

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAVELL EDMUND RICE,

Defendant-Appellant.

UNPUBLISHED

September 15, 2000

No. 214183

Oakland Circuit Court

LC No. 97-154708-FC

Before: Owens, P.J., and Jansen and R. B. Burns*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c). Defendant was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to fifteen to thirty years in prison for the first-degree home invasion conviction, and life in prison for each of the first-degree criminal sexual conduct convictions. Defendant appeals as of right and we affirm.

Defendant first argues that the trial court abused its discretion in admitting evidence of prior bad acts. The trial court admitted evidence of defendant's prior conviction for assault with intent to commit criminal sexual conduct. Defendant argues that this evidence was improperly admitted to show his propensity to commit the charged offense, and was not probative of anything other than his character. He also argues that the trial court erred in admitting this evidence because it was substantially more prejudicial than probative.

A trial court's decision to admit evidence of prior bad acts is reviewed for abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). The admission of evidence of a defendant's prior bad acts is governed by MRE 404(b)(1), which 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,

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

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.

To be admissible under MRE 404(b)(1), bad acts evidence must satisfy the following requirements: (1) it must be offered for a proper purpose; (2) it must be relevant under MRE 402, as enforced through MRE 104(b); (3) its probative value must not be substantially outweighed by its potential for unfair prejudice; and (4) a trial court may, upon request, give a limiting instruction to the jury. *Crawford, supra*, p 385; *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993). A general denial of guilt puts at issue all the elements of a charged offense. *Starr, supra*, p 501; *VanderVliet, supra*, p 78.

We find no abuse of discretion. Defendant's general denial put all elements of the offenses in issue. We reject defendant's claim that this evidence was probative only of his propensity to commit the charged offenses. The perpetrator's identity was at issue. The trial court found that the incidents were sufficiently similar for the evidence to be relevant regarding the issue of identity and the existence of a common scheme or plan. The evidence was also relevant to show defendant's modus operandi of entering the homes of females and attacking them in the early hours of the morning. The evidence was probative given the fact that the victims were unable to give a detailed description of their attacker. Further, the trial court provided a cautionary jury instruction regarding the limited use of the bad acts evidence. Accordingly, the bad acts evidence was properly admitted by the trial court because it was offered for a proper purpose (identity, scheme or plan), was relevant, its probative value was not substantially outweighed by the danger of unfair prejudice, and the trial court gave a limiting instruction. See also, *People v Sabin (After Remand)*, ___ Mich ___; ___ NW2d ___ (Docket No. 114953, decided July 27, 2000).

Defendant next advances two arguments regarding his sentence. Defendant claims that the trial court erred in finding that he was not amenable to rehabilitation. He contends that there was no foundation for the trial court's "assumption" that he is incapable of rehabilitation. Defendant also argues that the imposition of a life sentence constituted an abuse of discretion. We disagree with both arguments.

At sentencing, the trial court stated that defendant had had the opportunity to indicate that he could be rehabilitated, and that he had not done so. The trial court further stated that its "only choice is to keep you off the street and protect society from you." Contrary to defendant's assertion, we find that the trial court's finding at sentencing that defendant showed that he was not amenable to rehabilitation to be amply supported by the record. The presentence investigation report indicates that defendant (date of birth 12/18/1978) has an extensive juvenile record, dating back to 1993, of six felonies and two misdemeanors. Further, defendant was on probation for assault with intent to commit criminal sexual conduct when he committed the present offenses. The trial court also commented upon defendant's demeanor while testifying and his attitude in the courtroom. All of these factors support the trial court's conclusion that defendant could not be rehabilitated and must be incarcerated for society's protection. Significantly, we note that the sentencing transcript indicates that defendant was offered, and refused, to take a forensic examination. Defendant emphatically opposed undergoing such an

examination, and now asks this Court to fault the trial court for failing to base its conclusions upon an expert evaluation. We decline to do so.

Accordingly, the trial court's finding that defendant is not amenable to rehabilitation is amply supported by the record and is not clearly erroneous. MCR 2.613(C).

Finally, defendant argues that the trial court abused its discretion in sentencing him to life in prison. Because defendant was sentenced as a second habitual offender, the sentencing guidelines¹ are inapplicable and we review defendant's sentence for an abuse of discretion. *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999). In light of the severity of these offenses and defendant's record, we find no abuse of discretion.

Affirmed.

/s/ Donald S. Owens

/s/ Kathleen Jansen

/s/ Robert B. Burns

¹ We note that defendant makes much of the most recently enacted legislative sentencing guidelines because his scoring of the guidelines leads to a maximum sentence of twenty-eight years for the conviction of first-degree criminal sexual conduct. However, defendant acknowledges that the new sentencing guidelines are not applicable to him because they apply to crimes committed on or after January 1, 1999. Further, the sentencing guidelines under which defendant was properly sentenced do not apply to habitual offenders. Finally, we note that defendant's sentence of life for the criminal sexual conduct convictions are within the guidelines range of fifteen to thirty years or life.