STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 17, 1999
v	No. 217213 Lapeer Circuit Court
DAVID G. BENNER, Defendant-Appellant.	LC No. 98-006374 FC

Before: Holbrook, Jr., P.J., and Zahra and J.W. Fitzgerald,* JJ.

PER CURIAM.

Defendant appeals by leave granted from an order of the trial court that would allow the introduction of bad-acts evidence at his trial for three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2), one count of possessing child sexually abusive material, MCL 750.145c(4); MSA 28.342a(4), and one count of furnishing obscenity to children, MCL 750.142; MSA 28.337. We affirm.

The charges pending in the instant case involve defendant's daughter. The prosecutor is seeking the admission of testimony by defendant's stepdaughter and granddaughter that defendant subjected them to similar sexual abuse. The trial court found that the prosecutor was seeking to admit this testimony under the following theories: to show defendant's intent; to show the existence of a common scheme or plan; and to show defendant's motive. The court held that under the circumstances of the case, the first two rationales were proper noncharacter grounds for admission of the testimony. The court further held that the evidence was material to, and probative of both these theories, and that this probative value is not substantially outweighed by the danger of unfair prejudice.

The fundamental jurisprudential assumptions and principles that underlie the prohibition against bad-acts evidence were outlined by our Supreme Court in *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998):

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> The character evidence prohibition is deeply rooted in our jurisprudence. Far from being a mere technicality, the rule "reflects and gives meaning to the
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> central precepts of our system of criminal justice, the presumption of innocence." Underlying the rule is the fear that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged. Evidence of extrinsic bad acts thus carries the risk of prejudice, for it is antithetical to the precept that "a defendant starts his life afresh when he stands before a jury . . . ." [*Id.* at 384 (citations omitted).]

Nowhere is the risk that a jury will be led into improper propensity reasoning more pronounced than in cases involving charges of criminal sexual abuse, especially those where the alleged victims are children. In such cases, courts must be especially vigilant as they endeavor to "weed out character evidence that is disguised as something else." *Id.* at 387.

This Court reviews a trial court's determination whether evidence is admissible under MRE 404(b)[1] for an abuse of discretion. *Id.* at 458. In order for bad-acts evidence to be admissible under MRE 404(b), the following four part standard must be satisfied:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).]

Under the first prong of the *VanderVliet* standard, a prosecutor seeking to introduce bad-acts evidence must articulate a proper noncharacter ground for its admission. *Id*. at 74; *Crawford, supra* at 386; *People v Sabin*, ___ Mich App ___; ___ NW2d ___ (issued 06/04/99, Docket No. 187226) (Whitbeck, J., dissenting), slip op at 3. At the pretrial hearing on the prosecution's motion, the prosecutor argued that the evidence was admissible because, "[i]f nothing else, the three girls together saying the exact same thing, they corroborate each other and make it more likely that – that the evidence isn't something made up." Further, the prosecutor argued the evidence was admissible "under the theory of similar acts to show his common scheme, plan, his modus operandi of the Defendant to accomplish sexual abuse and to show – show the absence of either a mistake on the victims' allegations or perceptions, or of the intent of touching by the Defendant."

We conclude that within these remarks, the prosecutor identified the following rationales for admission of the evidence: (1) to corroborate the victim's testimony; (2) to refute a claim that the CSC I charges[2] were fabricated (i.e., the actus reus element); (3) to show the existence of a common pattern or method by which defendant accomplished the sexual abuse; and (4) to refute a claim that the defendant acted innocently or accidentally (i.e., the mens rea element). Each of these rationales is a proper noncharacter ground for admission of the disputed testimony. Thus, the first prong of the *VanderVliet* standard was satisfied.[3]

Turning to the second prong of *VanderVliet*, we conclude that the prosecutor did establish that the evidence is logically and legally relevant because it refutes a claim that the crimes were fabricated. *Starr, supra* at 501; *VanderVliet, supra* at 61. In other words, we believe the prosecutor established that the disputed evidence is probative of the actus reus elements of the CSC I charges, and thus serves an evidentiary purpose other than that prohibited by MRE 404(b).

