

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL BURNIE WELLBORN III,

Defendant-Appellant.

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UNPUBLISHED  
December 16, 2003

No. 242229  
Kent Circuit Court  
LC No. 01-005099-FC

Before: Griffin, P.J., and Neff and Murray, JJ.

NEFF, J. (*concurring*).

I concur in the result in this case. I write separately to express the opinion that our courts have established no per se rule concerning the admissibility of evidence of a prior acquittal and no such rule should be inferred from the decision in this case. It is clear from our decisions that evidence of an acquittal may be admissible under certain circumstances. *People v Oliphant*, 399 Mich 472, 496 n 12; 250 NW2d 443 (1976); *People v Bolden (Bolden I)*, 92 Mich App 421, 425; 285 NW2d 210 (1979). As the *Bolden II* Court acknowledged, 98 Mich App 452, 459-460; 296 NW2d 613 (1980), the critical distinction between that case and both *Oliphant* and *Bolden I*, is that in the latter cases the jury was aware of the defendant's acquittal.

In this case, unlike in *Oliphant* and the *Bolden* cases, the acquittal did not relate to similar acts evidence admitted under MRE 404(b). That is, the prosecutor did not seek the admission of the similar acts charged in the Montcalm County trial in which defendant was acquitted. Here, the acquittal evidence was at issue only because defense counsel planned to use the Montcalm County complainant's testimony in the earlier trial concerning an alleged act in Virginia to impeach her testimony in the Kent County trial. The prosecutor did not object to defense counsel's use of the testimony for impeachment purposes, as long as there was no mention of the acquittal. Defense counsel agreed. Because the acquittal was unrelated to the similar acts evidence defense counsel sought to admit, counsel's agreement was not unreasonable. Defendant's claim of ineffective assistance fails because he has not overcome the presumption that counsel's decision was a matter of trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Because the prosecutor was not seeking admission of the similar acts underlying defendant's acquittal, the analysis in *Oliphant, supra* at 498 n 14, cited in *Bolden II, supra* at 460-461, and cited by the majority in this case, is inapposite. Moreover, the cited reasoning in *Oliphant* concerned an issue of double jeopardy and cannot be considered an authoritative consideration of the principles governing the admissibility of acquittal evidence in conjunction with similar acts under MRE 404(b).

/s/ Janet T. Neff