STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED November 30, 2001
v	No. 231799 Berrien Circuit Court
JENNIFER ANN ALTMAN, Defendant-Appellee.	LC No. 2000-402472-FH

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's order denying plaintiff's pretrial motion to admit evidence of other acts under MRE 404(b). We reverse and remand for further proceedings in the trial court.

Defendant, a schoolteacher, is charged with having sexual contact with a thirteen-year-old junior high school student contrary to MCL 750.520e. The prosecution filed a motion in the trial court to admit pursuant to MRE 404(b), testimony from nine witnesses, including complainant, about alleged other acts of various levels of sexual intimacy between defendant and complainant. The prosecutor alleged the other acts evidence was relevant to show "scheme, plan, and/or system in doing an act, as well as the absence of mistake or accident so as to demonstrate that it is not unlikely as it might seem that the Defendant would molest a minor when other people were in the area." On appeal, the prosecutor is only arguing that the trial court erred with respect to the proffered testimony of the complainant regarding allegations of past interaction with defendant. Our holding today is limited to this specific testimony.

The trial court ruled that it was not persuaded that the evidence of other acts was properly admissible, although it believed that it was a close question. The trial court cautioned the attorneys that if the defense opened the door to the admission of the evidence, its ruling could be reversed. We review a trial court's decision to admit or exclude other acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Under MRE 404(b), other acts evidence may be admitted where: (1) the evidence is offered for some purpose other than propensity; (2) the evidence is relevant and material; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair

prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). "[T]he trial court, upon request, may provide a limiting instruction under MRE 105." *Id.* at 75. Accord, *People v Sabin (After Remand)*, 463 Mich 43, 55-59; 614 NW2d 888 (2000).

The prosecution asserts that complainant will testify that defendant previously hugged, kissed, and massaged him, groped him to the point of an erection, allowed him to fondle her breasts and vaginal area, and engaged in explicit sexual banter with complainant. The prosecution argues that this testimony should be admitted to put "otherwise incredible accusations" in context and to show defendant was willing to engage in the charged conduct on school property with other students around. We agree.

Evidence of further acts of sexual intimacy occurring before the behavior that serves as the basis of the pending charge "constitute a necessary part of [the] . . . principal transaction," *People v Jenness*, 5 Mich 305, 324 (1858), and thus tend to make more probable the truth of the complainant's assertions regarding the act charged. *People v DerMartzex*, 390 Mich 410, 414-415; 213 NW2d 97 (1973). This is a proper purpose for the admission of this testimony. "Limiting [complainant's] . . . testimony to the specific act charged and not allowing [complainant] . . . to mention acts leading up to the" act charged could undermine complainant's credibility. *Id.* Conversely, allowing such testimony tends to rebut the seemingly improbable assertion, raised by defendant at the preliminary examination, that defendant "was overwhelmed and overcome by seduction in a . . . 3 minute period. That, in literally, one minute, they're spilling hot chocolate and the next minute, she's underneath feeling [complainant's] leg." This scenario, defendant argued, "simply is not credible." As the *Jenness* Court observed:

> In any case, where a witness has testified to a fact or transaction which, standing alone and entirely unconnected with anything which led to or brought it about, would appear in any degree unnatural or improbable in itself, without reference to the facts preceding and inducing the principal transaction, and which, if proved, would render it more natural and probable; *such* previous facts are not only admissible and relevant, they constitute a necessary part of such principal transaction—a link in the chain of testimony, without which it would be impossible for the jury to appreciate the testimony in reference to such principal transaction. . . .
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> In the order of nature, facts do not occur single and independent—isolated from all others—but each is connected with some antecedent fact, or combination of facts, from which the fact in question follows . . . . Torn from this necessary connection, and exhibited alone, many real occurrences would appear under the guise of falsehood, and truth itself would be made to lie. [*Jenness, supra* at 323-342 (emphasis in original).]

We also do not believe that danger of unfair prejudice presented by this evidence substantially outweighs its significant probative value. *DeMartzex, supra* at 413. The test for admission of other acts evidence requires a trial court to consider not the danger of prejudice, but the danger of unfair prejudice. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). As we have just discussed, the evidence

of prior contact between defendant and complainant is not marginally probative. Further, we do not believe that if properly instructed, the jury will make the forbidden character inference from this evidence. We are keenly aware that in the context of prior other acts evidence, the danger of unfair prejudice is significant. However, given the nature of the alleged prior incidents, we do not believe that a properly instructed jury will conclude from this testimony that defendant had a propensity to commit the charged act and thus should be convicted on that basis alone. *Crawford, supra* at 385.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter