

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR HUDSON,

Defendant-Appellant.

UNPUBLISHED

June 22, 2004

No. 244411

Wayne Circuit Court

LC No. 01-005770

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(b), and sentenced to a prison term of twenty months to fifteen years. He appeals as of right. We affirm.

Defendant first argues that the trial court erroneously admitted other acts evidence under MRE 404(b). We disagree. At trial, the court allowed the prosecution to admit testimony from a woman who testified that, five months before the charged conduct, defendant also sexually assaulted her. The trial court determined that the testimony was sufficiently similar to the complainant's testimony to show a scheme or plan under MRE 404(b), but was not admissible to show defendant's motive in committing the charged conduct. We review for an abuse of discretion the trial court's decision to admit prior acts evidence under MRE 404(b). *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).¹

MRE 404(b) prohibits "the *use* of evidence of specific acts to prove a person's character to show that the person acted in conformity with character on a particular occasion." *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000) (emphasis in original). Thus, for evidence to be properly admitted under MRE 404(b), the evidence generally must satisfy three requirements: (1) it must be offered for a purpose other than a character or propensity theory, (2)

¹ We reject defendant's argument that this Court should employ a three-part standard of review utilized by the Sixth Circuit Court of Appeals in some cases. The proposed standard of review has never been used by the appellate courts of this state or the United States Supreme Court, and appears to have been abandoned by the Sixth Circuit Court of Appeals. See *United States v Mack*, 258 F3d 548, 553 n 1 (CA 6, 2001).

it must be relevant (having any tendency to make the existence of a fact more or less probable), and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Defendant relies on our Supreme Court's decision in *Crawford, supra*, to support his contention that the other acts evidence was improperly admitted. In *Crawford*, the defendant was charged with possession with intent to deliver cocaine. At trial, the prosecution was allowed to introduce evidence of the defendant's prior conviction for delivery of cocaine and conspiracy to deliver cocaine in order to show the defendant's knowledge that the cocaine in question was hidden in his car and his intent to deliver the cocaine. *Id.* at 378, 381, 387. The evidence established that the defendant's prior conviction stemmed from a controlled buy involving a large quantity of cocaine, while the charged conduct involved the defendant being stopped for a routine traffic violation which led to the discovery of a large quantity of cocaine hidden in the car's dashboard. The Supreme Court reversed the defendant's conviction, finding that the evidence of the defendant's prior conviction, while material, was impermissible character evidence because there was an "insufficient factual nexus between the prior conviction and the present charged offense to warrant admission of the evidence." *Id.* at 393-395. The Court concluded, "The prior conviction only demonstrated that the defendant has been around drugs in the past and, thus, is the kind of person who would knowingly possess and intend to deliver large amounts of cocaine." *Id.* at 396-397.

The admissibility of other acts evidence was also addressed in *Sabin (After Remand), supra*, another case cited by defendant. In that case, the trial court held that evidence that the defendant had sexually assaulted other young daughters or stepdaughters living in his household was relevant to show his plan, scheme, or system in committing the charged conduct involving his thirteen-year-old daughter. *Id.* at 61. The Supreme Court determined that the charged and uncharged conduct shared sufficient "common features" to infer a plan, scheme, or system, which included that the defendant and the alleged victims had a father-daughter relationship, the victims were of a similar age at the time of the abuse, and the defendant allegedly played on the victims' fears of breaking up the family to silence them. "One could infer from these common features that defendant had a system that involved taking advantage of the parent-child relationship, particularly his control over his daughters, to perpetrate abuse." *Id.* at 66. The Court noted that in determining whether the defendant acted pursuant to a prior design, there must be more than a mere similarity in the results of the charged and uncharged conduct; there must be "*such an 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.*" *Id.* at 64-65, quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249 (emphasis in original).

The facts of this case more closely resemble those of *Sabin* than *Crawford*, in that the uncharged conduct here was sufficiently similar to the charged conduct to infer a plan, scheme, or system in committing the acts. Defendant approached each woman in a public place and managed to have each tell him about her situation. The complainant in this case was a student working at Burger King and was searching for better employment. The other woman was homeless and in need of a place to shower and spend the night. Both women willingly went with defendant to his home after he offered to help them. In both cases, defendant led the women into his home through the back door, which apparently entered into his bedroom, and on both occasions he turned on the television in his bedroom and eventually played a pornographic

video. Although the other woman testified that she would have consented to a sexual encounter with defendant had he asked her, she unequivocally testified that he did not ask her. Instead, defendant forcefully grabbed her arm, twisted it behind her head, and engaged in forced sex with her.

The complainant in this case testified that she agreed to a dinner date with defendant, but first went to his home because he indicated that he needed to get something. Although she watched television with him for twenty minutes, she objected when he put in a pornographic video. When defendant left the room and returned naked, the complainant told him that she wanted to go home and wanted to call her mother. Defendant left the room again and returned with just a shirt on. He choked her, knocked her down on the bed, and engaged in forced sex with her. Despite some dissimilarities in the accounts of the two women, we find that there were sufficient “common features” between the uncharged conduct and the complainant’s testimony about the charged conduct to establish a scheme or plan. Defendant engaged the women in conversation to gain a modicum of trust, brought them to his house and entered through the door leading directly into his bedroom, played a pornographic movie, and when the women objected to it, defendant, without warning, used physical force to sexually assault the women. From the evidence, it does appear that defendant devised a plan and used it repeatedly to commit sexual assaults. Thus, the testimony was offered for a proper purpose under MRE 404(b). *Knox, supra* at 509; *Sabin, supra* at 66.

Further, we find that the testimony was relevant. “Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence.” *Crawford, supra* at 387. The issue to be proven at defendant’s trial was whether the sexual encounter between defendant and the complainant was forced, as the prosecution maintained, or consensual, as defendant argued. The reasonable inference of the other acts testimony was that it made it more probable that the encounter between defendant and the complainant was also forced and not consensual. Therefore, the other acts testimony was logically relevant to a material issue to be proven in this case given that the uncharged and charged conduct contain sufficient similarities to infer a common plan or scheme.

Finally, we find that the probative value of the other acts testimony was not substantially outweighed by its potential for unfair prejudice. The probative value of the evidence was significant, given the similarities between the charged and uncharged conduct, to prove that the sexual contact was forced. This is not a case where the jury was allowed to consider “marginally probative evidence” that was easily outweighed by the danger of unfair prejudice. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2002). Instead, the jury considered very similar conduct that was probative of defendant’s plan or scheme to engage in forced sexual intercourse that countered defendant’s argument that his sexual encounter with the complainant was consensual.

Because we find that the other acts testimony was admitted for the proper purpose of establishing defendant’s common plan or scheme, was relevant to the material issue of consent, and its probative value was not substantially outweighed by its potential for unfair prejudice, we conclude that the trial court did not abuse its discretion in admitting it under MRE 404(b). The evidence was admissible to establish the actus reus of the charged offense. *Sabin (After Remand)*, *supra* at 70-71.

Next, defendant argues that the trial court erroneously excluded evidence that, as a result of the complainant's severe depression, the complainant's mother was appointed as the complainant's guardian a few months before the charged conduct occurred. Again our review is for an abuse of discretion. *Crawford, supra* at 383.

At trial, defense counsel was allowed to question the complainant about her treatment for depression. She testified that she had been treated for depression for two years and was taking psychotropic drugs at the time of the charged offense. However, the trial court ruled that defense counsel could not inquire about the fact that the complainant's mother had obtained legal guardianship over the complainant because of her depression and instability and was her guardian when the charged offense was committed. Defendant maintains that this was a proper subject of inquiry in order to fully appraise the jury of the complainant's mental state, thus allowing it to understand what might motivate the complainant to fabricate allegations of sexual assault against defendant.

We conclude that the trial court did not abuse its discretion in excluding the evidence. As the trial court noted, the fact that the complainant was under treatment for depression and was taking psychotropic drugs arguably affected her mental state and ability to perceive events at the time of the incident in question and, therefore, was relevant. However, the same does not hold true with regard to the fact that the complainant's mother temporarily obtained guardianship over her adult daughter. At trial, defense counsel argued that it was not necessarily the fact of the guardianship but the facts about the complainant's condition contained within the guardianship papers and orders that were relevant to the complainant's credibility. However, counsel provided little information regarding what those facts were and could not offer a theory under which the evidence might be admissible. Therefore, defendant could not establish that the existence of the guardianship and the circumstances surrounding it made it more probable that the complainant fabricated the sexual assault allegation. *Crawford, supra* at 387.

On appeal, defendant relies on cases citing the Confrontation Clause, US Const, Am VI, for the propositions that a criminal defendant must be allowed to cross-examine a witness concerning possible bias and that the bias or interest of a witness is always a proper subject of inquiry. However, defendant does not explain how the fact of the guardianship demonstrates the complainant's bias or interest against him. Although a criminal defendant has the right of cross-examination, that right does not include a right to cross-examine on irrelevant issues, and the trial court retains wide latitude to impose reasonable limits on cross-examination. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Here, the jury was permitted to learn that the complainant was being treated for depression and was taking psychotropic drugs at the time of the charged offense for the purpose of evaluating her state of mind and ability to perceive events. Under the circumstances, we find that the trial court did not abuse its discretion when it reasonably limited defendant's right of cross-examination by precluding examination concerning the fact of the guardianship.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly