STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY P. HERNANDEZ,

Defendant-Appellant.

UNPUBLISHED
June 27, 1997

No. 188733
Oakland Circuit Court
LC No. 94-132906

Before: Gribbs, P.J., and Sawyer and Young, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), and unarmed robbery, MCL 750.530; MSA 28.798. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to thirty to sixty years' imprisonment for the first-degree criminal sexual conduct conviction, ten to fifteen years' imprisonment for the second-degree criminal sexual conduct conviction, and ten to fifteen years' imprisonment for the unarmed robbery conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that the trial court erred in admitting similar acts evidence. We review a trial court's decisions on evidentiary issues for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Under MRE 404(b), evidence of prior bad acts is inadmissible where it is "offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994).

In *VanderVliet*, the Michigan Supreme Court outlined a four-part test for determining the admissibility of prior-acts evidence. First, the evidence must be relevant to an issue other than the defendant's propensity to commit the crime. Second, the evidence must be logically relevant. Third, the judge must determine whether the danger of undue prejudice substantially outweighs the probative value of the evidence, in light of the other evidence available to the prosecution. Finally, when requested by the defendant, the trial court may provide a limiting instruction to the jury. *Id.* at 74-75. The Court

in *VanderVliet* recognized several requirements of logical relevance necessary to satisfy the second part of this test where the prior-acts evidence is offered to prove identity. First, there must be substantial proof that defendant committed the prior bad act. Second, there must be some special quality or circumstance of the bad act tending to prove the defendant's identity. Third, the identity of the perpetrator must be at issue in the trial. *Id.* at 66-67, n 16 (relying on *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982)).

Here, the prosecutor offered evidence of two prior assaults. It is clear that this evidence was offered for a proper purpose, that is, to prove defendant's identity. It is also clear that this evidence was relevant to show identity, because (1) there was substantial evidence that defendant committed the prior assaults, (2) the similarities between the current offense and the prior assaults tended to prove defendant's identity as the perpetrator, and (3) the identity of the perpetrator was the primary issue at trial. In addition, after this evidence was admitted, the trial court gave the jury a limiting instruction. Thus, parts one, two, and four of the *VanderVliet* test clearly are met here. The only remaining question is whether the probative value of this evidence was substantially outweighed by the danger of unfair prejudice, in light of the other evidence available to the prosecution. *VanderVliet*, *supra* at 74-75; MRE 403.

We conclude that the similarities between the prior assaults and the current offense were sufficient to make them highly probative on the issue of identity. While we recognize that this evidence also presented danger of unfair prejudice, we believe that the danger did not substantially outweigh its probative value. Thus, the trial court did not abuse its discretion in admitting this evidence. See *People v McMillan*, 213 Mich App 134, 137-139; 539 NW2d 553 (1995).

Next, defendant argues that the trial court should have suppressed evidence obtained as a result of an allegedly illegal arrest and search. We review a trial court's decision on a motion to suppress evidence for clear error. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996). However, we note that defendant did not challenge the propriety of his arrest below. Instead, defendant only moved to suppress the evidence seized from his apartment, asserting that the initial search of his apartment was illegal.

This Court has previously addressed the propriety of warrantless arrests inside a defendant's home:

> The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. The language of the amendment applies equally to seizures of persons and seizures of property. *Payton v New York*, 445 US 573, 585; 100 S Ct 1371; 63 L Ed 2d 639 (1980). An arrest without a warrant inside a private home is improper and unreasonable under the Fourth Amendment in the absence of exigent circumstances or consent to the entry. *People v Oliver*, 417 Mich 366, 379; 338 NW2d 167 (1983). In determining the validity of a consent, the trial court must examine the totality of the circumstances. *People v Brown*, 127 Mich App 436, 440-441; 339 NW2d 38 (1983), lv den 419 Mich 896 (1984). [*People v Gary*, 150 Mich App 446, 450; 387 NW2d 877 (1986).]

Thus, a valid consent to search an area obviates the need for a warrant for any search or arrest which takes place in the area covered by the consent. See *City of Troy v Ohlinger*, 438 Mich 477, 484-486; 475 NW2d 54 (1991).

Here, all the evidence introduced at defendant's evidentiary hearing, including defendant's own testimony, indicated that defendant voluntarily consented to the police search of his apartment. The trial court concluded that the police acted within the scope of this consent when they initially searched the apartment for a gun. We find that both defendant's arrest and the search of his apartment were proper pursuant to this consent. Moreover, the police obtained a search warrant for the apartment and defendant's automobile after defendant's arrest. Thus, we find no clear error in the trial court's decision to deny defendant's motion to suppress.

Defendant also argues that the trial court abused its discretion in admitting DNA statistical evidence calculated using the "product rule" method. Such evidence is properly admissible in Michigan. *People v Chandler*, 211 Mich App 604, 607-612; 536 NW2d 799 (1995); *People v Adams*, 195 Mich App 267, 277-280; 489 NW2d 192 (1992), modified on other grounds 441 Mich 916 (1993). Any challenge to the accuracy of this statistical evidence goes to its weight, not its admissibility. *Chandler, supra* at 611. Thus, we find no abuse of discretion in the admission of the DNA statistical evidence.

Finally, defendant argues that he was denied the effective assistance of counsel. This claim is without merit. Even if defendant could show that his attorney's performance fell below an objective standard of reasonableness, the overwhelming evidence against him, including DNA evidence, the victim's identification of defendant as the perpetrator, the prior similar acts, and defendant's own statements to his former girlfriend, preclude him from making the necessary showing of prejudice. *People v Launsburry*, 217 Mich App 358, 361-362; 551 NW2d 460 (1996).

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Robert P. Young, Jr.