# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 2, 2009 |
| v | No. 280077<br>Lenawee Circuit Court |
| BOBBY WAYNE HODGES,<br><br>Defendant-Appellant. | LC No. 2006-012777-FH |

Before: Servitto, P.J., and Owens and K. F. Kelly, JJ.

Servitto, J. (*dissenting).*

I respectfully dissent as to the majority's conclusion that the trial court did not abuse its discretion in the admission of "other acts" evidence pursuant to MRE 404(b).

Evidence of a criminal defendant's prior bad acts is generally not admissible at trial in order to ensure that the defendant is afforded a fair trial based on the evidence, rather than on his prior actions. *People v Starr*, 457 Mich 490, 577 NW2d 673 (1998). To that end, "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." MRE 404(b)(1). However, other acts evidence may 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. . ." To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice. *People v Kahley*, 277 Mich App 182, 184-185; 744 NW2d 194, 196-197 (2007). Evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002).

As our Supreme Court noted in *People v Crawford*, 458 Mich 376, 387-388; 582 NW2d 785 (1998), a common problem in MRE 404(b) cases is the trial courts' tendency to admit the prior misconduct evidence merely because it has been "offered" for one of the rule's enumerated proper purposes. However:

> Mechanical recitation of "knowledge, intent, absence of mistake, etc.," without explaining how the evidence relates to the recited purposes, is insufficient to justify

admission under MRE 404(b). If it were, the prosecutor could routinely admit character evidence by simply calling it something else. Relevance is not an inherent characteristic, nor are prior bad acts intrinsically relevant to "motive, opportunity, intent, preparation, plan," etc. 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. 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*. (internal citations omitted).

In *People v VanderVliet*, 444 Mich 52, 90-91; 508 NW2d 114 (1993), our Supreme Court strongly encouraged trial courts to utilize a flexible approach for determining admissibility to facilitate the informed exercise of their discretion under MRE 403:

> The probative value of other acts evidence and its true potential for prejudice is often unclear until the proofs are actually presented. Other acts evidence relevant to elements technically at issue because of a not guilty plea may initially have only marginal probative value in comparison to the potential prejudice generated by the evidence. Where, for example, the real issue contested is whether the act was committed, and the prosecution's claim is that the disputed issue of mens rea requires admission of other acts evidence in the case in chief, the trial court should defer the ruling on admissibility where the jury would be likely to determine criminal state of mind from the doing of the act, allowing admission in the case in chief only if the evidence of other acts meets the standards for admission as proof of actus reus. . . The ultimate goal is an enlightened basis for the trial court's conclusion of relevance and for the attendant inquiry under MRE 403.

Here, the prosecutor sought to introduce evidence of a sexual assault allegedly perpetrated by defendant that occurred two weeks after the incident at issue for the stated purpose of establishing lack of mistake, method of operation, and to refute a defense of consent, if offered. The trial court ruled that the evidence was admissible, prior to trial and without the benefit of an evidentiary hearing or witness testimony, "to show an absence of mistake or accident, to show intent . . .", i.e., finding that the evidence was offered for a proper purpose and was relevant to that purpose.[1] I disagree.

In the instant offense, defendant was a friend of the complaining witness' long-term boyfriend and had regularly spent time with the complaining witness and her boyfriend for approximately one year prior to the alleged assault. On the night of the alleged assault, all three,

[1] When the trial court ruled that the evidence would be admitted, there was no DNA evidence or witness testimony to establish that the Traverse City assailant was the defendant.

plus a friend of the complaining witness, spent the night at a campground after watching NASCAR races at a racetrack. According to the complaining witness, they had been drinking throughout the day, but she had stopped relatively early and was fairly sober by the end of the evening. At some point that night defendant entered the tent they were all to share, by himself, and fell asleep in one section of the three-section tent. The complaining witness and her boyfriend stayed up for awhile longer, then eventually entered the tent and fell asleep together on an air mattress in another section of the tent. The complaining witness testified she awoke to pain in her vaginal area and found defendant on top of her, allegedly attempting to penetrate her. The complaining witness testified she said "ow" and defendant rolled off of her and onto the air mattress. The complaining witness then woke her boyfriend, who was still sleeping next to her and advised him of what had transpired.

The "other acts" evidence admitted at trial also involved a sexual assault on one of the defendant's friends' girlfriends. That, however, appears to be the extent of the similarities between the two events. Prior to this assault, defendant, along with a group of friends were traveling from bar to bar during a festival in Traverse City. With the group of friends was the girlfriend of one of defendant's friends; a woman defendant had never previously met. The woman became highly intoxicated and passed out during a car ride to one of the friend's home. When they arrived at the home, the woman went to a bedroom and ended up sleeping there, alone. According to the woman, she awoke in the early morning hours lying on her stomach and being penetrated from behind. A bed sheet was held over the woman's head and the assailant physically held her down on the bed while the assault occurred. The woman did not see who the assailant was, nor did she hear his voice.

While the majority found that the events were similar and could establish method of operation or intent, I do not believe that the fact that alleged sexual assaults occurred after nights of drinking renders the events similar. The alleged assault in the instant matter concerned a woman that defendant knew well and spent a relatively significant amount of time with, whereas the other incident involved a woman defendant had just met. The complaining witness in the instant matter indicated that she was nearly sober by the time she went to bed and could recall how the evening progressed, whereas the victim in the Traverse City assault was completely inebriated and could remember little about the night. The complaining witness in the instant matter was in the same tent as her boyfriend, and was next to her boyfriend on the same air mattress when the alleged assault occurred, whereas the victim in the Traverse City assault was completely alone in a bedroom. In the instant matter, it is alleged that defendant made no effort to conceal his appearance and, when the complaining witness awoke and made an indication of pain, quickly rolled off her. The victim in the Traverse City assault, however, was prevented from seeing her assailant by a sheet held over her head and was physically restrained while the assault occurred. The facts of the Traverse City assault do not bear out the prosecutor's contention that defendant intended to sexually assault the complaining witness in the instant matter or that the alleged sexual assault was not the product of mistake or accident. Thus, the allegations of a later sexual assault by defendant were mere character evidence masquerading as evidence of "intent."

The majority indicated that the offered evidence "made defendant's theory that the contact in the instant case was accidental less probable." However, defendant's defense was not that the instant matter occurred by accident but that the instant matter *never* occurred. The

plausibility of this defense was to be determined by the jury on the basis of its assessment of the credibility of the witnesses. Defendant's counsel did indicate that the complaining witness may have rolled over toward defendant while they were sleeping on the airbed because of the weight difference and defendant did state that he might have accidentally bumped into the complaining witness while they were sleeping. However, these statements do not rise to the level of an assertion by the defendant that the removal of the complaining witness' pants while she slept or that the attempted penetration of her vagina occurred by accident or mistake. Defendant, in fact, consistently denied that *any* sexual contact occurred. Whether defendant sexually touched the complaining witness by mistake, then, was not a contested issue at trial. The "other acts" evidence was not offered for the otherwise proper purpose of establishing absence of mistake or accident as set forth in MRE 404(b)(1). This evidence was clearly offered for the purpose of proving propensity or "action in conformity therewith", and should have been excluded. Moreover, because the prosecutor failed to demonstrate that the evidence concerning the Traverse City assault created an intermediate inference that was probative of a contested issue in the instant matter, the evidence was not relevant.

Even if I was convinced the evidence was offered for a proper purpose and was relevant, the unfair prejudice of this evidence substantially outweighed its probative value. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Crawford*, *supra*, at 398.

> In the context of prior bad acts, that danger is prevalent. When a juror learns that a defendant has previously committed the same crime as that for which he is on trial, the risk is severe that the juror will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he "did it before he probably did it again." Because prior acts evidence carries with it a high risk of confusion and misuse, there is a heightened need for the careful application of the principles set forth in MRE 403. *Id.* (internal citations omitted).

In this matter, the admittance of the "other acts" evidence resulted in a trial-within-a-trial. Four out of the prosecution's nine witnesses testified concerning the other act, as did four out of defendant's nine witnesses. A rather large portion of defendant's trial, then, focused on the "other bad act" and disclosed vivid, disputed details of the Traverse City act. Where other bad acts evidence nearly overwhelms the trial on the charged act, the risk of confusion and undue emphasis cannot be anything but extraordinarily high. This is particularly so in the instant matter, where the prosecution presented a single DNA expert who, on direct examination discussed the DNA analysis she performed with respect to both cases. In the instant matter, no DNA evidence linked defendant to the complaining witness, whereas in the Traverse City matter, there was such a link.[2] The expert was questioned about and skipped back and forth between the two acts throughout her testimony, creating a high risk of confusion for the jury.

[2] As indicated previously, the Traverse City DNA test results were unknown to the trial court at the time of the ruling on the admissibility of the "other acts" evidence. Furthermore, there is
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As noted in *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988), the appetite for more knowledge of a defendant's background:

> . . . presents three types of impropriety. First, that jurors may determine that although defendant's guilt in the case before them is in doubt, he is a bad man and should therefore be punished. Second, the character evidence may lead the jury to lower the burden of proof against the defendant, since, even if the guilty verdict is incorrect, no "innocent" man will be forced to endure punishment. Third, the jury may determine that on the basis of his prior actions, the defendant has a propensity to commit crimes, and therefore he probably is guilty of the crime with which he is charged . . . The danger then is that a jury will misuse prior conviction evidence by focusing on the defendant's general bad character, rather than solely on his character for truthtelling.

Given that the Traverse City assault involved what could be considered a more violent assault than alleged in the instant matter (the Traverse City assault being a physically forceful assault having been perpetrated on an incapacitated woman where the assailant concealed his identity), I cannot help but conclude that the jury gave preemptive weight to the Traverse City assault in convicting defendant. I am convinced that the very improprieties warned of in *People v Allen, supra,* occurred in this matter. The "other acts" evidence was unfairly prejudicial and the prejudice substantially outweighed any probative value the evidence may have had.

While the jury was given a limiting instruction concerning this evidence, I do not believe the instruction could possibly remove or minimize the unfair prejudice of the evidence. Limiting instructions are generally employed where more than one fact may be derived from a given piece of evidence, but not all are permissible considerations. *People v Allen*, 429 Mich 558, 573-574; 420 NW2d 499 (1988).

> This is not always easy for a jury to do, but we must sometimes rely on limiting instructions if our system is to function. However, . . .in the case of most prior conviction evidence the permissible consideration can only be understood by first recognizing the impermissible consideration. Where the two factors are so inextricably linked, we do not believe that a jury can be reasonably expected to follow the instruction. *Id.*

As further noted in *People v Allen, supra*, at 572, quoting *Bruton v United States*, 391 US 123, 135; 88 SCt 1620; 20 LEd2d 476 (1968), "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

I believe that we are presented with such an exceptional circumstance. The jury having heard an overwhelming amount of evidence concerning defendant's alleged violent assault on an incapacitated woman in Traverse City, I do not believe that they could simply block the evidence

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nothing in the lower court record to indicate that the defendant was ever tried or convicted in the Traverse City matter.

from their minds for impermissible purposes, while employing it for another, permissible purpose. Finally, I believe the error in the admission of evidence was outcome determinative and thus not harmless. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). I would therefore reverse and remand for a new trial. I agree with the majority's conclusions as to the remainder of the issues addressed in this appeal.

/s/ Deborah A. Servitto