STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 25, 2006
v	No. 266959 Kalamazoo Circuit Court
CORAL EUGENE WATTS, Defendant-Appellee.	LC No. 04-002204-FH

Before: Murphy, P.J., and White and Meter, JJ.

PER CURIAM.

Defendant was charged with first-degree premeditated murder, MCL 750.316, in the 1974 stabbing death of Gloria Steele in Kalamazoo. The circuit court denied the prosecutor's pretrial motion to admit other-acts evidence under MRE 404(b), and this Court denied the prosecutor's application for leave to appeal. *People v Watts*, unpublished order of the Court of Appeals, entered August 3, 2005 (Docket No. 263407). The Michigan Supreme Court, however, in lieu of granting leave to appeal, remanded the case by order to this Court for consideration as on leave granted. 474 Mich 948 (2005). We affirm in part and reverse in part and remand.

The prosecution sought to introduce evidence regarding fifteen murders, eight assaults, and one stalking that were committed by defendant, an admitted serial murderer, in Michigan and Texas in the 1970s and early 1980s prior to defendant's imprisonment for 2 nonfatal assaults in Texas pursuant to a plea agreement in which he was granted immunity on a number of murders, but not the Steele murder. The prosecution also sought to introduce evidence, under MRE 404(b), relative to two incidents in which defendant allegedly knocked on doors in Steele's apartment complex on the day before the murder. Additionally, the prosecution sought to introduce the testimony of Ron Freemire, who prepared a PSIR for defendant in regard to assaults in Kalamazoo in 1974.[1]

[1] Freemire interviewed defendant in preparing the PSIR, and defendant allegedly told Freemire that he committed two or three assaults in Kalamazoo and five or six previously in Detroit. Defendant also allegedly told Freemire about his plan or scheme in committing the assaults, which included going to apartments, knocking on doors searching for young, attractive women who were alone, asking for a fictitious person, leaving, returning to the apartment to leave a

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We first direct our attention to the evidence arising solely out of the 1974 murder as reflected in the testimony at the preliminary examination, and then we shall proceed to review the proposed MRE 404(b) evidence.

At the preliminary examination, retired Western Michigan University (WMU) detective Phillip Herron testified that at approximately 1:40 p.m. on October 30, 1974, he was dispatched to the Stadium Drive Apartments in response to the homicide of Gloria Steele. Steele lived in apartment 350 on the third level of the building. There were a number of individuals already present at the crime scene, including other police officers, prosecutors, and emergency personnel. Steele was found dead, lying on her back on a bedroom floor. She was clothed, and there were blood stains around the area of her chest. There is no dispute that Steele was a black female, 19 years old, 5'4", and 120 pounds.

Joyce DeJong, a forensic pathologist, testified that she did not perform the autopsy on Steele and did not personally observe the body, but she had reviewed the autopsy report from 1974. The report revealed that Steele had been stabbed 30 to 35 times in the chest and abdomen. Most of the stab wounds were on the left side of the upper chest in the breast area. Several of the wounds penetrated and perforated Steele's left lung, and there were also wounds to the heart, including one wound that went entirely through the heart. One of the abdominal stab wounds perforated the colon and aorta, and then went through the third lumbar vertebrae, with part of the weapon remaining lodged in the third lumber vertebrae. According to DeJong, the weapon "looked to be some type of a carving tool or something." Only the shaft of the tool was lodged in Steele; there was no handle attached. DeJong also testified that there was some evidence suggesting manual strangulation, but the evidence was "not entirely definitive for that."

There was no evidence of a sexual assault. DeJong did not believe that fingerprints were collected. To the best of DeJong's knowledge, there was no blood, saliva, semen, hair, fiber, or fingernail scraping evidence collected from the body that could identify the killer. Nothing in the autopsy report identified who killed Steele.

Sam Waller testified that he lived with Steele, as boyfriend and girlfriend, in the apartment where Steele was found murdered. They had a young child together. Waller indicated that on the morning of the murder, Steele had gone to class at WMU and then to an interview at the Upjohn Company. Waller had been out of the apartment that morning, and when he returned to the home around 12:30 p.m., he found Steele's body.[2] Waller recalled seeing a black male

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message for a friend, and then choking the victim until she was unconscious. At the preliminary examination, Freemire did not testify to this information because defense counsel continually objected on various grounds, and although the trial court decided to hear the testimony, reserving a ruling on admissibility, the prosecutor chose to end the questioning. We further note that the prosecutor sought to introduce evidence that defendant, using hand tools, was caught removing some plywood from a ramp on the campus of Western Michigan University 19 days before the murder. The prosecutor does not pursue the matter on appeal; therefore, we decline to address the issue.

[2] There was testimony from an Upjohn employee, Patricia Atkins, who was also a Steele family friend, that Steele left the Upjohn building at about 11:00 or 11:15 p.m. following her interview. Waller indicated that he made an initial stop at the apartment at approximately 11:30 a.m., and

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coming out of a stairwell located in Steele's apartment building at the time Waller was searching the apartment complex in an effort to locate Steele. Defendant is black. As far as Waller was aware, there were no other black individuals living in the apartment building besides himself and Steele.

Waller did not notice anything having been taken from the apartment. But he also indicated that Steele's purse could not be located. Waller further testified that he had never heard Steele mention defendant's name, nor was Waller familiar with defendant. He did not notice any disturbed or overturned furniture or household items; however, Steele's books and keys were lying on the ground near her body.

George Wright testified that he lived in Steele's apartment complex at the time of the murder. He testified that in October 1974 someone pounded on his door.[3] Wright answered the door, and he encountered a black male who was about Wright's size, 5'10" and 168 pounds, and Wright's age, 21, back in October 1974, which description is consistent with that of defendant. The person at the door appeared agitated and was asking for someone, and although Wright could not remember what name the stranger mentioned, he recalled not recognizing the name and informed the stranger to check another apartment. The stranger did not attempt to force his way into the apartment, nor did he assault Wright.

Colette Herrick also lived in the apartment complex at the time of the murder, although it was a different building in the complex than the one in which Steele resided. On the day before the homicide, October 29, an individual rang Herrick's doorbell, and she opened the door slightly, keeping the chain lock in place. The individual at her door was black, looked about 5'8", and he appeared to be in his early twenties. She had never previously seen the man. The stranger was extremely agitated, and he repeatedly asked for "Charles." The stranger did not attempt to force his way into Herrick's apartment. Herrick subsequently identified defendant as the stranger at her door in a photographic array and later in a police lineup.[4]

Robert Brown, police chief at WMU, testified that he responded to the crime scene in October of 1974. His testimony was consistent with that of officer Herron as reflected above. Brown also testified that a brown paper bag containing a "narcotics work kit" had apparently

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Steele's vehicle was not in the parking area. Waller, who was accompanied by a couple of friends that morning, left and returned at about 12:30 p.m., at which time Steele's vehicle was in the parking lot. Waller did not have a set of apartment keys with him, and there was no response when he knocked on the apartment door. Waller and his companions searched the complex, including the laundry area, assuming that Steele was either doing laundry or visiting someone in the complex. Waller was eventually able to obtain apartment keys from a third party, and he discovered Steele's body after entering the apartment.

[3] It is not entirely clear from the transcript whether the incident discussed by Wright occurred on the day before the murder in October 1974. However, the prosecutor proceeds on the basis that the incident occurred on October 29, and defendant does not suggest or argue otherwise.

[4] We note that the trial court's ruling excluded the testimony of Wright and Herrick regarding the incidents. We find that the incidents are part of the res gestae and are admissible for the reasons discussed later in this opinion.

been thrown from the balcony of Steele's apartment, and a syringe was found in a toilet in the apartment.[5] Brown further testified regarding two nonfatal assaults involving young women in Kalamazoo.[6] He indicated that defendant had been arrested for those assaults, and he had the opportunity to interview defendant. Defendant admitted that he had been at the Stadium Drive Apartments, but only on the day before the murder, not the day of the crime, and he denied any involvement in the homicide. Defendant explained that he was at the apartment complex looking for a friend named Charles that he had met at a party or someplace on campus.

Brown stated that the partial weapon found in Steele's body was a skew chisel, which is used in woodworking. In a search of defendant's parents' home in Detroit, where defendant had a room and where his car was being stored, the police found a bag of woodcarving or woodworking tools and a bag of marijuana locked in a closet in defendant's room. No direct connection could be made between the woodcarving tools and the remnant of a tool that remained in the victim's body, and Brown conceded that the woodcarving tools found in defendant's room were common tools and not unique in any way.

Brown additionally testified that the search of defendant's vehicle led police to find two WMU parking tickets, a gold necklace, and a half-dozen pictures of young girls. One of the tickets was dated the day of the homicide, and it was for a parking violation on a lot on the WMU campus. Brown believed that the ticket was written sometime in the morning. The parking lot was located northwest of and across the street from Steele's apartment complex, and it was close in proximity to the apartment.

Eugene Bombich, a retired detective sergeant from the Kalamazoo Township Police Department, testified that, as he was transporting defendant from jail to court in 1974 for an arraignment on one of the nonfatal Kalamazoo assaults, defendant stated, "I guess you have me." And defendant then questioned Bombich, asking, "Do you have me on all of them[?]" The prosecutor points out that defendant used the words "all of them" and not "both of them." Defendant, however, gave no indication to what he was referring when making the comments. Defendant never stated that he killed Steele.

This was the extent of the evidence directly related to the Steele killing. In regard to other-acts evidence, the preliminary examination included the testimony of Lenore Knizacky. Knizacky testified that she lived in an apartment building in the Kalamazoo area near the WMU campus in October 1974. It was not the same apartment complex in which Steele resided, but it was nearby. On the day after the Steele murder, a twenty-something, black male, whom Knizacky had never seen before, knocked at her door. She opened the door slightly, leaving the chain lock in place. The individual at Knizacky's door asked if "Charles" was there. Knizacky told the stranger that no one lived there by that name. The stranger then proceeded to leave.

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[5] Waller's testimony indicated that he was involved in selling drugs, and there was some suggestion that Waller, who discovered the body, may have removed incriminating drug evidence before police arrived.

