STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 12, 2002
v	No. 226571 Washtenaw Circuit Court
BERTHA MAE PROVOST, Defendant-Appellant.	LC No. 99-011965-FC

Before: Bandstra, C.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Defendant was convicted of bank robbery, in violation of MCL 750.531. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to four to twenty years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant argues that the trial court erred in admitting, under MRE 404(b), evidence of defendant's prior bank robbery convictions. We agree, but conclude that the error was harmless.

The admissibility of bad acts evidence is within the trial court's discretion and this Court will reverse only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Generally, a party may not introduce evidence of prior crimes committed by a defendant unless there is some relevant purpose other than to show bad character or propensity to commit the crime charged. MRE 404(b). Concerning admissibility of prior bad acts evidence, our Supreme Court set out a four-part test in *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). However, in *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998), this Court concluded that when the evidence is used to prove identity through modus operandi, the test originally set forth in *People v Golochowicz*, 413 Mich 298, 308-309; 319 NW2d 518 (1982) applies. "Accordingly, and because *Golochowicz* was specially crafted to test whether modus operandi evidence is admissible, neither *VanderVliet* nor its progeny . . . would have us apply any other test." *People v Smith*, 243 Mich App 657, 671; 625 NW2d 46 (2000), remanded on other grounds for supplemental opinion, ___ Mich ___, 12/18/2001 (Table No. 118530).

If the bad acts evidence is offered to establish identification through a system in doing an act, the following factors must be present before admission of the evidence is permissible: (1) there must be substantial evidence that the defendant committed the bad act, (2) there must be some special quality or circumstance of the act tending to prove the defendant's identity or system, (3) it must be material to the defendant's guilt of the charged offense, and (4) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *Golochowicz*, *supra* at 309; *Smith*, *supra* at 670.

The first of these factors is not at issue in the present case. Defendant admitted committing the 1988 robberies, and was in fact charged and convicted of those crimes. The third factor is also not in dispute. Defendant's identity is clearly material because the person who robbed the bank was wearing a ski mask at the time of the robbery. It is the second factor with which we are here concerned. That factor requires that there be some special quality or circumstance of the prior robberies that tends to prove defendant's identity. In arguing the existence of such quality or circumstance, the prosecutor relies on this Court's recent decision in *Smith*, *supra*. In that case, the defendant had been charged with a robbery and sexual assault that occurred outside a University of Michigan dormitory in Ann Arbor. *Id.* at 660. At trial in that matter, the prosecutor sought to introduce evidence of two additional robberies that had occurred in the Ann Arbor area within two weeks of the charged crime – one near a middle school and another in the lobby of a hotel. *Id*. at 661-662. The trial court admitted evidence regarding both incidents. *Id*. at 666. On appeal, a panel of this Court concluded that although the evidence regarding the middle school robbery was properly admitted, the evidence regarding the hotel robbery was not. In doing so, the panel found that, with respect to the "special quality or circumstance" factor, the middle school incident and the charged crime had "sufficient similarities that tend to prove that the same assailant committed both crimes." *Id*. at 673. For instance, a "uniquely damaged white car" that had been linked to defendant was seen near the scene of both crimes. *Id*. The panel also noted similarities in the manner in which the crimes were committed, i.e., both crimes were committed in the early morning, and in both cases the perpetrator "staked out" the place where the crime occurred and then "forced his victim into a car by grabbing her from behind and pressing a small silver weapon against her head." *Id*. Although noting that "the charged offense may not have been precisely identical to the offense at the [middle school]," the panel found that "there [were] sufficient similarities that tend to prove that the same assailant committed both crimes." *Id*.

In contrast, the panel found that because of differences in the clothing descriptions (the hotel robber was not wearing a hood), as well as the fact that the hotel robbery did not involve a sexual assault or a perpetrator who attempted to force the victim into a car, the charged offense and the hotel robbery were not sufficiently similar to warrant admission under the test announced in *Golochowicz*. *Id*. at 679. In doing so, the panel noted that there was "nothing unique about the serious but rather ordinary robbery" at the hotel. *Id.*

Relying on *People v Daughenbaugh*, 193 Mich App 506; 484 NW2d 690, mod 441 Mich 867 (1992), defendant here contends that although the previous robberies and the charged offense were all committed using a mask, gloves, and a handwritten note, those facts are not sufficiently distinctive characteristics because bank robberies are often committed in such a manner. *Daughenbaugh* involved the "Blue Bandit" robberies that occurred in Lansing in 1988, so-called because the robber in each case wore blue jeans and a blue hooded sweatshirt. *Id*. at

508. The defendant challenged on appeal his four convictions of armed robbery on the ground that he should have had separate trials for the robberies. *Id*. at 508-509. A panel of this Court agreed, and because the issue of the admissibility of evidence of the separate robberies was likely to occur in each of the trials, addressed that issue. *Id*. at 511-517. In finding evidence of the individual robberies to be inadmissible at the separate trials, the panel stated that it was not convinced that the mere fact that each of the robberies was committed by a person wearing blue jeans and a blue sweatshirt, carrying a blue gym or duffel bag, and using a sawed-off shotgun establishes a "signature crime" as required by *Golochowicz*. *Id*. at 514. In doing so, the panel remarked that "[t]hese are rather common items; there is nothing out of the ordinary about them to establish a signature." *Id*.

We conclude that the facts of the present case are more analogous to those in *Daughenbaugh* than in *Smith*, and that defendant is correct that, like the clothing, bag, and sawed-off shotgun in *Daughenbaugh*, the use of a ski mask, gloves, and a handwritten note are not so distinctive as to constitute a "signature." This is particularly so because the contents of the notes at issue here are dissimilar. Unlike the note in the present case, the notes in the two prior robberies referenced a partner and the presence of a bomb. Therefore, the evidence of the two prior robberies should not have been admitted.

Ultimately, however, the admission of the evidence was harmless. An "error is not ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26.

At trial, there was significant evidence in support of defendant's guilt, apart from the testimony concerning her prior bad acts. Police officers testified that defendant admitted to the crime and in fact showed them where some of the money was hidden in her bedroom. Additionally, the bank teller who actually handed the robber the money testified that she included in the bag a device set to emit tear gas and a reddish dye once the device leaves the bank. Consistent with this testimony, a guest who had been staying in defendant's house only a short time after the robbery testified that defendant's grandnephew showed him a bill stained with red dye that was found in defendant's bedroom.

Although the above evidence was disputed, there was additional evidence demonstrating defendant's guilt. In searching defendant's bedroom, law enforcement officials found well over $1,000 in bills stained with red dye, including two "bait bills," whose serial numbers matched those recorded by the bank where the robbery occurred. Additional evidence indicated that four days after the robbery, defendant attempted to purchase $1,000 worth of money orders from a local convenience store using bills stained with red dye. A pile of money stained with this same red dye was also found at the apartment complex where defendant's nephew resided.

In light of the strength and weight of this untainted evidence, we conclude that the error in admitting testimony concerning defendant's prior bad acts was harmless. Defendant has not established that "it is more probable than not that the error in question 'undermine[d] the reliability of the verdict,' thereby making the error 'outcome determinative.'" *People v Snyder*,

462 Mich 38, 45; 609 NW2d 831 (2000), quoting *Lukity*, *supra*. Accordingly, reversal is not warranted.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald