

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS JAMES MINNER,

Defendant-Appellant.

UNPUBLISHED

June 28, 2002

No. 227956

Washtenaw Circuit Court

LC No. 99-012475-FC

Before: Owens, P.J., and Sawyer and Cooper, JJ.

PER CURIAM.

Defendant, who was charged with four counts of first-degree criminal sexual conduct, one count of kidnapping and one count of possession of a firearm during the commission of a felony, was convicted following a jury trial of one count of first-degree criminal sexual conduct (CSC I) (weapon used), in violation of MCL 750.520b. The trial court sentenced defendant to 15 to 22.5 years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant's conviction arises from the sexual assault of his estranged wife. According to her testimony, defendant had his son from a previous marriage lure the victim to a Home Depot store parking lot late at night with a tale of a broken car. Although reluctant and fearful that she was being set up to encounter defendant, the victim nonetheless went to help. Once she arrived, her fears were realized when defendant forced her at gunpoint to accompany him to his apartment where he performed several acts of nonconsensual sex with her.

Defendant first argues that the trial court erred in allowing prior bad act evidence to be admitted. We disagree.

The evidence being challenged is the victim's testimony that a week before the incident forming the basis for defendant's conviction, defendant choked her into unconsciousness and then when she revived, forced her to have sex with him. Defendant also challenges the admission of photographs depicting the injuries the victim suffered during that attack.

The admissibility of bad acts evidence is within the trial court's discretion and the court's decision will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that

there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id.*, 74. In addition, "the trial court may, upon request, provide a limiting instruction to the jury." *Id.*, 55.

First, the prosecution has offered a proper purpose. In his brief and at the motion hearing, the prosecutor asserted that the evidence was admissible to show the victim's state of mind regarding her reluctance to help her stepson, and her state of mind regarding her specific actions (and reasoning behind those actions) during the commission of the charged offense. Motive and intent are both examples of admissible other acts purposes, and the purpose of showing the victim's state of mind was to help clarify why the victim acted the way she did based on her prior "negative" experience with defendant. MRE 404(b)(1). None of the purposes were "offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *VanderVliet, supra*, 444 Mich 65. Therefore, because the prior act evidence was offered for a proper purpose, we next examine whether the evidence was relevant. *VanderVliet, supra*, 444 Mich 74. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Regardless of whether motive and intent were relevant purposes, only one purpose needs to be a "proper, noncharacter reason that compels admission for the testimony to be admissible." *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998). Therefore, we will concentrate on the primary purpose offered and addressed by both the prosecution and the trial court. That purpose was to show the victim's state of mind.

In addressing this purpose, the prosecution specifically articulated that it was necessary to show why the victim acted as she did during the occurrence of the charged offenses. The victim testified that in order to get defendant to let her go, she told defendant that she loved him, and that he could live with her again if he sought counseling. She also testified that she told him that she "wanted sex" and she missed having sex with him. However, the victim further testified that she did not willingly consent to any of the acts. Prior bad act evidence is properly admitted to rebut a defendant's claim of fabrication. *Id.* In the case at hand, the evidence of defendant's prior assault and rape of the victim was relevant to show the victim's state of mind, and more specifically to help rebut defendant's assertion that any acts of sexual conduct were consensual. *Id.* The prior act evidence clearly had a tendency to make it more probable than without the evidence that the victim did not willingly consent to the sexual acts, and to help demonstrate her state of mind during the commission of the charged offenses. MRE 401.

Third, we must determine whether the prejudicial nature of the evidence is outweighed by its probative value. *VanderVliet, supra*, 444 Mich 74. Any evidence that tends to prove the truth of a complainant's allegations will be prejudicial to a defendant's case; however, a determination of whether the prejudice outweighs the probative value of the evidence is then required. *Id.* "Although relevant, evidence may be excluded if its probative value is substantially outweighed

by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . .” MRE 403.

The evidence was probative to show that the victim had not fabricated the “nonconsensual” nature of the acts, and to show the basis for her fear of defendant. In addition, our Supreme Court has recognized the unfairness of leaving the trier of fact to make its decision while there remains a “chronological and conceptual void” regarding the evidence presented. *VanderVliet, supra*, 444 Mich 81. Evidence of the prior assault and rape by defendant was very probative in clarifying and further explaining how the prior act impacted the victim’s view of defendant, and therefore, probative of how the prior act may have impacted the victim’s state of mind during the commission of the charged offenses. *Starr, supra*, 457 Mich 502-503. Thus, the trial court did not abuse its discretion in finding that the probative value of the evidence outweighed the prejudicial impact on defendant. *Crawford, supra*, 458 Mich 383. The trial court also gave a limiting instruction to the jury concerning the proper use for the evidence. *Sabin, supra*, 463 Mich 56.

The evidence of defendant’s prior acts was offered for a proper, relevant purpose, and its probative value outweighed its prejudicial impact on defendant. The trial court did not abuse its discretion by allowing the prior acts evidence to be presented at trial. Because the trial court did not abuse its discretion in finding the prior bad act evidence to be admissible, the trial court’s denial of defendant’s motion for new trial, based on the same grounds, was also appropriate.

Defendant next argues that there was insufficient evidence to convict him of CSC I. Again, we disagree.

In reviewing sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Such review is de novo.

Under MCL 750.520b(1)

[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

* * *

(c) Sexual penetration occurs under circumstances involving the commission of any other felony

* * *

(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

There was more than sufficient evidence from which a rational trier of fact could conclude that penetration occurred. The victim specifically testified that penetration occurred and DNA evidence supported that testimony.

There was also sufficient evidence, in the form of specific testimony from the victim, that defendant was armed with a weapon. Although defendant points out that he was acquitted of felony-firearm, it was still possible for the jurors to conclude that he possessed a firearm during the commission of the crime. The felony-firearm charge was brought based on the allegation that defendant had a pistol in his possession during the commission of a felony (specifically kidnapping). Because the felony-firearm charge was based on the kidnapping charge, once defendant was acquitted of kidnapping he had to be acquitted of felony-firearm. MCL 750.227b. Therefore, it is not necessarily inconsistent that the jurors found defendant guilty of CSC I (use of a firearm), while they acquitted him of felony-firearm.

More than sufficient evidence was offered regarding all elements of CSC I. Taking the evidence in a light most favorable to the prosecution, the jury could have found that the elements of CSC I were proven beyond a reasonable doubt.

Finally, defendant argues that offense variables 7, 8, 12, and 13 were improperly scored, relying primarily on the assertion that because defendant was acquitted of all but one count of CSC I, evidence concerning the other counts for which defendant was charged could not be used in scoring the offense variables. We disagree.

Because the crime for which defendant was sentenced was committed on or about July 6, 1999, the statutory guidelines apply in this case. MCL 769.34(2); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). The issue raised by defendant concerns whether the trial court improperly scored OV 7, 8, 12, and 13 of the sentencing guidelines. This issue concerns a question of law as to the trial court's interpretation of MCL 777.33. "The interpretation and application of statutes is a question of law that is reviewed de novo by this Court." *People v Al-Saiegh*, 244 Mich App 391, 394; 625 NW2d 419 (2001).

First, there was sufficient evidence presented to show that the victim experienced increased fear and anxiety as a result of defendant's actions, thereby warranting the trial court's score of fifty points for OV 7 (aggravated physical abuse). MCL 777.37. The victim testified that during the entire incident defendant either held a gun to her head or had it within easy reach. In addition, the victim testified that defendant threatened several times to kill her.

For the final three offense variables challenged by defendant, he argues that because he was acquitted of all other counts, there was insufficient evidence to support the trial court's scoring of OV 8, 12, and 13. Because the standard of proof differs from that necessary for a criminal conviction, a fact can be established for the purpose of guidelines calculations even though it was not found for the purpose of conviction. *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993). Thus, calculations may be based on criminal activity for which the defendant was acquitted. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). Therefore, although defendant was acquitted of all but one count, all evidence offered at trial may be considered in the scoring of offense variables. *Id.*

Thus, even though defendant was acquitted of kidnapping, sufficient evidence was offered to show that the victim was asported (OV 8). In addition, despite the fact that defendant was acquitted of all counts but one, sufficient evidence was offered to show that defendant conspired to kidnap the victim, kidnapped the victim, and sexually penetrated the victim multiple times, in addition to the count of penetration for which defendant was convicted (OV 12). Sufficient evidence was also offered to show that defendant had engaged in a pattern of felonious criminal behavior (OV 13). That evidence consists of the present offense, the circumstances of the physical and sexual assault the week before the present offense, as well as a prior conviction for assault with intent to do great bodily harm less than murder.

Therefore, the record contains more than sufficient evidence to support the trial court's guidelines scoring decisions. In addition, defendant's primary argument for why the offense variables were scored incorrectly is that the scores were dependent on the credibility of the testimony of the victim. Defendant argues that because he was acquitted of all but one count, the jury clearly did not believe the victim, and therefore, her testimony is not credible. For the reasons discussed above, such an argument is wholly meritless.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jessica R. Cooper