# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 23, 2010 |
| v | No. 291688<br>Kent Circuit Court |
| GLENN SCOTT IDALSKI,<br><br>Defendant-Appellant. | LC No. 08-002691-FH |

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (victim younger than 13), for which he was sentenced to five years' probation and 365 days in jail. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I

Defendant's conviction arises from the fondling of a two-year-old boy on a crowded Grand Rapids bus. The victim's mother had placed the child on the seat in front of hers next to defendant, a passenger on the bus whom she did not know. Two other passengers seated across the aisle observed defendant patting the back of the victim's diaper; when the victim started sliding out of his seat, defendant pulled him back up. The passengers then saw defendant put his hand inside the victim's diaper, groping and fondling the child's buttocks and genitalia. A third passenger began yelling and screaming at defendant and alerted the victim's mother as to what had happened. Defendant told responding police officers that he is diabetic and that he blacks out at times and does not recall afterwards what he did. Although defendant claimed to not remember the incident with the victim, he was able to give a detailed account of the events surrounding the incident, and he admitted that he had been feeling "sexual" on the bus.

At trial, the prosecution sought admission of evidence that defendant had recently engaged in an act of sexual misconduct against "N.V.," the 17-year-old, Down Syndrome, adopted daughter of the pastor of a local church, during a church function. The prosecution argued that the uncharged-act evidence was admissible under MRE 404(b) for the purpose of demonstrating intent. The trial court agreed and permitted the testimony of N.V's adoptive

father and of a parishioner who witnessed the incident, ruling that it was demonstrative of a common scheme, plan, or system.

The parishioner testified that he and approximately 20 other parishioners were in the church's foyer following a service when he observed, from approximately ten feet away, that defendant was bent over and was fondling and squeezing N.V.'s buttocks. N.V., who appeared to the witness to be only seven or eight years old, remained passive and unresponsive throughout the incident. N.V.'s father testified that N.V., whose birth mother was a drug and alcohol user, was born with Down Syndrome and had the mental capacity and ability to function of a two- to five-year-old. Furthermore, she appeared to be much younger than her actual age, and people were generally "amazed" when they were told that she was 17 years old. When N.V.'s father met with defendant the following morning, defendant acted confused and claimed to have no recollection of an incident involving N.V. However, defendant later called N.V.'s father and said that he was in some trouble, that what had happened with N.V. was an accident, and that he would like the matter to be dropped.

Defendant, noting that the victim and N.V. are 15 years apart in age and of different genders and that the alleged acts occurred in different locations and under entirely different circumstances, asserts that the uncharged act was not sufficiently similar to the charged offense to be properly admitted.

II

"The admissibility of other-acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion." *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009). "A court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *Id*. at 670. "Because an abuse of discretion standard contemplates that there may be more than a single correct outcome, there is no abuse of discretion where the evidentiary question is a close one." *People v Smith*, 282 Mich App 191, 194; 772 NW2d 428 (2009).

MRE 404(b) prohibits the admission of evidence of a defendant's other acts or crimes when introduced solely for the purpose of showing that the defendant acted in conformity with his criminal character. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). However, MRE 404(b)(1) provides that such 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, whether such other crimes, wrongs or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence of a defendant's uncharged act is properly admitted under the following circumstances:

> (1) a party offers it to prove "something other than a character to conduct theory" as prohibited by MRE 404(b); (2) the evidence fits the relevancy test articulated

> in MRE 402, as "enforced by MRE 104(b)"; and (3) the balancing test provided by MRE 403 demonstrates that the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is offered[.] [*People v Hawkins*, 245 Mich App 439, 447-448; 628 NW2d 105 (2001), citing *VanderVliet*, 444 Mich at 74-75.]

The prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact other than the defendant's character or propensity to commit the crime. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), citing *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). "'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.'" *Id*. at 509, quoting *Crawford*, 458 Mich at 387. A fact is material when it is in issue or within the range of litigated matters in controversy. *People v Ackerman*, 257 Mich App 434, 439; 669 NW2d 818 (2003).

III

The trial court did not abuse its discretion in admitting evidence of defendant's misconduct with N.V. for the purpose of demonstrating a common scheme, plan, or system of assaulting helpless and youthful victims. "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." *Sabin*, 463 Mich at 63. General similarity between the charged and uncharged acts, standing alone, does not establish a scheme, plan, or system; rather, the evidence must show "'such 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.'" *Id*. at 64-65 (emphasis omitted), quoting Wigmore, Evidence (Chadbourn rev), § 304, p 249. However, "[l]ogical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot." *Id*. at 64. Moreover, there need not be an impermissibly high level of similarity between the uncharged act and the charged offense; nor are distinctive or unusual features required as long as the evidence supports an inference that the defendant used a common plan in committing the charged offense. *Knox*, 469 Mich at 509; *People v Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002); *People v Kahley*, 277 Mich App 182, 185; 744 NW2d 194 (2007).

Defendant was charged with CSC-II for fondling the buttocks and genitalia of a diapered, two-year-old boy on a public bus. The other-acts testimony established that defendant fondled N.V.'s buttocks in a public place; that the girl remained passive and unassertive throughout the event; that she had Down Syndrome and functioned at the level of a preschooler; and that, despite her actual age of 17, she appeared to be as young as seven or eight years old. This testimony supports an inference that defendant had a scheme, plan, or system of improperly touching vulnerable, passive children who lacked the ability either to resist or to communicate what was being done to them. Moreover, in both the charged and uncharged acts, defendant engaged in the improper touching in public places and then claimed to have done so innocently or by accident. Defendant initially told police that he did not remember touching the victim. At trial, however, defense counsel argued that defendant only touched the victim to stop him from sliding off the bus seat. Likewise, defendant initially claimed that he did not remember touching N.V., but later said it was an accident. The evidence of the uncharged act shared more than

"general similarity" with the charged offense, and instead shared "'such 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.'" *Sabin*, 463 Mich at 64-65.

Furthermore, we agree with the prosecution's assertion that the other-acts evidence was relevant to establish intent and absence of mistake. Where, as here, a defendant pleads not guilty, all elements of a criminal offense are in issue. *Crawford*, 458 Mich at 389; *People v Martzke*, 251 Mich App 282, 293; 651 NW2d 490 (2002). To establish defendant's guilt of CSC-II, the prosecution was required to prove that he intentionally touched the victim and that the intentional touching "can reasonably be construed as being for the purpose of sexual arousal or gratification [or] done for a sexual purpose." MCL 750.520a(q); MCL 750.520c(1)(a). Evidence that defendant had engaged in a similar act of touching a child-like and vulnerable victim in a public place was highly probative of whether defendant intended to touch the victim for a sexual purpose, as opposed to touching him by accident or for the innocent purpose, as suggested by defense counsel, of stopping him from sliding off his bus seat.

Finally, defendant argues that regardless of the probative value of the other-acts evidence, its admission was unfairly prejudicial and likely resulted in the jurors convicting him because they thought he was a bad person. Evidence is unfairly prejudicial if it presents a danger of being only marginally probative and is likely to be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). The evidence regarding defendant's touching of N.V. was more than "marginally probative." Rather, this evidence provided a substantial factual nexus to the charged offense to show defendant's common scheme, plan, or system, his intent, and the absence of mistake. Furthermore, the trial court provided a comprehensive limiting instruction to the jury, stressing that the other-acts evidence could be considered only for the purpose of deciding the believability of the testimony regarding the charged offense and that it could not be considered as evidence that defendant was a bad person or likely to commit crimes. It is well established that jurors are presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, the trial court's decision to admit the other-acts evidence was within the range of principled outcomes. See *Waclawski*, 286 Mich App at 670.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering