

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL ALLEN LEHMAN,

Defendant-Appellant.

UNPUBLISHED

August 21, 1998

No. 196560

Ingham Circuit Court

LC No. 95-069709 FH

ON REMAND

Before: Griffin, P.J., and Holbrook, Jr. and Neff, JJ.

PER CURIAM.

This case has been remanded to this Court by our Supreme Court for reconsideration in light of *People v Starr*, 457 Mich 490; ___NW2d ___ (1998). *People v Lehman*, ___ Mich ___; ___NW2d ___ (Docket No. 111768, issued 7/13/98). In our original opinion we reversed defendant's convictions and remanded the case for a new trial based on evidentiary error involving MRE 404(b). *People v Lehman*, unpublished opinion per curiam of the Court of Appeals, issued 3/3/98 (Docket No. 196560). After careful review of both our previous opinion and the Supreme Court's opinion in *Starr*, we reach the same conclusion and again reverse and remand for a new trial.

I

In *Starr*, our Supreme Court revisited MRE 404(b) in the context of testimony of prior sexual misconduct where the defendant was charged with first- and second-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2); MCL 750.520c; MSA 28.788(3). In reinstating defendant's convictions, the Court simply reiterated the standards for the admissibility of such evidence pursuant to MRE 404(b) that were articulated in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). Our reading of *Starr* leaves us with the firm belief that the opinion does not alter, contract or expand the Court's earlier pronouncement in *VanderVliet* regarding MRE 404(b), except to emphasize that the third prong of the *VanderVliet* test requires that the probative value of other acts evidence be *substantially* outweighed by the risk of unfair prejudice. *Starr, supra* at 498-500. It is because we believe that our earlier opinion correctly applied the principles of *VanderVliet* that we again reverse and remand.

II

Defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3). The prosecutor was permitted to introduce evidence of a prior incident of sexual misconduct involving defendant's half-sister. In allowing admission of this evidence, the trial court applied an incorrect test of admissibility.¹ On our review we applied the test required by *VanderVliet* and determined that the prior acts testimony (1) was not offered for a proper purpose, and (2) was not relevant to an issue of consequence at trial. Because of our findings regarding purpose and relevancy, it was not necessary for us to reach the third prong of the *VanderVliet* test, the balancing test of MRE 403, which is the focus of the decision in *Starr*.

On remand we hold that the decision in *Starr*, with its focus on the probative value/prejudicial effect of the evidence compels no different result from the one reached in our original opinion.

III

The Supreme Court's order on remand does not affect our earlier decision with regard to the other issue raised on appeal, namely improper questioning by the prosecutor. Accordingly, that holding stands as the law of the case.

Reversed and remanded for new trial. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Donald E. Holbrook, Jr.

/s/ Janet T. Neff

¹ Specifically, the trial court applied the four-part test from *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), as applied in *People v Terry Miller (On Remand)*, 186 Mich App 660; 465 NW2d 47 (1991). Our Supreme Court discarded this test in *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993).