STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 1, 2004
v	No. 243747 Kalkaska Circuit Court
WAYNE ALLEN RUSSELL, Defendant-Appellant.	LC No. 02-002198-FH

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree home invasion, MCL 750.110a(2), assault with intent to commit sexual penetration, MCL 750.520g(1), attempted first-degree home invasion, MCL 750.110a(2), attempted second-degree home invasion, MCL 750.110a(3), and indecent exposure by a sexually delinquent person, MCL 750.10a and MCL 750.335a.[1] Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to 217 to 480 months' imprisonment for his first-degree home invasion conviction, a consecutive 100 to 240 months' imprisonment for his assault conviction, two 80 to 120 months terms of imprisonment for the attempted first- and second-degree home invasion convictions (both concurrent to his first-degree home invasion conviction) and 1 day to life for his indecent exposure conviction (also concurrent to his first-degree home invasion conviction). We affirm.

Defendant's convictions stem from a series of incidents occurring at the victim's home in August and September 2001. On August 18, 2001, the victim awoke and discovered a naked man standing at the foot of her bed. When she yelled, the man fled. The victim could not see the man's face, but she noticed that he had a distinctive gait while running. On August 23, 2001, the victim heard a noise coming from her dining room. She investigated and discovered a man attempting to enter her home through a sliding glass door. The victim was again unable to see

[1] Defendant was tried before two separate juries. At the trial by the first jury panel, defendant was convicted of first-degree home invasion, assault with intent to commit sexual penetration, attempted first- and second-degree home invasion, and indecent exposure. At the second jury trial, defendant was convicted of being a sexually delinquent person. See *People v Helzer*, 404 Mich 410, 422; 273 NW2d 44 (1978). The issue raised on appeal relates to the first trial.

the man's face, but she did observe that he ran in the same distinctive way as the man from the earlier incident. After this second incident, the victim installed a video camera in her home. The camera could record continuously for a twenty-four hour period. On September 3, 2001, a man was videotaped at the victim's sliding glass door. The victim identified the man from his walk as being the same individual from the two earlier incidents. Subsequent laboratory analysis identified the presence of defendant's semen on the victim's bedroom carpet and bedspread.

The prosecution served notice that it intended to introduce evidence under MRE 404(b) of a prior assault involving defendant as proof of his motive, intent, scheme, plan, or system in doing the charged acts. Defendant objected on the basis that there was a lack of similarity between the events. The court admitted the evidence for the purpose of proving intent. Defendant's sole argument on appeal is that the court erred in admitting this evidence. We disagree.

Defendant argues that the evidence lacked sufficient similarity to the present case to support admission under MRE 404(b). Further, defendant argues that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. In support of this assertion, defendant notes that a juror submitted some questions inquiring about whether defendant had received a jail term for the prior assault and whether he had been in trouble with the law since. This Court reviews the trial court's admission of other-acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

For other-acts evidence to be admissible under MRE 404(b), the following evidentiary requirements must be satisfied: (1) the other-acts evidence must be offered for a proper purpose under MRE 404(b); (2) the evidence must be relevant to an issue of fact of consequence at trial under MRE 402, as enforced through MRE 104(b); (3) under MRE 403, the probative value of the evidence must not be substantially outweighed by its potential for unfair prejudice in view of the availability of other means of proof and other facts appropriate for making decisions of this kind; and (4) the trial court, on request, may provide a limiting instruction under MRE 105. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

In the present case, the prosecution proffered the prior assault evidence at the first trial to prove (1) motive, (2) intent, and (3) plan, system, or scheme in doing an act, all of which are proper purposes under MRE 404(b). Thus, the first prong of the test is satisfied. Further, although not requested by defendant, the trial court provided a clear limiting instruction on three separate occasions, thereby satisfying the fourth prong. Therefore, resolution of this issue focuses on the second and third prongs of the above test.

The issue of relevance turns on the similarity between the prior assault and the present charged acts. At the motion hearing, the trial court admitted the prior testimony to prove intent. During closing argument, the prosecution argued that evidence was offered "for the limited purpose of deciding what the defendant's intent was, what was his plan, what was his scheme, why was he there." Each of the crimes in issue was a specific intent crime.[2] "It is well

[2] First-degree home invasion can be both a specific and general intent crime. MCL 710.110a(2). In the circumstances of this case, however, the crime charged was a specific intent crime. (continued…)

established in Michigan, as well as in most jurisdictions, that *all* elements of a criminal offense are 'in issue' when a defendant enters a plea of not guilty." *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995). Thus, the specific intent element of each crime charged was in issue.

Proof of a common plan, system, or scheme can be used to prove intent. *People v Engelman*, 434 Mich 204, 220; 453 NW2d 656 (1990); McCormick on Evidence (5th ed, 1999), § 190, p 661 (observing that the existence of a common scheme or plan is "relevant as showing motive, and hence the doing of a criminal act, the identity of the actor, or his intention"). "When other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts 'are of the same general category.'" *People v VanderVliet*, 444 Mich 52, 80; 508 NW2d 114 (1993), quoting Imwinkelried, Uncharged Misconduct Evidence, § 3:11, p 23. In *Sabin (After Remand)*, *supra* at 66, the Court observed that the charged and uncharged acts in issue in that case "contained common features beyond mere commission of acts of sexual abuse." Conversely, the Court also acknowledged that "the uncharged and charged acts were dissimilar in many respects." *Id.* at 67. Nonetheless, the Court held that the trial court did not abuse its discretion in admitting the other-acts evidence in issue:

> This case thus is one in which reasonable persons could disagree on whether the charged and uncharged acts contained sufficient common features to infer the existence of a common system used by defendant in committing the acts. As we have often observed, the trial court's decision on a close evidentiary question such as this one ordinarily cannot be an abuse of discretion. [*Id.*]

The August 18 incident and the prior assault bore strong similarities. Both victims were elderly women who lived alone in homes located in a residential area. Both incidents happened at night while the victims were asleep in their bedrooms with the television or a light on. Sexual activity was involved in both incidents. In the present incident, the breezeway door was propped open, and in the prior incident it can be reasonably argued the door could have been propped open with an out-of-place flowerpot.

No two incidents are ever exactly the same, so the defendant rightly points out that there are some facts which distinguish the incidents. For example, while violent physical contact ensued in the prior assault, there is no evidence that the victim in this case was touched in any way. Further, there is less of an age difference between defendant and the present complainant than there was between defendant and the prior victim. However, the fact that no physical assault occurred in the present case may be due to the fact that the victim awoke screaming, which scared defendant from her premises. We find the age gap a miniscule matter that cannot stand as a basis for finding an abuse of discretion. Further, reasonable persons could disagree regarding whether the prior and present incidents "contained sufficient common features to infer the existence of a common system used by defendant in committing the acts." *Id.*

(…continued)

Further, any attempt to commit an offense is a specific intent crime. *People v Langworthy*, 416 Mich 630, 644-645; 331 NW2d 171 (1982). Finally, assault with intent to commit sexual penetration is also a specific intent crime. *People v Evans*, 173 Mich App 631, 634; 434 NW2d 452 (1988).

Turning to the issue of unfair prejudice, MRE 403 provides, in pertinent part, that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." The probative value of evidence is the tendency the evidence possesses 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. *Mills, supra* at 67.

Although the potential for prejudice always exists when introducing similar-acts evidence, the evidence introduced was highly probative of defendant's purpose in being in the victim's bedroom on August 18. It also is probative on the issue of what defendant intended to do when he tried to enter the victim's home on August 23 and September 3. Further, the record does not establish a tendency that this evidence would be given preemptive or undue weight. Unfair prejudice is not established merely because of the abhorrent nature of prior assault. *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998).

Moreover, the juror's questions should not be seen as establishing that defendant was unfairly prejudiced by the admission of this other acts evidence. One of the questions raised – relating to how defendant came to know where the complainant lived – had nothing to do with the other acts evidence at all. As for the other two questions, they can reasonably be understood as an attempt to determine what weight to give to the prior assault evidence. In any event, even assuming the existence of the danger of unfair prejudice, the circumstances do not support the conclusion that the probative value was substantially outweighed by this assumed danger. To bolster this contention, we point to the fact that the trial court took extra precautions to ensure that the prejudicial effect of the evidence was held to a minimum by instructing the jury three times on the limits to which the evidence could be put. Both these factors tend to establish that it is unlikely that the evidence would be weighed "out of proportion to its logically damaging effect." *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735; 344 NW2d 347 (1983).

Therefore, we conclude that the trial court did not abuse its discretion in admitting other-acts evidence under MRE 404(b).

Affirmed.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello