

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EDWARD HINE,

Defendant-Appellant.

UNPUBLISHED

February 25, 2000

No. 207358

Calhoun Circuit Court

LC No. 97-000307-FC

Before: Sawyer, P.J., and Hood and Whitbeck, JJ.

PER CURIAM.

A jury convicted Robert Hine of first-degree felony-murder, MCL 750.316(b); MSA 28.548(b) and first-degree child abuse, MCL 750.136b; MSA 28.331(2), but acquitted him of open murder, MCL 750.316; MSA 28.548. The trial court sentenced him to life in prison without the possibility of parole for the felony-murder conviction and ten to fifteen years for the first-degree child abuse conviction. He appeals as of right. We reverse and remand.

I. Basic Facts

This case involves the sudden death of two-and-a-half-year-old Caitlan McLaughlin on November 7, 1996. Hine and Caitlan McLaughlin's mother, Meagan McLaughlin, were in a dating relationship and the three lived together in Hine's home. Hine, who was out of work at the time, cared for Caitlan McLaughlin while Meagan McLaughlin was working.

Caitlan McLaughlin had a number of small accidents and illnesses in the two or so weeks before she died. In late October, she attended a birthday party and fell off a small bicycle or tricycle. At the party, Caitlan McLaughlin's six-year-old cousin also tried to scare her by jumping out of a closet, and while doing so, inadvertently caused the doorknob to hit her head, leaving a "goose egg" bruise on her forehead. The week preceding her death, while Hine was looking after her, she had several episodes of vomiting and fainting. This was, evidently, not unusual because she had a history of viral illnesses dating back to her birth that caused these symptoms to recur. Caitlan McLaughlin also had several accidents, which she voluntarily described to family members, including incidents when she fell against a bathtub

and a wooden toy box, causing her to sustain several bruises, a cut on her ear, as well as a swollen nose.

On November 7, Caitlan McLaughlin vomited after lunch and then fainted. Hine shook her shoulders until she regained consciousness, and then he called Meagan McLaughlin to report what had happened. Meagan McLaughlin came home from work a short time later and Caitlan McLaughlin continued vomiting. Caitlan McLaughlin finally was able to drink juice around 6:30 p.m. While Meagan McLaughlin was assisting Caitlan McLaughlin in the bathroom, she discovered that Caitlan McLaughlin had bruises on her buttocks, and confronted Hine about them. Hine admitted that he had spanked Caitlan McLaughlin earlier when she had defecated in her pants. They apparently resolved their tensions and after dinner Meagan McLaughlin helped Caitlan McLaughlin get ready for bed, at which time she discovered that Caitlan McLaughlin had some bruises on her arms and stomach; Meagan McLaughlin did not ask Hine about these bruises.

At around 9:00 p.m., Hine, Meagan McLaughlin, and Caitlan McLaughlin began watching a movie, with Meagan McLaughlin sitting on Hine's lap and Caitlan McLaughlin lying on a couch. About a half hour later, Meagan McLaughlin went to make a telephone call and Hine checked on Caitlan McLaughlin. He discovered that she was gagging and her eyes had rolled back. Hine picked Caitlan McLaughlin up and took her to Meagan McLaughlin, who was speaking on the phone. He handed Caitlan McLaughlin to Meagan McLaughlin and called 911. While on the telephone with the 911 operator, he attempted to follow the directions regarding how to resuscitate Caitlan McLaughlin. Emergency services personnel arrived within five minutes but could not revive her.

At trial, the medical evidence did not point to a single, conclusive cause of Caitlan McLaughlin's death. Postmortem photographs showed what appeared to be significant bruising to her body, but a police officer who responded to the 911 call was not sure that the marks were bruises and a paramedic who tried to revive Caitlan McLaughlin admitted that lividity, meaning discoloration, can occur naturally after death. Indeed, Meagan McLaughlin later told the police that the discoloration of Caitlan McLaughlin's body in police photographs was much worse than she had personally observed before her daughter died.

The medical examiner identified numerous minor bruises on Caitlan McLaughlin's body and two major injuries, one to her head that caused her brain to swell, and one to her liver that caused hemorrhaging. The head injury was likely from a forceful blow, not shaking, within the three days before Caitlan McLaughlin died, but there was no external mark demonstrating such a blow. In his opinion, the liver injury probably occurred three to seven days before Caitlan McLaughlin died and would have caused Caitlan McLaughlin to become weak, her blood pressure would have fallen, and it was possible that she could have been clumsy as a result. Although there was no evidence that anyone used a weapon or instrument against Caitlan McLaughlin, he thought that some of the bruising could have come from mild blows with a fist. He agreed that not all the marks on her body were actually bruises, but a lay person might reach that conclusion. He did not observe any mouth injuries or evidence that someone had "head-butted" Caitlan McLaughlin. The medical examiner could not conclude that any single injury caused her death, but concluded that Caitlan McLaughlin's death was a homicide because of the number of injuries and because they did not appear to be self-inflicted.

Caitlan McLaughlin's family doctor testified that she did not recall seeing evidence of abuse during her office visits. She agreed that a liver injury could have caused Caitlan McLaughlin's symptoms the week before she died, but that an accident two weeks before death was unlikely to cause her injuries. She did believe, however, that Caitlan McLaughlin's abdominal injuries should have been investigated further.

The prosecutor's expert in pediatric critical care, who specialized in child abuse cases, concluded that some of Caitlan McLaughlin's injuries, such as the injuries to her nose, were probably from an accident. He hypothesized on the basis of the police report, photographs, and autopsy report that the injuries to her chin and jaw were caused by someone grabbing her face and lifting or throwing her, and not during an effort to resuscitate her. He also suggested that the superficial injuries to Caitlan McLaughlin's cheek could have resulted from someone "raking" his or her fingers on the inside of her mouth, and that her abdominal injuries resulted from punches with a knuckle or fist. He believed that the head injury was what killed Caitlan McLaughlin. However, he did not examine Caitlan McLaughlin's body and admitted on cross-examination that he reached these conclusions only after being told that Meagan McLaughlin had lied about an accident occurring before Caitlan McLaughlin's death; he assumed that there was no accident. He also conceded that an impalement injury from a fall off a bicycle could cause a liver injury that would have produced vomiting, lethargy, and weak coordination, but not all the injuries Caitlan McLaughlin sustained.

Hine's theory was that Caitlan McLaughlin died from the injuries she sustained in the accidents in the weeks preceding November 7, 1996 and not from any action on his part. He presented numerous witnesses who testified that they never saw Hine act inappropriately and that Caitlan McLaughlin was always comfortable around him. Meagan McLaughlin also testified that she thought Hine had tried his best to care for Caitlan McLaughlin and that she had never seen any indication that he would hurt her. There was no direct evidence that Hine abused or killed Caitlan McLaughlin.

The trial court, over defense objection,¹ permitted Meagan McLaughlin and two of Hine's former girlfriends, Sherri Overbeck and Laura Diehl, to testify to instances when he allegedly assaulted them or exhibited violent tendencies toward them.² Meagan McLaughlin claimed that she and Hine had a history of fighting. When she would not talk to him, he would pin her down until she responded. He also "head-butted" her on the forehead two or three times, once hit her on the lip with his knee, and he once "fish-hooked" her mouth. She also said that Hine had poked or pushed her frequently, but they had been getting along very well for some time before Caitlan McLaughlin died.

Overbeck, the mother of Hine's son Kalija, testified that he assaulted her several times. For instance, she said, he would grab her arms, pin her down, threaten her, and grab her neck, pressing her necklace into her skin. He allegedly "head-butted" her, bloodying her nose, and he raped her while she was pregnant with their son. Yet, she never saw Hine even discipline Kalija, much less abuse him.

Diehl stated that one time when she and Hine were drunk he used his fingers to spread her mouth as wide as it would go. The next morning, she claimed, Hine threatened to "bust" a chair over her head, but did not actually do so. Several weeks later he threatened to blacken her eyes, but again, did not fulfill the threat. Diehl also recalled two other incidents where Hine harmed her, but which she

concluded were accidents: one time she fell against his knee injuring her nose, and the second time he dropped her while carrying her. Diehl never saw Hine abuse her two children, who lived with them, or Kalija.

At the close of trial, the court instructed the jury to consider Meagan McLaughlin, Overbeck, and Diehl's testimony regarding the abuse only to the extent that it demonstrated Hine's intent to act, his pattern in doing an act, or the absence of a mistake.

II. Other Acts Evidence

A. Standard of Review

Hine first argues that the trial court erred when it permitted Meagan and his two former girlfriends to testify regarding his alleged abuse against them. We review a trial court's decision to admit evidence, even other acts evidence, for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

B. Admissibility

Only "relevant" evidence is admissible at trial. MRE 402. Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the actions more probable or less probable than it would be without the evidence." MRE 401. A trial court may exclude or suppress relevant evidence if it would be confusing, waste time, or "if its probative value is substantially outweighed by the danger of unfair prejudice" MRE 403. A trial court may *admit* evidence that is intended to reveal a defendant's character through his other acts as long as it is not solely intended to prove his guilt on the basis of that character but has some other proper purpose. MRE 404(b)(1); see *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998).

MRE 404(b)(1), the rule specifically governing other acts evidence, states:

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. [Emphasis supplied.]

This rule provides a "nonexclusive" list of proper purposes for other acts evidence, *Starr, supra* at 496, and is intended "to avoid the danger of conviction based upon a defendant's history of other misconduct rather than upon the evidence of his conduct in the case in issue," *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982), questioned and rev'd on other grounds by *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993); see also *People v Allen*, 429 Mich 558, 566-567; 420 NW2d 499 (1988) ("[I]n our system of jurisprudence, we try cases, rather than persons, and thus a jury may look only to the evidence of the events in question, not defendant's prior acts in reaching

its verdict.”) In other words, “Evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts.” *People v Engelman*, 434 Mich 204, 211; 453 NW2d 656 (1990).

These rules of evidence provide the foundation for the test an appellate court applies to determine if proffered other acts evidence should be included or excluded at trial. *VanderVliet*, *supra* at 74. Other acts evidence is admissible if: (1) the prosecutor offers it to prove “something other than a character to conduct theory” as prohibited by MRE 404(b); (2) the evidence fits the relevancy test articulated in MRE 402, as “enforced by MRE 104(b)”; and (3) the balancing test provided by MRE 403 demonstrates that the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is being offered, defendant in this case. *Id.* at 74-75. A fourth factor articulated in *VanderVliet*, which does not fully conform to the idea of a test expressed in the preceding three factors, suggests that a party may request a limiting instruction under MRE 105 if the trial court decides to admit the challenged evidence. *Id.* at 75.

C. Trial Court’s Ruling

Here, the prosecutor offered the testimony of Meagan McLaughlin, Overbeck, and Diehl, that Hine had abused them to show absence of mistake or accident, intent, and a pattern of abusive conduct. The prosecutor claimed that their testimony would show that they sustained injuries similar to the ones Caitlan McLaughlin suffered, thus connecting Hine to the injuries that may have killed Caitlan McLaughlin.

The trial court concluded:

First of all, as to whether or not the evidence offered would be relevant to any issue other than propensity for violence, certainly the Prosecutor’s argument is that it would be. The defense, apparently, in this case in part may be accident, and lack of accident certainly is one of those types of things that can be shown perhaps by the evidence, I suppose, on the theory that these witnesses have testified that when the Defendant did an act of violence, he was prone, at least from the Prosecutor’s point of view, to persist in them and to continue them over a period of time.

In other words, not a simply one-shot, so to speak, act of violence that was quickly regretted or something of that nature; but rather a course of conduct, extension of the assaultive conduct over a period of time, a persistence in it.

So I suppose that goes to a lack of accident. Also perhaps to intent, doing an act, I suppose, on the same basis. The testimony – or the evidence offered is one that shows persistence and perhaps even compulsiveness, I suppose – depends on how you want to argue it – in violent conduct which is – there is an episode, it continues, and so on.

And specifically as to scheme or system, of course, the argument by the Prosecutor apparently is that there was, in fact, some peculiarities in the assaultive conduct of the Defendant according to these witnesses: head-butting, grabbing of the mouth, and so on; and the belief of the Prosecutor that that type of evidence can be related to the deceased victim in this case.

So the first question being whether or not there is some reason other than simply showing the Defendant's propensity for violence, the answer to that, I think is a fairly clear yes, there is.

The trial court next concluded that the case was "going to turn upon injuries sustained by the victim, how they were sustained, by whom if anybody, if they were intentional injuries, and among other things." As a result, this other acts testimony was relevant to the prosecutor's theory that Hine's intent to inflict the injuries "over a period of time," and "scheme, intent, system, plan, so on, [and] lack of accident." The trial court concluded that the testimony would not be more unfairly prejudicial than probative because it is difficult for prosecutors to gather evidence of unwitnessed acts of abuse. Furthermore, the trial court stated, the prejudicial impact of the evidence would be minimal because the witnesses did not intend to offer any testimony that they saw Hine abuse a child, so it was unlikely that the jury would use their testimony as evidence of his propensity to commit the charged crimes.

D. Analysis

At least facially, this evidence passed the first prong of *VanderVliet, supra*, because the prosecutor offered the other acts testimony for proper purposes listed in MRE 404(b)(1). However, the evidence utterly failed to pass the logical relevance requirement in *VanderVliet*, which tends to show that the testimony really was propensity evidence in masquerade. Our Supreme Court addressed a similar problem in *Crawford, supra* at 387, where it cautioned that a prosecutor will not satisfy the second prong of admissibility, relevance, merely by reciting a purpose listed in MRE 404(b). As the Court said:

Mechanical recitation of "knowledge, intent, absence of mistake, etc.," without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b). If it were, the prosecutor could routinely admit character evidence by simply calling it something else. Relevance is not an inherent characteristic, nor are prior bad acts intrinsically relevant to "motive, opportunity, intent, preparation, plan," etc. Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. In order to ensure the defendant's right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else. The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized. [*Id.* at 387-388 (citations omitted).]

When the trial court noted that Meagan McLaughlin, Overbeck, and Diehl had nothing “to say about Mr. Hine doing anything to a child, harming a child, or anything of that nature,” the trial court should have realized that the evidence made none of the facts in dispute more or less probable. MRE 401.

We note that the testimony did not demonstrate a common plan or scheme because the circumstances surrounding Hine’s alleged assaults against his former girlfriends, especially the injuries they sustained, are substantially dissimilar to the facts at issue in this case. In *Engelman*, *supra* at 221, the Michigan Supreme Court explained that evidence admissible for this purpose tends to show a *single* plan that encompasses both the charged and uncharged acts. See generally *People v Lee*, 134 Mich App 278, 291; 351 NW2d 294 (1984). The testimony here does not support a conclusion that the scheme or plan was to inflict a particular type of injury, because Caitlan McLaughlin’s injuries differed from the injuries her mother, Overbeck, and Diehl sustained. More importantly, that Hine allegedly assaulted adult women says nothing about a plan or scheme to assault children, especially when all three women testified that they never saw Hine threaten or assault his son or their children. Nor do we see any other element of the circumstances of the assaults, whether time, place, method, or purpose that would unify them into a single plan.

The prosecutor never explained, and nor can we divine, how the women’s testimony regarding abuse against them would support a conclusion that Hine intended to injure Caitlan McLaughlin, a very young child. See *Crawford*, n 13 *supra* at 395; *People v Johnson*, 113 Mich App 650, 660; 318 NW2d 525 (1982) (other acts evidence properly showed intent when it involved a previous altercation between the defendant and the victim). Nor is it plainly apparent that the alleged abuse against the women is “of the same general category” as the acts against the child, which might tend to show that Hine had a similar intent in all instances. *VanderVliet*, *supra* at 78, quoting Imwinkelried, *Uncharged Misconduct Evidence*, § 3:11, p 23. The only link between their testimony and intent that we can see is improper: Hine intentionally hurt people in the past and, acting on this same propensity to harm people, he “must have” hurt Caitlan McLaughlin.

Finally, the testimony did not demonstrate lack of accident. Lack of accident is but another way to prove intent because it shows that a defendant is so well versed or experienced in the method of the crime or engages in it so frequently that he would only commit the same act purposefully and not “accidentally.” See *VanderVliet*, n 37 *supra* at 81 (discussing doctrine of chances and providing examples); see also *Crawford*, *supra* at 392-395. However, Hine never claimed that he unintentionally or innocently engaged in some conduct toward Caitlan McLaughlin that appeared to be abuse or resulted in her death; he simply claimed that she sustained her cumulatively fatal injuries in unrelated incidents, which he called accidents. See *People v Major*, 407 Mich 394, 400; 285 NW2d 660 (1979). As a result, and in addition to the problems we have already identified with using this evidence to show intent, the testimony did not even begin to show the likelihood that his conduct was volitional and purposeful. Indeed, the experts were not able to agree on what that conduct might have been. The inquiry into logical relevance should not end simply because the word “accident” arose in the text of MRE 404(b)(1) and the circumstances of the alleged offense and the defense. See *Crawford*, *supra* at 387.

