes, [but] the prosecutor went far beyond the bounds of permitted conduct when presenting that evidence to the jury." *Id.* at 699. Specifically, "the prosecutor improperly implied that the jurors should consider [the defendant's] unseemly character when rendering their verdict . . . ." *Id.* Characterizing the case as "a close credibility contest . . . , with

[4] Although the majority suggests that the evidence showed that Knox had been physically abusive to Kelley, the record only establishes one incident involving shoving.

horrible acts alleged but scant hard evidence for the jury to weigh," the court reasoned that "a prosecutor must be doubly careful to stay within the bounds of proper conduct." *Id*. at 709. As a result of the erroneous use of the otherwise admissible evidence and other errors, the court reversed the defendant's conviction. *Id*.

Knox has again demonstrated that the trial court committed plain error in failing to prevent the prosecutor from improperly using the evidence of prior abuse. *Carines*, *supra*. As in *Washington*, this was a close credibility contest with little hard evidence and the prosecutor improperly sought to establish Knox's bad character rather than risk an acquittal as a result of the slim evidence of his guilt.

D. Good Character

I agree with the majority's conclusion that it was plain error[5] to allow the evidence of Kelley's good character to be considered by the fact-finder. *Ante* at ___. This evidence was improperly admitted because it did not serve any of the character purposes allowed by the court rules. *Ante* at ___. This evidence was used only to demonstrate that Kelley acted in conformity with her good character on the night of the incident, in contrast to Knox's acting in conformity with his bad character. This evidence improperly undermined defendant's credibility and defense.

E. Substantial Rights And Outcome

Knox argues that the plain errors in admitting the evidence of his prior bad acts and Kelley's good character were, in fact, outcome-determinative. See *Carines*, *supra*. He contends that the evidence amounted to nothing more than a direct credibility contest between himself and Kelley concerning who injured the baby. He concedes that he was the last person alone with the baby, but argues that the medical evidence allowed the possibility that Kelley injured the baby before she left the apartment.

I agree. Setting aside the improper evidence of Knox's anger-management problems, the baby's history of injuries, and Kelley's good character, there is virtually no weight to the prosecutor's case; I note that Knox's first trial in this case resulted in a hung jury. The only proper testimony that was damaging to Knox was that he had difficulty bonding with the baby, which frustrated him. However, Kelley and all the other prosecution witnesses testified that they never saw Knox harm the baby. Kelley also said that she never suspected Knox was abusing the baby. Moreover, the time line did not positively implicate Knox as the *only* person who could have inflicted the fatal injuries. Kelley left the apartment on the night in question around 9:30 p.m. or 9:35 p.m. By 10:00 p.m., Kelley's mother received a telephone call that there was something wrong with the baby. Further, there was testimony that 911 was called between 10:05 p.m. and 10:13 p.m. At trial, one of the medical experts testified that, within a minute or two of suffering the injuries, the baby probably would have lost consciousness and may have vomited or

[5] Defense counsel did raise a general relevancy objection to this evidence without specifically referencing the rules governing character evidence.

had seizures. Abnormal respiratory problems would arise very rapidly but could stabilize in an abnormal pattern for "an hour to two hours before the child totally collapses without breathing and without heart rate." If the baby consumed a bottle at 9:00 p.m., the expert indicated that the injury was inflicted somewhere between the time the bottle was given and the time the paramedics were called. Both parents were in the home during this time frame.

Given this testimony, the trial was essentially a credibility contest regarding which parent, both of whom had access to the baby, inflicted the injuries. Without the damning evidence of Knox's unrelated behavior and the baby's past injuries, and the positive evidence of Kelley's mothering abilities, the prosecutor had no reasonable likelihood of convicting Knox. Knox has demonstrated that this evidence was not harmless, and that it affected the outcome of the trial. See *People v Ullah*, 216 Mich App 669, 676; 550 NW2d 568 (1996). I further conclude that there is merit in Knox's claim that he was denied the effective assistance of counsel when there was no objection raised regarding the improper evidence. See *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

I would reverse Knox's conviction and remand for a new trial. Of course, I am shocked and saddened by the horrible circumstances of this baby's short and painful life. However, the conviction resulting from the trial court's plainly erroneous decision to admit this evidence cannot be properly affirmed. To do so would affect the integrity of the courts, calling into question the fairness of a system that allowed a jury to convict Knox on the basis of this improper evidence.[6] See *Carines*, *supra* at 763-764.

/s/ Richard A. Bandstra

[6] I concur with the majority regarding its "dual crimes" analysis. *Ante* at ___.