

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD LEE GLASER,

Defendant-Appellant.

UNPUBLISHED

December 29, 1998

No. 202558

Berrien Circuit Court

LC No. 96-003904 FH

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(f); MSA 28.788(3)(1)(f). We affirm.

As his sole issue on appeal, defendant argues that the trial court abused its discretion by admitting into evidence other-acts evidence pursuant to MRE 404(b). We disagree and hold that the trial judge correctly ruled that the testimony at issue was relevant for the limited purpose of proving defendant's plan or scheme and that its probative value was not outweighed substantially by the danger of unfair prejudice.

I

Defendant was charged with first-degree criminal sexual conduct for an alleged August 15, 1996, incident that occurred in the basement of his home. At trial, the nineteen-year-old female complainant testified that defendant asked her to join him in the basement of his residence. After complainant was seated on the couch in front of the television, defendant played a pornographic movie and thereafter approached her from behind. With his pants unzipped and his penis exposed, defendant proceeded to rub his penis on the back of complainant's neck and ears. Thereafter, defendant allegedly sat on her lap and forcibly touched her breasts and vagina.

II

Over defendant's objection, the prosecutor introduced testimony regarding an alleged prior incident that occurred in defendant's home approximately three years earlier. The prosecution witness testified that in June 1993, while she was fourteen or fifteen years old, she was baby-sitting for defendant's daughter in defendant's home when defendant committed an act of sexual misconduct. The baby-sitter testified that while she was sitting on the couch in the basement watching television, defendant approached her from behind and began rubbing his exposed penis on her neck and shoulders. The baby-sitter abruptly terminated defendant's actions when she promptly stood up and exited the room. The baby-sitter did not report the episode to the police and defendant was never charged.

Prior to trial, a hearing was held on defendant's objection to the other-acts testimony. At the conclusion of the hearing, the Honorable Paul L. Maloney applied the standards of *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), and ruled that the evidence was relevant and material for the purpose of establishing defendant's plan or scheme and that its probative value was not substantially outweighed by the danger of unfair prejudice. Subsequently, Judge Maloney instructed the jury that the evidence was to be considered only for the limited purpose of establishing defendant's alleged plan or scheme. Cf. *People v Mitchell*, 223 Mich App 395; 566 NW2d 312 (1997).

III

On appeal, defendant asserts that the evidence was not relevant to show a common plan or scheme and that even if it were, its probative value was substantially outweighed by the danger of unfair prejudice. We disagree with both arguments.

The decision whether to admit evidence is left to the discretion of the trial court. *People v Starr*, 475 Mich 490, 494; 577 NW2d 673 (1998). On appeal, this Court should reverse a trial court's ruling that admits or excludes evidence only if a clear abuse of discretion is shown. *Id.*

In the present case, Judge Maloney consciously and thoroughly applied the standards of *VanderVliet*, *supra*. In doing so, the trial judge ruled that the other-acts evidence was admissible because it (1) was offered for the proper and limited purpose of establishing defendant's plan or scheme, (2) was relevant to an issue of consequence at trial, and (3) its probative value was not substantially outweighed by the danger of unfair prejudice.

Defendant concedes that proving a common plan or scheme is a proper purpose under MRE 404(b). However, defendant argues that the prior incident was too dissimilar and remote in time to establish a common plan or scheme.

Evidence of a defendant's modus operandi – his “scheme, plan, or system in doing an act” may be admissible pursuant to MRE 404(b). Generally, defendant's modus operandi may be established by other acts that the defendant has committed in a unique, regular, or regimented manner. *People v Daughenbaugh*, 193 Mich App 506; 484 NW2d 690 (1992), modified in part 441 Mich 867 (1992). See also *People v Gibson*, 219 Mich App 530; 557 NW2d 141 (1996); *People v Lee*, 212 Mich App 228, 245-246; 537 NW2d 233 (1995).

In the present case, the defendant's plan or scheme for approaching both victims was strikingly similar, unique, and regimented. Both complainant and the baby-sitter were young females who were watching television on the couch in defendant's basement when defendant approached from behind with his penis exposed and began rubbing his penis on the back of the victims' neck, ears, or shoulders. The fact that the prior victim was successful in terminating the episode before sustaining bodily injury does not alter the fact that defendant preyed on both victims in the same unusual, regimented, and perverted manner. Further, the dissimilarities seized on by defendant, which include the fact that the latter victim was watching a pornographic movie rather than a television program and that in the subsequent episode defendant had been smoking marijuana, are minor in regard to defendant's overall scheme. After a thorough review, we hold that the trial court correctly ruled that the other-acts evidence was relevant for the limited purpose of proving defendant's plan or scheme for preying on his victims.

In addition, we agree with the MRE 403 balancing test applied by the trial judge. Previously, in the context of MRE 404(b) evidence regarding motive, we reasoned in *People v Hoffman*, 225 Mich App 103, 110; 570 NW2d 146 (1997) as follows:

Absent the other-acts evidence establishing motive, the jurors may have found it difficult to believe the victim's testimony that defendant committed the depraved and otherwise inexplicable actions.

Similarly, in the present case absent evidence of defendant's modus operandi, the jury may have found it difficult to believe that the defendant would sexually approach young women in the manner alleged by complainant. Although the other-acts evidence was damaging to defendant, it nevertheless established his common plan or scheme and was not unduly inflammatory or unfairly collateral. Cf. *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998).

In conclusion, we hold that the trial court correctly applied the standards of *VanderVliet*, *supra*, in admitting the other-acts evidence for the limited purpose of proving defendant's plan or scheme.

Affirmed.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Richard A. Bandstra