

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY JOVAN ADAMS,

Defendant-Appellant.

UNPUBLISHED

May 23, 2000

No. 213341

Saginaw Circuit Court

LC No. 98-015095-FH

Before: Owens, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant appeals of right from his jury trial conviction of first-degree home invasion, MCL 750.110(a)(2); MSA 28.305(a)(2), second-degree home invasion, MCL 750.110(a)(3); MSA 28.305(a)(3), and assault with intent to commit sexual penetration, MCL 750.520(g)(1); MSA 28.788(7)(1). The trial court sentenced defendant to terms of 160 to 240 months for the first-degree home invasion conviction, 120 to 180 months for second-degree home invasion, and 80 to 120 months for the assault conviction. We affirm.

The prosecution alleged that defendant twice broke into the victim's home on November 29 and 30, 1993 and that on the second occasion, he sexually assaulted her. Defendant denied that he committed the charged acts and interposed an alibi defense.

On appeal, defendant argues that the trial court abused its discretion in determining that pursuant to MRE 404(b), the other acts testimony given by Kimberly and Alexandra Ovalle was admissible for identification purposes, that is, to establish that defendant was the perpetrator in this case. According to defendant, the testimony lacked probative value and even if the testimony had probative value, that value was substantially outweighed by the danger of unfair prejudice. This Court reviews a trial court's decision to admit or deny evidence pursuant to MRE 404(b) for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Evidence of other acts is admissible under MRE 404(b)(1) if: (1) the evidence is offered for a proper purpose, (2) the evidence is relevant under MRE 402, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Id.* at 385; *People v*

VanderVliet, 444 Mich 52, 55; 508 NW2d 114 (1993). In addition, the trial court may, upon request, provide a limiting instruction to the jury to cushion any prejudicial effect of the evidence. *Crawford, supra* at 385; *VanderVliet, supra* at 75.

Evidence is relevant if it is material and has probative value. *Crawford, supra* at 388. “Materiality is the requirement that the proffered evidence be related to ‘any fact that is of consequence’ to the action.” *Id.*, quoting MRE 401. “Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial.” *Crawford, supra* at 389, quoting 1 McCormick, Evidence (4th ed), § 185, p 773. “The probative force inquiry 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.’ The threshold is minimal: ‘any’ tendency is sufficient probative value force.” *Crawford, supra* at 389-390.

After a careful review of the record, we conclude that the trial court correctly determined that the other acts testimony of the Ovalles was admissible to establish defendant’s identity as the perpetrator in this case. The testimony was material because defendant’s identity was “a fact of consequence to the action.” Additionally, the testimony had significant probative value, especially in light of defendant’s alibi defense, because it made the existence of defendant’s identity as the individual who broke into the victim’s home and assaulted her more probable than it would have been without the testimony. MRE 401; *Crawford, supra* at 388-390. Consequently, the Ovalles’ testimony, which was very similar to the testimony given by the victim in this case regarding the identity of the man who assaulted her, made it more probable that defendant was the responsible party.

We also conclude that the trial court correctly determined that the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. MRE 403; *VanderVliet, supra* at 74-75. As stated previously, the probative value of the testimony was relatively strong because of the unequivocal positive identification of defendant by Alexandria and the identification (albeit not as positive) by her mother Kimberley, and because of the similarity between the two incidents. The testimony went to the ultimate issue in dispute, which was whether defendant was the assailant in this case.

In addition, contrary to defendant’s argument, the trial court cushioned any prejudicial effect that the testimony may have had on the jurors by giving them a limiting instruction. *Crawford, supra* at 385. When analyzing the limiting instruction in its entirety, the trial court informed the jurors that if they believed the testimony given by the Ovalles, they could convict defendant based on that testimony only if it established that defendant was the assailant in this case, which is permissible pursuant to MRE 404(b). As a result, the trial court correctly determined that the testimony was admissible to establish that defendant was the assailant in this case.

Defendant also argues that the trial court erred by determining that the other act testimony of Marie Meyers was admissible for identification purposes. Meyers essentially testified that defendant asked her to talk to Kimberly Ovalle to see if she would drop the charges against him in another case in exchange for \$500 or some marijuana. According to defendant, this testimony was irrelevant in that it

had nothing to do with defendant's identity as the assailant in this case. We review the trial court's decision to admit or deny evidence pursuant to MRE 404(b) for a clear abuse of discretion. *Crawford, supra* at 383.

We agree with defendant that the trial court incorrectly determined that Meyers' testimony was admissible for identification purposes. Evidence that defendant may have been guilty of extortion bore no relationship to whether defendant was the assailant in this case and was therefore immaterial. *Id.* at 388-389. Merely because defendant may have been guilty of extortion did not necessarily mean that he was admitting that he assaulted Ovalle. If defendant was not admitting to Meyers that he was Ovalle's assailant, Meyers' testimony did not relate to whether defendant was the assailant in this case.

Although the testimony would have been admissible in the incident involving Ovalle as evidence of defendant's attempt to influence the testimony of a witness against him, *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981), and thus as showing his consciousness of guilt for that offense, the same cannot be said for its admission in this case. Defendant's apparent attempt to influence the testimony of a witness in a separate case regarding the charges in that separate case, does not have a tendency to show defendant's consciousness of guilt regarding this case. As a result, the testimony should have been deemed irrelevant.

However, our review of this case leads us to conclude that any error caused by admission of this testimony was harmless beyond a reasonable doubt. MCL 769.26; MSA 28.1096. This Court "focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999), quoting *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). For this Court to overturn defendant's conviction regarding a preserved, non-constitutional error, defendant must demonstrate that, after assessing the error "in the context of the untainted evidence . . . it is more probable than not that a different outcome would have resulted without the error." *Lukity, supra* at 495.

Here, defendant has failed to establish that it is more probable than not that absent the error in admitting Meyers' testimony, the outcome of the case would have been different. Indeed, defendant's argument regarding harmless error does not even consider the impact of the error concerning the admission of Meyers' testimony. We nevertheless conclude that the error in admitting Meyers' testimony "did not result in a miscarriage of justice that would justify reversal of defendant's conviction." *Lukity, supra* at 502.

First, the victim and the Ovalles all identified defendant in court as the assailant, and, with varying degrees of certainty, they all identified defendant as the assailant prior to trial. Second, all three testified that the assailant was a light-skinned African-American male who wore a mustache and had long hair on top and short hair on the sides. Defendant testified that during the months of November and December 1997, he wore a mustache and had long hair on top and short hair on the sides. Third, the victim and the Ovalles all testified that the assailant wore black leather gloves. A police detective testified that she confiscated a black pair of leather gloves from defendant's coat pocket after she arrested him. Fourth, defendant's girlfriend during the months of November and December 1997 testified that defendant gave her two rings in early December 1997, and those rings were identified by

the victim as the rings stolen from her home. Finally, a friend of defendant's testified that she was with defendant on the evening of November 30, 1997, and that she found several fifty-cent pieces in the pocket of his pants. According to the victim, several fifty-cent pieces were stolen from her home. After evaluating the effect of the error in the context of the untainted evidence, we conclude that it is not probable that a different result would have resulted without the error.

Affirmed.

/s/ Donald S. Owens

/s/ William B. Murphy

/s/ Helene N. White