

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

ALVARO JAVIER VALDES,

Defendant-Appellant.

UNPUBLISHED

November 18, 2003

No. 241563

Oakland Circuit Court

LC No. 01-180247-FH

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant Alvaro Valdes was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was sentenced to 153 days in jail and two years' probation.¹ Defendant appeals as of right. We affirm.

The instant appeal arises out of an incident where defendant touched the breast of a twelve-year old girl in an elevator. Defendant and Melissa, the girl in question, were neighbors and defendant had agreed to drive her and her mother to a doctor's appointment. Apparently, defendant asked Melissa if she wanted to ride in the elevators while waiting for her mother to finish with the doctor. When they were alone in the elevator, defendant asked Melissa for several hugs and kissed her on the cheek. Defendant then touched Melissa's breast for approximately three seconds over her clothing. At trial, defendant claimed that the touching was accidental because he lost his balance when the elevator started to move, due to the fact he has no toes.²

On appeal, defendant argues that the trial court erroneously permitted the prosecution to present evidence of his prior conviction of Importuning a Minor for purposes of impeachment under MRE 609. At trial, however, defendant argued that this evidence was inadmissible because it violated MRE 404(b). "An objection based on one ground at trial is insufficient to

¹ We note that the trial court discharged defendant from probation on October 25, 2002, because he was deported to his native country of Chile on October 9, 2002.

² Defendant was born with Apert Syndrome, a condition which results in serious bone malformations, including defendant's lack of toes.

preserve an appellate attack based on a different ground.”³ Accordingly, our review of the trial court’s admission of this evidence is limited to plain error affecting defendant’s substantial rights.⁴

Initially, we note that this evidence was not offered at trial for purposes of impeachment under MRE 609. Rather, a review of the record shows that the prosecution presented evidence of defendant’s prior conviction under MRE 404(b), to show that his actions were not accidental. Prior bad acts evidence is admissible under MRE 404(b) if: (1) the evidence is offered for a proper purpose under MRE 404(b); (2) it is relevant under MRE 402; and (3) its probative value is not substantially outweighed by any unfair prejudice.⁵

Here, the prosecution presented evidence that defendant had recently pled guilty in an Ohio court to the misdemeanor offense of Attempted Importuning. This conviction resulted from defendant conversing with a fifteen-year-old girl in Ohio, via the Internet, with whom he met in Ohio for the purpose of having sex. The girl involved in that case testified at the instant trial. Among other things, she claimed that she informed defendant she was underage and that defendant told her that he wanted to touch her breasts. The prosecution argued that this conviction was admissible “for the purpose of proving intent, lack of mistake, and/or common plan or scheme.”

Because defendant’s defense was that he accidentally touched Melissa’s breast, we find that evidence of his prior bad act was relevant and admissible under MRE 404(b) to show lack of accident or mistake on his part. Indeed, the two cases are similar to the extent that both cases involved under-aged girls that were drawn into secluded environments by defendant.⁶ To the extent defendant claims this evidence was unfairly prejudicial, we disagree. All relevant evidence is somewhat prejudicial to a defendant.⁷ In this case, the evidence of defendant’s prior actions had significant probative value in establishing his lack of mistake or accident in the instant case. We further note that the trial court instructed the jury that it could only consider the prior bad act evidence to determine whether defendant acted purposefully as opposed to accidentally. Juries are presumed to follow the court’s instructions.⁸

Affirmed.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jessica R. Cooper

³ *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

⁴ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

⁵ *People v Knox*, 256 Mich App 175, 182; 662 NW2d 482 (2003).

⁶ See *People v Magyar*, 250 Mich App 408, 415; 648 NW2d 215 (2002).

⁷ *Id.* at 416.

⁸ *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).