

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD DAVID LETIENNE,

Defendant-Appellant.

UNPUBLISHED

March 19, 1999

No. 206259

Iosco Circuit Court

LC No. 97-003405 FC

Before: O'Connell, P.J. and Jansen and Collins, JJ.

MEMORANDUM.

A jury convicted defendant of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and the trial court sentenced him to two and one-half to fifteen years' imprisonment. He appeals by right, challenging the trial court's decision to allow the complainant to testify regarding defendant's prior course of conduct of a sexual nature, e.g., nudity and display of pornographic magazines and sexual devices. We affirm.

The decision whether to admit evidence of other acts under MRE 404(b) is within the trial court's discretion, and will only be reversed when the trial court has clearly abused that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). We find no abuse of discretion here.

MRE 404(b)(1) provides as follows:

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.

Still, any bad-acts evidence that is otherwise relevant under MRE 404(b)(1) is still subject to exclusion under MRE 403 if the likelihood of unfair prejudice substantially outweighs the probative value.

However, “the probative value outweighs the disadvantage where the crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense.” *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973). Because in this case defendant was charged with sexual misconduct, “prior inappropriate sexual behavior by defendant toward the complainant . . . was admissible.” *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995). Besides possibly showing a “scheme” or “system in doing an act,” such evidence may go toward “knowledge, identity, or absence of mistake” in the sense of shedding light on the complainant’s credibility. *DerMartzex, supra* at 414-415.

We are not persuaded that the rule in *DerMartzex* should be limited to cases involving inchoate crimes. See, e.g., *People v Wilson*, 196 Mich App 604, 615; 493 NW2d 471 (1992); *People v Dreyer*, 177 Mich App 735, 737; 442 NW2d 764 (1989). Nor are we persuaded that the rule in *DerMartzex* fails to comport with, and stands therefore overruled by, the recent case *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). We find the trial court’s reliance on *DerMartzex* appropriate and consistent with *VanderVliet*.

Affirmed.

/s/ Peter D. O’Connell

/s/ Kathleen Jansen

/s/ Jeffrey G. Collins