

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM D. FISCHER,

Defendant-Appellant.

UNPUBLISHED

August 1, 1997

No. 195154

Recorder's Court

LC Nos. 94-011649;

95-004741

Before: Murphy, PJ., and Kelly and Gribbs, JJ.

PER CURIAM.

Defendant was convicted, following a consolidated jury trial with separate juries, of four counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b) (sexual penetration accomplished through force or coercion), committed against two different victims (whom we shall identify as "A" and "B"). He was sentenced to concurrent terms of ten to fifteen years' imprisonment for each of the third-degree criminal sexual conduct convictions involving "A," and concurrent terms of ten to fifteen years' imprisonment for each of the third-degree criminal sexual conduct convictions involving "B." Because the charges involving the offenses committed against "A" were pending when defendant committed the offenses against "B," the sentences in each case were ordered to run consecutive to each other. Defendant appeals as of right from those convictions. We affirm.

We first address defendant's claim that the trial court erred in admitting the prosecution's other acts evidence under MRE 404(b) because identity was not an issue. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996); *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996). Other acts evidence is admissible under MRE 404(b) if: (1) it is relevant to an issue other than propensity; (2) it is relevant to an issue or fact of consequence at trial; and (3) its probative value is not substantially outweighed by the danger of unfair prejudice under MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994); *People v Catanzarite*, 211 Mich App 573, 578-579; 536 NW2d 570 (1995). "Relevant other acts evidence

does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith.” *VanderVliet*, *supra* at 65.

The prosecution argues that because defendant interjected consent as a defense, “A’s” testimony was admissible to prove nonconsent on the part of “B” in that case, and vice-versa, and also that the testimony of a third witness who alleged that she was sexually assaulted by defendant in 1993 was admissible in both cases to show that neither “A” nor “B” consented. In a sexual assault prosecution, evidence of other acts is admissible under MRE 404(b) if it “tend[s] to show a plan or scheme to orchestrate the events surrounding the rape of complainant so that she could not show nonconsent.” *People v Oliphant*, 399 Mich 472, 488; 250 NW2d 443 (1976); *People v Gibson*, 219 Mich App 530, 533; 557 NW2d 141 (1996). We find that the other acts evidence in this case shows such a scheme.

Victims “A” and “B,” as well as the third prosecution witness, met defendant in ordinary business or social situations. All three went voluntarily with a seemingly friendly man, and in the presence of witnesses, under circumstances not likely to arouse fear on the part of the women. Once alone with him, each of the three women was subjected to similar forms of physical attacks and threats in order to induce fear and submission. In fact, each woman testified that she submitted to defendant’s demands out of fear of additional physical injury. Immediately following the assaults, defendant attempted to engage all three in ordinary conversation. Defendant told “A” that no one would believe that he raped her because she had dinner with him, his friends saw them together, and because her address was in his pager. This evidence demonstrates that defendant had a plan for making it appear as though ordinary social encounters ended in consensual sex.

We also conclude that the evidence was relevant. MRE 402. The fact that defendant employed similar methods in prior cases in an effort to escape punishment was probative of whether he employed the same means in anticipation of using the same defense if accused. *Gibson*, *supra* at 533. Finally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Nonconsent is crucial in a rape case and evidence regarding the circumstances of each incident here was particularly important. *Oliphant*, *supra* at 490. Moreover, both juries were given appropriate limiting instructions. Therefore, we are not convinced that the trial court abused its discretion in this matter.

Defendant next argues that the trial court erred in joining the offenses committed against “A” and “B” for a single trial with two juries. We agree, but conclude that the error was harmless. “[N]o prejudicial error [in joining offenses] results if the other bad acts evidence was properly admissible because identical testimony would have been presented in both cases had they been tried separately.” *People v James Smith*, 119 Mich App 431, 434; 326 NW2d 533 (1982). In this case, the evidence of the sexual assaults of “A” and “B” would be admissible in separate trials under MRE 404(b) as evidence of defendant’s plan, scheme, or system in doing an act. Therefore, defendant was not prejudiced by the trial court’s decision to join the offenses for a single trial with two juries rendering separate verdicts on each complaint.

Finally, defendant contends that he was denied a fair and impartial trial when the trial court interrupted defense counsel's first opening statement. When reviewing a claim involving judicial misconduct, we must determine whether the trial court's conduct or comments pierced the veil of judicial impartiality and "denied the defendant a fair and impartial trial by unduly

influencing the jury.” *People v Turner*, 99 Mich App 733, 746; 298 NW2d 848 (1980), rev’d on other grounds 411 Mich 897; 306 NW2d 103 (1981); *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). The trial court has a duty to control the proceedings and to limit arguments of counsel to relevant and material matters. MCL 768.29; MSA 28.1052; *Ullah, supra* at 674. In this case, counsel’s remarks during opening statement about whether it was “sinful” or “illegal” for a nineteen-year-old to drink alcohol, and whether the prosecution would call a particular witness, did not relate to any material issue in the case. We find no error in the trial court’s conduct.

Affirmed.

/s/ William B. Murphy

/s/ Michael J. Kelly

/s/ Roman S. Gibbs