

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARRON LEON MASON,

Defendant-Appellant.

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UNPUBLISHED

December 21, 2004

No. 251533

Kent Circuit Court

LC No. 02-004103-FC

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of first-degree felony murder, MCL 750.316(1)(b). The trial court sentenced him to life in prison without eligibility for parole. We affirm.

The instant case stems from allegations that defendant raped and murdered the decedent after breaking into the home where she was staying on December 16, 1982. On appeal, defendant first contends that the prosecution presented insufficient evidence to sustain his conviction.

We review de novo a defendant's claim that the evidence presented at trial was insufficient to support a conviction as a matter of law. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). The prosecution must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When reviewing a challenge to the sufficiency of the evidence, courts must examine the evidence in the light most favorable to the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). This includes all determinations concerning the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Further, circumstantial evidence and the reasonable inferences arising from it may constitute sufficient evidence of the elements of a crime. *People v Bulmer*, 256 Mich App 33, 37; 662 NW2d 117 (2003).

In *People v Hutner*, 209 Mich App 280, 282-283; 530 NW2d 174 (1995), this Court stated that the elements of felony murder consist of:

(1) the killing of a human being; (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result; (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316.

The list of felonies in MCL 750.316 includes third-degree criminal sexual conduct (CSC-3), which is defined in MCL 750.520d as “sexual penetration with another person under certain circumstances, including where the penetration is accomplished by force or coercion or where the actor knows the victim is physically helpless.” *Id.*, 283. MCL 750.520a(o) defines sexual penetration as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body.”

In the instant case, the medical examiner testified that the decedent died from asphyxia secondary to strangulation and massive blood loss due to a pair of stab wounds on the right side of her neck. He further stated that the decedent had been struck forcefully in the mouth and had several defensive wounds on her hands. And based on his discovery of seminal fluid on her genitalia and inside her rectum, he opined that her assailant had sexually penetrated both her vagina and anus.

Additionally, the decedent’s sister testified that her then six-year-old son Patrick Anible was the only person home with the decedent on the day of her death. The prosecution then presented a recording of an interview, taped shortly after the decedent's death, in which Patrick describes what occurred. On the tape, Patrick stated that a skinny black man came into the house and made the decedent go upstairs with him. After they went upstairs, Patrick heard the decedent screaming and something pounding on the floor or a door.

Defendant does not assert that this testimony would not lead a rational jury to determine that the decedent was intentionally killed and that the killing occurred during the commission of CSC-3. Rather, he challenges the sufficiency of the evidence identifying him as the perpetrator.

However, the prosecution presented the following evidence linking defendant to the decedent's death. At the time of her death, defendant was living a few blocks away from the house where the decedent was killed. He matched the physical description of the assailant given by the only eyewitness. Dr. Steve Milligan, a DNA analyst with the Michigan State Police, testified that defendant's DNA profile was consistent with that of the seminal fluid found on the decedent's body. He further stated that the genetic profiles of 89.7% of the African-American population would not be consistent with the fluid taken from the decedent's vagina and 96.6% of that population would not match that taken from her rectum. Similarly, Dr. Terry Melton, the president and CEO of Mitotyping Technologies, a company that specializes in mitochondrial DNA (mtDNA) testing, testified that defendant's mtDNA profile matched that of the foreign hair found on the decedent's body and that 99.93% of the population of North America would not match this profile. Finally, Daniel Rostic testified that while they were incarcerated together, defendant told him that he raped and killed a girl in his neighborhood in 1982 and the details he gave Rostic were consistent with the actual facts of the crime. When viewing this evidence in the light most favorable to the prosecution, a rational jury could find beyond a reasonable doubt

that defendant killed the decedent. Thus, the prosecution presented sufficient evidence to convict defendant of felony murder.

Defendant next contends that the prosecution failed to establish that the DNA testing done in the instant case was conducted using generally accepted laboratory procedures before the results were presented to the jury and that the trial court erred in failing to rule on the admissibility of this evidence. Because defendant failed to preserve his objection to the admission of the DNA evidence, we review the issue for plain error affecting his substantial rights. *Herndon, supra*, 404, citing *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The DNA profiles used to compare seminal fluid found on the decedent's body to samples of defendant's blood were created using the Polymerase Chain Reaction (PCR) method of DNA testing. And the comparison of the foreign hair found during the decedent's autopsy to defendant's DNA profile was conducted using mtDNA testing procedures. Under *People v Lee*, 212 Mich App 228, 282-283; 537 NW2d 233 (1995), "trial courts in Michigan may take judicial notice of the reliability of DNA testing using the PCR method." Similarly, in *People v Holtzer*, 255 Mich App 478, 481-488; 660 NW2d 405 (2003), this Court held that the trial court did not err in determining that mtDNA testing has become generally accepted in the scientific community and is therefore admissible evidence. Nevertheless, before a court may admit the results of a particular DNA test, the prosecution bears the burden of establishing that "generally accepted laboratory procedures were followed." *Lee, supra*, 283.

In the instant case, before testifying as to the results of the PCR tests, Dr. Milligan testified extensively concerning his qualifications as an analyst and the reliability of the State Police laboratory. This included testimony that the laboratory is accredited by the American Society of Crime Laboratory Directors (ASCLD) and that each of its analysts must pass proficiency tests given by an outside agency twice each year. Furthermore, Dr. Milligan testified that in the instant case, he followed the procedures mandated by the State Police to ensure the reliability of the test results. Similarly, Dr. Melton testified that her laboratory is also certified by the ASCLD and that she employed the proper procedures to prevent contamination of samples when conducting the mtDNA tests.

The analysts' testimony concerning the procedures they employed provided sufficient foundation for admitting the results of the DNA. Thus, the trial court did not commit plain error by allowing testimony concerning these results. Nevertheless, defendant asserts that the trial court had an affirmative duty to rule on the admissibility of the evidence and that a separate pretrial hearing should have been held to determine whether accepted procedures were followed.

In *Herndon, supra*, 404, the defendant similarly argued that the trial court erred in failing to hold a pretrial hearing regarding the admissibility of DNA evidence, but this Court found that such hearings were not required. It stated, "When presented with a different case, this Court or the Michigan Supreme Court might require this sort of hearing as some other jurisdictions have done." *Id.* But the defendant failed to request a pretrial hearing, the laboratory representatives indicated that they used proper procedures, defendant did not challenge their testimony, and he failed to present any evidence that they actually deviated from the approved procedures or that the DNA analysis was otherwise invalid. *Id.*, 404-405. Consequently, this Court found no plain

error affecting the defendant's substantial rights and refused to use the case as "a vehicle to change trial procedure." *Id.*, 405.

In the instant case, defendant failed to move for a pretrial hearing, the two DNA analysts testified that they employed proper procedures, and defendant did not challenge their testimony. As in *Herndon*, defendant failed to show that the laboratories actually deviated from the proper procedures or that the test results were invalid. Even if defendant had shown that improper procedures might have been followed, this would have constituted a question of weight rather than admissibility. *Lee, supra*, 281. Therefore, the trial court's failure to hold a pretrial hearing concerning the admissibility of the test results does not constitute plain error and we refuse to further review the issue.

Next, defendant asserts that the trial court erred in admitting the DNA evidence because the prosecution failed to provide sufficient context for the jury to assess the statistics concerning the likelihood that defendant was the source of the DNA found on the decedent. However, in *Herndon, supra*, 405, the defendant similarly claimed that the prosecution's DNA experts failed to give sufficient testimony concerning the "statistical probability" that the blood found on the defendant belonged to the victim. This Court stated that, although "there can be serious problems with making these predictions because of a variety of factors, including insufficient data used for the purpose of comparison, this sort of statistical evidence is generally admissible." *Id.*, 406. It then held that because the defendant had not "shown that there was any particular flaw in the statistics generated," he failed to establish the "plain error and prejudice necessary to merit a new trial." *Id.*

Like the defendant in *Herndon*, defendant fails to point to any specific problems with the computation of the statistics presented in the instant case. Rather, he merely asserts that there are general concerns about the reliability of such figures. Furthermore, challenges to the statistical analysis of DNA evidence are relevant to its weight, not its admissibility. *People v Coy*, 258 Mich App 1, 11; 669 NW2d 831 (2003). Therefore, defendant has not shown plain error affecting his substantial rights.

In his final challenge to the DNA evidence presented, defendant contends that, based on the instructions for taking samples on the state requisition form used in the instant case, no alcohol may be used to sterilize the skin or syringe when drawing a blood sample. He asserts that the prosecution failed to present sufficient foundation concerning whether this was done when his blood was drawn and thus, the results of the DNA tests were inadmissible. But defendant cites no authority to support the conclusion that the prosecution must establish that no alcohol was used before the results of such tests may be admitted. The only authority mentioned, MCL 257.625a, concerns the operation of a motor vehicle under the influence of alcoholic liquor or some other controlled substance. Defendant fails to assert that improper procedures were actually employed or explain why MCL 257.625a should apply to the instant case. Although the use of alcohol to sterilize a person's skin before drawing a blood sample might potentially affect the results of a blood alcohol test, defendant makes no argument that this can somehow affect the results of a DNA test. An appellant may not simply announce a position and leave "it to this Court to discover and rationalize the basis for the claims." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). And the failure to properly address the merits of a claim of error constitutes an abandonment of the issue. *Id.* Consequently, we decline to review this issue.

Finally, defendant contends that the trial court erred in allowing the prosecution to present evidence that he sexually assaulted another woman a few days after the decedent was killed. We review a trial court's decision to admit evidence for abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

The rule under which the trial court admitted the evidence, MRE 404(b), provides as follows:

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.

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994), our Supreme Court stated that before a trial court may admit evidence of other bad acts, it must determine:

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.

Regarding the first prong of this test, the prosecution sought to introduce the evidence of defendant's sexual assault of the second victim in order to show his "identity, his modus operandi, his plan, scheme, or system of doing acts." Proving "identity through modus operandi, which means a method of operating or doing things" constitutes a proper purpose under MRE 404(b). *People v Smith*, 243 Mich App 657, 672; 625 NW2d 46 (2000), remanded 465 Mich 931 (2001).

Concerning the second prong, this Court in *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998), stated that although the Court in *VanderVliet* adopted a new test for admission of evidence under MRE 404(b), the test set forth in *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), "remains valid to show logical relevance where similar-acts evidence is offered to show identification through modus operandi." The portion of this test pertinent to logical relevance requires that:

(1) there is substantial evidence that the defendant committed the similar act (2) there is some special quality of the act that tends to prove the defendant's identity [and] (3) the evidence is material to the defendant's guilt. [*Ho, supra*, citing *Golochowicz, supra*, 307-309.]

In *Ho, supra*, 185-186, the prosecution filed a pretrial motion to admit evidence that the defendant robbed a gas station to show that he was also the person who robbed and murdered a clerk at a fast food restaurant. In its motion, the prosecution argued that the defendant admitted

to robbing the gas station, and listed the similarities between the two crimes. *Id.*, 186-187. Based on the prosecution's arguments, this Court found that the *Golochowicz* logical relevance test was "satisfied by the substantial evidence that defendant committed the [gas station] robbery and that these two crimes shared special qualities." *Id.*, 187.

Similarly, when arguing in favor of the admission of other acts evidence in the instant case, the prosecution noted that defendant pleaded guilty to sexually assaulting the second victim in 1983. It also identified the following similarities between the assault on the second victim and the charged offense. Both crimes involved a breaking and entering into an occupied dwelling and occurred within a few blocks of defendant's home between December 16 and December 30, 1982. Additionally, both victims were raped, but the young children in the homes with them were left unharmed. Although the decedent was strangled and stabbed to death while the second victim survived, defendant grabbed the second victim by the throat and placed a pillow over her face during the assault. Furthermore, a few days after the assault, defendant was found inside the second victim's house with a butcher knife in his possession.

As in *Ho*, substantial evidence existed showing that defendant committed the other crime. Additionally, the crime charged in the instant case and the sexual assault of the second victim have several special qualities in common. Therefore, like the evidence of the robbery of the gas station in *Ho*, evidence concerning the second sexual assault was logically relevant to show that defendant was the perpetrator in the instant case.

In regard to the unfair prejudice prong of the test from *VanderVliet*, this Court in *Smith*, *supra*, 674, stated "virtually all evidence introduced at trial by an opponent is specifically intended to prejudice the other party." But "given the pressing need to prove that defendant was the person who committed the charged crimes, and the logical tendency for the [other offense] to help demonstrate defendant's identity," it could not say that the risk of prejudice substantially outweighed the probative value of the other act evidence. *Id.*, 675. In the instant case, the trial court clearly considered the potential for the other acts evidence to unfairly prejudice defendant. Although it allowed the prosecution to present evidence regarding defendant's sexual assault of the second victim, it excluded evidence of another sexual assault and murder for which defendant was convicted. It also prohibited the prosecution from mentioning that the victims were of a different race than defendant. As in *Smith*, we cannot say that the trial court abused its discretion in finding that the probative value of the other acts evidence outweighed its potential for unfair prejudice.

Finally, regarding the fourth prong of the test, the trial court gave a limiting instruction to the jury concerning the use of the other acts evidence.

The evidence presented by the prosecution under MRE 404(b) meets the standards for the admission of such evidence set forth by our Supreme Court in *VanderVliet*. Thus, the trial court did not abuse its discretion in admitting it and we affirm defendant's conviction.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Richard Allen Griffin  
/s/ Stephen L. Borrello