

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN HENRY MCGHAN,

Defendant-Appellant.

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UNPUBLISHED  
November 9, 2001

No. 225571  
Calhoun Circuit Court  
LC No. 98-004004-FC

Before: Doctoroff, P.J., and Wilder and Schmucker\*, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of second-degree criminal sexual conduct, MCL 750.520c, for which he was sentenced to serve concurrent prison terms of 2½ to 15 years in prison. He appeals as of right. We affirm.

Defendant argues on appeal that the trial court abused its discretion in allowing the prosecution to question the complainant regarding other instances of sexual contact by defendant. Defendant argues that this evidence was inadmissible character evidence under MRE 404(b). We disagree.

In a CSC prosecution, evidence of other sexual acts between a defendant and his victim may be admissible if, without such evidence, the victim's testimony would seem incredible. *People v DerMartex*, 390 Mich 410; 213 NW2d 97 (1973); *People v Layher*, 238 Mich App 573, 584-586; 607 NW2d 91 (1999), aff'd \_\_\_ Mich \_\_\_ (No. 116315, dec'd 07/17/01); *People v Wright*, 161 Mich App 682, 687-688; 411 NW2d 826 (1987). Further, in *People v Starr*, 457 Mich 490, 501-502; 577 NW2d 673 (1998), the Michigan Supreme Court held that prior sexual acts between the defendant and his half-sister were admissible to rebut the defendant's claim that the charges were groundless and fabricated by the victim's mother.

Here, the defense theory at trial was that the complainant had fabricated these charges for some unknown reason, and that her testimony regarding the alleged incident was inconsistent and generally not credible. Thus, because the complainant's credibility was a disputed issue at trial, the evidence that defendant allegedly had sexual contact with her on an earlier occasion was offered for a proper purpose in accordance with *Starr* and *DerMartex*. See also *Layher*, *supra* at 586. The trial court did not abuse its discretion in admitting this evidence.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant further contends that the prosecution failed to give proper notice of its intent to offer other-acts evidence, as required under MRE 404(b)(2). Because the prosecution concedes this error,<sup>1</sup> we must determine whether it was harmless. *People v Hawkins*, 245 Mich App 439, 453-456; 628 NW2d 105 (2001) (holding that the prosecution's noncompliance with MRE 404(b)(2) is subject to the harmless error rule). In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). An error is deemed to have been "outcome determinative" if it undermined the reliability of the verdict. *Id.*; *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).

Here, the prosecution's noncompliance with the notice provision of MRE 404(b)(2) was not outcome determinative. First, the other-acts evidence was admissible as relevant and probative of a disputed issue at trial. *Hawkins*, *supra* at 455. Second, the evidence was not substantially more prejudicial than probative. MRE 403. Third, given the prosecution's otherwise strong case against defendant, including defendant's inculpatory statements to the investigating officers, it cannot plausibly be argued that the outcome of the trial would have been different if the prosecution had complied with the notice rule. *Lukity*, *supra*.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Kurtis T. Wilder

/s/ Chad C. Schmucker

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<sup>1</sup> The prosecution disingenuously argues that this issue is not properly preserved for appellate review because defendant's objection was based on general relevancy, rather than MRE 404(b). The primary goals of the notice provision of MRE 404(b)(2) were "to ensure that the defendant is aware of the evidence" and "to assist the trial court in its evidentiary ruling." *People v Sabin (After Remand)*, 463 Mich 43, 57, n 5, 59, n 6; 614 NW2d 888 (2000). Here, the prosecution attempts to turn the notice provision on its head by demanding that defendant raise a timely and specific objection to the evidence, notwithstanding the prosecution's admitted noncompliance with the notice rule.