# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 17, 2012 |
| v | No. 304299<br>Oakland Circuit Court |
| NOLAN RAY GEORGE,<br><br>Defendant-Appellant. | LC No. 2010-234495-FC |

Before: O'CONNELL, P.J., and JANSEN and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree, premeditated murder, MCL 750.316(1)(a), for the 1968 killing of Gwendolyn Perry. He was sentenced to life in prison without the possibility of parole. We affirm.

Defendant argues that the trial court erred in admitting "similar bad acts" evidence under MRE 404(b), namely, his previous convictions for second-degree murder and involuntary manslaughter in the deaths of Frances Brown and Cindy Garland, respectively, along with the circumstances surrounding their deaths. We disagree.

"The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion." *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009), citing *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). The trial court has abused its discretion when "it chooses an outcome that is outside the range of reasonable and principled outcomes." *Waclawski*, 286 Mich App at 670. When an evidentiary question involves the interpretation of law, appellate review is de novo. *People v Orlewicz*, 293 Mich App 96, 101; 809 NW2d 194 (2011). When the issue is preserved, the erroneous admission of bad acts evidence requires reversal only when "it is more probable than not that the error was outcome determinative." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). The defendant has the burden of proving that there has been a miscarriage of justice. *Id.*

Rule 404(b) of the Michigan Rules of Evidence provides that:

> (1) 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.

When the prosecution seeks to admit evidence under MRE 404(b), it must first "offer the 'prior bad acts' evidence under something other than a character or propensity theory." *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Second, the prosecution must demonstrate that the evidence is relevant to a material fact, as required by MRE 401 and MRE 402, for a purpose other than showing defendant's character or criminal propensity.[1] *People v Mardlin*, 487 Mich 609, 615; 790 NW2d 607 (2010). Third, the prosecution must demonstrate that the evidence of prior or subsequent bad acts is admissible under the balancing test of MRE 403, which states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." If the prosecution satisfies these requirements, the defendant can request a limiting instruction under MRE 105 that directs the jury to consider the evidence only for noncharacter purposes. *Mardlin*, 487 Mich at 616. MRE 404(b) is an inclusionary rule of evidence. *Id.* at 616. "Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity." *Id.* at 615-616.

In this case, the prosecution offered the bad acts evidence for purposes other than criminal propensity. See MRE 404(b); *Knox*, 469 Mich at 509. The prosecution sought to introduce evidence of the circumstances surrounding the deaths of Brown and Garland, including defendant's convictions for these killings. The prosecution intended to produce the evidence during defendant's trial in this case to prove that (1) defendant had the specific intent to kill; (2) defendant acted with premeditation and deliberation; (3) defendant had a motive (he enjoyed the act of killing); (4) defendant's killing of Perry was part of a common plan or scheme; (5) defendant was the person who murdered Perry because he used the same modus operandi as the other killings; and (6) the doctrine of unlikely coincidences demonstrates that the killings were each "the product of defendant's design." The trial court did not address the prosecution's argument of the doctrine of unlikely coincidences but admitted the evidence under all of the other purposes raised by the prosecution.

The evidence concerning the Brown and Garland homicides is relevant in demonstrating intent, premeditation and deliberation, motive, common plan or scheme, and identity of the perpetrator in the Perry murder. See *Mardlin*, 487 Mich at 615. Because defendant denied the allegations against him in this case, all of the elements of first-degree murder were at issue. See *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). First-degree murder is a specific intent crime, which requires proof of intent to kill. *People v Herndon*, 246 Mich App

[1] MRE 402 provides that "[a]ll relevant evidence is admissible, except as other provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible." MRE 401 defines "relevant," as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

371, 386; 633 NW2d 376 (2001). The similar acts evidence demonstrates that Perry's death was not the result of an accident or mistake. Rather, defendant intentionally, with premeditation and deliberation, beat and strangled her. Defendant's intent is corroborated by his statements to former fellow inmates that he enjoyed seeing women struggle, kick, and move their arms as he strangled them. This testimony, along with the testimony regarding the Brown and Garland killings, also demonstrates defendant's motive. He enjoyed the act of killing itself.

Furthermore, the similar acts evidence in this case demonstrates a common plan or scheme, and defendant's identity as Perry's murderer. "[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." *Knox*, 469 Mich at 510, citing *Sabin*, 463 Mich at 63. The charged and uncharged acts do not have to be part of a "single continuing conception or plot." *Sabin*, 463 Mich at 63.

In this case, there are many similarities between Perry's murder and the killings of Brown and Garland. All of these women were relatively young, short, Caucasian women with dark hair. They were all killed in automobiles in isolated areas. The bodies of both Perry and Garland were found lying face-down in a field, off of a two-rutted lane. All of the women had recently had sexual intercourse, probably with their killer. Defendant drank beer before inflicting significant blunt force trauma to all of the women, primarily to their faces and heads. Defendant left all of the women in degrading positions; Brown and Perry were naked from the waist-down and Garland was left completely nude. Brown and Perry were both strangled with their own undergarments (underwear and pantyhose), and the evidence shows that defendant applied force to their necks, released, and then reapplied force, thus prolonging their deaths. Brown and Perry were killed within eight miles of each other, and only three months apart. Garland was killed about 10 months after defendant was released from prison for Brown's murder. These offenses are all "sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." The circumstances of the Brown and Garland murders, when compared with the circumstances surrounding Perry's death, indicate that defendant had a certain modus operandi and establish defendant's identity as Perry's murderer.

Third, this 404(b) evidence's probative value was not substantially outweighed by unfair prejudice. See *Mardlin*, 487 Mich at 616. This requirement seeks to avoid "unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself." *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). In this case, the nature of defendant's previous crimes is clearly abhorrent. See *id*. But that, in and of itself, is not "unfair prejudice." See *id*. Evidence of defendant's prior convictions and the circumstances surrounding the killings of Brown and Garland was highly probative. As discussed above, this evidence demonstrated intent, premeditation and deliberation, motive, common plan or scheme, and defendant's identity as Perry's murderer. There was also no other evidence available that would have been less prejudicial but provided the same probative value. Because this case is more than 40 years old, many of the witnesses are dead. Scientific evidence, like DNA testing, was not available in 1968. Even if such evidence were available, it would not demonstrate defendant's intent to kill, which is a required element of first-degree murder.

Finally, defendant requested, and the trial court provided, a limiting instruction to the jury with respect to this 404(b) evidence. The trial court instructed the jury that the evidence of defendant's other crimes should only be considered in determining if defendant acted intentionally, with premeditation and deliberation, and if defendant used a common plan or scheme that shows defendant committed the crime in the instant case.

Second, defendant argues that the trial court abused its discretion in admitting his 1969 confession to police that he killed Perry, because the statement was involuntary and given in response to a police officer's promise of leniency. We disagree.

When determining whether a statement was voluntary, and is therefore admissible, this Court "must review the record and 'make an independent determination of the ultimate issue of voluntariness.'" *People v Conte*, 421 Mich 704, 744; 365 NW2d 648 (1984), quoting *People v McGillen*, 392 Mich 251, 257; 220 NW2d 677 (1974). Unless this Court has a definite and firm conviction that a mistake was made, it must affirm the trial court's ruling. *Id*.

Involuntary confessions are generally inadmissible because they are unreliable. See *Conte*, 421 Mich at 753. In *Conte*, 421 Mich at 751, 761-762, four of the Supreme Court's justices determined that the totality of the circumstances test is best for determining if a statement was made voluntarily.[2] To determine if a statement was voluntary under this test, the trial court should consider several factors, including "the nature of the inducement, the length and conditions of detention, the physical and mental state of the defendant (including his age, mentality, and prior criminal experience), the conduct of the police, and the adequacy and frequency of advice of rights." *Conte*, 421 Mich at 754 (internal citations omitted). The court must determine if an inducement or promise of leniency offered overcome a defendant's ability to make a voluntary decision or whether defendant's will was overborne. See *id*. at 754-756. "As in determining whether a promise exists, we will focus upon the defendant's state of mind to determine if that promise caused him to confess." *Id*. at 741. The prosecution has the burden of demonstrating, by a preponderance of the evidence, that a defendant's confession was voluntary. *Id*. at 754-755.

The trial court did not err in determining that defendant's statement was voluntary, and thus, admissible. When police met with defendant on the afternoon of October 7, 1969, to discuss Perry's murder, defendant had already pleaded guilty to murdering Brown and was in police custody. It is not clear how long the entire interview lasted, but defendant admitted that he was responsible for killing Perry relatively early in the conversation. At the time of defendant's admission, a police officer was in the process of obtaining an attorney for defendant pursuant to defendant's request. Defendant asked to see pictures of Perry, and after looking at

[2] In *Conte*, 421 Mich at 751, 761-762, Justices Boyle, Brickley, Cavanagh, and Ryan adopted the totality of the circumstances test. Chief Justice Williams and Justices Kavanagh and Levin concluded that a defendant's confession should always be suppressed if there was a promise of leniency and that promise caused the defendant to confess. *Conte*, 421 Mich at 712. Because the Supreme Court majority adopted the totality of the circumstances test, it is the proper test to apply here. See *id.* at 751, 761-762.

them, he admitted to knowing her. One of the officers then told defendant that he would not be prosecuted if he was responsible for Perry's death, presumably because defendant had already pleaded guilty to murdering Brown. At this point, defendant said, "I did it" and provided details of the killing.[3]

At the time of his admission, it is clear that defendant was aware of his *Miranda* rights, as he had requested an attorney and an officer was in the process of locating one for him. Because he had already pleaded guilty to the murder of Brown and was awaiting sentencing in that crime, his continued detention was not contingent on confessing to Perry's murder. There was also no promise of release or leniency in his sentencing if he confessed to killing Perry. Defendant was with two officers, who were wearing plain clothes, in a relatively large room with windows along the wall. Defendant was not shackled or handcuffed. Although the officers each had a firearm, their firearms were beneath their coats.

There is no evidence that defendant was hungry, sick, tired, or under the influence of alcohol or drugs on that afternoon. Nor is there any evidence that defendant was coerced or threatened. Although defendant claims he was illiterate, the entire interaction was verbal. Defendant was 26 years old at the time and it appeared that he understood all questions asked of him, as his responses were rational. Defendant also had experience in the criminal justice system, he had just pleaded guilty to second-degree murder in the Brown case.

From the circumstances surrounding his statement, any promise of leniency was not the cause of defendant's confession. There was no negotiation between the police officer and the defendant or any evidence of mutual assent between the police officer and the defendant regarding a reduction of sentence or a non-prosecution agreement. Defendant simply voluntarily stated that he recognized Perry from the photographs. One officer explained that he expected defendant to serve 40 to 60 years in prison for Brown's murder and that confessing to Perry's murder would have no impact on that sentence. In all likelihood, defendant also expected to serve a long term in prison (as he was likely told what his sentence would be when he pleaded), so it is not clear what benefit defendant thought he would obtain from confessing. His immediate response, "I did it," when asked if he was responsible for Perry's death, supports the conclusion that any inducement by police was not a significant factor in his confession. As the prosecution points out, the testimony from former fellow prison inmates indicates that defendant

[3] Defendant has not argued, at trial or on appeal, that his statement is inadmissible because he had previously invoked his right to counsel. Generally, the interrogation of a suspect must cease when the suspect requests an attorney. See *People v Harris*, 261 Mich App 44, 53; 680 NW2d 17 (2004). However, "an exception to this rule exists where the defendant initiates the contact and makes a valid waiver of his rights." *People v Harrington*, 258 Mich App 703, 706; 672 NW2d 344 (2003). In this case, defendant requested an attorney and a police officer called the prosecutor's office to obtain one for him. Defendant then reinitiated the conversation with the police officers and asked to see photographs of Perry to determine if he knew her. Because defendant voluntarily waived his right to an attorney, his subsequent statements were admissible at trial. See *Harrington*, 258 Mich App at 706.

had a fondness for talking about killing women. All of these factors indicate that defendant's statements were voluntary, and possibly made because defendant liked talking about his crimes. Interestingly enough, until the instant matter, there is no evidence in the record that the defendant did anything to memorialize or follow-up on the police officer's statement.

We also note that even if defendant's statement could conceivably be deemed involuntary, and therefore, inadmissible, the admission of this statement at trial was harmless error. Error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *People v Dendel*, 289 Mch App 445, 475; 797 NW2d 645 (2010). The evidence against defendant was overwhelming. The similar bad acts evidence of the Brown and Garland killings established that defendant acted with specific intent to kill, premeditation, and deliberation. This evidence also established defendant's common plan of driving women to isolated areas, drinking beer and having sex with them, severely beating them, primarily on the head, and then in some cases, strangling the women with their own undergarments. In addition, the similar acts evidence demonstrated defendant's identity as Perry's murderer; Perry's murder was significantly similar to the killings of Garland and especially Brown. The similar acts evidence, along with the testimony of two former inmates who knew defendant in prison, also evidenced defendant's motive for killing Perry. Defendant enjoyed watching women struggle as he strangled them. Therefore, even if defendant's confession was involuntary and inadmissible, the admission of this statement at trial was harmless error that does not require reversal and a new trial.

Finally, defendant argues that there was insufficient evidence to find him guilty of first-degree, premeditated murder, because he lacked the specific intent required for a conviction of this crime. We disagree.

Sufficiency of the evidence questions are reviewed de novo, in a light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). This Court determines whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010).

First-degree murder includes murder "perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate, and premeditated killing." 1948 CL 750.316.[4] The elements of first-degree murder are: "(1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). First-degree murder is a specific intent crime, which requires proof of an intent to kill. *Herndon*, 246 Mich App at 386. "Premeditation and deliberation require 'sufficient time to allow the defendant to take a second look.'" *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011), quoting *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Circumstantial

[4] Perry was murdered in 1968. Therefore, the Michigan Compiled Laws of 1948 apply. See 1948 CL 750.316. However, the current statutory definition of first-degree murder uses almost identical language, defining first-degree murder as "[m]urder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing." MCL 750.316.

evidence and reasonable inferences can establish the elements of a crime. See *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007).

There was ample evidence presented at trial from which a reasonable juror could conclude that defendant intentionally killed Perry with premeditation and deliberation. The evidence showed that defendant had sexual intercourse with Perry, beat her several times in the head, and then strangled her with her own pantyhose. These actions would have required time, giving defendant the chance to "take a second look" at what he was doing before he actually killed Perry. See *Jackson*, 292 Mich App at 588. In addition, ligature strangulation is not an instant death. It takes 7 to 10 seconds for an individual to lose consciousness by strangulation when pressure is consistently and directly applied. One to two minutes of direct and consistent strangulation are required to cause death. In this case, the pinpoint bleeds on Perry's neck indicated that force was applied, released, and then reapplied. Because the force was not consistent, the time frame for Perry to lose consciousness and then die from asphyxiation would have been even longer. Furthermore, defendant did not strangle Perry with his hands. It appears that he used the pantyhose that Perry had been wearing, which would have required more time and effort. First, defendant had to acquire the pantyhose (by taking them off, or if they were already removed, by retrieving them). Defendant then wound the pantyhose tightly around Perry's neck and knotted the hose multiple times. These actions also indicate a plan, further evidencing that defendant acted with premeditation and deliberation. Not only do the circumstances of Perry's death indicate that defendant had the requisite specific intent to kill Perry, the evidence also shows that defendant intended to make Perry suffer and prolong her death.

Defendant also had a motive and common plan for killing women in the same manner as Perry, which also shows he acted with premeditation and deliberation. Defendant enjoyed strangling women because he liked to watch them kick and struggle. Two of defendant's former fellow inmates testified that defendant told them he liked to strangle women and watch them struggle, and he had done it multiple times before. The injuries sustained by Perry and Brown are consistent with this testimony. The pinpoint bleeds on Perry's neck indicate the application, release, and reapplication of pressure. Brown had even more pinpoint bleeds, on her neck, face, and eyes, indicating that she struggled more or took longer to die, possibly because defendant was intentionally prolonging her death because he enjoyed watching her struggle. Furthermore, defendant killed Brown in almost the same fashion as he killed Perry. Defendant inflicted significant blunt force trauma to Brown's head, strangled with her own underwear, and then left her body in a car in the back corner of a bar parking lot. Defendant also beat Garland on the head repeatedly before leaving her naked in a field to die from hypothermia. All of these women were left partly undressed and all recently had intercourse. The similar nature of these deaths indicates that defendant had a common plan or scheme, which is further evidence that he specifically intended to kill Perry and acted with the requisite premeditation and deliberation for a conviction of first-degree murder.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Michael J. Riordan