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UNPUBLISHED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.

COOPER, P.J. *(dissenting).*

I respectfully dissent from the majority opinion affirming defendant's conviction. I would find that the trial court erred when it admitted testimony under MRE 404(b) from two women who alleged that they were sexually assaulted in defendant's apartment.

As noted by Justice Brickley in *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998), the prohibition against the use of character evidence is deeply rooted in our jurisprudence. "In order to ensure the defendant's right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else. The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized." *Id*. at 388.

Pursuant to *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993) as reaffirmed in *Crawford, supra* at 385, and *People v Sabin*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), the first inquiry of the trial court with regard to the introduction of such evidence is whether or not the evidence sought to be introduced is for a proper purpose.

The prosecutor's stated purpose in introducing the testimony of these two witnesses was to show that defendant had a common scheme or plan to get women into his apartment so that he could get them intoxicated and then sexually assault them. In the instant case, the victim claimed that she was overcome by force and violence and while she admitted she was drinking, she did not claim she was too intoxicated to resist. Further, there was no testimony that she was enticed to the apartment. In fact, on the night in question she came back to the defendant's apartment uninvited. Therefore, the testimony introduced under MRE 404(b) did not meet the threshold

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

inquiry of proper purpose because there was no plan or scheme to lure the victims into his apartment.

The record further indicates that two women, who were permitted to testify under MRE 404(b), also came to defendant's apartment on a voluntary basis. Indeed, one of the women was invited to a New Year's Eve party in mid-December, but did not accept until 10:30 p.m. on the night of the party when *she* called the defendant. Moreover, it was the express intent of these young women upon visiting the apartment to drink. Both of them did, in fact, drink to excess. There was no testimony that defendant forced or even encouraged them to drink. In fact, there was testimony that Ms. Rice mixed her own drinks. Therefore, under the second prong of MRE 404(b), the testimony was either irrelevant or very weak at best.

More disturbing was the introduction of Ms. Rice's testimony, who could not even identify her alleged assailant. She speculated, based on the condition of her clothing when she awoke, that she was raped by *someone* in the apartment after she passed out. However, she also admitted that there were two other men at defendant's apartment on the night in question. Consequently, there was no showing that defendant committed the alleged assault. Speculative evidence does not have probative value.[1] Under the third prong of the requirements of MRE 404(b), the prejudicial effect of such testimony clearly outweighed the probative value.

Because this testimony failed to meet *any* of the requirements of MRE 404(b), I disagree that a limiting instruction would cure the undue prejudice.

/s/ Jessica R. Cooper

[1] It is interesting to note that no charges arose out of the incident with regard to Ms. Rice and that the defendant was subsequently acquitted of the charges brought by the second young woman.