

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

January 4, 2000

Plaintiff-Appellee,

v

No. 211946

TERRY LANCEFORD SCHATZER, II,

Bay Circuit Court

LC No. 97-001557 FH

Defendant-Appellant.

Before: Talbot, P.J., and Gribbs and Meter, JJ.

PER CURIAM.

A jury convicted defendant of domestic assault, third offense, MCL 750.81(4); MSA 28.276(4), against his live-in girlfriend. The trial court sentenced defendant as a second habitual offender, MCL 769.10; MSA 28.1082, to five years' probation, with the first 360 days to be served in the county jail and credit for fifty-six days served. We affirm.

On appeal, defendant argues that the trial court abused its discretion in allowing defendant's former girlfriend to testify that he physically abused her during their relationship. We disagree. This Court reviews a trial court's decision regarding the admission of prior acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383, 582 NW2d 758 (1998). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Hoffman*, 225 Mich App 103, 104; 570 NW2d 146 (1997).

Pursuant to MRE 404(b) evidence of other crimes, wrongs, or acts is admissible if such evidence is (1) offered for a proper purpose rather than to prove the defendant's character or propensity to commit a crime, (2) relevant to an issue or fact of consequence at trial, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993). Accord *Crawford*, *supra* at 385; *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). In addition, the trial court may provide a limiting instruction if requested. *VanderVliet*, *supra* at 75.

In this case, the prosecution alleged that defendant physically assaulted the victim, his live-in girlfriend, in an alley after a night of drinking. At trial, the prosecutor offered evidence that defendant assaulted his prior girlfriend during their relationship when he was drinking not to show that he had the propensity to commit domestic assaults, but to prove a “lack of mistake or accident,” which is a proper purpose under MRE 404(b). As the trial court noted, the other acts evidence was directly relevant to rebut the defense theory that defendant did not assault the victim, but accidentally pulled the victim to the ground when his weak knee collapsed, an action which mislead eyewitnesses into believing that he was assaulting her. See MRE 401; *Crawford, supra* at 387-390. Accordingly, the evidence was offered for a proper purpose and was relevant to an issue of consequence at trial.

In addition, we are not persuaded that the high probative value of the other acts evidence was substantially outweighed by the danger of unfair prejudice. The evidence went to the issue whether defendant intended to commit the charged offense, and the jury received an appropriate limiting instruction. *People v Gibson*, 219 Mich App 530, 534; 557 NW2d 141 (1996).

We further find no merit to defendant’s claim that the trial court erred in failing to make a factual determination that the other acts occurred, as required under MRE 404(b). In *Huddleston v United States*, 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988), the Supreme Court rejected the identical argument with respect to its federal corollary, FRE 404(b), holding that a court is not required to make a factual finding that the prior acts occurred before presenting it to the jury; the court must simply examine the evidence and determine whether the jury could reasonably find that the prior acts actually occurred. *Id.* at 686-687, 690-691. After a thorough review of the trial court’s ruling we find that it effectively determined that, based on the evidence offered, the jury could reasonably conclude that defendant abused his prior girlfriend during their relationship. Consequently, the trial court did not abuse its discretion in admitting the other acts evidence.

Defendant also argues that the trial court abused its discretion in prohibiting him from impeaching a crucial prosecution witness with a prior conviction for attempted breaking and entering with intent to unlawfully drive away an automobile. Again, we disagree. This Court reviews a trial court’s decision whether to allow the impeachment of a witness with evidence of a prior conviction for an abuse of discretion. *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992).

Where, as here, a party seeks to impeach a nonaccused witness with a prior theft conviction, the trial court must determine whether the conviction has significant probative value on the issue of credibility. MRE 609(a)(2)(B). In making that determination, the court need only consider the “age of the conviction” and “the degree to which a conviction of a crime is probative of veracity.” MRE 609(b); *People v Allen*, 429 Mich 558, 608; 420 NW2d 499 (1988). Here, the trial court determined that the nine-year-old conviction was too remote and that it was not probative of the witness’s ability to tell the truth about what he saw on the day in question. Further, defendant cites authority for the proposition that attempted unlawful driving away an automobile is “significantly” probative of veracity. *People v Dixon*, 175 Mich App 472, 476-477; 438 NW2d 303 (1989). However, that case is distinguishable, and as the trial court recognized,

the probative value of a theft conviction is to be determined on a case by case basis. *Allen, supra* at 606 n 33.

Affirmed.

/s/ Michael J. Talbot
/s/ Roman S. Gibbs
/s/ Patrick M. Meter