

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICKEY A. HICKS,

Defendant-Appellant.

UNPUBLISHED

April 21, 2000

No. 210639

Oakland Circuit Court

LC No. 97-156359-FH

Before: Collins, P.J., and Neff and Smolenski, JJ.

MEMORANDUM.

Defendant appeals as of right his conviction for felonious assault, MCL 750.82; MSA 28.277, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arose out of an assault on his former girlfriend, who testified that defendant slapped her and hit her on the head with a beer bottle. Defendant claimed that the bottle accidentally broke in the course of an argument. To refute this defense, the prosecutor sought to introduce evidence of other assaultive acts by defendant. On appeal, defendant argues that the trial court abused its discretion in admitting this evidence.

MRE 404(b)(1) provides:

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.

The decision whether such evidence is admissible is within the trial court's discretion and will only be reversed where there has been an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289-

291; 531 NW2d 659 (1995). In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Court rejected a bright line approach to the rule, and set forth the following test for the admission of other acts 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.

Here, the evidence was offered for a proper purpose, to refute defendant's claim that the victim's injuries were caused by an accident. This evidence was relevant where the question was central to the defense. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Given the evidence in this case, there is no showing that the trial court abused its discretion in finding that the probative value was not substantially outweighed by the prejudicial effect. An appropriate limiting instruction was given.

Affirmed.

/s/ Jeffrey G. Collins

/s/ Janet T. Neff

/s/ Michael R. Smolenski