[6] We shall discuss these assaults by way of the victims' testimony when viewing the MRE 404(b) evidence.

However, he started knocking on other apartment doors, and subsequently returned to Knizacky's door. Again, the stranger asked if "Charles" was there, and Knizacky said "no." Knizacky then offered to give the stranger a pencil and some paper so he could write a message for whomever he was searching, and when she went to retrieve the items inside her apartment, she left the door unchained. The stranger followed her inside and pushed her to the ground. He then climbed on top of her and placed his hands around Knizacky's throat. Knizacky passed out briefly, and as she was regaining consciousness, she saw a shadowy figure get up and leave. Knizacky's attacker did not sexually assault her, nor had he acted threatening when at the door. After the assault, Knizacky identified defendant as her assailant in a police lineup, and she also identified him in court as her assailant at the preliminary examination regarding the Steele murder. She acknowledged that no weapons were used against her during the assault. Knizacky, who is white, 5'4", and has brown hair, was 20 years old and weighed about 120 pounds when she was attacked.

The district court also heard testimony from Diane Hoskins regarding her assault.[7] Hoskins lived in an apartment building in Kalamazoo that was located a few miles from the Steele murder scene. On November 12, 1974, Hoskins, who was 23 years old and 115 pounds at the time of the assault and is 5'7" and white, answered a knock at her apartment door, where she encountered an individual she later identified in a police lineup as defendant. Hoskins was home alone. She recognized defendant, though not by name, and she recognized his vehicle[8] because he had approached the apartment several times in the past, asking for "Charles." Defendant again asked for "Charles," and he asked for a pencil and some paper so he could leave a note. Hoskins thought it was possible that there was someone named Charles living in the apartment complex, and she provided defendant with a pen or pencil and some paper. Defendant walked over to some nearby mailboxes and then returned to Hoskins' doorway to return the writing utensil and paper. At this point, defendant suddenly and ferociously attacked Hoskins, choking her with both hands. A struggle ensued inside the apartment, with Hoskins attempting to fend off defendant while defendant punched and choked Hoskins. Hoskins did not know whether she remained conscious during the assault, and she could not recall defendant leaving her home; he was just gone. She was not sexually assaulted, nor did defendant use a weapon as far as Hoskins could tell, other than his hands.

There were six additional assaults, the fifteen murders, and the one stalking incident. The occurrence and details of some of these crimes were supported by testimony at the preliminary examination from various officers who worked the cases in Michigan and Texas. This testimony was supplemented with documentary evidence that was included in an offer of proof presented by the prosecutor. Further, the crimes for which there was no direct testimony at the preliminary examination were also the subject of documentary evidence included in the offer of proof. The documentary evidence consisted of such materials as police notes and reports, autopsy or medical examiner reports, photographs, and transcripts of interviews with defendant. We have carefully scrutinized the preliminary examination testimony and the extensive documentary evidence, reviewing the facts and circumstances of each of the crimes that the prosecution seeks

[7] Hoskins name at the time of her assault in 1974 was Diane Williams.

[8] Hoskins testified that the vehicle had a WMU parking sticker.

to introduce. We shall discuss the nature of the other-acts evidence in the context of our analysis below.

Other-acts evidence regarding several of defendant's previous crimes was admitted at the preliminary examination in the district court, and defendant was bound over for trial as charged. The circuit court ruled, however, that because there was no direct evidence of identity relative to defendant's alleged involvement in the Steele murder, and because there was only weak circumstantial evidence offered by the prosecution to support a claimed inference that defendant was the killer, the other-acts evidence, considering its quality and quantity, would be inflammatory, highly prejudicial, and thus inadmissible under the law. Following its ruling on the evidence, the circuit court remanded the case to the district court and ordered the district court to reconsider its decision to bind defendant over for trial, but this time without consideration of the other acts-evidence that the circuit court had found inadmissible.

The prosecution contends on appeal that the circuit court abused its discretion by failing to consider the three-part test set forth in *People v VanderVliet,* 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), by failing to articulate its *VanderVliet* analysis on the record, by demanding direct or circumstantial evidence to prove identity before other-acts evidence could be utilized, and by remanding the case to the district court. The prosecution further maintains that it properly offered the other-acts evidence to prove identity, pursuant to *People v McMillan,* 213 Mich App 134; 539 NW2d 553 (1995), to prove a common scheme, plan, or system in doing an act, pursuant to *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000), and to prove defendant's intent, motive, and opportunity to commit the murder. According to the prosecution, the circuit court abused its discretion, in addition to the arguments above, by misapplying the *McMillan* test, by failing to recognize that the Steele murder was patterned after defendant's other acts, and by disregarding facts showing that defendant was familiar with Steele's apartment complex, was capable of being in the complex on the day she was murdered, and was developing a personal plan in 1974 to suddenly attack, stab, and/or choke young women. Finally, the prosecution argues that the case should be assigned to a different circuit court judge on remand.

In general, this Court reviews a trial court's decision regarding the admissibility of other-acts evidence for an abuse of discretion. *People v Crawford,* 458 Mich 376, 383; 582 NW2d 785 (1998). "However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence." *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1999). Questions of law are reviewed de novo. *Id.*

Pursuant to MRE 404(b)(1), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Other-acts evidence, however, may 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[.]" MRE 404(b)(1). It is insufficient for the proponent of the evidence to merely recite one of the purposes articulated in MRE 404(b). *Crawford, supra* at 387. The proponent must also explain how the evidence relates to the recited purposes. *Id.*

Evidence of other acts may be admitted under MRE 404(b)(1) if: (1) the evidence is offered for a proper purpose, i.e., "something other than a character to conduct theory[,]" (2) the evidence is relevant under MRE 402, as enforced by MCR 104(b), "to an issue or fact of consequence at trial[,]" and (3) the probative value of the evidence is not substantially outweighed by its potential for undue prejudice under MRE 403.[9] *VanderVliet, supra* at 74-75, citing and quoting *Huddleston v United States,* 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988). With respect to the first two *VanderVliet* requirements, our Supreme Court in *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), reviewing the law regarding MRE 404(b), stated:

> In *People v Crawford,* 458 Mich 376, 385; 582 NW2d 785 (1998), this Court explained that the prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Crawford, supra* at 387. Where the only relevance of the proposed evidence is to show the defendant's character or the defendant's propensity to commit the crime, the evidence must be excluded.

In *Crawford, supra* at 398, our Supreme Court discussed the heightened need for the careful application of the principles found in MRE 403 when determining the admissibility of other-acts evidence under MRE 404(b):

> Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. In the context of prior bad acts, that danger is prevalent. When a juror learns that a defendant has previously committed the same crime as that for which he is on trial, the risk is severe that the juror will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he "did it before he probably did it again." *People v Johnson,* 27 F3d 1186, 1193 (CA 6, 1994).

Here, with respect to the purposes for which the evidence was proffered, the prosecution focused chiefly on identity, motive, and common scheme, plan, or system in doing an act.

We begin our analysis by first observing some legal errors in the circuit court's approach to the prosecution's motion to admit the other-acts evidence. First, the circuit court's apparent demand that there be direct evidence, as opposed to circumstantial evidence, of defendant's involvement in the Steele murder before evidence under MRE 404(b) can be considered is legally unsound. Circumstantial evidence and reasonable inferences that arise from the evidence

[9] MRE 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Moreover, the language of MRE 404(b) provides no such prerequisite before other-acts evidence can be considered. Next, it is not entirely clear from the record whether the circuit court took into consideration the facts and circumstances with respect to each of the crimes or incidents that the prosecutor sought to admit. It appears that the court viewed them as a whole or lumped them together in conducting the *VanderVliet* analysis without deeper examination of the possibility that one or some of the crimes or incidents could be introduced under *VanderVliet*. That being said, we disagree with the prosecution's argument that the court abused its discretion by not articulating a detailed *VanderVliet* analysis on the record. Trial courts are not required to conduct this analysis on the record. *People v Smith*, 243 Mich App 657, 675; 625 NW2d 46 (2000), remanded on other grounds 465 Mich 931 (2001).

Additionally, with regard to the two incidents in which defendant allegedly knocked on the doors of individuals living in Steele's apartment complex the day before the murder, this evidence was admissible as part of the res gestae. In *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996), our Supreme Court, after acknowledging MRE 404(b), stated, "Nevertheless, it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." Quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978), the *Sholl* Court expressed:

> "It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "compete story" ordinarily supports the admission of such evidence." [*Sholl, supra* at 742 (citations omitted).]

By way of testimony from George Wright and Colette Herrick, there was evidence that defendant was in Steele's apartment complex the day before the murder, that he was agitated and acting strangely, and that he was asking for someone unknown to both Wright and Herrick. Defendant himself told police that he was at the Stadium Drive Apartments the day before the murder, and he did not live in the complex. There was also evidence, the parking ticket, placing defendant in close proximity to the apartment complex on the day of the murder. And an unknown black male was seen leaving Steele's apartment building around the time Steele was found dead, which building, according to Sam Waller, had no other black residents besides himself and Steele. Presentation of the events that occurred in the Stadium Drive Apartments involving defendant on the day directly before the murder, which murder occurred in that same complex, is necessary to give the jury an intelligible presentation of the full context in which disputed events took place. A jury is entitled to the complete story. Testimony by Wright and Herrick regarding the incidents before the day of the murder is admissible as part of the res gestae and not excludable under MRE 404(b).

With respect to the two Kalamazoo assaults, we hold that the evidence is admissible under MRE 404(b) to show common scheme, plan, or system in doing an act. In regard to proving common plan, scheme, or system, our Supreme Court in *Knox, supra* at 510, citing and summarizing *Sabin, supra*, stated:

> We clarified that "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." We cautioned both that "[l]ogical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception of plot," and that "[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Id.* at 64. [Citations omitted; alterations in original.]

In both of the Kalamazoo assaults, defendant was identified as the perpetrator, and in both cases he used the same ruse of asking for someone named "Charles." While there is no direct evidence regarding how the person who killed Steele gained entry into her apartment, entry was made, and there was specific evidence that defendant was in Steele's apartment complex the day directly before the murder asking for someone named "Charles." Taken with evidence that placed defendant in the vicinity on the day of the murder, i.e., the parking ticket, along with the observance of an unidentified black male exiting the stairwell of Steele's apartment building shortly before the body was discovered, Waller's testimony that he did not know defendant and that Steele had never mentioned defendant's name, and defendant posing a question to an officer whether the police had him on "all" of the crimes, it can be inferred that a ruse was used to gain entry into Steele's apartment. Although the probative value of the other acts evidence is marginal, considering the lack of direct evidence that defendant gained entry by way of a ruse, it is not substantially outweighed by the danger of unfair prejudice, given the wildly divergent characteristics of the attacks. Indeed, hearing evidence that defendant assaulted two women through use of his bare hands by choking but not killing them, after hearing that Steele was brutally murdered with a woodcarving tool, suffering 30 to 35 stab wounds, might leave a reasonable juror believing that the attacks were not committed by the same individual, especially when the murder occurred first in time.[10]

With respect to the remaining other-acts evidence, we conclude that the circuit court erred in not allowing evidence regarding the Ann Arbor murders of Rebecca Huff and Glenda Richmond for the purpose of proving identity. Additionally, the circuit court erred in not allowing evidence of the Texas murders of Susan Wolf and Yolanda Garcia[11] for purposes of identity and motive. Defendant confessed to the murders of Wolf and Garcia.

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[10] With regard to the proposed testimony of Ron Freemire, the district court will be limited on remand to consideration of Freemire's actual testimony at the preliminary examination for purposes of determining whether defendant should be bound over to the circuit court. In the context of a circuit court trial should defendant be bound over for trial, Freemire is not precluded under MRE 404(b) from testifying about statements made by defendant as those statements pertain to the assaults against Knizacky and Hoskins.

[11] This victim's name is noted as "Gracia" in some documents and transcripts and "Garcia" in other documents. The investigator's report and autopsy report show "Garcia," and we shall use this name and spelling for purposes of this opinion.

Rebecca Huff was murdered on September 14, 1980, in the Ann Arbor area. She was 30 years old, 5'6", and 140 pounds. Huff was stabbed 54 times in the heart, lungs, liver, and spleen. The type of wounds were consistent with the use of a screwdriver-type instrument. Her body was found at the doorway of her apartment. Huff was a student at the University of Michigan. Her car keys and house keys were found on the ground beside her. There was no evidence of a sexual assault. Huff was taken by surprise, and the police had no known motive for the killing.[12]

Glenda Richmond was murdered on July 13, 1980, in the Ann Arbor area. She was 25 years old, white, 5'5", and 157 pounds. Richmond suffered 28 stab wounds from a "blunt type puncture instrument," possibly a screwdriver. The stab wounds were to "the anterior chest and upper abdominal wall." Richmond's heart and lungs were penetrated by the weapon. Her body was found just outside her apartment building. There was no evidence of a sexual assault. The homicide fact sheet indicates that she was attacked by surprise and killed after a brief struggle.

Susan Wolf was murdered on September 13, 1981, in Texas. She was 21 years old, white, 5'4", and 122 pounds. Wolf was stabbed with a knife five times in her left lung and heart and once in the abdomen. She was found just outside her apartment. There was police testimony, based on defendant's statements to police, which indicated that defendant had grabbed Wolf, knocked her down, straddled her chest, and then stabbed her repeatedly. Wolf was not sexually assaulted, and there is no indication that Wolf knew defendant.

Yolanda Garcia was murdered on April 16, 1982, in Texas. She was white, 22 years old, 5'5", and 119 pounds. Garcia was stabbed twice in the heart. Defendant grabbed Garcia by the neck from behind, spun her around, stabbed her, and then fled. There was no evidence of a sexual assault, and no evidence that Garcia knew defendant. Defendant told Thomas Ladd, a retired homicide detective with the Houston Police Department who testified at the preliminary examination, that he killed Garcia because she had evil in her eyes. Detective Ladd, who

[12] We note that defendant did not directly confess to the Ann Arbor homicides, and they were not part of the Texas plea agreement. Defendant, however, became the chief suspect in the murders after he was stopped by police in his vehicle when they observed him "stalking" a young female who was walking in an area the police had under surveillance relative to an investigation of thefts from parking meters. This stalking incident, which the prosecutor argues should be admissible under MRE 404(b), occurred on November 15, 1980. A search of defendant's vehicle uncovered two screwdrivers and a box of woodworking files. Detective Paul Bunten aggressively pursued defendant as a suspect in the Ann Arbor murders, and the detective interviewed defendant. Defendant cried when Bunten spoke about the murders, and defendant expressed that he was troubled and needed professional help. Defendant also asked Bunten about what a person could expect if one confessed to three homicides. Defendant, however, did not admit involvement in the murders. Shortly after defendant's encounter with the police in Ann Arbor, at which time he was placed under surveillance, he moved to Texas, where more homicides and assaults quickly began occurring. After defendant's arrest in Texas, detective Bunten again questioned defendant, asking him whether Bunten needed to continue looking for the perpetrator of the Ann Arbor murders. Defendant told Bunten that there was no need for Bunten to continue his search for the Ann Arbor killer. Defendant's concession that there was no need for Bunten to look further is tantamount to an expression of guilt and, considering also the other circumstantial evidence, is sufficient for admissibility under MRE 404(b).

extensively interviewed defendant regarding the Texas murders and assaults, including the murder of Susan Wolf, testified that defendant expressed that he was compelled to attack women because they had evil eyes, and he needed to rid them of the evil spirit. This motive was given by defendant in police interviews as reflected in documentary evidence presented to the circuit court.

As indicated in the language of MRE 404(b)(1), evidence of other crimes or wrongs may be admissible against a defendant when the evidence offered tends to prove the identity of the person who committed the crime for which the defendant is on trial. If other-acts evidence is offered to establish identity through a *modus operandi* theory, as it was in this case, (1) there must be substantial evidence that the defendant committed the bad act, (2) there must be some special quality or circumstance of the act tending to prove the defendant's identity or system, (3) it must be material to the defendant's guilt of the charged offense, and (4) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *VanderVliet, supra* at 68-72, citing *People v Golochowicz,* 413 Mich 298, 309; 319 NW2d 518 (1982); see also *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998).

In *Ho*, this Court noted that, "[a]lthough the *VanderVliet* Court adopted a new test for admission of evidence under MRE 404(b), the four-part test of [*Golochowicz, supra*], remains valid to show logical relevance where similar-acts evidence is offered to show identification through modus operandi." *Ho, supra* at 186, citing *McMillan, supra* at 138. In *Golochowicz, supra* at 310, the Supreme Court discussed the level of similarity required to permit the introduction of other-acts evidence for the purpose of identity:

> Where, as in this case, the only conceivable justification for admission of such similar-acts evidence is to prove the identity of the perpetrator, the link is forged with sufficient strength to justify admission of evidence of the separate offense only where the circumstances and manner in which the two crimes were committed are "[s]o nearly identical in method as to earmark [the charged offense] as the handiwork of the accused. Here much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The [commonality of circumstances] must be so unusual and distinctive as to be like a signature." McCormick, Evidence (2d ed), § 190, p 449. [Alterations in original.]

We find that evidence regarding the Michigan murders, except that of Rebecca Huff and Glenda Richmond, the stalking incident, and the Texas assaults and murders, aside from the murders of Susan Wolf and Yolanda Garcia, was properly excluded on the posited theories of admission.[13] Various differences between the facts and circumstances of the other crimes and the Steele murder lead us to conclude that the trial court did not abuse its discretion in excluding the evidence when those crimes are viewed in the context of the analytical framework set forth in

[13] Although the Texas murders and assaults that we are not allowing into evidence could be considered for the purpose of motive, the evidence would be cumulative after consideration of the Wolf and Garcia murders on the issue of motive. See MRE 403.

VanderVliet and its balancing test. Some of the murders and assaults exclusively involved strangulation, choking, drowning, or hanging, with no evidence of a stabbing, and additional murders and assaults, although committed through the use of stabbing instruments, involved very public locations, away from any apartments or homes,[14] or involved stabbing instruments that varied greatly from those used in the Steele murder, or involved a single stab wound or a wound to a part of the body not reminiscent of the Steele murder. In yet other cases, defendant took several personal items and burned them and, on occasion, he would even remove bodies from crime scenes and bury them. These differences call into question the purposes for which the prosecution claimed it sought introduction of the evidence and lessen the probative value of the evidence on identity and common plan such that any probative value is substantially outweighed by the danger of unfair prejudice. Moreover, in attempting to show consistencies between the Steele murder and the other crimes, the prosecution makes assumptions concerning the Steele murder that are not supported by direct evidence or circumstantial evidence and reasonable inferences that flow from the evidence. Even though we may disagree with the trial court regarding exclusion of some of these other crimes under MRE 404(b), we cannot conclude that it abused its discretion.

However, the parallels between the Steele murder and the murders of Huff, Richmond, Wolf, and to a lesser degree Garcia, are so close as to reflect defendant's signature on each of them. As noted in *VanderVliet, supra* at 67 n 18, "In the case of modus operandi to prove identity, the jury focuses on the defendant's modus, not predisposition, to infer that the same person committed both acts."

Both Steele and Huff were young women who were attending college and who were killed at their apartments while alone by being stabbed by hand tools, each suffering an extremely excessive amount of stab wounds, 30 or more, to the left area of the chest, including the lungs and the heart, which ferocity of attack reflected overkill, yet there was no evidence of any sexual assault or prior connection or relationship between defendant and the victims. We also note that both victims were left fully clothed and that each victim's keys were left lying on the ground beside their bodies.

Richmond's murder also involved an unusually high number of stab wounds, 28, to the heart and lungs through use of a hand tool, yet, again, there was no evidence of any sexual assault or prior connection or relationship between Richmond and defendant. Richmond, like Steele, was a young woman of similar stature, and she was found dead on the grounds of her apartment complex.

Wolf was of comparable age to Steele and almost of identical height and weight. Wolf was also viciously stabbed multiple times in the left chest region, including the heart, and once in the abdomen. Similar to the Steele murder, this murder occurred at Wolf's apartment complex, there was no evidence of a sexual assault, and there was no indication that Wolf knew defendant.

[14] The Garcia murder occurred on a street, but this crime goes not so much to establish identity as it does motive. Therefore, it is included in other-acts evidence that should have been admitted.

Garcia was also a young woman, comparable in height and weight to Steele. She was also stabbed in the heart multiple times, and there was no evidence of a sexual assault, nor any evidence that Garcia knew defendant.

These are all very distinctive and unusual crimes such that they can be utilized to show identity, and to the extent that the Wolf and Garcia murders lack the commonality that the Huff and Richmond murders have to the Steele murder, these Texas murders are clearly probative on the issue of motive, where the nature of the Steele murder and surrounding circumstances would leave a reasonable juror begging to know why defendant would commit such a horrific act.

On the subject of motive, this Court's decision in *People v Hoffman*, 225 Mich App 103; 570 NW2d 146 (1997), is enlightening. The *Hoffman* panel held that other-acts evidence regarding the defendant's previous assaults on two women, in which he expressed hatred for women, was properly admitted at a trial on charges of assaulting and kidnapping a female victim. *Id.* at 104, 110. According to the Court, other-acts evidence "tending to establish that defendant hated women was properly admitted at trial for the purpose of proving defendant's motive for his brutal and depraved actions." *Id.* at 104. The Court first defined the term "motive" by reference to Black's Law Dictionary (rev 5th ed), in which the term is defined as the "[c]ause or reason that moves the will and induces action. An inducement, or that which leads or tempts the mind to indulge a criminal act." *Hoffman, supra* at 106. The prosecution sought to introduce evidence of the two prior assaults to show the defendant's hatred of women, thereby establishing the defendant's motive. This Court noted that the distinction between admissible evidence of motive and inadmissible evidence of propensity or character is subtle. *Id.* at 107. The *Hoffman* panel then attempted to explain the distinction, stating:

> The following hypothetical may clarify the differentiation:
>
> "In midafternoon, on the outskirts of a rural Michigan village, an African-American man is savagely assaulted and battered by a white assailant. The assailant neither demands nor takes any money or property. The assailant is a total stranger to the victim. The defendant is later apprehended and charged with the attack. After the arrest, the prosecutor discovers that the defendant had been involved in several other violent episodes in the past, including bar fights, an assault on a police officer, and a violent confrontation with a former neighbor."
>
> Absent a proper purpose (such as to prove a common plan, scheme, or other exception), this other-acts evidence would be inadmissible because its only relevance is to establish the defendant's violent character or propensity towards violence. However, if we were to add to this hypothetical the fact that all the defendant's prior victims were African-American and that defendant had previously expressed his hatred toward blacks, then the evidence of the defendant's prior assaults would be admissible to prove the defendant's motive for his conduct. By establishing that the defendant harbors a strong animus against people of the victim's race, the other-acts evidence goes beyond establishing a propensity toward violence and tends to show why the defendant perpetrated a seemingly random and inexplicable attack. [*Id.* at 107-108 (citations omitted).]

This Court concluded that evidence of the two prior assaults was relevant to the defendant's motive for his unprovoked, cruel, and sexually demeaning assault on his female victim, and that the trial court did not abuse its discretion in finding that the probative value of the other acts evidence did not substantially outweigh the danger of unfair prejudice. *Id.* at 109-110.

Again, retired detective Thomas Ladd, speaking of the Texas murders and assaults and one murder in Grosse Pointe Farms, Michigan, testified that defendant expressed that he was compelled to attack women because they had evil eyes, and he needed to rid them of the evil spirit. When discussing Garcia's murder, Ladd testified:

> *Q*. Did you ask him why he did it, why he killed Yolanda Garcia?
>
> *A*. Yeah, he said she had evil in her eyes.

Ladd further testified:

> *Q*. What did [defendant] say about how he selected his victims?
>
> *A*. He said they had evil in their eyes. He was driving around and he'd see a woman with evil in her eyes and that was the selection process.

There is no dispute that Wolf, Garcia, and Steele were all young, petite women. The motive evidence is extremely probative and vital in the context of the Steele homicide in which defendant allegedly perpetrated a seemingly random and inexplicable attack of great brutality and depravity against a female stranger. See *Hoffman, supra* at 107-108.

The probative value of the evidence regarding the murders of Huff, Richmond, Wolf, and Garcia is vast and substantial with respect to the relevant issues of identity and motive, as the relevant evidence clearly makes it more probable that defendant killed Steele, but not on the basis of propensity, but rather on the basis of similarities between the Steele murder and the four homicides, especially in light of the circumstantial evidence regarding defendant and his presence in Kalamazoo in 1974. Undoubtedly, defendant will incur some prejudice when the other-acts evidence is revealed to the trier of fact, but we cannot conclude that the other-acts evidence is *unfairly* prejudicial, nor that the highly significant probative value of the evidence is *substantially* outweighed by the danger of unfair prejudice, assuming some level of "unfair" prejudice. In *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995), our Supreme Court noted that all evidence offered by the prosecution is prejudicial to some extent, but the fear of prejudice does not render the evidence inadmissible unless the probative value is substantially outweighed by the danger of unfair prejudice. "Unfair prejudice" does not mean damaging. *Id.* The *Mills* Court, quoting *United States v McRae*, 593 F2d 700, 707 (CA 5, 1979), stated:

> "Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403. . . . Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. . . . It is not designed to permit the court to 'even out' the

> weight of the evidence, to mitigate a crime, or to make a contest where there is little or none." [*Mills, supra* at 75 (omissions in original).]

The other-acts evidence that we are allowing to be admitted is not of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. Rather, it is proper and powerful evidence of identity and motive. We note that our ruling effectively bars presentation of eleven murders, six assaults, and one stalking – a majority of the crimes that the prosecution sought to admit – and crimes which defendant indeed committed. The circuit court's abuse of discretion and legal errors arise from its failure to contemplate the admission of some of the other-acts evidence, its demand for direct evidence of defendant's involvement in the Steele murder, and its misinterpretation of MRE 403 by focusing on prejudice, but not properly considering the probative value of the evidence, whether the prejudice was unfair, and whether the probative value was substantially outweighed by the danger of unfair prejudice.

In sum, the prosecution is permitted to introduce, and the district court may consider, evidence of defendant knocking on doors in Steele's apartment complex on the day before the murder, as it constituted part of the res gestae, evidence of the two Kalamazoo assaults against Lenore Knizacky and Diane Hoskins on the basis of common scheme, plan, or system, and evidence regarding the murders of Rebecca Huff, Glenda Richmond, Susan Wolf, and Yolanda Garcia for purposes of showing identity and motive.

We also conclude that it is proper for the district court to reconsider the evidence, as limited by our ruling, and decide if the case should be bound over to the circuit court. Except as otherwise provided by law, a court must conduct a preliminary examination in accordance with the rules of evidence. MCR 6.110(C); see also *People v Makela,* 147 Mich App 674, 683-684; 383 NW2d 270 (1985). Thus, at a preliminary examination, a magistrate may only consider legally admissible evidence. *People v Walker,* 385 Mich 565, 575-576; 189 NW2d 234 (1971), overruled on other grounds by *People v Hall,* 435 Mich 599; 460 NW2d 520 (1990). If, during the preliminary examination, the court determines that evidence being offered is excludable, it must, on motion or objection, exclude the evidence. MCR 6.110(D). And, if the circuit court finds a violation of, in relevant part, MCR 6.110(C) or (D), the court "must either dismiss the information or remand the case to the district court for further proceedings." MCR 6.110(H).

Michigan courts have recognized the circuit court's well-established authority to remand criminal cases for further preliminary proceedings. See *Genesee Prosecutor v Genesee Circuit Judge,* 391 Mich 115, 119-120; 215 NW2d 145 (1974); *People v Dunham,* 220 Mich App 268, 276; 559 NW2d 360 (1996). In this case, the circuit court determined that the district court violated MCR 6.110(D) because the court considered the inadmissible other-acts evidence at the preliminary examination. We conclude that MCR 6.110(C)("the court must conduct the examination in accordance with the rules of evidence") is the provision that actually supports the circuit court's proposition. Regardless, the circuit court's decision to remand the case pursuant to MCR 6.110(H) did not constitute an abuse of discretion because, as indicated above, MCR 6.110(H) permits remand to the district court for violation of MCR 6.110(C). The only modification of the circuit court's ruling in this regard is our direction that some, but not all, of the other-acts evidence be considered by the district court on remand as is consistent with our evidentiary holding.

The prosecutor also contends that this case should be reassigned to a different circuit court judge. Assuming that the district court binds defendant over for trial and that the particular circuit court judge who previously heard this case is again assigned the matter, he shall be permitted to sit on the case because there is no legitimate basis for disqualification.

"The general concern when deciding whether to remand to a different trial judge is whether the appearance of justice will be better served if another judge presides over the case." *Bayati v Bayati,* 264 Mich App 595, 602; 691 NW2d 812 (2004). And, absent actual personal bias or prejudice against either a party or a party's attorney, a judge will not be disqualified under MCR 2.003(B)(1). *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). We find that the circuit court judge did not make any comments on the record indicating actual bias or prejudice against the prosecution. Moreover, there is nothing to indicate that the judge disregarded, disbelieved, or minimized the prosecution's offer of proof. We disagree with the prosecutor's assessment that the circuit court had prejudged the prosecution's case. The record does not support this contention. The judge simply rendered a ruling unfavorable to the prosecution, and this in itself is insufficient to disqualify a judge. *Id.* at 495-496. The prosecution has failed to overcome the heavy presumption of judicial impartiality. *Id.* at 497. Accordingly, the prosecution's argument that the circuit court judge should not be permitted to sit on this case in the future is without merit.

We affirm in part, and reverse in part and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Patrick M. Meter