STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 2002
v	No. 222303 Shiawassee Circuit Court
JOHN RONALD ESPIE, Defendant-Appellant.	LC No. 99-002999-FC

Before: Fitzgerald, P.J., and Bandstra and K. F. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), and carjacking, MCL 750.529a, in connection with the killing of seventy-one-year old Nathan Nover, a civilian transport officer who was driving defendant from a juvenile detention facility to a neuropsychological evaluation. The trial court vacated defendant's carjacking conviction and sentenced him to life imprisonment without the possibility of parole for one count of first-degree murder supported by two theories: premeditation and felony-murder. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion when it admitted evidence of his past conduct in stealing his mother's van and bank checks, writing the checks without permission, and fleeing from the state of Michigan with his fourteen-year-old girlfriend. We conclude that the evidence was properly admitted pursuant to MRE 404(b), which provides:

> 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. [Emphasis added.]

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Court clarified the test to be utilized in determining the admissibility of other bad-acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

It is insufficient for the prosecution to merely recite one of the purposes articulated in MRE 404(b). *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). The prosecution must also demonstrate that the evidence is relevant. *Id.*

> Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence . . .. The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized. [*Id.* (citation omitted).]

In this case, the prosecution articulated proper purposes under MRE 404(b) -- specifically, to establish that defendant acted in accordance with a certain plan or scheme and to establish intent. Given that proper purposes were articulated, the next determination to be made is whether the evidence was relevant.

The evidence was logically relevant and probative. Defendant's defense was that he did not plan to kill the victim or steal the victim's car in order to escape. Defendant claimed that he himself was the victim of an attempted sexual molestation and that he killed out of panic. The evidence that defendant previously stole a car from his mother, customized it using his mother's stolen money, and picked up his girlfriend and left Michigan was relevant to prove that defendant acted deliberately and with intent in this case and to refute that he acted in a blind panic after an attempted molestation. That defendant followed a similar pattern before when he ran away assisted the prosecutor in demonstrating that the chain of events in this case was preplanned. Intent was a material issue in the first-degree murder case. The evidence of defendant's past crimes, especially when considered in light of the letter that defendant wrote to his girlfriend, made the prosecution's theory of defendant's intent more probable than it would have been without the evidence. Thus, the evidence was logically relevant and probative.

Defendant further argues that, even if the evidence was relevant, the danger of unfair prejudice substantially outweighed the probative value of the evidence.

> The trial court may exclude the admissible evidence of other acts "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. [*People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000).]

Defendant claims that the overriding inference the jury likely made was that he was a bad person and must be guilty because he had previously committed similar acts. While defendant claims that the evidence was unfairly prejudicial, his argument is lacking. The prosecutor limited his use of the evidence to proper purposes under MRE 404(b). He did not utilize the evidence for

impermissible character reasons. The evidence was highly probative and the danger of unfair prejudice did not outweigh the probative value. Moreover, the trial court gave a limiting instruction on the use of the evidence immediately following the testimony of defendant's girlfriend and her mother. It again gave a limiting instruction after closing arguments. The trial court did not abuse its discretion in admitting the evidence.

Defendant next argues that several instances of prosecutorial misconduct denied him a fair trial. None of the alleged complaints of misconduct are preserved because defendant made no objection to the comments at trial. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). "[A] defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001), lv pending, citing *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." . . . To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "`seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citations omitted).]

"No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Watson, supra*, quoting *Schutte, supra* at 721.

In this case, we have reviewed all of the challenged comments. While some of the comments may have been improper, we find that none require reversal. The evidence against defendant was substantial and overwhelming and any prejudice stemming from the comments could have been cured with a cautionary instruction upon request. More importantly, the prosecutor's comments were not outcome determinative and any alleged improper comments did not result in the conviction of an actually innocent defendant or affect the fairness, integrity, or public reputation of the proceeding. *Id.*

Defendant also argues that MCL 769.1 should be deemed unconstitutional as violating federal and state doctrines of separation of powers, equal protection, and due process. These precise arguments were considered and rejected in *People v Conat*, 238 Mich App 134; 605 NW2d 49 (1999). We are bound by the decision in *Conat, supra*, MCR 7.215(H)(1).

Finally, defendant argues that his sentence of life imprisonment without the possibility of parole is cruel and unusual punishment because he was only sixteen years old at the time of the crime and because the goal of rehabilitation was not a consideration in his sentence. In order to determine whether a punishment is cruel or unusual, there are several considerations: the gravity

of the offense; the harshness of the penalty, a comparison of the penalty to penalties for other crimes in this state; a comparison of the penalty to penalties imposed for the same offense in other states; and the goal of rehabilitation. *People v Launsburry,* 217 Mich App 358, 363; 551 NW2d 460 (1996). The goal of rehabilitation, however, is not always relevant to a determination of whether a sentence is cruel and unusual. In *People v Fernandez,* 427 Mich 321, 339; 398 NW2d 311 (1986), the Court noted that, for obvious reasons, the goal of rehabilitation is not really a consideration where the sentence is a mandatory, nonparolable, life sentence. *Id.* Where rehabilitation is not a consideration, "other policies, such as deterrence of others, deterrence of the offender, or punishment of the offender, may suffice to deflect a cruel and unusual punishment challenge." *Id.* See also *People v Hall,* 396 Mich 650, 658; 242 NW2d 377 (1976).

In *Launsburry, supra* at 363-365, the Court analyzed whether a sentence of life imprisonment without the possibility of parole for a juvenile convicted of first-degree felony murder was cruel and unusual. This Court determined that it was not. *Id.* The juvenile defendant, who was sixteen-years-old at the time of the offense, was sentenced as an adult after the trial court held a hearing to determine how he should be sentenced. *Id.* MCL 769.1, as amended in 1996 to automatically require an adult sentence, was not in effect. This Court held:

> We conclude it is not cruel and unusual punishment to sentence a juvenile to life imprisonment without the possibility of parole. The crime of first-degree murder is the most serious offense possible to commit and should be dealt with harshly. Michigan imposes the same sentence for crimes other than murder, and other states have imposed the same sentence for the crime of murder. Finally, the need to consider rehabilitation is already set forth as a factor to be considered in sentencing. We also note Michigan case law and statutes have treated juveniles as adults. . . . [O]ur Supreme Court stated there is no constitutional right to be treated as a juvenile. [*Id.* at 364-365 (citations omitted).]

This Court found that the need for rehabilitation was taken into consideration by the court when it determined whether the juvenile should be sentenced as a juvenile or an adult. *Id.* at 364.

In this case, defendant's situation is different because the sentence was mandatory under MCL 769.1. Defendant, who was waived into the adult system, was convicted of first-degree murder. The goal of rehabilitation was not a consideration where the sentence was a mandatory life imprisonment without the possibility of parole. This fact, however, does not suffice to sustain defendant's challenge that the punishment was cruel and unusual. Society's need to deter similar behavior by juveniles and the need to prevent defendant from causing further harm to society, as well as punishment of defendant, are all relevant considerations. In enacting MCL 769.1, the Legislature intended to more effectively accomplish its goal of treating juvenile offenders harshly for engaging in certain crimes. *Conat, supra* at 158. Certainly, the Legislature considered deterrence, future harm, and punishment when enacting MCL 769.1. Further, juveniles do not have a constitutional right to be treated differently than adults. *Id.* at 158-159. Life imprisonment without the possibility of parole is not cruel and unusual punishment for an adult and, such punishment has been held constitutional for juvenile offenders under similar

circumstances. *Launsburry, supra* at 363-364. Thus, we find that the punishment here was not cruel and unusual as a matter of law.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly