

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DAVID ANGEL SIFUENTES,

Defendant-Appellant.

UNPUBLISHED
November 5, 2002

No. 232286
Midland Circuit Court
LC No. 00-009445-FH

Before: Cooper, P.J., and Jansen and R. J. Danhof*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b), and furnishing alcohol to a minor, MCL 436.1701(1). The trial court sentenced him to concurrent terms of five to fifteen years' imprisonment for the CSC III conviction, and thirty-one days for furnishing alcohol to a minor. Defendant appeals as of right and we affirm.

Defendant first argues that the trial court erred when it admitted testimony under MRE 404(b) from two young women who alleged that defendant sexually assaulted them after he provided them with alcohol at his apartment. Defendant contends that the other acts were not sufficiently similar to the charged act to be probative of a common plan or scheme, and that the prejudicial effect of the evidence substantially outweighed any probative value.

The trial court's decision regarding whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, where the decision regarding the admissibility of evidence involves whether a rule of evidence precludes admissibility of the evidence, the issue is one of law and is reviewed de novo. *Id.*

Other acts evidence may be admitted under MRE 404(b) when the following requirements are satisfied: (1) it must be offered for a proper purpose under MRE 404(b),¹ (2) it

¹ 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

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

must be relevant under MRE 402, (3) its probative value must not be substantially outweighed by its potential for unfair prejudice, and (4) if requested, a limiting instruction may be given to the jury. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000); *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).

First, the evidence was admitted for a proper purpose under MRE 404(b) because the prosecution used the evidence to show defendant's common scheme or plan to get young women into his apartment, get them intoxicated, and sexually assault them.

To be relevant, a scheme or plan must demonstrate "a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations"; however, the plan need not be unusual or distinctive. *Sabin, supra*, at 64-66. Here, the common features of the three alleged assaults include: (1) the young age of the women (each was under the age of twenty); (2) defendant provided alcohol to the women; (3) the women were in an intoxicated, weakened state at the time of the assaults; and (4) the women were sexually assaulted in defendant's apartment. Although there were dissimilarities between the uncharged and charged acts, the distinctions between the sexual acts in the present case were no more dissimilar than the acts in *Sabin*, which involved a single act of intercourse compared with repeated acts of molestation over a period of years. Further, although one of the witnesses could only speculate that defendant was her assailant, her testimony concerning the events before and after the assault supports a finding that defendant committed the alleged assault.

Moreover, the trial court very carefully considered the question of undue prejudice. The trial court did not permit testimony to the jury of the fact that one of the witnesses was under the age of eighteen and that both witnesses thought they may have been drugged. Also, the trial court permitted defendant to present witnesses who refuted the testimony of the two women. Lastly, at defendant's request, the trial court gave an appropriate limiting instruction to the jury both at the time of the testimony and during its final instructions.

Accordingly, we conclude that the trial court did not abuse its discretion in permitting the prosecution to introduce other acts evidence through the two witnesses.

Defendant also argues that he is entitled to resentencing, contending that three offense variables were misscored. Defendant properly objected to the scoring of offense variable ten (OV 10) and offense variable thirteen (OV 13) at sentencing, thus preserving his challenge to those two offense variables on appeal. MCL 769.34(10).

With regard to OV 10, defendant maintains that he should have been scored five points under MCL 777.40(1)(c) (offender exploited victim by size or strength difference, or exploited intoxicated, asleep, or unconscious victim), rather than the fifteen points scored under MCL

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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.

777.40(1)(a) (predatory conduct). Predatory conduct is defined as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). The evidence adduced at trial showed that defendant would encourage young women to drink alcohol in his apartment and he would then sexually assault them once they were intoxicated. This record evidence is sufficient to support the trial court’s score of fifteen points for OV 10. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

With regard to OV 13, defendant argues that it should not have been scored at all because one of the alleged assaults was improperly included as a crime against a person where defendant was not identified as the perpetrator. The trial court scored OV 13 at twenty-five points (offense was part of a pattern of criminal activity involving three or more crimes against a person). MCL 777.43(1)(b). Even if one of the witnesses did not specifically identify defendant at trial, there is still record evidence that defendant committed three or more crimes against a person where he was convicted of one count of CSC III in the present case and the other witness testified to three acts of criminal sexual conduct against her. Therefore, the trial court’s score for OV 13 is supported by the record.

Lastly, defendant claims that trial counsel was ineffective for failing to object to the score of OV 3 at ten points (bodily injury requiring medical treatment to the victim). MCL 777.33(1)(d). The record indicates that the victim was examined and treated by medical personnel at a hospital after she was assaulted by defendant. The victim complained of a bite mark to her cheek, and soreness to her jaw and shoulder, and she was given antibiotics to prevent an infection. Under these circumstances, defense counsel’s conduct was neither deficient nor prejudicial by not objecting to the score of OV 3. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Affirmed.

/s/ Kathleen Jansen
/s/ Robert J. Danhof