

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY LEE EDWARDS, JR.,

Defendant-Appellant.

UNPUBLISHED

June 9, 2000

No. 213336

Calhoun Circuit Court

LC No. 97-003885-FC

Before: Fitzgerald, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct (CSC 1), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), second-degree criminal sexual conduct (CSC 2), MCL 750.520c(1)(f); MSA 28.788(3)(1)(f), and assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). The trial court sentenced him to concurrent prison terms of twelve to thirty years for the CSC-1 conviction, four to fifteen years for the CSC-2 conviction, and two to ten years for the assault with intent to commit criminal sexual conduct conviction. He appeals as of right. We affirm defendant's convictions but remand for resolution of defendant's challenges to the factual accuracy of the presentence investigation report (PSIR).

I

The complainant worked as a clerk in defendant's baseball card store. She alleges that shortly after she began work there, defendant sexually assaulted her in a back room of the store. Defendant contends that complainant consented to the sexual encounter. On appeal, defendant raises several issues of trial error.

II

Defendant argues that the trial court improperly excluded from evidence the complainant's statement that she had previously been "date-raped." We agree that the trial court erroneously excluded the evidence under the rape-shield statute. However, we hold that the evidence was properly excluded because it is irrelevant.

At defendant's preliminary examination and again at a pretrial hearing, the complainant testified that she told defendant during her job interview that she had previously been "date-raped." At plaintiff's motion, the trial court excluded this evidence from trial under the rape-shield statute, MCL 750.520j; MSA 28.788(10). Defendant now contends, as he did at trial, that the complainant's statement regarding a previous date-rape does not fall within the scope of the rape-shield law. He argues that the evidence that complainant made this statement is highly relevant to demonstrate that his relationship with the complainant quickly proceeded to a very intimate level consistent with his averment that all sexual contact between the two was consensual.

The Michigan rape-shield statute provides as follows:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). [MCL 750.520j; MSA 28.788(10).]

The related rule of evidence, MRE 404, provides:

(a) **Character Evidence Generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

* * *

(3) *Character of Victim of Sexual Conduct Crime.* In a prosecution for criminal sexual conduct, evidence of the victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease

In *People v Adair*, 452 Mich 473, 480-481; 550 NW2d 505 (1996), the Court stated:

The rape-shield statute was aimed at thwarting the then-existing practice of impeaching the complainant's testimony with evidence of the complainant's prior consensual sexual activity, which discouraged victims from testifying "because they kn[e]w their private lives [would] be cross-examined." House Legislative Analysis, SB 1207, July 18, 1974. A complainant's sexual history with others is generally irrelevant with respect to the alleged sexual assault by the defendant. MRE 401. More importantly, a witness' sexual history is usually irrelevant as impeachment evidence because it has no bearing on character for truthfulness. MRE 608. [Accord: *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982); *People v Wilhelm (On Rehearing)*, 190 Mich App 574, 580-581; 476 NW2d 753 (1991)].

We first consider if the complainant's testimony about the previous date-rape falls within the scope of the rape-shield statute and/or related rule of evidence. The statement here might arguably refer to sexual conduct, which could bring the statement within the coverage of the rape-shield statute. *People v Ivers*, 459 Mich 320, 329; 587 NW2d 10 (1998). However, in light of legislative intent as described in *Adair*, *supra*, it is clear that the challenged evidence is not the kind that the Legislature intended to prohibit. It does not constitute character evidence involving the complainant's past sexual conduct, nor is it general impeachment of the complainant's sexual reputation.¹ It was therefore error for the trial court to exclude the evidence under the rape-shield statute.

However, we will not reverse a trial court if it reached the right result, albeit for the wrong reason. *People v Mayhew*, 236 Mich App 112, 118, n 2; 600 NW2d 370 (1999). Here, the trial court properly excluded the evidence because it was not relevant to any issue. Generally, relevant evidence is admissible, but evidence that 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. Defendant has failed to demonstrate that the complainant's statement about a previous date rape was relevant to his defense. According to defendant, evidence of plaintiff's willingness to relate personal information would have helped prove that she consented to the sexual encounter in the back room. However, we are unable to see the connection. Were we to agree with defendant that complainant's willingness to discuss the date-rape reflected a degree of intimacy between complainant and defendant sufficient to support his defense that the sex between the two was consensual, and not coerced, defendant's theory is too tenuous and speculative to support a relevancy finding. The evidence was thus inadmissible because it was irrelevant.

III

Defendant maintains that the trial court erred by allowing Katrina Wilson, defendant's former girlfriend, to testify that defendant had earlier sexually assaulted her under circumstances similar to those existing in the case at bar. We disagree. The admissibility of "other-acts" evidence under MRE 404(b) is within the trial court's discretion and will be reversed on appeal only when there has been a clear

abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

MRE 404(b)(1) provides:

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 the case.

Plaintiff introduced Wilson's testimony on the grounds that it showed intent, a common scheme, plan or system of doing an act, and showed absence of accident or mistake. Use of other acts as evidence of character is excluded, except as allowed by MRE 404(b), "to avoid the danger of conviction based on a defendant's history of misconduct. . . ." *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998), quoting *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982). To be admissible under MRE 404(b), other-acts evidence must: (1) be offered for a proper purpose under MRE 404(b); (2) be relevant under MRE 402 as enforced through MRE 104(b); and (3) not have its probative value substantially outweighed by unfair prejudice. *Starr, supra* at 496, quoting *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Also, the trial court may, on request, provide a limiting instruction to the jury regarding this evidence. *Id.* Where the prosecution advances various theories purportedly warranting admission of other-acts evidence, "only one such theory needs to be a proper, noncharacter reason that compels admission for the testimony to be admissible." *Starr, supra* at 501.

Comparison of Wilson's testimony with that of the complainant reveals numerous similarities regarding details of the respective sexual assaults. Both assaults occurred in the same back room at defendant's store, both were perpetrated upon female acquaintances of defendant, both were accompanied by physical violence toward the complainants, and both included defendant's attempts to accomplish sexual intercourse and fellatio and to forcibly remove portions of the women's clothing. The present case therefore is analogous to *People v Miller (On Remand)*, 186 Mich App 660, 664; 465 NW2d 47 (1991), where a child who was the same age as the complainant and who also attended the same learning center was allowed to testify that he had been sexually molested by the defendant in the same manner and in the same or similarly secluded areas of the school. This Court in *Miller* concluded, "We find no reason to believe, in light of [*People v Engelman*, 434 Mich 204; 453 NW2d 656 (1990)], that the child's testimony is any less probative of defendant's scheme, plan, or system in committing the charged act than we did in our previous opinion." *Id.*

Similarly, in *People v Lee*, 212 Mich App 228, 245-246; 537 NW2d 233 (1995), the defendant was accused of the kidnap-murder of a young girl, and the trial court allowed admission of evidence that, as two young girls were walking to school only six days before the complainant was kidnapped, the defendant stopped his car and asked the girls for the time and directions. This evidence was introduced to show the defendant's pattern or plan for committing child abductions and that defendant committed this crime, *id.* at 245, and this Court affirmed, stating, "We do not agree with defendant that the prosecutor's use of the evidence exceeded the limited purpose allowed under MRE 404(b)." *Id.* at 246. Wilson's trial testimony met the first two requirements of the *Starr/VanderVliet* standard because it was offered for a proper purpose under Rule 404(b) (demonstrating defendant's plan, scheme or pattern of committing sexual assaults), and was relevant to a fact in issue under Rule 402, because it helped negate defendant's contention that the sexual conduct he committed with the complainant was consensual. See *Starr, supra* at 496-497.

The third factor of the *Starr/VanderVliet* standard requires that the probative value of the other-acts evidence not be substantially outweighed by unfair prejudice. The trial court concluded that Wilson's testimony was not so outweighed. We agree. In *Starr, supra* at 498, the Court stated:

This Court recently clarified that the third prong of this standard requires nothing more than the balancing process described in MRE 403. *VanderVliet, supra* at 72. Rule 403 allows for the exclusion of relevant evidence 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.'

Here, Wilson's testimony is substantially more probative than prejudicial because it shows defendant's plan, scheme or pattern of sexually assaulting females in the back room of his store and thus helps refute his contention that his sexual contact with the complainant was consensual.

Finally, the fourth factor of the *Starr/VanderVliet* standard was met by the trial court's limiting instruction to the jury. There was no error.

IV

Defendant claims that the trial court improperly allowed plaintiff to redact an audiotape of defendant's interview that was played for the jury. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Starr, supra* at 494. Plaintiff redacted statements by the police regarding the alleged penalty associated with CSC 1. The trial court permitted redaction in response to plaintiff's contention that the challenged references were inappropriate and would conflict with the trial court's jury instructions. By removing the suspect references, the trial court prevented the possibility of conveying to the jury information to which it was not entitled. There was no error.

V

Defendant contends that error occurred when a doctor who examined the complainant after the assault testified that the complainant's difficulty in making eye contact with him was typical of recent sexual assault complainants, and that a cervical strain he diagnosed was consistent with the application of force against her. Because defendant failed to object, appellate review has traditionally been limited to whether the evidence resulted in manifest injustice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). More recently, the Court in *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999) held that a defendant seeking relief for unpreserved nonconstitutional error must show a plain error affecting substantial rights, and that the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. Here, defendant has not demonstrated entitlement to appellate relief under either of these standards.

VI

Defendant also argues that the cumulative effect of alleged trial errors denied him the due process of law. Although it is possible for the cumulative effect of a number of errors to necessitate reversal, "only actual errors are aggregated to determine their cumulative effect," *Rice, supra* at 448, quoting *People v Bahoda*, 448 Mich 261, 292, n 64; 531 NW2d 659 (1995) and citing *People v Dilling*, 222 Mich App 44, 56; 564 NW2d 56 (1997). Because we find no "actual errors", this issue is without merit. *People v Snider*, 239 Mich App 393, 429, n 6; 608 NW2d 502 (2000).

VII

Defendant challenges the accuracy of the PSIR. The PSIR states that defendant "harbors a dark and predatory side to his personality" and that defendant's mother agreed with her ex-husband's negative comments regarding defendant's personality. Defendant challenged these statements, but the trial court did not adjudicate his criticisms. Because we are unable to state with assurance that the court's omission constitutes harmless error, we remand for clarification. *People v Daniels*, 192 Mich App 658, 675; 482 NW2d 176 (1991), citing *People v Thompson*, 189 Mich App 85, 87-88; 472 NW2d 11 (1991). If, on remand, the court determines that the disputed information affected defendant's sentences, it must resolve the challenge and resentence defendant. However, if the disputed material did not affect the sentences, they shall stand, although the court must strike all challenged inaccuracies from the presentence report. *Id.*

Defendant's convictions are affirmed and the case is remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck

¹ See *People v Morse*, 231 Mich App 424; 586 NW2d 555 (1998), where this Court held that evidence of prior sexual abuse of a child complainant was not barred under the rape-shield act because

its purpose was not to impeach the child's character, but to show the source of the child's age-inappropriate sexual knowledge. *Id.* at 432, 436.