STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 7, 2002
v	No. 236454 Alger Circuit Court
URIAH W. KUHLMAN, Defendant-Appellant.	LC No. 01-001452-FH

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

PER CURIAM.

Defendant was convicted, following a jury trial, of third-degree criminal sexual conduct. MCL 750.520d(1)(a) (victim under 16). He was sentenced to two to fifteen years in prison. He now appeals and we affirm.

At the time of the offense, the victim was fourteen-years-old and defendant was twenty-three-years-old and employed by the City of Munising as a police officer. Defendant first met the victim a few months before the incident when he was briefly dating her mother. He had continued contact with her because he was living next door to the victim's father and her grandparents' store. Additionally, shortly before the incident, the victim began working at the Dairy Queen, which defendant frequented.

According to the victim, on the day in question she was at her father's house, sunbathing in the yard, when she developed a rash due to a new suntan lotion she was using. Knowing that defendant was an EMT, she went next door to his house to seek assistance. He let her into the house and examined her rash. During the examination, he put his hand down her shorts and digitally penetrated her vagina. He then led her to his bedroom, where he placed her on his bed, removed her shorts and bathing suit bottom, removed some of his clothing, and they engaged in sexual intercourse.

Defendant's only argument on appeal is that the trial court erred in granting the prosecutor's motion to admit evidence of other bad acts under MRE 404(b). We disagree.

The prosecutor gave notice before trial of the intent to use evidence under MRE 404(b). Specifically, evidence that defendant engaged in flirtation and sexual innuendo in conversations with various teenage girls working at the Dairy Queen, that defendant had engaged in sexual intercourse with one of the victim's coworkers around the same time as the alleged act with the

victim,[1] and that he had had sexual contact with other girls. Defendant filed an objection. Following a hearing, the trial court ruled that the evidence would be admissible, opining as follows:

> In this matter the Court considers the objection to the proposed 404B [sic] evidence offered by the People and as further outlined by the argument in this matter. The Court overrules the objections; the evidence as proffered will be received. This is an instance in which there is one allegation of sexual intercourse, consensual sexual intercourse with underage minor. The Court has reviewed the preliminary examination in aid of the court amplification of the defense theories that have been proposed.
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> It is obvious that the issue will be of credibility on a one-instance act by the defendant. It is – was elicited from the defendant there – or from the alleged victim that there are times she's truthful and time's that she's untruthful. This also is relevant on the basis of scheme or plan. In light of the defense it's further a part of the res gestae of this circumstance because of the other relationships involved, one being the defendant's being a police officer, and the other relationships that are indicated in the preliminary examination to show a pattern which is alleged by the People. And the objection is overruled.

As the Supreme Court explains in *People v VanderVliet*, 444 Mich 52, 64; NW2d (1993), MRE 404(b) is a rule of inclusion and not a rule of exclusion:

> Rule 404(b) limits the use of logically relevant evidence *only* when both steps of the process are violated. Therefore, if the proffered other acts evidence is logically relevant, and does not involve the intermediate inference of character, Rule 404(b) is not implicated. [*People v*] *Engelman*, [434 Mich 204, 216; 453 NW2d 656 (1990).] If the evidence is relevant to a fact in issue (facta probantia), there may be no inference to conduct. See Imwinkelried, [Uncharged Misconduct Evidence], § 2:21, p 55. The question is not whether the evidence falls within an exception to a supposed rule of exclusion, but rather whether the "evidence [is] in any way relevant to a fact in issue" other than by showing mere propensity, Stone, *The rule of exclusion of similar fact evidence: America*, 51 Harv L R 988, 1004 (1938). "Put simply, the rule is *inclusionary* rather than exclusionary." *Engelman*, *supra* at 213. (Empahsis added.)
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> Thus, the Court of Appeals reference to "the general exclusion of similar acts evidence" is mistaken. There is no policy of general exclusion relating to other acts evidence. There is no rule limiting admissibility to the specific exceptions set forth in Rule 404(b). Nor is there a rule requiring exclusion of other misconduct when the defendant interposes a general denial. Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the

[1] The girl was sixteen at the time of the incident and, therefore, no criminal charges were brought regarding this incident.

> criminal propensity of an individual to establish that he acted in conformity therewith. [Footnotes omitted.]

Thus, the evidence was admissible if offered for a reason other than solely to show defendant's criminal propensity and that he acted in conformity with that propensity. We are satisfied that the evidence was offered for such a purpose. Specifically, we agree with the prosecutor that this evidence was properly admitted to establish the credibility of the victim and her claims. That is, by itself, a claim that defendant, an adult police officer, would engage in improper sexual contact with a fourteen year old, first by kissing her and feeling her breasts while they were golfing and later by engaging in sexual intercourse, would seem incredible. The credibility problem for the prosecutor is further exacerbated by the fact that the victim had a juvenile adjudication for making a false report of there being a bomb at her school.

However, the incident with the victim is placed in context by the evidence that defendant not only flirted with her, but with her co-workers at the Dairy Queen, including sexual innuendos involving an ice cream cone and references to his gun which were suggestive of his penis. Further, his act of inviting the victim into his house, offering her alcohol and then engaging in sexual intercourse was consistent with his conduct with the sixteen-year-old, and similar to activities with other girls which did not result in sexual intercourse.

Moreover, we do not find this evidence to be unduly prejudicial. While it certainly made the victim's claims more credible, the evidence would not so arouse the passions of the jury against defendant to create the possibility that they would convict him despite a lack of evidence on the charged offense.

In sum, the evidence was offered for reasons other than solely to show that defendant had a criminal propensity with which he acted in conformity. Accordingly, the trial court properly granted the prosecutor's motion to admit the evidence.

Affirmed.

/s/ Richard Allen Griffin
/s/ Harold Hood
/s/ David H. Sawyer