STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2013
v STEVEN MICHAEL KELSEY, JR., Defendant-Appellant.	No. 298372 Oakland Circuit Court LC No. 2009-225787-FC

Before: MURPHY, C.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b), arising from the death of one victim. The judgment of sentence initially reflects a conviction on two counts of first-degree murder – one for felony murder and one for premeditated murder – and two associated sentences of mandatory life imprisonment. However, the judgment of sentence then provides as follows: "DEF CONVICTION IS FOR 1 CT OF 1ST DEGREE MURDER SUPPORTED BY 2 THEORIES; PREMEDITATED MURDER AND FELONY MURDER." This statement is accurate under Michigan law with respect to cases, such as the one at bar, where a sole individual is killed and the prosecutor proceeds to charge the defendant with first-degree murder based on alternate theories of premeditated and felony murder, obtaining a conviction on both theories. *People v Williams*, 475 Mich 101, 103; 715 NW2d 24 (2006) (affirming the principle that in order "to avoid double-jeopardy implications, the defendant receives one conviction of first-degree murder, supported by two theories"). For purposes of clarity and to avoid any future confusion, we remand for the ministerial task of correcting the judgment of sentence. We direct that in the sentence section of the judgment, the sentence on count 2 be changed from "LIFE" to "ZERO," with an asterisk placed in the "OTHER INFORMATION" area and a second corresponding asterisk placed next to the language at the bottom of the judgment that speaks of one murder being predicated on two theories. In all other respects, we affirm.

Evidence was presented establishing that defendant murdered his younger sister by stabbing her multiple times in the neck and right eye with a kitchen knife as she lay in bed. The evidence also established that defendant engaged in a sexual act with the victim while she was dead or dying, resulting in ejaculation. Defendant gave the police a full confession to these acts. DNA evidence acquired from a vaginal swab also connected defendant to the crime. Additionally, a bloodstained backpack containing items and information linking the backpack to

defendant was found in a restaurant dumpster. Evidence of surrounding circumstances placed defendant at the crime scene, reflected that he had an opportunity to commit the crime, showed deception and flight by defendant after the crime, and otherwise supported the conclusion that defendant committed the murder. In sum, there was overwhelming evidence of defendant's guilt.

Defendant first argues that the trial court erred in admitting other-acts evidence under MRE 404(b)(1). The evidence pertained to sexual relations between defendant and the victim that occurred a couple of times several years earlier when both were minors. The trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion, which occurs when the decision falls outside the range of principled outcomes. *People v Danto,* 294 Mich App 596, 598-599; 822 NW2d 600 (2011). "However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence[,]" and "[t]his Court reviews questions of law de novo." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Under MCL 769.26, a verdict shall not be reversed, nor will a new trial be granted, on the ground of "improper admission . . . of evidence . . . unless . . . it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." Reversal is only required under MCL 769.26 if a defendant demonstrates that the error was prejudicial. *Lukity*, 460 Mich at 495. "[T]he effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id.* Given the strength of the untainted evidence showing guilt, especially the confession and DNA evidence, we cannot conclude that it is more probable than not that a different verdict would have resulted, assuming that admission of the other-acts evidence constituted error.

Furthermore, there was no error in the trial court's decision to admit the evidence. Under MRE 404(b)(1), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Thus, if the sole purpose in offering the evidence is to show the defendant's propensity for particular conduct based on his character as inferred from other wrongful conduct, it is not admissible. *People v Gimotty,* 216 Mich App 254, 259; 549 NW2d 39 (1996). The evidence is admissible, however, 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" if that purpose is material. MRE 404(b)(1). Admission of other-acts evidence is governed by a three-part test: (1) the evidence must be offered for a proper purpose, i.e., to prove "something other than a character to conduct theory," (2) the evidence must be relevant under MRE 402 "to an issue or fact of consequence at trial," and (3) the evidence should not be subject to exclusion under the balancing test set forth in MRE 403. *People v VanderVliet,* 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod on other grounds 445 Mich 1205 (1994). If the evidence is admitted, the court may, upon request, give a cautionary instruction regarding its limited use to the jury. *Id.* at 75.

Defendant was charged with killing his sister with premeditation or during the commission of a felony, sexual assault. Evidence that defendant and the victim had previously engaged in sexual relations could be considered by the jury for the relevant purpose of proving motive. The other-acts evidence may have explained why defendant killed his sister, i.e., she

ostensibly engaged in "consensual" sex with him previously but perhaps was unwilling to do so on this occasion. In that same vein, the other-acts evidence also provided the jurors with general insight regarding the nature of the relationship between defendant and the victim, which typically is a relevant subject in any murder case. MRE 404(b) is inclusionary, not exclusionary, and a proper purpose is not limited to those expressly stated in the court rule. *VanderVliet*, 444 Mich at 64-65. Furthermore, we find that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Although incest is a distasteful subject, there was no dispute that some type of sexual activity occurred at the time of the murder; therefore, it can hardly be said that defendant incurred any *unfair prejudice* when the evidence was admitted, as it was likely given little weight and did not result in any inequity. See *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995) (prejudice arises when marginally probative evidence could be given preemptive or undue weight by jurors and unfairness speaks to whether it would be inequitable to use the evidence against a defendant). The trial court gave the jury a limiting instruction on the proper use of the evidence, thereby protecting against any potential for unfair prejudice. And, once again, any assumed error was clearly harmless.

The only other issue raised by defendant concerns the judgment of sentence and double jeopardy implications, which matter we disposed of in the introduction to this opinion.

Affirmed, except for that portion of the judgment of sentence discussed in our introductory paragraph requiring modification, which we vacate and upon which we remand for the ministerial task of correcting the judgment as directed above. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher