

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 13, 2012

v

KEITH DOUGLAS BOCK,

Defendant-Appellant.

No. 305638
Bay Circuit Court
LC No. 10-010831-FH

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(b) (force or coercion). He was sentenced to 120 days in jail and 3 years probation. Because the challenged evidence was not admissible under MRE 404(b) or MRE 608, we affirm.

The complainant in this matter is defendant's adult stepdaughter. She testified that defendant touched her buttocks and breasts on numerous occasions without consent, between 2007 and 2010. At the time, the complainant and her children lived with defendant and the complainant's mother. The complainant testified that she did not tell her mother or anyone else at the time because her mother was already having mental health issues and she did not want to cause her mother to have further problems. The complainant eventually told her father and the police what had been occurring, and defendant's conviction resulted from one of the incidents described by the complainant.

On appeal, defendant argues that the trial court erred when it prevented defense counsel from introducing evidence tending to show that the complainant was dishonest. Specifically, defendant challenges the trial court's refusal to admit evidence that the complainant fraudulently e-filed her 2009 tax return and took his \$8,000 tax refund.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "[D]ecisions regarding the admission of evidence frequently involve preliminary questions of law, such as whether a rule of evidence or statute precludes admitting of the evidence. This Court reviews questions of law de novo." *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An evidentiary error in a

criminal case does not warrant reversal unless it is more probable than not that a different outcome would have resulted absent the error. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

All evidence must be relevant to be admissible. MRE 402. Relevant evidence is evidence that has any tendency to make a fact of consequence more or less probable. MRE 401. However, character evidence, even if it is relevant “is not admissible for the purpose of proving action in conformity therewith on a particular occasion[.]” MRE 404(a).

First, defendant argues that the evidence was admissible under MRE 404(b)(1), which provides:

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. It may, however, 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.

This rule applies to both criminal defendants and witnesses. *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991). “To be admissible under MRE 404(b), bad-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 (2007).

The evidence that complainant fraudulently e-filed defendant’s taxes was not admissible under MRE 404(b), because it was not admitted for a proper purpose. Defendant sought to introduce the evidence for the admitted purpose of showing that the complainant was a dishonest person and that she therefore lied about the sexual allegations. Using the evidence for this purpose is in direct conflict with MRE 404(b). Defendant cannot use the character evidence to prove complainant acted in conformity therewith on a particular occasion. While defendant also contends that the evidence was admissible under MRE 404(b) because it established a motive on the complainant’s part to fabricate allegations against him, this argument was not raised at trial. This Court will not address this unpreserved issue. *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002), mod 468 Mich 881 (2003).

Next, defendant argues that the evidence was admissible under MRE 608, which provides in part:

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Defense counsel attempted to question defendant regarding a specific instance of complainant's conduct to prove that she was dishonest. However, MRE 608 does not allow defense counsel to question a witness on direct examination about specific instances of conduct. Such questioning must be done on cross-examination. MRE 608(b). The evidence was not admissible under MRE 608.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot