

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES ALLEN MCCULLAR, JR.,

Defendant-Appellant.

UNPUBLISHED

January 31, 2006

No. 256309

St. Clair Circuit Court

LC No. 03-003027-FC

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Defendant appeals as of right from his jury conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(a). Defendant was sentenced as a third habitual offender, MCL 769.11, to 20 to 40 years' imprisonment. We affirm.

I. FACTS

This case stems from alleged sexual assault of defendant's two-year-old daughter. Both defendant and the victim have tested positive for the same strain of genital warts or human papilloma virus (HPV). At trial, defendant maintained that his daughter contracted genital warts through innocent contact. Defendant's only argument on appeal is his assertion that the trial court erred in allowing the prosecution to admit other acts evidence under MRE 404(b). Specifically, the court admitted evidence related to a juvenile adjudication for second-degree criminal sexual conduct arising out of an incident where the then thirteen-year-old defendant performed cunnilingus on his babysitter's five-year-old daughter. The court also admitted evidence that defendant sexually assaulted another two-year-old during the same time frame as the charged sexual assault.

II. STANDARD OF REVIEW

We review the admission of other acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "If an error is found, defendant has the burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error. No reversal is required for a preserved, nonconstitutional error 'unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.'" *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001), quoting *People v Lukity*, 460 Mich 484, 495, 596 NW2d 607 (1999).

III. ANALYSIS

MRE 404(b) governs admission of other bad acts evidence. It 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.

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if such evidence is (1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the evidence under MRE 403.¹ *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993). Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. *Id.* at 75.

Here, the prosecution offered the other acts evidence for a proper purpose, namely to show defendant's scheme, plan, or system in doing an act, and to establish the identity of the victim's attacker. Further, the court did provide a limiting instruction on the use of the other acts evidence. Thus, resolution of this issue and appeal centers on the relevance of the evidence and whether the danger of unfair prejudice outweighs its probative value.

The prosecution argues on appeal that the evidence is relevant to proving lack of accident. While the prosecution did not assert in its notice of intent that the evidence was being offered to establish the lack of accident, "[t]he prosecution's recitation of purposes at trial does not restrict appellate courts in reviewing a trial courts decision to admit the evidence." *People v Sabin (After Remand)*, 463 Mich 43, 59-60 n 6; 614 NW2d 888 (2000). Importantly, the trial court admitted the evidence in part "because it's necessary for this jury to understand the connection between these two incidents in order to verify that this wart did not result from some non criminal act." Further, the court instructed the jury that they could "only think about whether this evidence tends to show Defendant specifically meant to sexually assault [the victim], that defendant acted purposefully, that it is not by accident or by mistake" See *Sabin, supra* at 59-60 n 6 (reasoning that where the lower court had provided a similar instruction to the jury it would do "little to further the ends of justice" by refusing to consider an alternate theory of admissibility on appeal). Accordingly, we will consider whether the evidence was relevant to prove lack of accident.

Our Supreme Court in *VanderVliet* set forth the standard for admission of other acts

¹ MRE 403 provides in relevant part that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

evidence.² Quoting from *Huddleston v United States*, 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988), the Court stated in pertinent part as follows:

The [*Huddleston*] Court rejected the proposition that Rule 104(a) mandated a preliminary finding by the trial judge that the other act occurred.

“[It] not only superimposes a level of judicial oversight that is nowhere apparent from the language of that provision, but it is simply inconsistent with the legislative history behind Rule 404(b). The Advisory Committee specifically declined to offer any ‘mechanical solution’ to the admission of evidence under 404(b). Rather, the Committee indicated that the trial court should assess such evidence under the usual rules for admissibility: ‘The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability [sic] of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.’

* * *

[Q]uestions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b). . . . In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact” [*VanderVliet, supra*, 444 Mich 68-69 n 20, quoting *Huddleston, supra*, 485 US 688-690 (citations omitted by *VanderVliet*).]

Here, there is no question that evidence of defendant’s juvenile adjudication, which included the statements of the then five-year-old victim and an eyewitness to the assault, could allow a jury to reasonably conclude he committed the other act.

Regarding the other incident, the record indicates that defendant had access to the other two-year-old on several occasions while he babysat her. Sometime thereafter, the two-year-old began to act out sexually. An examination revealed that she had been penetrated and had contracted genital warts. The examining doctor opined that this evidence made him strongly suspicious of sexual abuse. Given this evidence, we conclude that it was not an abuse of

² Defendant correctly argues that were the prosecution is attempting to prove identity, this Court should apply “substantial evidence” test and set forth in *People v Golochwicz*, 413 Mich 298, 308-309; 319 NW2d 518(1982). *People v Ho*, 231 Mich App 178, 186, 585 NW2d 357 (1998). However, *Golochwicz* is inapplicable in the present analysis because the prosecution argues on appeal that the evidence is relevant to proving lack of accident. *Id.*

discretion for the trial court to determine that a reasonable jury could conclude by a preponderance of the evidence that defendant assaulted the other two-year-old.

We also conclude that the other acts evidence was logically relevant to proving that the victim in the case at hand did not accidentally contract genital warts from defendant. Defendant argued forcefully in his opening and closing statements that the victim accidentally contracted warts from him through innocent contact either during baths or through contact during diaper changes. The fact that the victim and defendant were infected with the same strain of HPV was strong evidence linking defendant to the charged act. Accordingly, the lack of an accidental transmission was a material issue at trial. Again, the other two-year-old had also contracted genital warts. However, there is no evidence that defendant bathed the other two-year-old or changed her diaper. Thus, the evidence regarding the other two-year-old tended to undermine defendant's theory of innocent transmission. Similarly, evidence that defendant sexually assaulted the five-year-old when he was a juvenile was relevant to proving that he did not accidentally transfer genital warts to the victim in the case at hand.

Additionally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Again, the primary evidence linking defendant to the charged sexual assault was the fact that both he and the victim had the same strain of HPV. Defendant maintained that she contracted it from him accidentally as the result of innocent contact. The medical experts testifying at trial provided somewhat contradictory testimony regarding the probability of innocent transfer through bath water. Accordingly, any evidence tending to prove that the transfer was not a result of innocent contact was highly probative.

Further, the probative value of this testimony was not outweighed by its potential prejudice. Unfair prejudice exists when there is a tendency to that the evidence will be given undue or preemptive weight by the trier of fact. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). While the other-acts evidence is prejudicial, the record does not establish the tendency that it would be given preemptive or undue weight, and thus be properly characterized as unfair. *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). Unfair prejudice is not established merely because of the abhorrent nature of the prior assault. *Id.* The determination of whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to a contemporaneous assessment of the presentation, credibility and effect of the testimony. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).

Additionally, reversal is not required because defendant did not establish that it affirmatively appears to be more probable than not that any alleged error was outcome determinative. *Lukity, supra* at 495-496. The record established that defendant had frequent access to the victim. Two medical doctors concluded that the victim had been sexually assaulted. One of those doctor's testified that the physical evidence was "about as strong as [evidence] gets for sexual abuse." Also, an expert in HPV testified that approximately thirty-five biologically distinct strains of HPV cause lesions in the genital area. DNA testing revealed that defendant had HPV 6 and HPV 11 and that the victim had HPV 11. This expert also opined that the virus concentration would be "way too low" to transfer in bath water. Moreover, a witness testified that after the allegations of sexual assault were made, defendant told him that he was going to move to Texas and take the identity of his deceased brother. Accordingly, defendant cannot establish that it affirmatively appears to be more probable than not that the alleged errors

were outcome determinative.

Affirmed.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette