

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN D. MARTIN,

Defendant-Appellant.

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UNPUBLISHED

February 5, 1999

No. 203773

Detroit Recorder's Court

LC No. 96-004761

Before: McDonald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant was convicted of four counts of first-degree criminal sexual conduct, MCL 750.520(b); MSA 28.788(2), first-degree home invasion, MCL 750.110a(2); MSA 28.305(1), larceny from a person, MCL 750.357; MSA 28.589, and possession of a firearm during the commission of a felony, MCL 750.227(b); MSA 28.424(2). He was sentenced to thirty to sixty years' imprisonment for each count of criminal sexual conduct, ten to twenty years' imprisonment for home invasion, five to ten years' imprisonment for larceny from a person and two years' imprisonment for felony-firearm. Defendant now appeals as of right. We affirm.

Defendant argues his convictions should be reversed because the trial court improperly admitted prior acts evidence. A trial court's decision to admit evidence will not be reversed unless there is a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

In order to be admissible, other acts evidence must meet the standard articulated in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). The evidence must be offered for a proper purpose under MRE 404(b), the evidence must be relevant under MRE 402, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403, and the trial court may, upon request, give a limiting instruction to the jury. *Id.* at 74-75. In addition, where the other acts evidence is being offered to prove identity through modus operandi, the evidence also must meet the four-part test articulated in *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982). *VanderVliet*, *supra* at 66; *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998); *People v McMillan*, 213 Mich App 134, 138; 539 NW2d 553 (1995). The *Golochowicz* logical-relevance test requires that (1) there is substantial evidence that

the defendant committed the similar act; (2) there is some special quality of the act that tends to prove the defendant's identity; (3) that the evidence is material to the defendant's guilt; and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. *Golochowicz*, *supra* at 309; *Ho*, *supra* at 186.

Defendant specifically argues the evidence of his prior convictions for breaking and entering and criminal sexual conduct should not have been admitted because it was more prejudicial than probative. We disagree. The proper inquiry is not merely whether the evidence is more prejudicial than probative, but whether its probative value is substantially outweighed by the risk of unfair prejudice. *People v Starr*, 457 Mich 490, 499; 577 NW2d 673 (1998).

The probative value of the evidence of defendant's prior convictions is high. The prosecution articulated fifteen separate points of similarity between the crimes for which defendant was convicted in the early 1980s and that for which he was currently on trial. Among other things, in both assaults the victims were vaginally penetrated from behind, the victims were assaulted in their homes in the early morning, the victims homes were near defendant's home, the locks of each victim's home had been tampered with so that they appeared functional when they were not. Moreover, in both assaults the perpetrator wore some type of mask and used a weapon during the assault, complimented each victim on her appearance, and attempted to have a friendly conversation with each victim after the assault. We reject defendant's argument that the points of similarity between the previous assault of which he was convicted and the instant case are not significant because they are typical of most rapes. We find the similarities between the two crimes easily rise to the level of providing a special quality to the act that tends to prove that the acts were committed by the same person, defendant. *Golochowicz*, *supra* at 310-312; *Ho*, *supra* at 187. We also reject defendant's argument that common scheme evidence is not admissible unless the defendant commits a series of crimes in a regular or unique manner. To the contrary, this Court has previously found enough similarity to allow admission when there was only a single prior act. *Ho*, *supra*; *McMillan*, *supra*.

While we acknowledge the prejudicial nature of the challenged evidence, we do not believe the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Defendant incorrectly argues that criminal sexual conduct cases are more likely to arouse prejudice and therefore, should be subjected to a higher standard. However, "[t]he danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself." *Starr*, *supra* at 500. Moreover, the prior acts evidence was not the only evidence that the prosecution offered to prove defendant's identity. *McMillan*, *supra* at 139. The victim recognized defendant from her neighborhood and identified him as her attacker. Moreover, the trial court properly cautioned the jury before the evidence was admitted and in its final instructions to the jury that the evidence should only be used to establish identity and not to infer that defendant must have committed this crime because he is of bad character. *Id.* Therefore, we find that the probative value of the prior acts evidence was not substantially

outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in admitting the evidence.

Affirmed.

/s/ Gary R. McDonald

/s/ Kathleen Jansen

/s/ Michael J. Talbot