

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY RAY HERMENITT,

Defendant-Appellant.

UNPUBLISHED

June 18, 2013

No. 309560

Kent Circuit Court

LC No. 11-008884-FC

Before: MURPHY, C.J., and FITZGERALD and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(f). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 22 to 50 years' imprisonment. Because we conclude that the trial court's admission of evidence pursuant to MRE 404(b) was not an abuse of discretion, we affirm.

Defendant's conviction stems from a sexual assault in which he engaged the victim in nonconsensual sexual intercourse while she was sleeping. Defendant was at the victim's home with a friend who was invited to the home by one of the victim's roommates. The victim's boyfriend asked defendant to leave the home at one point during the night, and defendant and his friend left. However, the victim's other roommate called defendant's friend and asked him to come back over to the house. Defendant and his friend returned. The victim came out of her room and saw that defendant had returned to the home. The victim shared a drink with defendant, and gave him a pillow so he could sleep on the couch. The victim then went into her own bedroom and went to sleep; however, sometime later she awoke to defendant sexually assaulting her. The victim reported the incident to the police, and defendant claimed that the sexual acts were consensual.

Before trial the prosecution filed a notice of intent to admit other acts evidence pursuant to MRE 404(b). Specifically, the prosecution intended to admit the testimony of a woman who alleged that she invited defendant over to her apartment late one evening to talk, and that they entered her bedroom because that was the only room in which they could speak privately. The woman would testify that once they were in her bedroom, defendant forcefully sexually assaulted her. After the victim reported the incident, defendant claimed that the sexual acts were consensual. Defendant moved to exclude the offered other acts evidence.

After hearing arguments from both parties, the trial court ruled that the other acts evidence was “extremely probative and of substantial value” to the determination whether the sexual activity between defendant and the victim in this case was consensual. Specifically, the trial court noted that the two situations were similar enough to support the prosecution’s claim that the evidence demonstrates that defendant operates under a similar plan or scheme in order to achieve “sexual gratification” with “unwilling participants.” The trial court noted that the similarities included sexual penetration, physical injuries, immediate reporting, immediate allegations of nonconsensual activity, the taking advantage of vulnerability or accessibility as a result of the use of alcohol, and the taking advantage of individuals who are in relationships. Accordingly, the trial court permitted the introduction of the evidence, and at trial, testimony regarding defendant’s alleged other acts of sexual assault was admitted.¹

On appeal, defendant argues that the trial court abused its discretion by admitting the other acts evidence during trial. Specifically, defendant maintains that the alleged other sexual acts are too dissimilar to be relevant to whether defendant operated under a common scheme or plan, and that the prejudicial value of the evidence substantially outweighed its probative value.

We review for an abuse of discretion the trial court’s decision to admit evidence. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). We will not reverse a conviction because of a trial court’s evidentiary ruling unless “it is more probable than not that the error was outcome determinative.” *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

“At its essence, MRE 404(b) is a rule of inclusion, allowing relevant other acts evidence as long as it is not being admitted solely to demonstrate criminal propensity.” *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002). MRE 404(b)(1) provides that

[e]vidence 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.

This Court uses the test articulated in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), to determine whether the other acts evidence was admissible.

¹ The prosecution also moved for admission of the testimony from another woman who alleged defendant sexually assaulted her; however, the trial court concluded that the circumstances giving rise to that incident were too dissimilar to the instant case and granted defense counsel’s motion to exclude that evidence.

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*Id.* at 55.]

Regarding whether the evidence was admitted for a proper purpose, “[i]n 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), quoting *People v Oliphant*, 399 Mich 472, 488, 250 NW2d 443 (1976). Thus, we conclude that the evidence in this case was offered for a proper purpose because the evidence was offered to show that defendant employed a common plan or scheme to orchestrate events surrounding the sexual assault that would negate the victim’s claim of nonconsent.

In this case, defendant isolated both of his victims, assaulted them in scenarios where it would appear they might have consented, and used a similar defense to both of their claims of sexual assault. *Id.* For instance, with regard to the assault alleged in the other acts evidence, the prosecution presented evidence that defendant assaulted his victim after she invited him into her bedroom at 3:00 a.m. to talk. As for defendant’s defense in that case, he told police officers that his victim initially consented to sexual contact, but later changed her mind and became upset. Defendant employed a similar method in the case at bar by taking advantage of another late-night scenario where it would appear the victim might have consented to sexual contact, and by claiming a similar defense. Specifically, the victim in the case at bar testified that she shared a drink with defendant late at night in her home before the assault occurred. Additionally, defendant asserted as his defense that the victim in the case at bar initially consented to his contact, but subsequently changed her mind and became upset. Thus, defendant took advantage of similar situations where it appeared that his victims might have consented to sexual contact, and then used the same defense to explain their subsequent claims against him. This demonstrates that defendant had a common plan or scheme for selecting the victim and in asserting a defense to her subsequent claims of nonconsensual contact.

We also find, under the second step in the *VanderVliet* analysis, that the other acts evidence was relevant because “[t]he fact that defendant employed a similar method and defense in a prior case is probative of whether he employed the same means in anticipation of using the same defense if accused [in the case at bar].” *Gibson*, 219 Mich App at 533. Here, because defendant previously employed a similar method of selecting his victim and a similar defense to claims of nonconsensual contact, the other acts evidence was probative of whether he employed the method and defense in the case at bar to negate the victim’s claims that she did not consent. *Id.* Furthermore, the evidence was particularly relevant because it responded to defendant’s theory that the victim consented. See *People v Mardlin*, 487 Mich 609, 624; 790 NW2d 607 (2010) (“The defense theory in a case in part governs what evidence is logically relevant.”).

Regarding the remaining prongs of the *VanderVliet* test, the other acts evidence was admissible because the danger of unfair prejudice did not substantially outweigh the probative value of the evidence under MRE 403, and because the trial court instructed the jury regarding how it was to consider the evidence. “Unfair prejudice exists when there is a tendency that

evidence with little probative value will be given too much weight by the jury.” *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005). Here, the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice because the other acts evidence was probative of defendant’s common plan or scheme of taking advantage of a scenario where it would be difficult for his victims to prove that they did not consent. *Gibson*, 219 Mich App at 533. The evidence was also highly probative because it affected the victim’s credibility. See *People v King*, 297 Mich App 465, 476; 824 NW2d 258 (2012). Moreover, the evidence was not unfairly prejudicial because the trial court instructed the jury that it could only consider the evidence for purposes of deciding whether defendant employed a common plan or scheme, and not for propensity purposes. “[A] limiting instruction . . . that cautions the jury not to infer that a defendant had a bad character and acted in accordance with that character can protect the defendant’s right to a fair trial.” *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, the trial court did not abuse its discretion by admitting evidence of defendant’s prior bad acts.

Moreover, we find that even if the trial court abused its discretion when it admitted the evidence, defendant is not entitled to relief because he cannot demonstrate that it was more probable than not that the admission of the other acts evidence was outcome determinative. The victim testified that defendant sexually assaulted her, and her testimony was all that was necessary to support defendant’s conviction. MCL 750.520h; *People v Lemmon*, 456 Mich 625, 642-643 n 22; 576 NW2d 129 (1998). Further, her testimony was largely un rebutted. Additionally, there was evidence to corroborate portions of the victim’s testimony. Specifically, there was testimony that one of the injuries suffered by the victim was consistent with a nonconsensual sexual encounter.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra