

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CAVANTA D. MCLILLY, DEONDRICK D.
MCLILLY, LOUIS C. MCLILLY, JR., and
ORRACCIOUS Q. BROWN,

Defendants-Appellees.

UNPUBLISHED
December 20, 2002

No. 234577
Genesee Circuit Court
LC Nos. 00-007098-FC
00-007099-FC
00-007100-FC
00-007507-FC

Before: Fitzgerald, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Defendants were each charged with possession of a firearm during the commission of a felony, MCL 750.227b, carrying a concealed weapon, MCL 750.227, and conspiracy to commit armed robbery, MCL 750.529; MCL 750.157a. The circuit court granted defendants' separate motions to suppress hearsay statements offered to prove the existence of the conspiracy charge on the ground that the prosecutor failed to prove the existence of a conspiracy by proof independent of the hearsay statements. This Court granted the prosecutor's application for leave to appeal. We reverse and remand.

I. Facts and Procedural History

During the early morning hours of September 11, 2000, Eddie McGhee was the victim of an armed robbery by two hooded men who took, *inter alia*, his car and his Nokia 6120 cellular phone. The phone included a feature that would state the greeting "Hi, Eddie" when turned on. Later that morning, McGhee's son called McGhee's cellular phone. It was answered by an unidentified man. McGhee's son misled the man to believe that he wanted to purchase narcotics. Upon learning this information, Bradford Barksdale, Captain of the Flint Police Department's Special Operations Bureau, devised a plan under which he would call McGhee's phone and lead the unidentified man to believe that the owner of the phone, McGhee, was a drug dealer, and that Barksdale wanted to purchase controlled substances from McGhee. Barksdale reasoned that, because the person or persons who had McGhee's phone were robbers, they would be willing to rob him if he gave them the impression that he had money. That evening, Barksdale called McGhee's number. An unidentified man answered the phone. Barksdale identified himself as "Ralph," and asked for Eddie. When the man told him that Eddie was not in, Barksdale told the man to let Eddie know that he was coming from Detroit to pick up his package, and that he

would be in Flint in an hour. About an hour later, Barksdale called McGhee's phone again. He identified himself as Ralph and he asked for Eddie. The unidentified man identified himself as Eddie's nephew, and he said that Eddie was not in. Barksdale explained that he was running late due to bad weather and heavy traffic from Detroit, but that he would arrive in twenty minutes. The unidentified man asked Barksdale about the nature of the package. Barksdale said that he had originally wanted "twenty" but that he only had enough money for "ten," and accordingly, only wanted "ten." Barksdale never mentioned anything about purchasing drugs, but he wanted the man to believe that he was talking about drugs. The unidentified man promised Barksdale that the quantity would be available when Barksdale arrived.

Accompanied by several unmarked police units, Barksdale went to the IMA Sports Arena parking lot in Flint. Barksdale called McGhee's phone number. He informed the unidentified man that he was waiting behind the IMA. The man said that he was driving a white Corsica. Barksdale told the man that he was in a bronze pickup truck.

At this point in the phone conversation, Barksdale believed that the man was going to continue the conversation, but Barksdale soon realized that the man failed to properly hang up the phone. Barksdale listened to a conversation that took place between the unidentified man and two or three other unidentified men. In that overheard conversation, the men laid out their plan of action to rob Ralph. Barksdale also heard the closing of car doors, the sound of a motor starting, and the sound of a car radio. He heard the conversation continue in what sounded like a moving vehicle. He learned that the unidentified man with whom he had just spoken tried to trick Barksdale into believing that he was arriving in a Corsica, when he was actually driving a truck.

At a point in the overheard conversation, Barksdale turned off his cellular phone. About ten to fifteen minutes later, a dark Ford Explorer sports utility vehicle arrived from the Lapeer Road entrance of the parking lot, located south of where Barksdale was parked. The Explorer immediately turned left and drove to the west side of the parking lot behind the IMA building. For a couple of minutes, the Explorer circled the parking lot areas south and then north of where Barksdale was parked, moving fairly slowly. Barksdale radioed the marked police units and ordered them to block all parking lot entrances. The Explorer then slowly drove toward the Lapeer Road entrance it had entered. However, when the Explorer came face to face with one of the marked police units that was blocking that entrance, it turned and drove west toward the IMA building and stopped about fifty yards from its entrance. Barksdale saw the front passenger door open. He saw a man lean out of the Explorer and reach to the ground. Four men disembarked from the Explorer and walked toward the entrance of the IMA where they were apprehended by police officers. Barksdale walked to the Explorer, which was parked outside of the marked parking spaces in the lot with its headlights lights on, the driver's window down, and the driver's door open. He found on the ground, within two feet of the front passenger door, two loaded Smith and Wesson handguns. Barksdale then walked down the path that the Explorer had driven. About twenty-five yards from the rear of the Explorer and on the driver's side, he found a Nokia cellular phone and, a couple of feet away, a battery. Barksdale determined that the battery fit the cellular phone. He attached the battery to the phone. The phone came up with the greeting "Hi, Eddie." Barksdale called McGhee's phone number. The phone rang and displayed a city of Flint trunk line on it. The Explorer was also searched. Behind the backseat was a paper bag with the top of the bag rolled down, containing two knit ski masks with holes cut out that

appeared to be eye holes. One of the ski masks was black and one was dark blue. Beside the bag were two other ski masks, one green and the other blue. No illegal substances were found in the Explorer.

The trial court suppressed evidence of the McGhee armed robbery on the ground that the prosecutor failed to establish its relevancy to the conspiracy charge. The trial court ruled that the independent evidence in the case merely established defendants' presence, and no more. The trial court suppressed the overheard statements on the ground that the existence of the conspiracy was not proved by a preponderance of the evidence.

II. Analysis

On appeal, the prosecutor argues that the trial court improperly suppressed the statements as inadmissible hearsay that was not admissible absent independent evidence of the conspiracy. We conclude that the trial court abused its discretion because the independent evidence in this case was sufficient to show the existence of a conspiracy by a preponderance of the evidence, and, accordingly, the overheard statements were not hearsay and were admissible because they were made in the course and in furtherance of the conspiracy.

The decision whether to admit evidence will not be reversed on appeal absent an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Factual findings made in conjunction with a motion to suppress are reviewed for clear error. *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000). However, where the decision regarding the admissibility of evidence involves a preliminary question of law, that question is reviewed de novo on appeal. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

According to MRE 801(d)(2)(E), the overheard statements at issue are not hearsay "if the statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on *independent* proof of the conspiracy." (Emphasis added.) It is well settled in Michigan that, in order for a statement to qualify as a coconspirator statement under MRE 801(d)(2)(E), three requirements must be met. First, there must be independent proof by a preponderance of the evidence that a conspiracy in fact occurred. *People v Vega*, 413 Mich 773, 780-782; 321 NW2d 675 (1982). Proof by a preponderance of the evidence requires that the factfinder believe that the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence. *Blue Cross & Blue Shield v Milliken*, 422 Mich 1, 89; 367 NW2d 1 (1985). Second, the statement must be made during the course of a conspiracy. *People v Bushard*, 444 Mich 384, 394; 508 NW2d 745 (1993). Finally, the statement must be made in furtherance of a conspiracy. *Id.* at 395.

Establishing that the individuals specifically intended to combine to pursue the criminal objective of their agreement is critical because the gist of the offense of conspiracy lies in the unlawful agreement. *People v Justice*, 454 Mich 334, 345; 562 NW2d 652 (1997). Identifying the objectives and even the participants of an unlawful agreement is often difficult because of the clandestine nature of criminal conspiracies. *Id.* at 347. Thus, proof may be derived from the circumstances, acts, and conduct of the parties. *Id.*

Before resolving the element at issue – that is, whether there was independent proof by a preponderance of the evidence that a conspiracy in fact occurred, the question regarding the admissibility of evidence of the underlying McGhee armed robbery must first be addressed.

In general, other acts evidence may not be used to establish a defendant's character to show his or her propensity to commit the charged offense. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). However, logical relevance is the touchstone of the admissibility of uncharged misconduct evidence. *People v VanderVliet*, 444 Mich 52, 61; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In *VanderVliet*, our Supreme Court clarified the standard for admission of prior bad acts evidence. First, the evidence must be relevant to an issue other than propensity under MRE 404(b). *Id.* at 74. Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue or fact of consequence at trial, i.e., *mens rea*. *Id.* at 74, 86. Third, the trial court must employ the balancing process under MRE 403 to determine whether the danger of undue prejudice substantially outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under MRE 403. *Id.* at 74-75. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. *Id.* at 75.