Defendant's general denial of guilt placed all elements of the CSC I charges at issue. *Starr, supra* at 501; *VanderVliet, supra* at 78. In arguing why the prosecutor's motion should not be granted, defense counsel made the following remarks: "We're not claiming a lack of mistake. We are claiming absolutely a general denial . . . ." Counsel's cryptic statement did not make it clear whether he was intending to assert that the acts never took place (the actus reus element), or if they did, that defendant had acted innocently or accidentally (the mens rea element).

However, defendant's failure to make clear at this point in the proceedings the precise nature of his defense did not handcuff the court with respect to the issue of the admissibility of the testimony. As the *VanderVliet* Court observed, "Where the trial court can reliably determine that a fact will be in issue before trial, it may determine admissibility." *VanderVliet, supra* at 70. Defendant's blanket denial makes it clear that the actus reus, the mens rea, or both elements of the CSC I charges would be at issue. Under current Michigan law, bad-acts evidence can legitimately be admitted under the doctrine of chances to help establish both the mens rea, *id.* at 78-79, and the actus reus elements, *Starr, supra* at 500-501, of a crime.

In any event, in his brief now before us, defendant asserts that when making the above quoted remarks, he was "simply deny[ing] that the charged acts occurred." Thus, it is now clear that the actus reus element of the CSC I charges will be at issue. With respect to the actus reus element, we conclude that the stepdaughter's and granddaughter's testimony is relevant because it tends to make it objectively less probable that the acts underlying the pending charges were fabricated.[4] See *Starr, supra* at 501-502; *VanderVliet, supra* at 79. The focus being on the accuser's stories and not the conduct of the accused, the bad-acts evidence serves a purpose similar to that of corroborative evidence.

Additionally, although the requirements of the second prong of *VanderVliet* are satisfied if a single rationale establishes a proper noncharacter ground for admission, *Starr, supra* at 501, we note that the prosecutor also satisfied his burden on this matter with respect to the other three rationales identified above.

We acknowledge and are mindful that employing the doctrine of chances in circumstances such as are presented in the case at hand is fraught with the potential for abuse. However, we believe that the marked similarity between the events testified to by all three women is sufficiently strong to justify the application of the doctrine. *Crawford, supra* at 395. Indeed, it is the strength of this similarity that leads us to also conclude that the probative value of the evidence is not substantially outweighed by the real danger of unfair prejudice. See *id.* at 398-399; *Starr, supra* at 503.

The proffered evidence includes testimony from a victim whose allegations are the subject of a separate trial of defendant. These other charges were originally included in the information charging

defendant with the crimes at issue, and defendant therefore argues that allowing this evidence to be admitted in effect negates the trial court's decision to sever the original case. As the trial court noted, however, the prosecutor has met the legal standard for the admission of the evidence under MRE 404(b), and the fact that the evidence includes allegations that are the subject of charges that were severed from this trial does not render the evidence inadmissible.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ John W. Fitzgerald

[1] MRE 404(b) governs the admissibility of other acts evidence, and 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.

[2] We believe that the reasons articulated by the prosecutor are all focused on the CSC I charges. The use of the evidence at trial should be similarly circumscribed.

[3] We note that this list includes purposes not identified by the trial court. Under *VanderVliet* and its precursors, what is important is the grounds actually articulated by the prosecutor when seeking admission of the bad-acts evidence, not a trial court's characterization of those grounds. "[T]he fact that a trial court may have erred in assigning a proper purpose for accepting the other acts testimony is not fatal on appeal, *if a proper purpose existed and was articulated at trial*." *Sabin, supra* slip op at 29, n 10 (Whitbeck, J., dissenting).

[4] In holding that the bad-acts evidence at issue in *Starr* could be admitted, the *Starr* Court focused on the defendant's claim that those charges of abuse had been fabricated. *Starr, supra* at 501-502. Even though the term is never directly employed, implicit in this discussion is the notion of actus reus. If a defendant is arguing that the charges are a complete fabrication, then it follows that he is arguing that the acts never occurred, and thus that the actus reus element of the crime involved could not be established.