

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARK ROBERT GISSE,

Defendant-Appellee.

UNPUBLISHED

March 16, 1999

No. 206213

Iosco Circuit Court

LC No. 97-003493 FH

Before: Cavanagh, P.J., and MacKenzie and McDonald, JJ.

PER CURIAM.

The prosecutor appeals by leave granted the trial court's denial of his motion to allow the introduction of evidence of other allegedly similar acts between defendant and the complainant. We affirm.

Defendant was charged with third-degree criminal sexual conduct, MCL 750.520d(1)(c); MSA 28.788(4)(1)(c),¹ or, in the alternative, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b).² The prosecutor argues that the trial court erred in refusing to allow the introduction of the similar acts evidence. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The prosecutor acknowledges that the primary issue in this case is consent. Relying on *People v Oliphant*, 399 Mich 472; 250 NW2d 443 (1976), the prosecutor argues that the other acts involving defendant and the complainant are admissible under MRE 404(b) to show a plan or scheme on the part of defendant to make it appear that consent was given. See *People v Gibson*, 219 Mich App 530, 533; 557 NW2d 141 (1996). However, the other acts sought to be introduced are not themselves relevant to the existence of a scheme or plan. The acts seem to establish that defendant enjoyed touching the complainant's genitals, and therefore tend to make the occurrence of the fellatio more probable. However, because the defense is consent rather than denial of the event, whether defendant performed fellatio on the complainant is not in issue. The acts showing defendant's inclination to touch

the complainant's genitals do not make more or less probable a plan by defendant to make lack of consent difficult to prove.

The prosecutor also suggests that the other acts are admissible to disprove a defense of consent by showing that the complainant had not previously consented to defendant's touching. However, with one exception, the record does not establish that the acts were inflicted on the complainant without his consent. With regard to that exception, the prosecutor's motion does indicate that the complainant did not consent to defendant's conduct in grabbing the complainant's penis. Nevertheless, the probative value of the prior acts on the issue of consent depends on the similarity between the other acts and the act that is the basis for the charged offense. See *People v Zysk*, 149 Mich App 452, 459-460; 386 NW2d 213 (1986). Because of the dissimilarity between the prior act of grabbing the complainant's penis and the act forming the basis for the present charges, we are not persuaded that the other acts evidence is probative of the complainant's nonconsent.

In sum, the prosecutor has failed to establish that the proffered evidence was relevant to proving a material fact in issue. See MRE 401; MRE 402; *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). Moreover, the trial court's finding that the probative value of the proffered evidence, if any, would be substantially outweighed by the danger of unfair prejudice, MRE 403, is not clearly erroneous. Accordingly, the trial court did not abuse its discretion in denying the prosecution's motion. *Ullah, supra*.

Affirmed. We vacate the stay entered by this Court on October 23, 1997.

/s/ Mark J. Cavanagh

/s/ Barbara B. MacKenzie

/s/ Gary R. McDonald

¹ MCL 750.520d(1)(c); MSA 28.788(4)(1)(c) prohibits sexual penetration when "[t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless."

² MCL 750.520d(1)(b); MSA 28.788(4)(1)(b) prohibits sexual penetration when "[f]orce or coercion is used to accomplish the sexual penetration."