

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

V

WILLIE BRYANT,

Defendant-Appellee.

UNPUBLISHED

January 22, 2002

No. 231655

Wayne Circuit Court

LC No. 99-011533

Before: Hood, P.J., and Murphy and Markey, JJ.

PER CURIAM.

The prosecution appeals by right from the trial court's order dismissing the charges¹ against defendant after the court denied the prosecution's motion to admit evidence of the complaining witness' preliminary examination testimony and granted defendant's motion to admit evidence of the complaining witness' character and prior misconduct. We affirm in part, reverse in part, and remand.

The prosecution first argues that the trial court erred in denying the prosecution's motion to admit evidence of Officer Brown's preliminary examination testimony and in granting defendant's motion to dismiss on this basis. This issue involves defendant's Sixth Amendment right to confront his accuser, which is a constitutional issue that is reviewed de novo on appeal. *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999). The parties agree that this Court should review this issue de novo. However, a trial court's decision to exclude preliminary examination testimony from evidence is reviewed for an abuse of discretion. *People v Adams*, 233 Mich App 652, 656; 592 NW2d 794 (1999). A trial court's decision whether to grant a motion to dismiss is also reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001).

Where a declarant is unavailable as a witness, the hearsay rule does not exclude

[t]estimony 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

¹ Defendant was charged with third-degree fleeing a police officer, MCL 257.602a(3), and felonious assault, MCL 750.82.

opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. [MRE 804(b)(1); *Adams, supra* at 656-657.]

A witness is considered “unavailable” when he asserts his Fifth Amendment right to silence at trial. *People v Meredith*, 459 Mich 62, 65-66; 586 NW2d 538 (1998).

In the instant case, Officer Brown invoked his Fifth Amendment right to silence. Therefore, he was unavailable as a witness. *Id.* Consequently, his preliminary examination testimony is admissible under the Michigan Rules of Evidence if defendant had an opportunity and similar motive to develop the testimony on cross-examination. MRE 804(b)(1). In *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986), this Court discussed MRE 804(b)(1):

MRE 804(b)(1) is identical to FRE 804(b)(1). McCormick on Evidence, commenting on FRE 804(b)(1), states that the issue for which the former testimony was elicited and the issue for which the party wishes the former testimony admitted must be substantially similar before the former testimony may be admitted[.]

In *People v Cooper*, 168 Mich App 62; 423 NW2d 597 (1988), rev’d in part on other grounds 433 Mich 862; 444 NW2d 527 (1989), this Court stated:

This Court has, pursuant to MRE 804(b)(1) and MCL 768.26; MSA 28.1049, held on many occasions preliminary examination testimony admissible in lieu of the actual testimony of the witness where the witness is unavailable. These rulings have rejected confrontation clause challenges. Whether defense counsel cross-examined the witness at the preliminary examination was a principle factor in these cases. The cases in which preliminary examination testimony has been held inadmissible involved instances where the prosecutor did not use due diligence in trying to locate the witness so that the witness could testify at trial. [*Cooper, supra* at 66-67 (citations omitted).]

In the instant case, defense counsel conducted a substantial cross-examination of Officer Brown at the preliminary examination. The record reveals that the cross-examination consisted of twenty-eight pages of transcript. Therefore, defendant did have the opportunity to develop Officer Brown’s testimony through cross-examination. The issue is whether defendant had a similar motive when cross-examining Officer Brown at the preliminary examination as he would have had at trial.

We find that the trial court abused its discretion in finding that Officer Brown’s preliminary examination testimony was inadmissible under MRE 804(b)(1). Not only did defendant have the opportunity to cross-examine Officer Brown at the preliminary examination, but also defendant’s motive in his cross-examination of Officer Brown at the preliminary examination was similar to what his motive would have been at trial. At the preliminary examination, Officer Brown testified that defendant fled from the police and that defendant attempted to hit him with his car. Defendant cross-examined Officer Brown to attack his credibility and to find inconsistencies in his testimony. The purpose of his cross-examination was to show that defendant did not commit the crimes for which he was charged. After the preliminary examination, the media apparently revealed to the parties that Officer Brown had

allegations against him for improper police conduct. Consequently, defendant had a new reason to cross-examine Officer Brown because defendant could now question him about these allegations. Nonetheless, defendant's motive behind cross-examining Officer Brown remained similar in that he still had the goal of attacking Officer Brown's credibility in order to show that defendant was not guilty of the charged crimes. Therefore, we conclude that Officer Brown's preliminary examination testimony was admissible at trial under MRE 804(b)(1).

"Even when evidence of an unavailable witness is admissible under the Michigan Rules of Evidence, it is still necessary to determine whether use of the testimony would violate a defendant's constitutional right to confront prosecution witnesses." *Meredith, supra* at 67. A defendant has a constitutional right to confront prosecutorial witnesses. US Const, Am VI; Const 1963, art 1, § 20; *Adams, supra* at 659. The Confrontation Clause allows the preliminary examination testimony of an unavailable witness to be used at trial under MRE 804(b)(1) only upon a showing that the testimony bears satisfactory indicia of reliability. *Meredith, supra* at 68. "This reliability requirement is satisfied 'without more' if the proposed testimony falls within a firmly rooted exception to the hearsay rule." *Id.* at 69. Because MRE 804(b)(1) is a firmly rooted exception to the hearsay rule, testimony that falls within this rule satisfies the indicia of reliability. *Meredith, supra* at 71; *Adams, supra* at 659-660. Therefore, because Officer Brown's preliminary examination testimony falls within MRE 804(b)(1), it satisfies the indicia of reliability. The Confrontation Clause is in turn satisfied and the testimony is admissible. Therefore, the trial court abused its discretion in denying the prosecution's motion to admit Officer Brown's preliminary examination testimony at trial and in granting defendant's motion to dismiss on these grounds.

Next, the prosecution argues that the trial court abused its discretion in granting defendant's motion to admit evidence of Officer Brown's character and prior misconduct. "The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). In the trial court, defendant moved to admit evidence of Officer Brown's violent character, that he had shot three suspects to death in five years, and had fired his gun during several other incidents. Defendant argued that the evidence would show that Officer Brown consistently used deadly force against suspects and then lied to justify his use of that force. Defendant sought to have this evidence admitted in order to show that Officer Brown was lying about defendant's conduct in the instant case in order to justify his use of deadly force and to protect his career and his employers from liability. We find that the trial court abused its discretion in granting of defendant's motion to admit evidence of Officer Brown's prior conduct, but did not abuse its discretion in granting defendant's motion to admit evidence of Officer Brown's character.

MRE 404(a)(2) states that evidence of a person's character is not admissible to prove action in conformity therewith on a particular occasion except for "[e]vidence of a pertinent trait of character of the victim of the crime, other than in a prosecution for criminal sexual conduct, offered by an accused, or by the prosecution to rebut the same" The violent character of the victim, even though it is unknown to the defendant, is admissible under MRE 404(a)(2) as evidencing the victim's probable aggression toward the defendant. *People v Harris*, 458 Mich 310, 315; 583 NW2d 680 (1998). Evidence of the victim's pertinent character trait is admissible even if the defendant does not claim self-defense. *People v Anderson*, 147 Mich App 789, 793;

383 NW2d 186 (1985). “[A] defendant may show a pertinent trait of character of the alleged victim that bears on whether the victim committed an act of aggression on the particular occasion in conformity with that trait.” *Harris, supra* at 315. The only purpose for which evidence of the victim’s violent character is admissible is to render more probable the evidence that tends to show an act of violence at the time of the crime. *Id.* at 316. If evidence of the victim’s violent nature sheds light on whether the defendant intended to commit the crime, it is pertinent and admissible under MRE 404(a)(2). *Anderson, supra* at 793.

“[W]hen character evidence is used circumstantially, the existence of a particular disposition is not itself the matter in issue; rather, evidence of a person’s disposition is offered to show the doing or not-doing of an act on a particular occasion. . . . [T]he accused may ordinarily offer evidence of a pertinent trait of character of the victim, . . . but such use of evidence also constitutes circumstantial use of character.” [*Harris, supra* at 317-318, quoting 1A Wigmore, Evidence (Tillers rev.), § 69.1, p 1478.]

We find that the trial court did not abuse its discretion in determining that evidence of Officer Brown’s violent character is admissible under MRE 404(a)(2). Officer Brown’s allegedly violent character is pertinent to whether defendant committed the charged crimes because it may provide proof that Officer Brown may have shot at defendant without provocation, i.e., he may have shot even though defendant was not intentionally driving his car directly at Officer Brown. Evidence of Officer Brown’s violent character sheds light on whether defendant committed the felonious assault because it shows that Officer Brown may have the character trait of resorting to violence even if it was unnecessary. Therefore, the trial court did not abuse its discretion in granting the portion of defendant’s motion to admit evidence of Officer Brown’s character.

Next, “MRE 404(b)(1) is a means by which ‘other acts’ evidence is properly admissible.” *Starr, supra* at 495. MRE 404(b)(1) states:

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.

The Supreme Court has created a four-pronged standard to determine whether evidence is admissible under MRE 404(b):

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. [*Starr, supra* at 496, quoting *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).]

Under the first prong, MRE 404(b) prohibits the admission of evidence “[i]f the proponent’s only theory of relevance is that the other act shows defendant’s inclination to wrongdoing in general to prove that the defendant committed the conduct in question” *Starr, supra* at 496, quoting *VanderVliet, supra* at 63. Therefore, to be admissible, the specific acts may not be used to prove a person’s character to show action in conformity with character on a particular occasion, the evidence must be relevant to an issue of fact of consequence at trial, and the danger of undue prejudice must not outweigh the probative value of the evidence. *People v Sabin (After Remand)*, 463 Mich 43, 55-58; 614 NW2d 888 (2000). MRE 404(b) applies to the prior acts of any person, including the victim, witness, or defendant. *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991). MRE 404(b) specifically addresses the admissibility of uncharged conduct and permits the admission of evidence of other crimes, wrongs, or acts even if the conduct has not resulted in a criminal conviction. *Starr, supra* at 499.

“[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.” *Sabin, supra* at 63.

General similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts.

* * *

The added element, then, must be, not merely a similarity in the results, but *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.*” [Emphasis in original.] [*Sabin, supra* at 64-65 (citations omitted).]

We find that under MRE 404(b)(1), evidence of Officer Brown’s previous shootings of suspects is inadmissible to show Officer Brown’s propensity toward violence in performance of his police duties. Additionally, this evidence is inadmissible to show a common scheme, plan, or system. Defendant argues that he was a victim of Officer Brown’s scheme, plan, or system of unjustly shooting suspects such as defendant and then falsely accusing them of committing a crime in order to justify his use of deadly force. However, “[t]o establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts” *Sabin, supra* at 65-66, quoting *People v Ewoldt*, 867 P2d 757, 770 (Cal, 1994). To establish the existence of a common design, plan, or scheme, “the effort is to establish a definite prior design or system which included the doing of the act charged as part of its consummation.” *Sabin, supra* at 64, quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249. Defendant does not argue that Officer Brown’s previous shootings were planned or that his shooting of defendant was part of the consummation of a plan in which these prior shootings were involved. Although these previous shootings may have been similar acts, they appear to be a series of similar spontaneous acts, rather than a concurrence of common features that are naturally explained as caused by a general plan of which they are individual manifestations. See *Sabin, supra* at 64-65, quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249. Therefore, evidence of Officer Brown’s previous misconduct was not admissible under MRE 404(b)(1).

Defendant also argues that evidence of specific instances of Officer Brown's conduct is admissible under MRE 405 and MRE 608. However, neither of these evidentiary rules is applicable to this case. MRE 405(b) allows evidence of specific instances of conduct where character is an essential element of the charge, claim, or defense. Officer Brown's character is not an essential element of defendant's defense. MRE 608 allows evidence that is probative of the witness' veracity. The proffered evidence relates to Officer Brown's violent character and acts and is not relevant to his veracity. Therefore, the proffered evidence is not admissible under MRE 405 or MRE 608. The trial court abused its discretion in granting the portion of defendant's motion to admit evidence of Officer Brown's previous misconduct.

In summary, we reverse the circuit court's order denying the prosecutor's motion to admit evidence of Officer Brown's preliminary examination testimony, reverse the court's order granting defendant's motion to dismiss the charges, reverse the court's order granting defendant's motion to admit evidence of Officer Brown's previous conduct, and affirm the court's order granting defendant's motion to admit evidence of Officer Brown's character. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood
/s/ William B. Murphy
/s/ Jane E. Markey