

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLAN CHARLES BROWN,

Defendant-Appellant.

UNPUBLISHED
October 29, 1996

No. 180969
LC No. 94-050263

Before: Cavanagh, P.J., and Murphy and C.W. Simon, Jr.,* JJ

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, of first-degree sexual conduct. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). The victim of defendant's misconduct was his live-in girlfriend's twelve-year-old daughter. We affirm.

Defendant claims that he was denied his constitutional right to confront the witnesses against him when the trial court ruled that the victim could not be questioned about a prior incident in which she accused her uncle, who was convicted, of criminal sexual conduct. Defendant argues that the evidence was relevant to attack the victim's credibility by showing that although defendant's misconduct allegedly occurred over the course of time, she knew how the system worked and knew how to report such conduct.

Defendant's claim is essentially that the trial court improperly limited the scope of cross-examination of the victim. In this case, even assuming, without deciding, that the testimony was relevant, we find any error to have been harmless.

Two inquiries are pertinent to whether an error of constitutional dimension is harmless. One is whether the error is so offensive to the maintenance of a sound judicial process that it can never be regarded as harmless, and the other is whether the error is harmless beyond a reasonable doubt. *People v Robinson*, 386 Mich 551, 563; 194 NW2d 709 (1972).

* Circuit judge, sitting on the Court of Appeals by assignment.

An erroneous limitation on cross-examination which prevents the exploration of a witness' bias is not so offensive to the judicial process that it can never be regarded as harmless. *People v Minor*, 213 Mich App 682, 687-688; 531 NW2d 576 (1995), and in this case, in light of the corroborating eyewitness testimony of the victim's sister, we do not believe that the effect of defendant's diminished cross-examination of the victim deprived him of a more favorable verdict. *Id.* at 687. We believe any error was harmless beyond a reasonable doubt.

Next, defendant challenges the admission of the victim's testimony regarding prior sexual acts between the victim and defendant. Defendant argues that the trial court failed to balance the probative value of the evidence against the danger of unfair prejudice, and that when such balancing is done, it is clear that the evidence should not have been admitted. We review such evidentiary issues for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Pursuant to MRE 404(b), 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. *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). It is further the case that other acts evidence is not admissible simply because it does not violate MRE 404(b). The trial court must also determine whether the evidence is relevant under MRE 402, and whether the danger of unfair prejudice substantially outweighs the probative value of the evidence under MRE 403. *People v Ullah*, 216 Mich App 669, 674-675; ___ NW2d ___ (1996).

An exception to the general rule barring the admission of prior acts evidence was set forth in *People v DerMartex*, 390 Mich 410; 213 NW2d 97 (1973). In *DerMartex*, our Supreme Court stated that "the probative value outweighs the disadvantage where the crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense." *Id.* at 413. This is especially true where the victim is a member of the defendant's household. *Id.* at 415. The rationale behind the exception is that sexual intercourse and attempts thereat are most frequently the culmination of prior acts of sexual intimacy, and those prior acts tend "to throw light upon the transaction itself, explaining and rendering more natural and probable that which, without such explanation, might appear unnatural and improbable." *Id.* at 414 n 2, quoting *People v Jenness*, 5 Mich 305, 324-325 (1858).

Therefore, we hold that although the trial court did not set forth a balancing analysis on the record, the prior acts evidence was admissible under *DerMartex*, and its probative value outweighed any unfair prejudice. Under such circumstances, we find no abuse of discretion.

Defendant also argues that reversal is required because plaintiff did not comply with the notice requirement set forth in MRE 404(b) and *VanderVliet*, *supra*, at 89, which requires the prosecution to provide reasonable pretrial notice that it will be seeking to admit evidence of prior crimes, acts or wrongs. We disagree.

In *Ullah*, *supra*, the plaintiff failed to give pretrial notice of its intent to admit prior acts evidence. This Court reversed the defendant's conviction and remanded for a new trial. However, we

do not read *Ullah* as mandating reversal when the plaintiff fails to comply with the notice requirement. In *Ullah*, the failure to provide notice was merely one of several factors which contributed to this Court's holding. *Id.* at 676. Instead, we consider the trial court's admission of the prior acts evidence in the absence of pretrial notice to be an error in the admission of evidence subject to harmless error analysis. *Id.*

In this case, defendant moved the trial court, prior to trial, to rule on the admission of the prior acts evidence. Although plaintiff did not give the required pretrial notice, it cannot be said that defendant was unfairly surprised or did not have time to prepare arguments against its admission, when in fact defendant argued, on his own motion, against the admission of the evidence prior to trial. As a result, we fail to see how defendant was prejudiced by plaintiff's failure to provide pretrial notice, and find any error to have been harmless.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Charles W. Simon, Jr.