Even if the women's testimony were relevant, the unfair prejudice that flowed from it substantially, and unmistakably, outweighed any marginally probative value. MRE 403. We take special notice of the portion of the trial court's ruling that referred to the difficulty prosecutors have in procuring evidence of abuse. Perhaps, had the evidence been relevant, this would have been a proper consideration when weighing prejudice against probative value. However, in the context of this case where there was not a single piece of direct evidence that Hine abused Caitlan McLaughlin and only equivocal testimony that her death was a homicide, the trial court's reasoning is tantamount to saying that the prosecutor can substitute other acts evidence for proof of the charged offense simply because gathering proper evidence is a difficult task. This is the very essence of unfair prejudice and the trial court plainly abused its discretion in admitting the challenged testimony.

Having found that the trial court erred in admitting this other acts testimony, *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), instructs us to determine whether it was more likely than not that this error affected the outcome of the case in light of the properly admitted evidence. As our discussion of the unfair prejudice in this case intimates, the properly admitted evidence in this case did not directly prove that Hine abused or killed Caitlan McLaughlin. No one saw him strike her at any time, much less in proximity to her death. Although he admitted to spanking her, the medical examiner concluded that her bruising was superficial, not fatal. Nor was there any circumstantial evidence that tied him to her death. For example, Hine was not the only person to care for Caitlan McLaughlin in the weeks before she died. Thus he was not the *only* person with an opportunity to abuse her. There was no physical evidence, such as blood, clothing fibers, hair, or bodily tissues, that tied Hine to an act of abuse, regardless of its potential for being fatal. Nor was there medical evidence relating to the cause of her death that would make it clear that something within Hine's control, perhaps a tool, weapon, or even his fists, killed the little girl.

To the contrary, there was substantial evidence that Caitlan McLaughlin sustained serious injuries, corresponding to the head and abdominal injuries the medical examiner identified after her death, when she was playing at a party. The prosecutor's expert, who never examined Caitlan McLaughlin and presented theories inconsistent with the injuries she actually sustained, only discounted this theory of accidental death after the prosecutor incorrectly informed him that there was no accident. Caitlan McLaughlin's behavior before her death may have been inconsistent with abuse in that she never exhibited any fear of being around Hine and even independently and voluntarily told family members when she inadvertently fell in the bathtub and against a toy box. Without the other acts evidence, the jury would not have had any indication that Hine had a violent character, much less that he abused Caitlan McLaughlin in such a way that she ultimately died from the injuries he inflicted. What appears to be the prosecutor's desperate attempt to introduce this testimony and other completely irrelevant testimony shows how very weak the evidence of Hine's guilt was.

Although we cannot say with complete assurance that the evidence irrefutably points to Hine's actual innocence beyond a reasonable doubt, *Lukity, supra* does not require such a conclusion as a prerequisite for reversing a criminal conviction. Rather, we must only be certain that it is "more probable than not" that the improperly admitted evidence overshadowed all other properly admitted evidence, thereby determining the outcome of the case. *Id* at 494-496. In our view, Overbeck, Diehl,

and Meagan McLaughlin's testimony almost certainly unfairly affected the outcome of this case by making propensity an issue, thereby allowing the jury to justify a guilty verdict on the basis that Hine had committed abuse against women in the past and thus must have harmed the child. The magnitude of this error indicates that it resulted in a miscarriage of justice. While there may be virtually countless times and circumstances when other acts evidence is relevant and otherwise proper for the jury to receive, this was not such a case. Accordingly, we reverse Hine's convictions and remand for a new trial.

III. Conclusion

In light of our ruling with regard to the MRE 404(b) evidence, we need not address Hine's remaining arguments. We do, however, note that even if we had not reversed Hine's convictions because of the trial court's abuse of discretion, we would have vacated his conviction for first-degree child abuse because convicting and sentencing a defendant for both felony-murder and the predicate felony violates the prohibition against double jeopardy. US Const, Am V; Const 1963, art 1, § 15; *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996).

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

/s/ David H. Sawyer

/s/ Harold Hood

/s/ William C. Whitbeck

¹ The trial court ruled the testimony admissible before trial commenced.

² The trial court barred Kim Bailey, a waitress in a bar who claimed to have seen Hine acting rude and aggressive, from testifying.