

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIRK BERNARD HENDEN,

Defendant-Appellant.

UNPUBLISHED

June 26, 2012

No. 303552

Wayne Circuit Court

LC No. 10-003956-FC

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

STEPHENS, J. (*concurring*)

I write separately only to address the majority's analysis of the admission of evidence regarding other crimes. In its well-written opinion, the majority found that the trial judge's decision to admit the evidence of the other acts was supported by the evidence. While I concur that the trial judge's decision to admit the evidence was not outside the realm of principled outcomes, I am concerned that the judge's decision was made based upon what was likely an unintentional error in the prosecutor's argument regarding the admission of the testimony from two other crime victims. The trial judge specifically noted that he was persuaded in part by the fact that all three incidents occurred at night. In fact, only the crime for which the defendant was found guilty occurred at night. The record does not afford sufficient information upon which to conclude that the trial judge would have allowed the evidence to be admitted had he been accurately informed as to the timing of the other incidents. There is a compendium of differences between the subject crime, which happened at night, in Detroit, and involved a sexual assault and the prior incidents, which occurred during the day, in Redford, and did not involve sexual assault. Consequently, because the manner of attack was not unique nor unusual, the trial judge may have excluded the evidence had he been provided with accurate information. However, because the scientific evidence of defendant's guilt was so overwhelming, even if the trial judge was misled and would or should have excluded the evidence, the error was clearly not outcome determinative.

/s/ Cynthia Diane Stephens