STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 6, 1999
v	No. 185484 Kent Circuit Court
DARRELL SIMPSON, Defendant-Appellant.	LC No. 94-000205 FC AFTER REMAND

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

MARKMAN, J. (dissenting).

Because I do not agree with the majority that the trial court abused its discretion in admitting evidence of defendant's prior sexual assaults, I respectfully dissent. I would affirm defendant's convictions in their entirety.

In its initial decision in this matter, prior to my appointment to this panel, this Court stated that, with regard to the prior sexual assaults allegedly carried out by defendant,

> We hold that the prior bad act evidence is relevant [to the CSC-2d conviction] for the purpose of showing intent, modus operandi or system, unlikely coincidence, common plan, scheme or system, and lack of mistake or accident.

In the absence of greater explanation by the majority, it is difficult for me to understand how each of these justifications for the introduction of the evidence of defendant's prior bad acts has been rendered invalid by the Supreme Court's decisions in *People v Starr*, 457 Mich 490; 577 NW2d 673 (1998) and *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998). I do not understand these decisions to have substantively or procedurally modified the requirements of MRE § 404(b), but merely to have attempted to clarify the often difficult analytical process required by this rule. With all due respect, I am hard-pressed to discern what language in these decisions compels this Court's reversal of its prior conclusion that the "other acts" evidence was admissible on at least seven separate bases under § 404(b).[1]

In any event, although I would not necessarily concur with each of these seven bases as justification for the admissibility of the "other acts" evidence, I am persuaded that the "other acts" evidence here is relevant to an understanding of defendant's modus operandi or system and, therefore, that such evidence makes it more likely that defendant abused the victim in the instant case in accordance with such modus operandi or system. In particular, the modus operandi or system evidenced by the "other acts" is one in which defendant took sexual advantage of young girls who were at the time directly under his authority, and took sexual advantage of them to an extent more or less commensurate with the degree of his authority.[2] While such modus operandi or system is perhaps less specific in its detail, and less dispositive in evidencing that defendant committed the charged conduct, than other instances of modus operandi or system evidence, it is nevertheless sufficiently distinctive, in my judgment, to justify its admission under § 404(b).

On this basis, I conclude that the "other acts" evidence satisfies the test in *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). First, as I have indicated, I believe that the evidence was offered for a legitimate non-propensity purpose under § 404(b), a purpose which was, in fact, identified at trial by the prosecutor. Second, as I have also indicated, I believe that evidence of this modus operandi or system is relevant in determining the truth of whether or not the alleged conduct--which was arguably consistent with this modus operandi or system-- occurred. Third, although I am sensitive to the fact, as was the trial court, that the "other acts" were committed substantially prior to the instant episode of conduct, ultimately I am persuaded that this factor goes principally to the weight of the evidence presented as opposed to its potentially "prejudicial" impact upon defendant. In terms of the potential prejudice of the "other acts" themselves, I believe that the relatively milder misconduct evidenced by these acts is unlikely to have prejudiced defendant in the context of the substantially more serious misconduct reflected by the instant charges. Fourth, the trial court issued a cautionary instruction in regard to the evidence, stating:

> You have heard some evidence in this trial that was introduced tending to show that the defendant may have committed other improper acts at prior times for which he is not presently on trial. If you believe this evidence, you must be very careful only to consider it for certain limited purposes. You may only think about whether this evidence tends to show that the defendant used a plan, system, or characteristic scheme that he had used before or since, or to demonstrate the so-called modus operandi or system of defendant as it's sometimes called, or for purposes of demonstrating the Prosecutor's theory of unlikely coincidence, or finally, as to the second count of the Information charging Criminal Sexual Conduct in the Second Degree, for the purpose of demonstrating that the defendant meant to engage in a criminal act in the present case, with the intent to achieve thereby, sexual gratification. This is evidence therefore received by the Court only for those limited purposes and you must not consider this evidence for any other purpose.

Although I recognize that the issuance of a cautionary instruction is merely one of a number of factors that must be assessed under *VanderVliet*, in the absence of contrary evidence I am not inclined to assume anything other than that the jury here was comprised of reasonably intelligent and responsible

individuals who not only abided by the express direction of the trial court but were fully capable of recognizing the logically limited value of the "other acts" evidence, even absent such an instruction.

Additionally, I would affirm the trial court with regard to the admissibility of the "other acts" evidence in the context of the CSC-lst conviction, contrary to the majority in both the instant and the prior opinions. Again, it is unclear to me from the prior opinion what this Court's basis was for distinguishing between the "other acts" evidence in the context of the CSC-lst and CSC-2d convictions. I am also uncertain as to what actions the majority would have had the trial court and prosecutor take to practically fine-tune the use of the "other acts" evidence-- permitting it in support of the CSC-2nd charge but prohibiting it in support of the CSC-lst charge-- short of severing the trial on these charges. After all, if the trial court's limiting instruction here is viewed as unavailing in mitigating the potential misuse by the jury of the "other acts" evidence, it is hardly likely that another limiting instruction offering this same guidance, and further making distinctions between the use of the evidence in the context of the CSC-lst and CSC-2d charges, would be more effective in ensuring proper consideration of the evidence. Most significantly, however, one need not over-generalize in characterizing defendant's modus operandi or system in order to find it equally descriptive of, and equally relevant to, both criminal charges. The modus operandi or system in evidence here is one involving the sexual abuse of young girls who, at least temporarily, fell within his authority. That they were allegedly subject to greater levels of sexual abuse, including sexual intercourse, when they were more rather than less completely within his authority, does not mitigate the value of the "other acts" evidence in the case of the CSC-lst charge. Indeed, such a circumstance only reinforces the sexual abuse of authority underlying defendant's modus operandi or system. As the prosecutor observes:

> While it may be that for some sex offenders, touching another may be all the sexual gratification that is desired, in many cases of sexual assault the difference between first and second degree CSC might well be said to hinge upon the question of how far a defendant has proceeded with unwanted sexual advances-- merely to the level of foreplay or to the level of actual intercourse.

In the instant case, the differing levels of sexual conduct with defendant's various victims may be more a function of the degree of his authority over the girls, along with the attendant differences in opportunity, than a reflection of any fundamental differences in the character of his conduct. While there may well be instances of "other acts" which are so uniquely relevant to a particular element of CSC-lst or CSC-2d that they are irrelevant to proof of the other offense, I do not believe that the prior sexual assaults involved in the instant case fit this description. To the extent that the "other acts" here evidence a relevant modus operandi or system on defendant's part-- and in my judgment they do-- I see little basis for viewing them as relevant only with respect to the CSC-2d charge.

Finally, I note that I am in general agreement with the remainder of the majority's analysis in its prior opinion in this case, relating to the issues of prosecutorial misconduct and the improper use of hearsay evidence. In addition, I do not find that defendant was denied the effective assistance of counsel because defense counsel did not call any witnesses for the defense. Defendant fails to offer any evidence or explanation regarding who he would have called as a defense witness or how the outcome of the trial would have been different had they testified. *People v Hyland*, 212 Mich App 701, 710;

180 NW2d 383 (1995). Further, it is irrelevant to say that defendant's first trial ended in a hung jury because defense witnesses were called and, thus, that the instant trial would also have resulted in a hung jury had defense witnesses been called. Obviously, every trial is unique, as are the jurors who make the determinations of guilt or innocence.

Additionally, even assuming that defendant has preserved the issue for appeal, his prosecution and conviction here did not constitute double jeopardy. Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. These guarantees are substantially identical and protect a defendant against both successive prosecutions for the same offense and multiple punishments for the same offense. *People v Torres*, 452 Mich 43; 549 NW2d 540 (1996). Defendant claims that he was placed in jeopardy several times for the same offense of criminal sexual conduct. Defendant first claims that he was charged and convicted of sexual abuse and emotional neglect with respect to the victim in the Kent County Probate Court Juvenile Division. Defendant only provides vague information regarding the juvenile court proceedings; however it appears that the victim was removed from the home due to the alleged sexual abuse by defendant. Although defendant may have felt that he was being put on trial in those child protective proceedings, they were not, in fact, criminal proceedings in which defendant was charged with criminal sexual conduct, convicted and sentenced. *People v Burks*, 220 Mich App 253, 256; 559 NW2d 357 (1999).

Defendant further argues that the prohibition against double jeopardy was violated as a result of the three criminal trials to which he has been subjected in Kent Circuit Court. According to defendant, his first trial ended in a mistrial on July 18, 1994. Defense counsel's brief indicates that the mistrial was declared because defendant entered a mental hospital after the jury had been impaneled. If a motion for mistrial was made by the prosecutor or by the trial judge *sua sponte*, retrial is permissible if such mistrial was manifestly necessary. *People v Dawson*, 431 Mich 234, 252; 427 NW2d 886 (1988). Manifest necessity is usually determined on a case-by-case basis, *People v Booker (Aft Remand)*, 208 Mich App 163, 172-73; 527 NW2d 42 (1994), and exists when there are sufficiently compelling circumstances which, absent mistrial, would have deprived defendant of a fair trial or would have made completion of the trial impossible. *People v Tracey* 221 Mich App 321, 326; 561 NW2d 133 (1997). Absent further information supplied by defendant, we can only conclude that mistrial in that case was manifestly necessary because defendant could not be present at the proceedings.

Defendant's second trial also ended in a mistrial on November 9, 1994 as the result of a hung jury. The Supreme Court has held that a deadlocked jury constitutes manifest necessity. *People v Mehall* 454 Mich 1, 4-5; 557 NW2d 110 (1997). Consequently, it was also permissible for defendant to be retried in the instant case in January 1995. *Dawson*, *supra* at 252. Therefore, even assuming defendant had not waived his claim, the proceedings against him did not result in a violation of double jeopardy.

I would affirm the trial court in all particulars.

/s/ Stephen J. Markman

[1] Having said this, I am nevertheless compelled to state my agreement with the dissent in *People v Sabin*, ___ Mich App ___; ___ NW2d ____ (Docket No. 187226, issued 6/4/99) in which Judge Whitbeck remarked:

> I must say that the Supreme Court may have set us an impossible task; it simply may not be possible to reconcile the majority opinions in [*Starr* and *Crawford*] and then to apply them to the facts in this case. . . . [O]ne can easily argue that a dense, almost impenetrable, fog of words has fallen over the much contested battlefield of other acts evidence under MRE 404(b).

The conflicting §404(b) decisions in the instant case on the part of the three trial judges involved and the three members of this Court only underscore the perceptiveness of this observation.

[2] Although defendant was convicted of criminal sexual conduct with respect to both prior "other acts," the trial court ruled that MRE 609 did not permit admission of defendant's convictions in those cases.