

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD DWAYNE BROWN,

Defendant-Appellant.

UNPUBLISHED

March 11, 1997

No. 178041

Eaton Circuit Court

LC No. 93-000407-FC

Before: Fitzgerald, P.J., and MacKenzie and Taylor, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316; MSA 28.548, breaking and entering an occupied dwelling with the intent to commit larceny, MCL 750.110; MSA 28.305, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of life imprisonment without parole for the murder conviction and ten to fifteen years for the B&E conviction, and two consecutive years for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion by admitting evidence that he had participated in two uncharged B&E's. We note that both parties indicate that the four-pronged test for the admissibility of other acts evidence articulated in *People v Golochowicz*, 413 Mich 298, 308-309; 319 NW2d 518 (1982), was applicable to the admission of this evidence. However, this aspect of *Golochowicz* was overruled in *People v VanderVliet*, 444 Mich 52, 65-66, 74; 508 NW2d 114 (1993). Other acts evidence is admissible under MRE 404(b) whenever it is relevant to a theory other than proving a person's character in order to show that the person acted in conformity with it. *Id.* at 65; *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996).

In this case, the evidence of defendant's participation in two uncharged B&E's was highly relevant apart from suggesting that he acted in conformity with a bad character. If defendant had been connected only to items taken from the deceased's home, it would have been more plausible to believe that he obtained those items from third parties in accordance with his testimony. However, evidence that defendant had possessed items taken from all three houses seriously undermined defendant's

position because it is more difficult to believe that, by chance, he obtained items from all three houses from third parties as opposed to having participated in the B&E's. Accordingly, evidence of the two uncharged B&E's was not excluded by MRE 404(b) because it bore directly on the credibility of defendant's general denial of committing the charged offenses. *VanderVliet, supra* at 82-83. Although there was some risk of an unfair prejudicial effect from the admission of this evidence, the risk did not substantially outweigh its high probative value. See MRE 403. A defendant should not be allowed to interdict other acts evidence that is highly probative of a truly contested issue. *VanderVliet, supra*, at 91. Thus, the trial court did not abuse its discretion by admitting evidence of defendant's participation in the two uncharged B&E's.

Next, defendant contends that the trial court abused its discretion by denying his motion for a mistrial. One witness, who had testified that he committed the three B&E's with defendant, also testified that he had personally committed five or six B&E's in Eaton County. In context, the exchange of questions and answers may have suggested that the witness committed all of these B&E's with defendant. However, a mistrial should be granted only for an irregularity that is prejudicial to the defendant's rights and impairs the defendant's ability to receive a fair trial. *People v Griffis*, 218 Mich App 95, 99-100; 553 NW2d 642 (1996); *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996). In *People v Lugo*, 214 Mich App 699, 702-705; 542 NW2d 921 (1995), this Court found no abuse of discretion in the denial of a mistrial where the defendant was being tried for assaulting police officers and where officers testified about the admittedly irrelevant matter of the defendant's possible involvement with another offense. In this case, the testimony was ambiguous regarding whether defendant participated in the unrelated B&E's. We conclude that any potential for prejudice here was even less than in *Lugo*. Accordingly, we find no abuse of discretion in the trial court's denial of the motion for a mistrial. *Cunningham, supra*.

Finally, defendant argues that the trial court denied him a fair and impartial trial by making certain remarks in which it assumed the prosecutor's role and questioned witnesses in a way that denigrated the defense theory. A trial court may question witnesses to clarify testimony or elicit additional relevant information, but it must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair or partial. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996); *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994). While we do not condone the trial court's behavior, we find that, due to the overwhelming evidence of defendant's guilt, any error was harmless. *People v Davis*, 216 Mich App 47, 50-51; 549 NW2d 1 (1996).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Clifford W. Taylor