

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC JAMES SMALL,

Defendant-Appellant.

UNPUBLISHED

April 15, 2003

No. 237889

Kent Circuit Court

LC No. 01-002288-FH

Before: Jansen, P.J. and Kelly and Fort Hood, JJ.

MEMORANDUM.

Defendant appeals as of right his jury conviction for third-degree criminal sexual conduct, MCL 750.520d, and assault with intent to commit criminal sexual conduct, MCL 750.520g(1). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that the court erred in admitting evidence regarding a prior conviction for third-degree criminal sexual conduct. A decision whether such evidence is admissible is within the trial court's discretion, and will only be reversed where there has been a clear abuse of discretion. *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995).

In order to admit evidence under MRE 404(b)(1), the prosecutor first must offer the evidence under a theory that is not based on character or propensity to commit the act. Second, the evidence must be relevant to an issue of fact of consequence at trial. Third, under MRE 403, a determination must be made that the danger of undue prejudice does not substantially outweigh the probative value of the evidence. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). Evidence of other instances of sexual misconduct that establish a scheme is logically relevant to prove that the charged act was committed where the two offenses are sufficiently similar. *Id.*, 63. Where a defendant denies that a criminal act occurred, other acts evidence is probative that sexual misconduct occurred. *Id.*, 71.

The other acts evidence was probative of a basic element of the crime, that a sexual assault occurred. Where the other acts evidence was used to rebut defendant's denial that he committed the criminal acts, the trial court did not abuse its discretion in determining that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. *Id.*

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood