

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM BURKE HAYES,

Defendant-Appellant.

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UNPUBLISHED

July 21, 2000

No. 206611

Genesee Circuit Court

LC No. 96-054438-FH

Before: White, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2); MSA 28.788(7)(2). The trial court sentenced defendant to twenty-four to sixty months' imprisonment. We affirm.

Defendant first argues that the trial court abused its discretion in failing to sua sponte exclude similar acts evidence where the court had notice of the prosecution's intent to present such evidence. Where a defendant fails to object to testimony of prior bad acts, he fails to preserve the issue for appellate review. *People v Yarger*, 193 Mich App 532, 538-539; 485 NW2d 119 (1992). The trial court's failure to conduct an evidentiary hearing does not require reversal where the defendant failed to file a motion in limine. *People v Williamson*, 205 Mich App 592, 596; 517 NW2d 846 (1994).

Although defendant raised the issue at a pretrial motion hearing and the trial court asked the parties to brief the issue and set a deadline for filing the briefs, neither party filed a brief and no other argument took place. The trial court never ruled on the admissibility of this evidence, and the prosecution introduced it without objection. This issue is therefore unpreserved. We review unpreserved errors, whether constitutional or nonconstitutional, for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). We find no plain error affecting substantial rights in this case because we conclude that the evidence was admissible.

Evidence is relevant and generally admissible if it tends to make the existence of a fact that is of consequence more or less probable than it would be without the evidence. MRE 401; *People v VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person, or to show that a person acted in conformity with the other action. However, evidence of other acts is admissible to prove 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. MRE 404(b)(1).

*VanderVliet, supra*, discussed the factors that a trial court should consider in determining whether to admit evidence of similar acts. First, evidence that is only relevant because it shows a defendant's inclination to commit the conduct in question is not admissible. MRE 404(b); *VanderVliet, supra* at 63. Second, the evidence must be relevant to an issue or fact of consequence to the trial. *VanderVliet, supra* at 74. Third, the court must determine if the danger of undue prejudice outweighs the probative value of the evidence, taking into consideration other means of proof and other appropriate facts. *Id.* at 74-75.

The evidence in question was the testimony of two Red Roof Inn housekeepers. The housekeepers were both working at a motel that was within a short walking distance from the motel where the victim also worked as a housekeeper. According to the Red Roof Inn housekeepers, defendant approached them while they were working and asked them questions regarding their views on religion, politics, and sex. Their encounter with defendant was approximately one-half hour before defendant attacked the victim. This evidence was relevant to establish defendant's identity because the victim also testified that just before the attack, defendant approached her while she was working and asked for her opinion on religion, politics, and sex. Therefore, the evidence tended to make more probable that defendant was the person who attempted to rape the victim. MRE 401. The evidence was also relevant to establish defendant's preparation, scheme or plan in approaching housekeepers at motels to discuss the subject of spontaneous sexual encounters in an effort to either coerce or force the housekeepers to engage sexual intercourse with him.

Lastly, we consider whether under MRE 403 the danger of undue prejudice outweighed the probative value of the evidence. "In this context, prejudice means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis . . . ." *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). In our view, the testimony was not more prejudicial than probative because neither of the Red Roof Inn housekeepers testified that defendant engaged in any illegal conduct with them. Therefore, under the *VanderVliet* test, the evidence was properly admitted, and no plain error affected defendant's rights. *Carines, supra* at 774; *VanderVliet, supra* at 74-75.

Defendant next argues that his trial counsel was ineffective in failing to object to the admission of the similar acts evidence discussed above. We disagree. Effective assistance of counsel is presumed. To overcome this presumption, this Court must determine whether counsel's performance was objectively unreasonable and whether counsel's defective performance prejudiced defendant. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). As we concluded above, the similar acts evidence was admissible. Therefore, no reasonable probability existed that the outcome of the case would have been different. See *People v*

*Pickens*, 446 Mich 298, 302-303, 327; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668, 692-696; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant's last argument is that the trial court erred in scoring an offense variable because the prosecution presented no evidence of bodily injury or that defendant's conduct was designed to substantially increase the fear or anxiety of the victim. A challenge that is directed to the scoring of an offense variable must establish that its factual predicate was wholly unsupported, materially false, and that the sentence was disproportionate. *Mitchell, supra* at 177. Because defendant did not contend in his brief that his sentence was disproportionate, defendant failed to state a cognizable claim for this Court to review.

Affirmed.

/s/ Helene N. White  
/s/ Martin M. Doctoroff  
/s/ Peter D. O'Connell