

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN RODNEY McRAE,

Defendant-Appellant.

UNPUBLISHED

January 12, 2001

No. 217052

Clare Circuit Court

LC No. 98-001151-FC

Before: Talbot, P.J., and Hood and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a). The trial court sentenced him to life imprisonment without parole. Defendant appeals as of right. We affirm.

The fifteen-year-old male victim was reported missing in 1987. The victim's skeletal remains were discovered in 1997 on property where defendant lived at the time of the victim's disappearance. The prosecution alleged at trial that defendant killed the victim, performed sexually sadistic acts on him, dismembered his body and then buried it under a pile of goat manure to evade cadaver dogs. Defendant denied that he killed the victim, claiming that he had moved out of the state before the victim's death.

Defendant first argues that the trial court abused its discretion in admitting evidence that he murdered, partially dismembered, and buried another young boy in 1950. The trial court ruled that the evidence was admissible under MRE 404(b) to prove defendant's motive, intent, premeditation and deliberation. This Court reviews a trial court's decision to admit other-acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Hoffman*, 225 Mich App 103, 105; 570 NW2d 146 (1997).

Pursuant to MRE 404(b)(1) evidence of other crimes, wrongs, or acts is admissible if the evidence is (1) offered for a proper purpose other than to prove the defendant's character or propensity to commit a crime (2) relevant to an issue of fact or consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Accord *Crawford*, *supra*

at 385; *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). Only one of the purposes for which the other-acts evidence is offered “needs to be a proper, noncharacter reason that compels admission for the testimony” *Id.* at 501.

Contrary to defendant’s contention, the prosecutor did not offer or use the contested evidence to establish that he acted in conformity with a propensity to commit bad acts. Rather, the prosecution used the evidence to counteract defendant’s general denial that he murdered the victim by establishing that the murder was motivated by sexual sadism. See *Starr supra* at 501. Proof of motive in a prosecution for murder, although not essential, is always relevant, and evidence of other acts to prove motive is among the purposes for which such evidence is expressly admissible under MRE 404(b)(1). *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). “Motive” for purposes of 404(b) was defined in *Hoffman, supra* at 106; 570 NW2d 146 (1997) as:

Cause or reason that moves the will and induces action. An inducement, or that which leads or tempts the mind to indulge in a criminal act. [] In common usage intent and “motive” are not infrequently regarded as one and the same thing. In law there is a distinction between them. “Motive” is the moving power that impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. “Motive” is that which incites or stimulates a person to do an act. [Citations omitted.]

In *Hoffman*, this Court held that the trial court did not abuse its discretion in admitting testimony from two women whom the defendant had allegedly assaulted and battered and to whom he had expressed a general hatred toward women to establish that the defendant’s actions against the victim were motivated by misogyny (hatred of women). *Id.* at 104-110. In rejecting the defendant’s contention that the evidence was only relevant to establish his character or propensity toward violence, this Court held that the evidence was “relevant and material to defendant’s motive for his unprovoked, cruel, and sexually demeaning attack on his victim.” *Id.* at 107, 109-110. This Court also noted that “absent the other-acts evidence establishing motive, the jurors may have found it difficult to believe the victim’s testimony that defendant committed the depraved and otherwise inexplicable actions” and that the evidence “also tends to counter defendant’s self-serving testimony that the victim provoked the incident by stealing his money.” *Id.* at 110.

In this case, several prosecution witnesses testified that the victim’s skeletal remains contained numerous cut marks; that some marks indicated a successful attempt to cut the body in half in the lumbar region; that there were at least three cut marks on the inside of the sacrum in an up and down pattern; that the victim’s foot bones were found inside his socks with a ropes tied around their tops; and that the victim’s unbuttoned and unzipped blue jeans were found without leg bones inside them. Clinical and forensic psychologists testified that the cuts in the sacrum suggesting penetration of the anal or urogenital area with a knife, ropes indicating that the victim may have been restrained prior to death, and the blue jeans without leg bones suggesting that the victim was naked except for socks, constituted compelling evidence that defendant’s actions were motivated by sexual sadism.

In an attempt to provide an explanation for why defendant perpetrated this seemingly random and inexplicable crime, *Hoffman*, *supra* at 108, the prosecutor presented experts who drew the same conclusion with respect to the 1950 homicide in which defendant: choked the 8½ year-old victim; pulled his underwear and pants down almost to the knees; pulled his shirt up to the rib cage; slashed his throat and body; nearly severed his penis; and, may have inflicted an anal wound. As in *Hoffman*, this evidence established more than character or propensity, was “relevant and material to defendant’s motive for his unprovoked, cruel, and sexually demeaning attack on his victim,” and absent evidence establishing motive, the jury may have found it difficult to believe that defendant committed the depraved and otherwise inexplicable crime. *Id.* at 107, 109-110. Under these circumstances, we hold that the evidence was properly admitted to establish defendant’s motive for committing the instant offense, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

We also hold that the evidence would have been admissible for the proffered purpose of establishing defendant’s identity as the perpetrator of the crime. Where other acts evidence is offered to show identification through modus operandi, this Court continues to apply the four-part test of *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982). *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998); see also *People v Smith*, ___ Mich App ___; ___ NW2d ___ (Docket No. 209326, issued 12/15/00), slip op pp 7-8. Other-acts evidence is admissible under *Golochowicz* if “(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 (3) the evidence is material to the defendant’s guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice.” *Ho*, *supra* at 186, citing *Golochowicz*, *supra* at 207-209.

Here, defendant contested his identity as the perpetrator of the offense at issue, and we are persuaded that the instant offense and the offense for which he was convicted in 1951 shared special qualities which tended to prove his identity. *Smith*, *supra* at slip op pp 8-9; *Ho*, *supra* at 187. Both offenses involved prepubescent males whom defendant knew, repeated assaults with a knife, razor or other sharp object, efforts or success at dismemberment, evidence suggesting sexually sadistic motivations, and the burial of both bodies in places close to defendant. In light of these strong similarities, we do not find the disparities in the victims’ ages, the likely depths of the graves, and the lack of proximity in time and location dispositive here. See *Smith*, *supra* at slip op pp 8-9 (holding that there were sufficient similarities tending to prove that the same assailant committed both crimes based on less evidence than that presented here). Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice where there were no eyewitnesses to testify at trial and there was strong evidence linking defendant to both crimes. *Ho*, *supra* at 187.

Defendant next argues that the trial court erred in admitting statements he made to his cellmate while in prison. Defendant contends that their admission violated his constitutional right to counsel because the evidence suggested that the police placed the cellmate with him knowing that he would elicit incriminating statements outside the presence of counsel. Although defendant filed a pretrial motion to exclude the evidence and sought to adjourn trial to investigate the matter, there is no indication that he obtained a ruling regarding their admissibility, that he requested a hearing on the issue, or that he objected to them at trial. Our review of this

unpreserved issue is therefore limited to determining whether defendant has demonstrated a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

On this record, we cannot conclude that the police deliberately placed the inmate in defendant's cell to elicit incriminating statements as an agent for the police or that they "intentionally created a situation likely to induce [defendant] to make incriminating statements without the assistance of counsel." *United States v Henry*, 447 US 264, 270, 274; 100 S Ct 2183; 65 L Ed 2d 115 (1980); see also *Kuhlmann v Wilson*, 477 US 436, 459; 106 S Ct 2616; 91 L Ed 2d 364 (1986); *Massiah v United States*, 377 US 201, 206; 84 S Ct 1199; 12 L Ed 2d 246 (1964). In support of his contention, defendant makes much of the fact that the cellmate's plea agreement provided that the prosecution would consider a sentencing agreement "based upon [his] assistance with ongoing investigations," that he was eventually only sentenced to concurrent terms of six months in jail for serious crimes, and that he allegedly had an "ongoing relationship" with a deputy at the jail. However, the cellmate also testified that: he did not know about defendant at the time he entered his plea agreement; that he was moved into defendant's cell due to an altercation with another inmate; that he did not ask defendant questions about his case; that the first time he ever heard anything about defendant's crime was from defendant himself; that he decided to tell police what defendant told him because "the way [defendant] talked about [the crime] was just sick . . . [j]ust weighed heavy on my mind"; and, that he did not ask for or expect or receive any favors from the state for the information. Further, although the cellmate spoke with a deputy three or four times during his stay in jail, he only testified that he spoke with him "a small amount" regarding defendant's case. The cases defendant cites are distinguishable. See, e.g., *Maine v Moulton*, 474 US 159; 106 S Ct 477; 88 L Ed 2d 481 (1985); *Henry, supra*; *Massiah, supra*; *United States v Brink*, 39 F 3d 419 (CA 3, 1994). Defendant has therefore failed to demonstrate that the admission of the cellmate's testimony constituted a plain error that affected his substantial rights. *Carines, supra* at 763-764.

For the same reasons, defendant has not established that his trial counsel's failure to obtain a ruling on his motion to exclude the cellmate's testimony was objectively unreasonable or prejudicial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Lastly, defendant argues that the trial court erred in denying his motion to suppress his statement to his former neighbor who came to the jail at defendant's request in his reserve deputy sheriff uniform and questioned him about his guilt. Defendant maintains its admission violated his constitutional rights to counsel and against compelled self-incrimination because the statement was elicited without the presence of counsel or the requisite warnings. Following a *Walker*¹ hearing, the trial court determined that defendant's rights were not violated because the testimony established that he initiated the conversation with the reserve deputy sheriff. Assuming, without deciding, that the trial court erred in denying defendant's motion to suppress the contested statement, we hold that its admission was harmless beyond a reasonable doubt.

¹ *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

The erroneous admission of a confession into evidence is a nonstructural defect subject to a harmless error analysis. *People v Whitehead*, 238 Mich App 1, 6-7; 604 NW2d 737 (1999), citing *Arizona v Fulminante*, 499 US 279, 295, 306-307; 111 S Ct 1246; 113 L Ed 2d 302 (1991); see also *People v Anderson (After Remand)*, 446 Mich 392, 402-407; 521 NW2d 538 (1994). The alleged error at issue may therefore be “quantitatively assessed in the context of other evidence presented to determine whether its admission was harmless beyond a reasonable doubt.” *Anderson, supra* at 405-406. “This requires the beneficiary of the error to prove, and the court to determine, beyond a reasonable doubt that there is ‘no reasonable possibility that the evidence complained of might have contributed to the conviction.’” *Id.*, citing *Chapman v California*, 386 US 18, 23; 87 S Ct 824; 17 L Ed 2d 705 (1967). To make this determination, we examine the entire record and consider both defendant’s statement and its use by the prosecutor during arguments. *Whitehead, supra* at 8, citing *Anderson, supra* at 406.

Here, defendant’s statement, “Dean, it was bad. It was bad,” was not a direct admission of guilt. The prosecutor referred to the statement briefly during his closing argument, informing the jurors that they had to decide what was “bad,” and then again briefly in rebuttal in response to arguments attacking the reserve deputy’s credibility. Moreover, other substantial evidence of defendant’s guilt was properly admitted at trial, including: defendant’s 1951 murder conviction which tended to establish his motive for the instant offense; defendant’s familiarity with the victim who frequently visited his home; the victim’s skeletal remains found on property where defendant lived at the time the victim disappeared; defendant’s sudden move out of the state soon after the victim’s disappearance; and, defendant’s alleged admissions to his cellmate that he and the victim had an altercation, that he shot the victim twice, that he buried the body beside his barn, and that he covered it with a pile of manure which concealed the smell from the cadaver dog. The prosecution also presented testimony to rebut the evidence defendant offered in support of his theory that the victim was seen alive after defendant moved out of the state. After reviewing the contested statement within the context of the entire record we conclude that the error, if any, was harmless beyond a reasonable doubt.

Affirmed.

/s/ Michael J. Talbot

/s/ Harold Hood

/s/ Hilda R. Gage