

Daniel Seltzer appeals his conviction for murder.¹ Seltzer raises one issue, which we revise and restate as whether the trial court abused its discretion by admitting evidence pertaining to another murder committed by Seltzer. We affirm.

The relevant facts follow. On March 29, 1981, the mother of Gerald George Gherardi found Gherardi dead in his apartment at the 100 Center Apartments in St. Joseph County, Indiana. Gherardi's naked body was found draped halfway into his bathtub with his head partly submerged in water. Gherardi, who was homosexual, was a white male and stood about five feet, four inches tall, weighed between 120 and 130 pounds, and had a mustache. Gherardi had worked as a church organist and choir director at a local church. Gherardi's neck was bruised, exhibited "extensive hemorrhag[ing], soft tissue injury," and "his thyroid cornua had been broken from application of blunt force injury." Transcript Volume II at 459-460. There were petechial hemorrhages "seen about the face and the head" due to hypertension in Gherardi's head, and "the lungs of [Gherardi] had a lot of fluid in them, pulmonary edema type fluid." *Id.* at 462-463. These injuries are consistent with a person being killed by asphyxia due to manual strangulation, or "strangulation with the hands." *Id.* at 461.

¹ Ind. Code § 35-42-1-1 (1980) (subsequently amended by Pub. L. No. 326-1987, § 2 (eff. July 1, 1987); Pub. L. No. 296-1989, § 1 (eff. July 1, 1989); Pub. L. No. 230-1993, § 2 (eff. July 1, 1993); Pub. L. No. 261-1997, § 3 (eff. July 1, 1997); Pub. L. No. 17-2001, § 15 (eff. July 1, 2001); Pub. L. No. 151-2006, § 16 (eff. July 1, 2006); Pub. L. No. 173-2006, § 51 (eff. July 1, 2006); Pub. L. No. 1-2007, § 230 (eff. March 30, 2007)).

There were no signs of forced entry into Gherardi's apartment. The apartment looked "ransacked," and there were items missing, including Gherardi's high school class ring and two pocket watches, one of which was gold and one of which was silver. Transcript Volume I at 224. There was loud music playing in the apartment, and marijuana and bottles of alcohol were present. Also, ten cigarette butts were recovered from an ashtray in the living room, including six "plain end or non-filtered" butts, three with white filters and one "yellow colored" cigarette butt. Transcript Volume II at 297. During this time period, Seltzer smoked "Camel non-filter cigarettes." Id. at 352. After a police investigation, the case was "closed pending new information." Id. at 302.

Sometime in 1981 or 1982, Seltzer told his friend and neighbor Paul Bolger that Seltzer had "choked a homosexual" and killed that person. Id. at 336. Also, sometime during 1982, Seltzer had dinner at a restaurant located "[a]t the 100 Center" with Cindy Clark, a woman whom Seltzer had dated and discussed marriage with, and during the dinner Seltzer "pointed over to the apartments, the 100 Center Apartments and told [Clark] that he had killed a guy over there." Id. at 349. Seltzer told Clark that "he had strangled him in the bathtub." Id. On another occasion, Seltzer and Clark were staying at the 100 Center Motel, and Seltzer again mentioned killing someone at the 100 Center Apartments. Seltzer also told James Reid, a former coworker of Seltzer's, that:

[Seltzer] was at a bar drinking and that a guy asked [Seltzer] if he wanted to smoke some pot and listen to some LPs over at his house. And [Seltzer] said yeah. And [Seltzer] said they went there and [Seltzer] sat down on the couch and the guy gave him a tray to [] start rolling up some pot. And [Seltzer] told [Reid] that the guy came out of the bathroom, wherever he

went to while [Seltzer] was rolling some joints, and he sat down next to [Seltzer] naked. And then [Seltzer] just said he lost it and grabbed him by the throat And [then Seltzer] choked him to death.

Id. at 365.

At some point in 1981 or 1982, Seltzer was having dinner with Kathy Adkins² at a restaurant at the 100 Center when Seltzer told Adkins that he “killed a guy over there.” Transcript Volume IV at 8. Seltzer first identified the victim as “GGG,” but he later in the conversation told Adkins that the person’s name was “Gerald Gherardi.” Id. at 10. When Adkins asked where Seltzer had killed Gherardi, he replied “[a]t the 100 Center.” Id. at 8. Seltzer told Adkins that he went back to Gherardi’s “place” and Seltzer “choked [Gherardi], put him in the bath – run the water, put him in the bathtub.” Id. Seltzer explained to Adkins that he put Gherardi in the bathtub “[t]o make it look like he had slipped and fallen.” Id. at 9.

As early as 1982, Seltzer carried a silver pocket watch that had the initials “GGG,” which were Gherardi’s initials, engraved on it. Transcript Volume IV at 20. Seltzer told Adkins that the pocket watch had belonged to Gherardi. In 1983 or 1984, Bolger and Seltzer were “horse playing” and Bolger kicked Seltzer and “smashed” Seltzer’s pocket watch. Transcript Volume II at 337. It was “a small pocket watch, probably silver, a nickel. . . . It was . . . blue or had a different color to it.” Id. at 338. Seltzer did not drive or own a vehicle during the early 1980s.

² Adkins had also at some point in her life had the last names Wilson, Sams, Armstrong, and Freeman.

On June 11, 1983, George Lamphere was found dead in his unit at the University Park Apartments, which were located about five miles from the 100 Center Apartments. Lamphere had been killed by asphyxia due to strangulation. The unit had been set afire, and Lamphere's body was charred. Lamphere was a white male, stood between five feet, six inches and five feet, seven inches tall, and had a mustache. Lamphere had worked as a choir master and church organist at a local church. Lamphere was also homosexual.

When Lamphere's body was found, he was naked. Lamphere's neck exhibited "extensive soft tissue hemorrhag[ing]." Transcript Volume II at 473. Lamphere's thyroid cornua cartilage was fractured in the same way that Gherardi's cornua had been. Also, Lamphere's apartment was in "[a] total state of disarray," including items misplaced and dresser drawers opened and on the floor. *Id.* at 413. There also were beer cans found throughout the apartment.

At some point, Detective William Schwartz of the Mishawaka Police Department executed a search warrant on 1225 Van Buren Street, which was the home of Seltzer at the time. When Detective Schwartz and other officers entered Seltzer's bedroom, they discovered items that had been named in the search warrant, including a "gold tone ballpoint pen," a television, and record albums. *Id.* at 419. Also, on the top of a shelf in Seltzer's bathroom Schwartz found a high school class ring with the initials "GEL," which were Lamphere's initials, inscribed on the inside of the band. The ring was for the Massachusetts high school that Lamphere had attended. Seltzer was eventually found guilty of murdering Lamphere.

In 1993, Adkins called “Crime Stoppers in Mishawaka” and eventually spoke with Officer Craig Whitfield of the Mishawaka Police Department. Transcript Volume IV at 13. At Whitfield’s urging, Adkins wrote a letter to Seltzer, who was in the Department of Correction on the Lamphere murder. After the initial letter, Adkins decided not to continue writing to Seltzer, but Officer Whitfield continued to write Seltzer in Adkins’s name and attempted to persuade Seltzer to divulge details of Gherardi’s murder. Seltzer also wrote numerous letters back. In one letter dated May 16, 1994, Seltzer wrote that he had killed someone at the 100 Center Apartments, but the facts in the account were inconsistent with those present in Gherardi’s murder. The Mishawaka Police Department had not heard of an incident which matched the description provided by Seltzer in the letter.

On September 19, 2007, contemporaneously with Seltzer being released from prison on the Lamphere murder, the State charged Seltzer with the murder of Gherardi. Seltzer was transferred to the St. Joseph County Jail.

In October 2007, Douglas Knox, a prisoner in the county jail, contacted the police metro homicide unit regarding the Gherardi murder. Knox, who also knew Seltzer back in the early 1980s, had spoken with Seltzer about both the 1981 and 1983 murders while in jail. Seltzer had told Knox “about this girl that [Seltzer had] kind of been intimidated [sic] with,” and how “she tried to contact [Seltzer] by mail and he was concerned because of the return address [Seltzer] wasn’t sure if it was like a set up” Transcript Volume V at 213. Seltzer told Knox that he had given the woman “misleading

information,” and Knox found that interesting “because why would he try to mislead her, why didn’t he tell her the truth if there was anything not to hide.” Id. at 214.

Seltzer also came into contact with Jeff Smith, another inmate in the county jail in 2007. Seltzer talked to Smith about a case he was awaiting trial on involving “[a] murder of a boy named Gherardi.” Id. at 174. Seltzer told Smith that “it was an old case [and] that the police kept cigarette butts and they found some DNA . . . [and] that his girlfriend turned him in” Id. After Smith told Seltzer that he would be getting out of jail soon, Seltzer asked Smith if he would “find a girl that he knows.” Id. at 175. Seltzer wanted Smith to “pick her up and kind of get her out of town so she wouldn’t testify against him.” Id. at 175-176. Seltzer wrote a note to Smith to remind Smith, and the note listed both the names “Cynthia June Clark” and “Kathleen Freeman A.K.A. Kathleen Wilson, Kathleen Sams.” State’s Exhibit 4.

Also, in the summer of 2008, Seltzer shared a jail cell with Michael Anderson, who was in jail as a habitual traffic violator. Seltzer told Anderson that there was “one particular lady . . . that knew that [Seltzer] had committed [a crime],” and that “after all this time she was willing . . . to like give him up And if [Anderson] got out . . . and take care of the situation for [Seltzer] . . . he would be able to repay [Anderson].” Transcript Volume V at 108-109. Seltzer also told Anderson about a former cellmate who Seltzer had “gave some information to . . . about the case” and was prepared to testify, but that Seltzer “wasn’t worried about that . . . because he kept a lot of his legal

information in his cell and he could always . . . tell his lawyer . . . that the guy got into his paperwork.” Id. at 108.

In May 2008, also while in the county jail, Seltzer came into contact with another inmate named Erik Thompson, and Seltzer had multiple conversations with Thompson about Seltzer’s murder charge. At one point, Seltzer told Thompson that “if it wasn’t for them damn cigarette butts I would have never been in trouble.” Id. at 191. Seltzer told Thompson that they were “Camel non-filter” cigarette butts. Id. Seltzer also told Thompson that the murders were “connected because they were both organ players at the same church and they were both fags” Id. at 193. Seltzer told Thompson that Gherardi “was strangled” and that Gherardi “fought back” Id. at 195.

A jury trial was held on Gherardi’s murder beginning on February 3, 2009. The State introduced evidence that four of the cigarette butts which were recovered from Gherardi’s apartment and subjected to DNA testing matched Seltzer’s DNA profile. Three of the four cigarette butts which contained Seltzer’s DNA were “non-filtered cigarette butts and they were white paper.” Id. at 157. The fourth was a “non-filtered cigarette butt[] but had Camel in blue letters on [it].” Id.

In addition, the State presented evidence surrounding the events from the 1983 Lamphere murder.³ Specifically, the State introduced evidence that both Gherardi and Lamphere were murdered by manual strangulation, and that in both cases the thyroid cornua was broken due to the strangulation. Dr. Rick Hoover, the person who performed

³ The State filed its Notice of Intention to Use Evidence Under Rule 404(b) on January 29, 2009.

Gherardi's autopsy, testified that the fracture of a thyroid cornua was "an uncommon finding," and that it is a circumstance which he has noticed in less than twenty-five percent of the manual strangulation cases he has seen. Transcript Volume II at 464-465. Hoover also testified that strangulation victims "are almost always females." Id. at 468. On redirect examination, Hoover testified that the fracturing of a thyroid cornua is attributable to a combination of the strength of the particular cornua and the technique of the assailant. "You have to grab it in the right spot, squeeze hard and the cornua has to be brittle enough" for it to fracture. Id. at 489.

At one point during the trial, and as requested by Seltzer, the jury was admonished by the trial court regarding the evidence from the 1983 murder of George Lamphere. Specifically, the trial court informed the jury that the evidence of Lamphere's murder had "been received solely on the issue of [Seltzer's] identity with respect to this charge. The evidence should not be considered by you for any other purpose other than that limited purpose." Id. at 423.

On February 9, 2009, the jury found Seltzer guilty of murder. On March 11, 2009, the trial court sentenced Seltzer to sixty years in the Department of Correction.

The sole issue is whether the trial court abused its discretion by admitting evidence pertaining to another murder committed by Seltzer. We review the trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. Roche v. State, 690 N.E.2d 1115, 1134 (Ind. 1997), reh'g denied. We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Joyner v.

State, 678 N.E.2d 386, 390 (Ind. 1997), reh’g denied. Even if the trial court’s decision was an abuse of discretion, we will not reverse if the admission constituted harmless error. Fox v. State, 717 N.E.2d 957, 966 (Ind. Ct. App. 1999), reh’g denied, trans. denied. We may find harmless error where “the conviction is supported by substantial independent evidence of guilt sufficient to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction.” Ware v. State, 816 N.E.2d 1167, 1175 (Ind. Ct. App. 2004).

Indiana Evidence Rule 404(b) provides, “[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. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”⁴ The well-established rationale behind Evidence Rule 404(b) is the jury is precluded from making the “forbidden inference” that the defendant had a criminal propensity and, therefore, engaged in the charged conduct. Goldsberry v. State, 821 N.E.2d 447, 455 (Ind. Ct. App. 2005).

In evaluating the admissibility of evidence under Evidence Rule 404(b), a trial court must: (1) decide if the evidence of other crimes, wrongs, or acts is relevant to a

⁴ In his brief, Seltzer points out that “[i]n 1981, when this crime was committed, Indiana had not adopted the rules of evidence.” Appellant’s Brief at 6. Seltzer does not, however, develop an argument that the Indiana Rules of Evidence, which were followed at his trial, were improper to use. Further, as the State points out, “[e]videntiary rules are procedural rules, not substantive rules, and therefore the evidentiary rules in effect at the time of the trial are those that are applied to the case.” State’s Brief at 9 n.2 (citing Hardin v. State, 611 N.E.2d 123, 128-129 (Ind. 1993) (noting that Federal Rule of Evidence 404(b) was adopted in Lannan v. State, 600 N.E.2d 1334, 1339 (Ind. 1992) and was to be applied at any trial from that day forward, including the remand of defendant’s case)).

matter other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403. Id. at 447. "To determine whether the trial court abused its discretion, we employ the same test." Wilhelmus v. State, 824 N.E.2d 405, 414 (Ind. Ct. App. 2005) (quoting Iqbal v. State, 805 N.E.2d 401, 406 (Ind. Ct. App. 2004)).

Seltzer argues that the trial court erred when it allowed in evidence related to the murder in 1983 of George Lamphere. Seltzer argues that "[t]here were insufficient similarities between the murder of [Lamphere] and [Gherardi] to have them described as 'signature crimes.'" Appellant's Brief at 5. Specifically, Seltzer argues that in Lamphere's murder, "large items, such as a television and records were removed from [Lamphere's] home," as well as "a class ring [and] gold pen," which were recovered from Seltzer's apartment. Id. at 10. "There were no similarly large items missing from the Gherardi apartment." Id. Seltzer argues that although "jewelry, including a monogrammed pocket watch were taken from the Gherardi apartment, no items were recovered from [Seltzer's] possession." Id. Seltzer also argues that "although both victims died as a result of manual strangulation, that in and of itself is not sufficient to be considered [a] 'signature' method killing." Id. Thus, Seltzer argues that the "prejudicial impact on the jury far outweighed any probative value to allow the jury to hear, not only of the prior conviction for murder, but the details of the Lamphere murder . . ." Id. at 5.

The evidence surrounding the 1983 murder of George Lamphere was admitted by the trial court under the identity exception. "The identity exception to the general

prohibition on propensity evidence is crafted primarily for ‘signature’ crimes with a common modus operandi.” Thompson v. State, 690 N.E.2d 224, 234 (Ind. 1997). The rationale behind this exception “is that the crimes, or means used to commit them, were so similar and unique that it is highly probable that the same person committed all of them.” Id. (citing Lockhart v. State, 609 N.E.2d 1093, 1097 (Ind. 1993)). The test applied for determining whether evidence may be admitted under the identity exception as a “signature crime” is:

[T]he State may prove identity by showing that the similarities between the prior offense and the crime charged are so strong and the method so clearly unique that it is highly probable that the perpetrator of both is the same person. “However, the repeated commission of similar crimes is not enough to qualify for the exception to the general rule. The acts or methods employed must be so similar, unusual, and distinctive as to earmark them as the acts of the accused.”

Lockhart, 609 N.E.2d at 1097 (quoting Lannan v. State, 600 N.E.2d 1334, 1340 (Ind. 1992) (quoting Willis v. State, 268 Ind. 269, 272, 374 N.E.2d 520, 522 (1978))). The inquiry has also been stated as: “Are these crimes so strikingly similar that one can say with reasonable certainty that one and the same person committed them?” Davis v. State, 598 N.E.2d 1041, 1048 n.2 (Ind. 1992), reh’g denied, cert. denied, 510 U.S. 948, 114 S. Ct. 392 (1993).

Here, a comparison of the Gherardi and Lamphere murders reveals many similarities. Both Gherardi and Lamphere were homosexual white males of slight builds, and both men had mustaches. Both men were church organists in St. Joseph County. Both men died of asphyxia due to manual strangulation which is an uncommon way for a

male to be murdered. The bodies of both Gherardi and Lamphere exhibited extensive soft tissue hemorrhaging in the neck region, and in each case, the thyroid cornua had been fractured, which was something Dr. Hoover had noticed in less than twenty-five percent of manual strangulation cases he had seen and was attributable in part to the technique of the assailant. Also, the bodies of both Gherardi and Lamphere were naked when they were found and were subjected to physical trauma after they had been killed. Gherardi's body was placed halfway into a bathtub and his head partially submerged in water, and Lamphere's body was burned.

Also, the residences of both Lamphere and Gherardi were ransacked and were left in a state of disarray. In each case, there were no signs of forced entry, and there was evidence present in each residence that alcohol had been consumed. Also, possessions were taken in each case. Significantly, in both cases the victim's high school class ring had been stolen. Finally, both murders were committed within walking distance of Seltzer's residence which is significant because Seltzer did not drive.

Given the striking similarities between the murder of George Lamphere in 1983 and the murder of Gerald Gherardi in 1981, we cannot say that the trial court abused its discretion in determining that whatever prejudice might arise was outweighed by the probative value of the evidence. See, e.g., Lockhart, 609 N.E.2d at 1097 (holding that there were striking similarities, including the demographic of the victim, the lack of forced entry into the residences, the fact that both victims were found naked, the fact that both victims died by similar methods and of similar wounds, and that in each case, "the

killer fled with a picture of his victim,” and that therefore it was proper to admit the evidence of the previous murder under the identity exception to Evid. R. 404(b)); Brown v. State, 577 N.E.2d 221, 227 (Ind. 1991) (holding that the circumstances surrounding two murders caused by asphyxia due to strangulation were “distinctive enough to constitute signature crimes . . .”), reh’g denied, cert. denied, 506 U.S. 833, 113 S. Ct. 101 (1992). Further, any prejudice should have been minimized by the jury admonishment given by the trial court that the evidence presented which pertained to the 1983 Lamphere murder “has been received solely on the issue of [Seltzer’s] identity with respect to this charge. The evidence should not be considered by you for any other purpose other than that limited purpose.”⁵ Transcript Volume II at 423; see Wilhelmus, 824 N.E.2d at 415 (noting that “any prejudice should have been minimized by the following final instruction: ‘Evidence has been introduced that the Defendant was involved in a crime other than that charged in the information. This evidence has been received solely on the issue of Defendant’s identity. This evidence should be considered by you only for the limited purpose for which it was received’”).

Even if admission of evidence related to the 1983 Lamphere murder was in error, not all trial court error is reversible. See Ind. Trial Rule 61. “The improper admission of evidence is harmless when the conviction is supported by substantial independent

⁵ We note that the State argues that “[Seltzer] has waived review of this claim by failing to provide an adequate record,” because Seltzer “has failed to provide this Court with the transcript from the pre-trial hearing that was held on this matter.” State’s Brief at 8. Because we find that the trial court did not abuse its discretion in admitting the evidence surrounding the 1983 Lamphere murder, we need not address this argument.

evidence of guilt sufficient to satisfy the reviewing court that there is no substantial likelihood that the improperly admitted evidence contributed to the verdict.” Winbush v. State, 776 N.E.2d 1219, 1221 (Ind. Ct. App. 2002), trans. denied. “Error in the admission of evidence is disregarded unless it affects the substantial rights of a party.” Id.

During the trial, a multitude of evidence was presented from which a jury could have found Seltzer guilty beyond a reasonable doubt of Gherardi’s murder. First and foremost, DNA matching Seltzer’s profile was identified on four non-filtered cigarette butts which were recovered from Gherardi’s apartment. Seltzer was a smoker of non-filtered cigarettes in the early 1980s. Seltzer also wrote a letter received by Officer Whitfield in which he confessed to killing someone at the 100 Center Apartments, although the circumstances described in the letter were inconsistent with those of Gherardi’s murder.

Also, the State presented testimonial evidence from four people all of whom knew Seltzer in the early 1980s and all of whom were told by Seltzer in varying degrees of specificity that he had killed someone prior to 1983. Most specifically, in conversation with Adkins, Seltzer first identified the victim as “GGG,” but he later in the conversation told Adkins that the person’s name was “Gerald Gherardi.” Transcript Volume IV at 10. Seltzer told Adkins that he went back to Gherardi’s “place” and Seltzer “choked [Gherardi], put him in the bath – run the water, put him in the bathtub.” Id. at 8. Seltzer explained to Adkins that he put Gherardi in the bathtub “[t]o make it look like he had

slipped and fallen.” Id. at 9. Seltzer also had conversations with Bolger, Clark, and Reid about Gherardi’s murder.

Adkins also recalled that Seltzer carried a silver pocket watch with the initials “GGG” on it, and that Seltzer at one point told Adkins that the pocket watch had belonged to Gherardi. Id. at 20. Clark also recalled that Seltzer carried a silver pocket watch that had initials engraved on it which “weren’t [Seltzer’s].” Transcript Volume II at 352. Bolger recalled that in 1983 or 1984 he broke Seltzer’s silver pocket watch while they were “horse playing.” Id. at 337.

Also, Seltzer spoke with a number of prison inmates about his involvement in Gherardi’s murder. Seltzer told Knox that he had given a woman whom had been writing Seltzer about the Gherardi murder “misleading information.” Transcript Volume V at 214. Seltzer asked Smith, whom Seltzer thought was about to get out of jail, to “find a girl that [Seltzer] knows” and “pick her up and kind of get her out of town so she wouldn’t testify against him.” Id. at 175-176. Seltzer wrote Smith a note, which was admitted into evidence, listing both the names “Cynthia June Clark” and “Kathleen Freeman A.K.A. Kathleen Wilson, Kathleen Sams.” State’s Exhibit 4. Seltzer told Anderson that there was “one particular lady . . . that knew that [Seltzer] had committed [a crime],” and that “after all this time she was willing . . . to like give him up And if [Anderson] got out . . . and take care of the situation for [Seltzer] . . . he would be able to repay [Anderson].” Id. at 108-109. Seltzer also told Anderson about a former cellmate who was prepared to testify about things that Seltzer had told him. Finally, Seltzer told

Thompson that Gherardi “was strangled” and Gherardi “fought back” Id. at 195. Seltzer also complained to Thompson that “if it wasn’t for them damn cigarette butts I would have never been in trouble.” Id. at 191.

Based upon the substantial independent evidence of guilt, even assuming that the trial court erred in admitting the evidence of the 1983 murder, any such error was harmless. See Holden v. State, 815 N.E.2d 1049, 1054 (Ind. Ct. App. 2004) (holding that even if evidence admitted under an exception to Ind. Evidence Rule 404(b) was error, any such error was harmless), trans. denied.

For the foregoing reasons, we affirm Seltzer’s conviction for murder.

Affirmed.

MATHIAS, J., and CRONE, J., concur.