

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
September 22, 2016

v

CALVIN RAY KELLY,
Defendant-Appellee.

No. 331731
Kalamazoo Circuit Court
LC No. 2014-001300-FC

Before: MURRAY, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

In this interlocutory appeal, the prosecution appeals by leave granted¹ the trial court's order denying its motion to admit other acts evidence. For the reasons explained in this opinion, we vacate the trial court's MRE 404(b) analysis and remand for further proceedings not inconsistent with this opinion.

In the present case, defendant has been charged with kidnapping, MCL 750.349, three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b, and assault with intent to commit CSC involving sexual penetration, MCL 750.520g. These charges arise from the alleged sexual assault of SH in April of 2008. DNA collected during SH's sexual assault exam matches defendant's DNA profile. Indeed, defendant does not dispute that a sexual encounter with SH occurred on the date in question. Rather, the defense theory of the case, as set forth in lower court documents, is that SH "did in fact consent to the sexual contact or penetration with" defendant. According to the defense theory, SH consented to sex that evening as a prostitute in exchange for compensation.

In contrast, according to the prosecution's theory of the case, this 2008 attack on SH is just one of eight sexual assaults committed by defendant. These eight sexual assault cases date from 1985 through 2010 and span four different states—Missouri, Tennessee, Michigan, and Virginia. In each case, defendant isolated the victims by selecting women who were alone and/or driving them to a more secluded location. Once the victims were isolated, defendant then

¹ *People v Kelly*, unpublished order of the Court of Appeals, entered May 16, 2016 (Docket No. 331731).

forced them to engage in vaginal-penile penetration. To compel the victims' compliance, defendant employed weapons, most commonly a knife, and physical violence, including punching and choking his victims. He did not use a condom and he ejaculated, frequently leaving behind DNA evidence. DNA evidence links defendant to five of these cases, including SH's case; and, in two of the cases without DNA evidence, defendant acknowledged to police that he had sex with the victims at the times in question. While defendant was interviewed by police in several of the other cases, he was never brought to trial and there are no convictions relating to these other cases. If confronted by police, as in the present case, defendant claimed that the sex was consensual and he disparaged the victims, typically claiming that they were disgruntled prostitutes who fabricated claims of sexual assault after he refused to pay for their services.

In this case, the prosecution filed a notice of intent under MRE 404(b)(2), indicating that it intended to introduce evidence of defendant's other acts relating to these reported sexual assaults. Given the similarities between the other acts and the alleged assault on SH, the prosecutor argued that the other acts evidence was relevant and admissible under MRE 404(b) for proper purposes, namely: to establish defendant's intent and to demonstrate a common scheme, plan or system in doing an act.² In contrast, defendant took the position that "[r]elevancy means believability" and, because the other conduct involved mere "allegations" of sexual assault and the previous victims were not credible, the evidence lacked probative value and amounted to mere propensity evidence. According to defendant, allowing the prosecutor to present proof of these other acts would turn the trial into a "sordidly long affair," and any probative value was substantially outweighed by the danger of unfair prejudice.

Ultimately, the trial court ruled in defendant's favor, concluding that the evidence was inadmissible under MRE 404(b). However, in making this ruling, the trial court did not consider whether the prosecutor identified a proper purpose for the evidence and the court failed to address whether the evidence was legally relevant to the proper purposes identified. Instead, the trial court observed that *if* defendant's conduct in relation to the other acts was not criminal, then the other acts evidence would not be "of any use" in the present case. In this respect, the trial court emphasized that there were no actual convictions relating to this conduct and that there was a credibility contest between defendant and the victims in terms of consent. In these circumstances, the trial court concluded that it could not "take a leap" to find that defendant had engaged in a pattern of criminal conduct. Without discussing the evidence's probative value in relation to the prosecution's proper purposes, the trial court nonetheless conducted a balancing test under MRE 403, determining that it would be unfairly prejudicial to defendant to require the jury to determine defendant's guilt of the other crimes in addition to the crimes charged in this case, particularly given the age of some of the other acts.

² In the trial court, the prosecutor also initially stated that the evidence was relevant to show defendant's identity and also to establish his motive, but the prosecutor does not pursue these arguments on appeal and we consider them abandoned. See *People v Bosca*, 310 Mich App 1, 48; 871 NW2d 307 (2015).