Michigan Rule of Evidence 404(b) permits the judge to admit other acts evidence whenever it is relevant on a noncharacter theory. *VanderVliet, supra* at 62-63, 65. Admission of evidence of bad acts is governed by MRE 404(b), which provides:

(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 other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts “are of the same general category.” *VanderVliet, supra* at 79-80. Here, a review of the record shows that evidence of the McGhee armed robbery was relevant and offered for proper purposes to show motive, opportunity, and identity. Specifically, the record shows that the evidence was offered to explain the reason why Barksdale, accompanied by several marked and unmarked police units, was at the IMA parking lot. Without this evidence, the fact finder would be left with a chronological and conceptual void in the sequence of the factual events. *VanderVliet, supra* at 81. The evidence showed motive and opportunity because Barksdale expressly testified that he led the unidentified man who answered the stolen cellular phone to believe that Barksdale was carrying \$9,000 cash. The evidence was also offered to show the identity of the person or persons involved in the McGhee armed robbery. Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976).

Moreover, the evidence showed preparation, scheme, and plan. Evidence 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. *People v Sabin (After Remand)*, 463 Mich

43, 63; 614 NW2d 888 (2000). Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. *Id.* at 66. Here, other evidence offered at the preliminary examination suggested a high degree of similarity between the uncharged McGhee armed robbery and the charged conspiracy. The evidence showed preparation, scheme and plan in conducting the crime. The McGhee robbery, in which McGhee's cellular phone was stolen, involved the use of weapons and hoods. Here, McGhee's phone was recovered, and weapons and hoods were found near or in the vehicle that defendants were driving. In light of the above, evidence of the McGhee armed robbery satisfied the first two *VanderVliet* prongs.

Because the McGhee armed robbery evidence was relevant and offered for proper purposes under MRE 404(b), its probative value was not outweighed by its highly prejudicial nature. "Prejudice inures when marginally probative evidence would be given undue or preemptive weight by the jury." *People v Rice (On Remand)*, 235 Mich App 429, 441; 597 NW2d 843 (1999). From the above analysis, it cannot be said that the proffered evidence was only marginally probative. Thus, evidence of the McGhee armed robbery was admissible. Accordingly, the trial court abused its discretion in suppressing it.

The question remains whether the trial court erred by concluding that the prosecutor failed to present independent proof by a preponderance of the evidence that a conspiracy in fact occurred. The testimony independent of the statements established that Barksdale communicated his desire to purchase drugs to an unidentified person who answered the cellular phone that had been stolen during an armed robbery by two men who wore hoods with eyeholes. Defendants arrived at the agreed-upon location and were armed, were in possession of four ski masks with eyeholes, and were driving suspiciously throughout the parking lot. Additionally, defendants abruptly turned away from marked police units at the parking lot entrance and left their vehicle with its headlights on and the driver's door open. The stolen cellular phone was found only twenty-five feet away in the path that the vehicle had driven, and no drugs were found to consummate a drug sale. Circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence. *People v Wolfe*, 440 Mich 508, 526; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). The *only* evidence supporting the non-existence of the conspiracy may be the fact that the perpetrators of the McGhee armed robbery and the declarants of the phone and overheard statements, were unidentified, and that no drugs were found on defendants or in their vehicle. The above evidence supporting the existence of the conspiracy outweighs the evidence offered supporting its nonexistence, thus satisfying a preponderance of the evidence standard. *Blue Cross, supra* at 89. Therefore, the independent proof was sufficient to prove by a preponderance of the evidence that a conspiracy existed, and a jury could reasonably infer that all four defendants conspired to commit an armed robbery. Accordingly, we conclude that the trial court abused its discretion by ruling that the coconspirators' statements were not admissible under MRE 801(d)(2)(E) on the ground that independent proof of the conspiracy was not established.¹

¹ The trial court did not address whether the second and third prongs necessary for a statement to be qualified as a coconspirator statement were met, and no argument in this regard is raised on appeal. We note, however, that these prongs were established by a preponderance of the
(continued...)

Reversed and remanded. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald

/s/ Jessica R. Cooper

(...continued)

evidence.