

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER B. LISK,

Defendant-Appellant.

UNPUBLISHED

December 28, 1999

No. 204306

Kalamazoo Circuit Court

LC No. 96-001499 FH

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of fourth-degree criminal sexual conduct, MCL 750.520e(1)(e); MSA 28.788(5)(1)(e) (sexual contact by a county employee with a county prisoner). He was sentenced to twenty-four months of probation. He appeals by right. We affirm.

Defendant first argues that the verdict was against the great weight of the evidence. Because defendant did not move for a new trial below, this issue is not preserved. Accordingly, we decline to address it.¹ See *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997); *Brown v Swartz Creek Memorial Post 3720—VFW Inc*, 214 Mich App 15, 27; 542 NW2d 588 (1995).

Defendant also argues that the trial court abused its discretion when it allowed a witness to testify that defendant engaged in sexual contact with her under circumstances similar to those alleged by the victim. We disagree.

The admissibility of other bad-acts evidence is within the trial court's discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). MRE 404(b) provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or

acts are contemporaneous with, or prior or subsequent to the conduct at issue in this case.

In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Court clarified the standard for the admission of evidence of other crimes or wrongs: the evidence must be relevant to an issue other than propensity under MRE 404(b); must be relevant to an issue or fact of consequence; and must not be more prejudicial than probative under MRE 403. In addition, the trial court may, upon request, provide a limiting instruction. *Id.* at 75.

In this case, the trial court specifically determined that the other bad-acts testimony was admissible under the test set forth in *VanderVliet*, *supra*. First, the testimony was provided for a proper purpose under MRE 404(b). The prosecution used it to demonstrate that defendant, a guard at the jail, had a common plan or scheme for engaging in sexual contact with inmates. We note that there were striking similarities between the testimony of the victim and the other witness.

Second, because defendant generally denied the allegations, the prosecution had to prove each of the elements of the case. *Id.* at 78. The similar acts evidence, if believed, showed that defendant engaged in sexual contact under similar circumstances in the past. This testimony was relevant to prove that defendant intentionally touched the victim in this case for the purpose of sexual gratification. Proof that the touching was for the purpose of sexual gratification was a necessary element of the case. See MCL 750.520e(1)(e); MSA 28.788(5)(1)(e) and MCL 750.520a(k); MSA 28.788(1)(k). The other bad-acts testimony was also relevant to the issue of whether the victim fabricated the assault, an issue raised by defendant. See *People v Sorscher*, 151 Mich App 122, 136; 391 NW2d 365 (1986).

Third, although the evidence was prejudicial, there has been no showing that the prejudice was unfair, i.e. that it substantially outweighed the probative value of the evidence. MRE 403; *People v Mills*, 450 Mich 61, 74-76; 537 NW2d 909, modified 450 Mich 1212 (1995). “Unfair prejudice” does not simply mean “damaging.” *Id.* at 75. We also note that the trial court gave two limiting instructions to the jury, one immediately after the witness testified and one prior to deliberations. Thus, we find that it was not improper, under the circumstances, to admit the other bad-acts testimony.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

¹ We note, however, that in making his argument, defendant refers to the trial court’s failure to grant his motion for a directed verdict of acquittal. The fact that defendant moved for a directed verdict at the close of the proofs does not preserve the issue of whether the jury’s *verdict* was against the great weight of the evidence. Moreover, the trial court properly denied defendant’s motion for a directed verdict.