STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ROY WELSH,

Defendant-Appellant.

UNPUBLISHED
May 23, 1997

No. 188800
Allegan Circuit Court
LC No. 95-009713-FC

Before: Murphy, P.J., and Markey and A.A. Monton*, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction for second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). We affirm.

Defendant, the fiancee of complainant's mother, contends that reversal is required because the prosecution did not produce a tape recording of an interview with the complainant. We disagree. The record shows that the prosecution did produce two transcripts of the interview and thus complied with the mandatory disclosure requirement of MCR 6.201(A). When defendant requested the tape itself, the court, in a discretionary ruling, ordered the prosecution to make reasonable efforts to produce it before trial. *People v Laws,* 218 Mich App 447, 454-455; 554 NW2d 586 (1996). When the prosecution was unable to produce the tape at the time of trial, defendant did not object and provided no proof that the prosecution failed to make reasonable efforts to procure the tape from the Phoenix Police Department. Thus, defendant's alleged error is not preserved, and defendant has waived issue on appeal. See *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995).

Defendant next contends that the court erred by failing to hold an evidentiary hearing regarding evidence admitted under MRE 404(b). The court held a hearing where the prosecution made an offer of proof regarding the introduction of complainant's sister's testimony at trial. Defendant has offered no reason why the offer of proof was unacceptable, except to point out that the sister was not a credible witness, which is an issue for the jury. *People v McElhaney,* 215 Mich App 269, 287; 545

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

NW2d 18 (1996). Defendant also contends that the court should have delayed its ruling until some unspecified point in trial when the theories of the case were demonstrated. By its plain terms, MRE 404(b) neither requires the court to delay its ruling nor requires an evidentiary hearing. To require an evidentiary hearing would contravene the flexible approach in evaluating evidence under MRE 404(b) that our Supreme Court has encouraged trial courts to take under *People v VanderVliet*, 444 Mich 52, 89-90; 508 NW2d 114 (1993). We decline to do so. See also *People v Williamson*, 205 Mich App 592, 596; 517 NW2d 846 (1994).[1]

Finally, defendant contends that the court abused its discretion in admitting the MRE 404(b) evidence. We disagree. The prosecution moved before trial to admit testimony of the complainant's sister regarding uncharged prior criminal sexual conduct that defendant committed against the sister involving acts similar to those charged in this prosecution. Under the specific circumstances of this case, the evidence was not "so horrendously prejudicial" that it should have been suppressed as being more prejudicial than probative. Cf. *People v Starr*, 217 Mich App 646, 647, 650-651; 553 NW2d 25 (1996) (Markey, J., dissenting). The decision to admit evidence is within the trial court's discretion and will only be disturbed on appeal in light of an abuse of discretion, i.e., where the court's ruling has no basis in law or fact. *Id.* at 649; *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Under *VanderVliet*, *supra* at 74-75, our Supreme Court set forth a new four-pronged analysis applicable to requests for the admission of similar acts evidence: (1) the evidence must be relevant to an issue other than propensity under MRE 404(b) to protect against the introduction of extrinsic act evidence for the sole purpose of proving character; (2) the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue or fact of consequence; (3) the trial court should conduct the balancing test of MRE 403, i.e., whether the danger of undue prejudice substantially outweighs the probative value of the evidence; and (4) the trial court shall, upon request, instruct the jury that similar acts evidence is to be considered only for the proper purpose underlying its admission pursuant to MRE 105. Here, the prosecution argued that defendant had a plan, scheme, or method of sexually abusing young females in his household and for whom he was an authority figure. "Such a plan or scheme evidences that this is similar conduct and is not so general as to suggest a propensity to sexually assault children." *Starr*, *supra* at 650-651.

Unfortunately, the trial court did not apply each of the *VanderVliet* elements to the prosecution's request that the complainant's sister be permitted to testify under MRE 404(b). Although we review the admission of evidence for an abuse of discretion, *McAlister*, *supra*, we believe that we may conduct our own de novo review to determine whether MRE 404(b) applies to the proposed testimony at issue here and whether the trial court correctly applied the law. See, e.g., *Burgess v Clark*, 215 Mich App 542, 545; 547 NW2d 59 (1996); *St George Greek Orthodox Church of Southgate v Laupmanis Associates, PC*, 204 Mich App 278, 282; 514 NW2d 516 (1994).

We acknowledge at the outset that MRE 404(b)(1) is a rule of inclusion, not exclusion. *VanderVliet*, *supra* at 64. This rule states:

> 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. [MRE 404(b)(1).]

First, we find that the sister's testimony was relevant to an issue or fact of consequence other than propensity. Specifically, it was relevant to defendant's motive and scheme of sexually assaulting girls significantly younger than he, as well as his design and plan of sexually abusing children within his household. In response, defendant argues that the sister was an habitual liar, so her testimony was not credible, and it impermissibly dealt with defendant's motive or propensity to commit criminal sexual conduct. MRE 404(b) does not, however, depend upon a positive credibility determination, but instead hinges on relevance. *VanderVliet, supra* at 60-65; see also *People v Brooks*, 453 Mich 511, 520; 557 NW2d 106 (1996); *People v Gibson*, 219 Mich App 530, 532-533; 557 NW2d 141 (1996). Moreover, if the sister did present herself as an incredible witness, it is unlikely that the jury believed her; thus, defendant cannot successfully assert that he was harmed by her testimony. In other words, defendant cannot claim both that her lack of veracity or mental acuity justified the exclusion of her testimony as incredible and then claim to the contrary that, under the fourth test, the danger of undue prejudice substantially outweighed the probative value of her testimony, which requires an assumption that the jury believed her.

We also reject defendant's assertion that the sister's testimony regarding alleged sexual acts that defendant engaged in with her differed from those alleged acts against the complainant, thereby precluding the prosecution from establishing any scheme, plan, or system in doing an act. The testimony in *VanderVliet* was comparable to the disputed testimony in the instant case and was presented by multiple witnesses. The testimony in *VanderVliet* was arguably even less similar to the charged offense than the sister's testimony at issue in this case; nevertheless, the testimony was admitted in *VanderVliet, supra* at 69. Accord *Starr, supra* at 652; see also *People v Lee (After Remand)*, 212 Mich App 228, 245-247; 537 NW2d 233 (1995).

Also, while the sister's testimony may have been prejudicial, as was the testimony admitted into evidence in *VanderVliet*, we do not believe that the danger of undue prejudice "substantially outweighs" the probative value of the evidence. Defendant provides no case authority for the proposition that the sister's prior lack of veracity negated the probative value of her testimony regarding defendant's mens rea, lack of accident, or common plan or scheme. *VanderVliet, supra* at 87; cf. *Starr, supra* at 647-648.[2] Finally, the trial court gave the jury a limiting instruction with respect to the sister's testimony, informing the jurors to consider the testimony "for only one limited purpose; that is, to help you judge the defendant's motive or intent." The court told the jury that it "must not decide that it shows that the defendant is a bad person or that the defendant is likely to commit crimes.

You must not convict the defendant here because you think he is guilty of other bad conduct." Defendant fails to claim any error arising out of this limiting instruction.

Accordingly, we find that the sister's testimony was not offered to establish defendant's propensity to sexually abuse, was relevant to defendant's alleged plan or scheme of sexually assaulting young women residing in his home, was presented along with a limiting instruction to the jury, and its prejudicial impact did not substantially outweigh the testimony's probative value. We therefore find abuse of discretion in the admission of the sister's testimony. *VanderVliet, supra* at 74-75; *McAlister, supra*.

Affirmed.

/s/ Jane E. Markey
/s/ Anthony A. Monton

I concur in result only.

/s/William B. Murphy

[1] In *Williamson, supra*, this Court relied on *VanderVliet, supra*, in affirming the admission of evidence under MRE 404(b) and then stated that "[n]either *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), nor *People v Engleman*, 434 Mich 204; 453 NW2d 656 (1990), mandates that an evidentiary hearing be held where, as in this case, no motion in limine had been made by the defense." Here, although the prosecution filed a motion in limine to have the complainant's sister's testimony admitted into evidence under MRE 404(b), both the complainant and the sister were in Arizona with their father and could not be present for the May 2, 1995 motion hearing.

[2] On March 19, 1997, the Michigan Supreme Court granted the prosecution's application for leave to appeal in *Starr, supra*.