

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREEMAN JAMES SCOTT, JR.,

Defendant-Appellant.

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UNPUBLISHED

October 8, 1996

No. 171031

LC No. 93-001363-FC

Before: Sawyer, P.J., and Neff and R.D. Gotham,\* JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of murder in the first degree, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to the mandatory terms of life without parole on the murder conviction and to the consecutive two-year term on the felony-firearm conviction. He now appeals and we affirm.

Defendant first argues that the trial court erred in admitting testimony of a witness' prior consistent statements. We disagree. These statements were admissible under MRE 801(d)(1)(B).

Defendant next argues that the trial court erred in admitting evidence of other drug sales and the pointing of a pistol earlier in the day of the murder, as well as evidence of the discharge of a pistol three weeks before the murder. We disagree. First, we note that MRE 404(b), which concerns the admission of evidence of other bad acts, is a rule of inclusion, not exclusion. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993). Thus, the question to be asked is not whether the evidence falls within an exception to a rule of exclusion, but whether the evidence is being offered for a relevant reason other than the impermissible reason of showing that the defendant acted in conformity with his character. *Id.* In assessing admissibility, four factors must be considered. *Id.* at 74. Defendant challenges two of those factors.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

First, defendant argues that the evidence was not relevant. With respect to the prior drug sales, this evidence was relevant to show that defendant sold drugs while armed, a transaction at the heart of the murder. Furthermore, the evidence of the gun demonstrates that defendant was known to possess a gun similar to that used to commit the murder. Similarly, the evidence of the use of the gun on a prior occasion was relevant to establishing that defendant owned or possessed a gun similar to that used in the murder.

Defendant also argues that the evidence violates the third prong of the test, namely that the evidence is more prejudicial than probative. There certainly is no unfair prejudice to defendant concerning the evidence of the other drug transactions inasmuch as there was evidence that defendant was engaged in a drug transaction with the victim. Similarly any prejudicial effect of the evidence on the prior possession or use of the gun does not outweigh its probative value of establishing defendant's possession of a weapon similar to that used in the murder.

Next, defendant argues that the trial court erred in admitting an in-court identification of defendant by two witnesses where that identification was tainted by a suggestive identification of defendant at the preliminary examination. We disagree. Even assuming that the identification at the preliminary examination was suggestive, both witnesses clearly had an independent basis for identifying defendant since they had shared a residence for several days preceding the murder.

Finally, defendant argues that the cumulative effect of improperly admitted evidence requires a new trial. We are unpersuaded that this is the case.

Affirmed.

/s/ David H. Sawyer

/s/ Janet T. Neff

/s/ Roy D. Gotham