

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUIS ANGEL PESQUERA,

Defendant-Appellant.

FOR PUBLICATION

January 16, 2001

9:00 a.m.

No. 209238

Monroe Circuit Court

LC No. 96-027383-FC

Updated Copy

March 16, 2001

Before: M.J. Kelly, P.J., and Holbrook, Jr. and Griffin, JJ.

M.J. KELLY, J. (*dissenting*).

I respectfully dissent. I believe the trial court abused its discretion in permitting the children to testify by videotape and in admitting other acts testimony under MRE 404(b)(1). I would reverse.

While the children's mothers testified that the children were afraid of defendant and of the courtroom setting, the children themselves did not testify at the hearing that they would be unable to testify in defendant's presence. The record belies the prosecutor's claim that the children were unable to testify in the courtroom setting. Significantly, following their testimony, the children were able to confront defendant in face-to-face encounters and identify him. As defendant points out, the court itself noted that the children did not have difficulty doing so. Thereafter, the court expressed concerns about the fact that the children had been allowed to testify by giving videotaped depositions. Given that the children were able to testify in a courtroom setting and were able to confront defendant personally, it appears that the children should have been required

to testify in defendant's presence. Therefore, I believe the use of videotaped testimony violated the defendant's right to confrontation and mandates reversal unless the state has shown that the error was harmless beyond a reasonable doubt. *Hoversten v Iowa*, 998 F2d 614, 617 (CA 8, 1993). All testimony from witnesses permitted to testify outside the defendant's presence must be discounted, and harmlessness must be determined on the basis of the remaining evidence. *Coy v Iowa*, 487 US 1012, 1022; 108 S Ct 2798; 101 L Ed 2d 857 (1988). This case involved a credibility contest and turned on whether the jury believed the children's testimony. Under these circumstances, the Confrontation Clause violation cannot be deemed harmless.

Regarding the other acts testimony, MRE 404(b) provides:

(1) 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.

To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). The prosecutor bears the burden of establishing relevance. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). Use of bad acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *Starr, supra* at 495; *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982). Upon request, the trial court must

provide a limiting instruction concerning the use of bad acts evidence regardless of whether the evidence was introduced by the prosecutor or the defendant. *Starr, supra* at 498; *VanderVliet, supra* at 75. If evidence of a defendant's bad acts is admitted for a limited purpose, a prosecutor deprives the defendant of a fair trial if he argues that a jury should consider the evidence for a different purpose. *People v Quinn*, 194 Mich App 250, 253; 486 NW2d 139 (1992).

In this case, the prosecutor argued for the admission of the similar acts testimony of two witnesses to show a scheme, intent, opportunity, or motive, and "to negate the possibility of a mistake." The trial court ruled that the other acts testimony was conditionally relevant to "motive, intention, scheme, plan, knowledge, absence of mistake and absence of accident." In finding that the probative value of the testimony was not substantially outweighed by unfair prejudice under MRE 403, the trial court remarked that, given that defendant denied the charges against him, "absence of mistake, absence of accident" were "perhaps not least important, maybe even more important" than "motive, scheme, plan, knowledge." Before allowing the introduction of the challenged other acts testimony, the trial court gave the following limiting instruction:

Members of the jury, you may shortly hear evidence that is introduced to show that the defendant committed a crime or improper acts for which he is not on trial. If you believe this evidence, you must be very careful to only consider it for certain purposes. You may only think about whether this evidence to [sic] show that the defendant specifically meant to engage in sexual acts with a person under age 13. That the defendant acted purposefully, that is not by accident or mistake, or because he misjudged the situation. That the defendant used a plan, a system, or characteristic scheme that he has used before or since. Members of the jury, you must not consider this evidence for any other purpose, for example, you must not decide that it shows the defendant as a bad person, or that he is likely to commit crimes.

As the prosecutor correctly argues, identity was a material fact in issue in the face of defendant's denial that he was responsible for the sexual abuse of the children in this case. To

establish identity on the basis of a common scheme or plan, the prosecutor introduced the other acts testimony of two witnesses to show that defendant "acted according to a certain modus operandi that also was followed in the commission of the charged offense[s]." *People v Engelman*, 434 Mich 204, 236-237; 453 NW2d 656 (1990). According to the prosecutor, defendant's modus operandi was characterized by befriending victims under the age of ten and their parents over a period, by seeking an opportunity to be alone with the victim, usually in a room in the family home, and by touching or fondling the child's "private spot" with his fingers or by setting the child on his lap to arouse himself. In my view, the claimed plan of befriending and then abusing young children does not amount to a "certain modus operandi" sufficient to support the admission of the other acts testimony. The other acts evidence in this case lacked any "special quality or circumstance" as to be like a "signature" of defendant under *VanderVliet* and *Golochowicz*. The prosecutor did not establish with specificity that defendant followed a certain modus operandi in the commission of the offenses. Even if the other acts evidence were admissible to show "absence of mistake or accident," I believe the trial court erred in concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

I would reverse.

/s/ Michael J. Kelly