Following the trial court's ruling, the prosecution moved for a stay of proceedings pending an application to appeal. The trial court granted the stay, and the prosecutor filed an interlocutory application for leave to appeal, which this Court granted.

On appeal, the sole issue before this Court is whether the trial court abused its discretion by excluding evidence of the seven other instances of alleged criminal sexual conduct by defendant. We conclude that the trial court failed to operate within the MRE 404(b) legal framework and thus abused its discretion. For this reason, we vacate the trial court's MRE 404(b) analysis and remand for reconsideration of this issue.

“The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion.” *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009). A trial court's decision is an abuse of discretion “when it chooses an outcome that is outside the range of reasonable and principled outcomes.” *Id.* at 670. “When the decision involves a preliminary question of law however, such as whether a rule of evidence precludes admission,” this Court reviews the question de novo. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). An abuse of discretion may occur when “the trial court operates within an incorrect legal framework.” *People v Hine*, 467 Mich 242, 250–251; 650 NW2d 659 (2002).

As a general rule, “evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts.” *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Although such evidence is inadmissible for propensity purposes, it may be admitted for other purposes under MRE 404(b)(1), which states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

A prosecutor seeking to introduce other acts evidence under this rule “bears an initial burden to show that the proffered evidence is relevant to a proper purpose under the nonexclusive list in MRE 404(b)(1) or is otherwise probative of a fact other than the defendant's character or criminal propensity.” *Mardlin*, 487 Mich at 615. More fully, whether other acts evidence may be admitted under MRE 404(b) requires application of a four-pronged standard.

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).]

In this case, the trial court failed to follow this legal framework and thus abused its discretion. See *Hine*, 467 Mich at 250-251. First, the trial court failed to determine whether the prosecutor offered the evidence for a proper purpose and the court failed to consider the legal relevance of the evidence in light of this proper purpose. Without consideration of the evidence's purpose and legal relevance under MRE 404(b), the trial court could not reasonably engage in the balancing test required by MRE 403. See *Rock v Crocker*, ___ Mich ___, ___; ___ NW2d ___ (2016) (Docket No. 150719); slip op at 8-9. On this basis alone, we find it appropriate to vacate the trial court's decision and remand for consideration of the issue within the proper MRE 404(b) framework.

Second, we note also that the trial court appears to have abdicated the necessary relevancy analysis based on impermissible credibility concerns. In other words, the trial court allowed defendant's protestations of "consent" in respect to the other acts to control the MRE 404(b) analysis. This too was improper. See *Mardlin*, 487 Mich at 625 ("Although defendant . . . emphasize[s] that he offered innocent explanations for the past [conduct], his innocent explanations do not control the admissibility analysis.").

Under MRE 404(b), when considering the relevancy of evidence under MRE 402 as enforced through MRE 104(b), "the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence." *VanderVliet*, 444 Mich at 68-69 n 20, quoting *Huddleston v United States*, 485 US 681, 690; 108 S Ct 1496; 99 L Ed 2d 771 (1988). "The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence." *VanderVliet*, 444 Mich at 68-69 n 20, quoting *Huddleston*, 485 US at 690.

In this regard, defendant does not dispute the occurrence of the other acts sexual conduct at issue in this case. Plainly, there is considerable evidence that the sexual acts in question occurred and that defendant was the actor.³ The only issue is whether that conduct was consensual as claimed by defendant or criminal sexual conduct as asserted by the alleged victims. This clearly is a question of credibility and the trial court could not wholly dismiss the evidence as being without "any use" merely because there was a credibility dispute.

[A] jury may generally decide whether a defendant's claim of innocence [regarding other alleged acts of misconduct] . . . is more credible or likely than the prosecution's claim of guilt. The jury is the sole judge of the facts; its role includes listening to testimony, weighing evidence, and making credibility determinations. Indeed, "a basic premise of our judicial system [is that] providing more, rather than less, information will generally assist the jury in discovering the truth." The weight to be given to admitted evidence is left to a properly instructed

³ Given the trial court's emphasis on the lack of convictions arising from the other acts, we note briefly that, under MRE 404(b), the others acts may be uncharged conduct and even conduct for which a defendant was acquitted. See, e.g., *People v Starr*, 457 Mich 490, 499; 577 NW2d 673 (1998); *People v Gibson*, 219 Mich App 530, 533; 557 NW2d 141 (1996).

jury's common sense and judgment. [*Mardlin*, 487 Mich at 626 (citations in footnotes omitted).]

Indeed, given defendant's proposed consent defense in regard to SH's allegations in this case, defendant's similar protestations of "consent" in numerous other cases underscores, rather than obviates, the relevancy of the other acts evidence.⁴ Cf. *id.* at 624. See also *People v Oliphant*, 399 Mich 472, 488; 250 NW2d 443 (1976) (finding that a defendant's common plan to make it appear that the victims had consented to sexual assaults was both material and relevant). In short, at this stage of proceedings, defendant's differing version of events does not mandate exclusion of the other acts evidence, and, by allowing defendant's credibility arguments to control, the trial court failed to conduct the proper relevancy analysis.⁵ Cf. *Mardlin*, 487 Mich at 625-626.

In sum, the trial court failed to consider the evidence's relevance in relation to the purposes for which it was offered under MRE 404(b). Without considering the evidence's legal relevance for a proper purpose, the trial court could not conclude that the evidence's probative value was substantially outweighed by unfair prejudice or any of the other concerns identified in MRE 403.⁶ See *Rock*, slip op at 8-9. By failing to follow the proper legal framework, the trial court neglected a fundamental responsibility in its MRE 404(b) evidentiary analysis and thus the trial court abused its discretion by excluding the proposed testimony. See *People v Uribe*, 499 Mich 921; 878 NW2d 474, 475 (2016). Accordingly, we vacate the trial court's analysis and remand for reconsideration regarding the admission of the other acts evidence.

⁴ In other words, employing the doctrine of chances, it strikes us as extraordinarily improbable that eight unrelated women in four different states would fabricate reports of sexual assault after engaging in consensual sex with defendant. See *Mardlin*, 487 Mich at 617.

⁵ A defendant's claims of innocence may be considered under MRE 403 in balancing prejudice with probative value, *Mardlin*, 487 Mich at 626-627; but, as noted, the first inquiry under MRE 404(b) is relevancy in regard to a proper purpose, and defendant's claims of innocence cannot control this necessary inquiry.

⁶ Related to MRE 403, in response to arguments by the prosecutor on appeal, we note briefly that, on remand, the trial court should consider whether all, some, or none of the proposed testimony is admissible. See generally *People v Watkins*, 491 Mich 450, 493 & n 93; 818 NW2d 296 (2012) (holding, in the context of MCL 768.27a and MRE 403, that the trial court erred by failing to review each alleged act separately "and instead lumped all of the evidence together"). For example, the trial court repeatedly emphasized the age of some of the acts involved as a reason why the evidence should not be admitted. But, this concern does not apply to *all* of the acts in question, some of which in fact occurred more recently than the conduct charged in this case. With regard to the age of some of the conduct at issue, we note also that age is not dispositive because "there is no time limit applicable to the admissibility of other acts evidence." *People v Yost*, 278 Mich App 341, 405; 749 NW2d 753 (2008).

Vacated and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Christopher M. Murray

/s/ Joel P. Hoekstra

/s/ Jane M. Beckering

Court of Appeals, State of Michigan

ORDER

People of MI v Calvin Ray Kelly

Docket No. 331731

LC No. 2014-001300-FC

Christopher M. Murray
Presiding Judge

Joel P. Hoekstra

Jane M. Beckering
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 35 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, *People v Kelly*, unpublished opinion per curiam of the Court of Appeals (Docket No. 331731), the trial court shall apply the MRE 404(b) framework set forth in *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993) to determine whether the prosecution's proffered other acts evidence is admissible. In particular, the trial court must perform the full MRE 404(b) analysis before engaging in an MRE 403 analysis. See *Rock v Crocker*, 499 Mich 247, __; __ NW2d __ (2016) (Docket No. 150719); slip op 8-10.

The prosecution shall file with this Court a copy of the order entered by the trial court on remand within 7 days. Any objections either party has to the order must be filed in this Court within 14 days of its entry. If an objection is filed, thereafter the objecting party shall cause to be prepared a transcript of the proceedings on remand. The transcript shall be completed and filed with this Court within 21 days of its being requested. After filing of the transcript, the objecting party has 14 days to file a brief in this Court and the non-objecting party then has 14 days to file a response.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

SEP 22 2016

Date

Chief Clerk