STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE ANTON EGGEBEEN,

Defendant-Appellant.

UNPUBLISHED
December 30, 1997

No. 198677
Kent Circuit Court
LC No. 96-002902-FC

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), and was sentenced as a third-felony offender and second-sex offender to three concurrent life terms. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred by admitting evidence of other bad acts allegedly committed by defendant because the evidence was presented solely for the purpose of establishing his bad character in violation of MRE 404(b). We disagree.

The use of bad acts as evidence of character is excluded, except as allowed by MRE 404, and is improperly admitted where 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). However, evidence is not necessarily subject to MRE 404(b) analysis merely because it discloses a bad act; bad acts can be relevant as substantive evidence without regard to MRE 404. *Id*., 64. "[I]f the proffered other acts evidence is logically relevant, and does not involve the intermediate inference of character, Rule 404(b) is not implicated. . . . The question is not whether the evidence falls within an exception to a supposed rule of exclusion, but rather whether the 'evidence [is] in any way relevant to a fact in issue' other than by showing mere propensity. . . . 'Put simply, the rule is *inclusionary* rather than exclusionary.'" *Id*., citing *People v Engelman*, 434 Mich 204, 213, 216; 453 NW2d 656 (1990).

The evidence established that the female witness, like the victim in the present case, was hired by defendant to do work for a company that did not exist, was taken by defendant to a secluded area supposedly for employment purposes, and was then forced to engage in sexual acts with him. In both instances, defendant employed a young woman for a bogus job, took affirmative steps to be alone with her on more than one occasion, and then lured her to a place where they first engaged in friendly interaction, such as a walk around the lake or park

Defendant's case at trial rested solely on the issue of consent and, although the evidence at issue created a negative image of defendant, it was highly relevant as to whether the victim in fact consented to sexual intercourse with defendant. Moreover, in a sexual assault prosecution, evidence of prior acts is admissible under MRE 404(b) if it "tend[s] to show a plan or scheme to orchestrate the events surrounding the rape of complainant so that she could not show nonconsent." *People v Gibson*, 219 Mich App 530, 533; 557 NW2d 141 (1996). It was for these reasons that the "other bad acts" evidence was elicited, rather than merely to make the "character to conduct" inference forbidden under MRE 404 and *VanderVliet*. Therefore, the trial court did not abuse its discretion in admitting the evidence. *People v Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993).

Defendant next argues that the lower court abused its discretion when sentencing him to life in prison. We disagree. The evidence elicited at trial supports the trial court's conclusion that defendant was a "predator" and posed a threat to society. After a thorough review of the record, we conclude that the sentence imposed is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Last, defendant argues that he is entitled to have challenged information stricken from the presentence investigation report. We disagree. The sentencing judge did not state that he would disregard the challenged information because it was inaccurate, but rather indicated that the information did not affect his sentencing decision. Therefore, contrary to the majority's conclusion, the court was not obligated to strike the information. See *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993).

Further, we disagree with defendant's contention that the use in the presentence report of the term "rape" to describe the acts he committed against another female witness in the past was factually inaccurate. Although defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), in 1983, the victim of that assault plainly testified at trial in the present case to facts that would have supported a conviction of first-degree criminal sexual conduct. A sentencing court may consider the facts underlying uncharged offenses, pending charges, and acquittals. *People v Ewing*, 435 Mich 443, 446; 458 NW2d 880 (1990)(Brickley, J); *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Here, the court could have considered the information in sentencing because defendant had an opportunity to challenge its accuracy at trial. Hence, a remand is not warranted.

Affirmed.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald