

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL SIMPSON,

Defendant-Appellant.

UNPUBLISHED

August 6, 1999

No. 185484

Kent Circuit Court

LC No. 94-0205-FC

AFTER REMAND

Before: Saad, P.J., and Neff and Markman, JJ.

PER CURIAM.

The jury convicted defendant of one count of criminal sexual conduct in the first degree (CSC I)¹, and one count of criminal sexual conduct in the second degree (CSC II)². Previously, we reversed the CSC-I conviction and remanded for a new trial, but affirmed the CSC-II conviction. We now revisit this case after remand from our Supreme Court. In light of the recent decisions *People v Starr*, 457 Mich 490; 577 NW2d 673 (1998) and *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998), we reverse the CSC II conviction and remand for a new trial. Our earlier reversal of the CSC-I conviction remains in effect.

I

During the trial, two witnesses testified that the defendant had committed CSC II against them while they were at the defendant's home. In a pretrial motion, defense counsel argued against the admission of this evidence on the ground that it was improper "prior bad acts" evidence under MRE 404, and that its only purpose was to show the defendant's propensity to commit the wrongful act. The trial court found that the evidence was admissible in order to show unlikely coincidence, modus operandi and/or a common plan, scheme or system. Additionally, the court held that the evidence was admissible with respect to both counts, sexual penetration and sexual contact, though neither witness alleged sexual penetration.

On appeal, we held that the prior bad acts evidence were admissible with respect to the CSC-II count, but inadmissible with respect to CSC I. We held that because defendant made a general denial to all elements of the CSC-II offense, the prior acts were relevant to establish the element that defendant acted with a sexual purpose. We concluded that the two prior incidents of sexual assault were sufficiently similar, and thus relevant, because the complainant and the two other girls were fondled while the defendant was in a position of authority over them. Our decision was based on the four-part test of *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993) (first, the evidence was offered for a proper purpose; second, the evidence was relevant; third, the probative value of the evidence was not outweighed by unfair prejudice; fourth, the trial court provided an appropriate limiting jury instruction).

In 1998, our Supreme Court clarified and explained the *VanderVliet* holding in *Starr, supra* and *Crawford, supra*. We are now asked to reconsider our earlier holding in light of these two decisions.

II

In *Starr*, 457 Mich 490, the defendant was convicted of raping his six-year-old daughter. The daughter first alleged that defendant had raped her when her mother questioned her about sexual abuse by defendant. *Id.*, 491-492. The defendant argued that the mother had fabricated these charges to prevent him from visiting his children. *Id.*, 493. To counter this argument, the prosecution introduced evidence that the mother was prompted to question the complainant about sexual abuse after the mother learned that defendant had sexually abused his younger half-sister. *Id.*, 503. This Court held that the evidence was inadmissible character evidence, and reversed the conviction. 217 Mich App 646; 553 NW2d 25 (1995).

Reviewing this Court's decision in *Starr*, our Supreme Court reiterated the holding in *VanderVliet* that MRE 404(b)(1) provides the "means by which 'other acts' evidence is properly admissible." 457 Mich 495. The Court stated:

While MRE 404(B)(1) is one of a few rules with which 'other acts' evidence may properly be admitted, it is a rule of inclusion that contains a nonexclusive list of "noncharacter" grounds on which evidence may be admitted. This rule permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct. *People v Engelman*, 434 Mich 204, 213; 453 NW2d 656 (1990). [*Id.*, 496.]

Reversing this Court's decision, the Supreme Court held that the evidence was admissible because it related to a proper non-character purpose, namely to explain that the victim's mother had a legitimate reason to suddenly question her daughter about sexual abuse because she learned recently that

defendant had raped his sister on several occasions. *Id.*, 501-502. The Court determined that this testimony “effectively rebut[ted] defendant’s claim that the charges were groundless and fabricated by her mother.” *Id.*, 502.

In *Crawford*, 458 Mich 376, the Supreme Court clarified the material/probative element of the *VanderVliet* test. The defendant in *Crawford* was charged with possession with intent to deliver cocaine, after police found several small plastic bags of cocaine concealed in his car.³ The prosecution introduced evidence of a prior drug crime, purportedly to establish the defendant’s knowledge of the presence of the cocaine and his intent to deliver it. *Id.*, 380-381. Reviewing the trial court’s decision to admit this evidence, the Supreme Court held:

a common pitfall in MRE 404(b) cases is the trial courts’ tendency to admit the prior misconduct evidence merely because it has been “offered” for one of the rule’s enumerated proper purposes. Mechanical recitation of “knowledge, intent, absence of mistake, etc.,” without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b). If it were, the prosecutor could routinely admit character evidence by simply calling it something else. Relevance is not an inherent characteristic, [*People v*] *Huddleston*, [485 US 681,] 689[; 108 S Ct 1496; 99 L Ed 2d 771 (1988)], nor are prior bad acts intrinsically relevant to “motive, opportunity, intent, preparation, plan,” etc. Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. *United States v Sampson*, 980 F2d 883, 888 (CA 3, 1992). In order to ensure the defendant’s right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else. The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized. [*Id.*, 387-388.]

Applying Michigan’s evidence rules on relevance⁴ the Court observed that “evidence is relevant if two components are present, materiality and probative value.” *Id.*, 388. The Court noted that because all elements of a criminal offense are “in issue” when a defendant pleads not guilty, the materiality test was satisfied because the prosecution was obligated to prove the defendant’s knowledge and intent with respect to possessing and delivering cocaine. *Id.*, 389. The Court then turned to the probative force inquiry, which “asks whether the proffered evidence tends ‘to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” *Id.*, 389-390. The Court elaborated:

In the context of prior acts evidence, however, MRE 404(b) stands as a sentinel at the gate: the proffered evidence truly must be probative of something *other* than the defendant’s propensity to commit the crime. If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded, notwithstanding its logical relevance to character. [*Id.*, 390.]

The Court rejected the prosecutor's argument that the prior drug offense was probative to the new offense under the "doctrine of chances", which is predicated on the assumption that the more often the defendant has committed an actus reus, the lesser the likelihood that the defendant's actions were accidental or unintentional (i.e., that the defendant lacked the requisite mens rea). *Id.*, 393. However, in order to use prior acts to establish mens rea for the charged offense under this test, the prosecutor must show that each of the prior incidents is similar to the charged offense. *Id.*, 394-395. The Court concluded that the prior drug offense was not probative under this test, and was therefore inadmissible character evidence. *Id.*, 396-397.

Here, we cannot say that the prior acts of sexual assault were probative under *Crawford*. Neither of the prior acts was sufficiently similar to the present offense to qualify as probative under the doctrine of chances. Although MRE 404(b) is a rule of inclusion, rather than exclusion⁵, the prosecutor here failed to establish any basis for inclusion. Accordingly, we must reverse the CSC-II conviction and remand for a new trial. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Janet T. Neff

¹ MCL 750.520b(1)(b); MSA 28.788(2)(1)(b).

² MCL 750.520c(1)(b); MSA 28.788(3)(1)(b).

³ MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii).

⁴ Generally, relevant evidence is admissible, but evidence which is not relevant is not admissible. MRE 402. "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

⁵ *Starr*, 457 Mich 496.