

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
October 17, 2017

v

DAVID PRICE III,

Defendant-Appellee.

No. 336819
Livingston Circuit Court
LC Nos. 16-023396-FH,
16-023397-FH

Before: BOONSTRA, P.J., and METER and GADOLA, JJ.

PER CURIAM.

In this interlocutory appeal, the prosecution appeals by leave granted¹ two orders issued by the trial court (one in each of two cases) granting defendant's motion to exclude other acts evidence. We vacate the trial court's orders and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant is charged with three counts of criminal sexual conduct in two separate lower court cases. Each case concerns a different alleged victim, and in each case the alleged victim was an employee of defendant and the alleged sexual assault was committed at the restaurant owned by defendant. After a joint preliminary examination, the prosecution moved to join the two cases and also filed in each case a notice of intent to introduce other-acts evidence under MRE 404(b); in other words, in each case it planned to introduce evidence of the alleged sexual assault in the other case. The prosecution argued that the two cases should be joined under MCR 6.120 because there was "a commonality to both crimes as both cases involve criminal sexual conduct committed through use of force or coercion." The prosecution also argued that "defendant engaged in the same plan or scheme to accomplish the sexual activity with both women," and that it was offering evidence of the similar factual scenarios in both cases for the non-character purpose of showing defendant's intent and use of a common plan, scheme, or system of committing sexual assault. On April 22, 2016, the trial court denied the prosecution's

¹ *People v Price*, unpublished order of the Court of Appeals, entered May 17, 2017 (Docket No. 336819).

motion for joinder, concluding that there were sufficient distinguishing factors between the cases that it would exercise its discretion to try the cases separately.

Thereafter, on January 3, 2017, the trial court orally granted defendant's motion to exclude the proffered other-acts evidence, relying on its denial of the prosecution's motion for joinder:

All right. What, uh, the Court will do after having heard arguments of counsel earlier and has, uh, read the pleadings and papers, uh, with respect to defendant's motion to exclude other acts evidence, uh, for the same reasons that I have previously ruled that these two cases would not be joined. Similarly, in keeping with that prior ruling, uh, I am, I find the, uh, response and the order in this case, in order to stay consistent with the, uh, prior ruling not to join these cases is to, uh, exclude the, uh, one act of, the one case from being heard in the other case. And that will, uh, be consistent with my previously [sic] ruling to have these cases severed.

The trial court subsequently issued orders in each case to that effect. The trial court granted the prosecution's motion to stay the cases below pending the interlocutory appeal of its orders.

II. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Smith*, 282 Mich App 191, 194; 772 NW2d 428 (2009). "A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *People v Danto*, 294 Mich App 596, 598-599; 822 NW2d 600 (2011). "An abuse of discretion may occur when 'the trial court operates within an incorrect legal framework.'" *People v Kelly*, 317 Mich App 637, 643; 895 NW2d 230 (2016), quoting *People v Hine*, 467 Mich 242, 250-251; 650 NW2d 659 (2002).

III. ANALYSIS

The prosecution argues that the trial court abused its discretion by excluding the other-acts evidence, because it did not engage in the proper legal analysis when deciding defendant's motion. We agree.

At issue is the interplay between the standard for joinder as set forth in MCR 6.120(B)(1) and the standard for admitting other-acts evidence as set forth in MRE 404(b)(1). MCR 6.120(B)(1) states:

Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

- (a) the same conduct or transaction, or
- (b) a series of connected acts, or
- (c) a series of acts constituting parts of a single scheme or plan.

MRE 404(b)(1) states in relevant part as follows:

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 . . . scheme, plan, or system in doing an act . . . 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.

The objectives of joinder of offenses for trial and exclusion of other-acts evidence from trial are distinct. Whereas joinder is appropriate when it “promote[s] fairness to the parties and a fair determination of the defendant’s guilt or innocence of each offense,” the admission of other-acts evidence is limited by MRE 404(b) to avoid the danger of conviction based on “a defendant’s history of other misconduct rather than on the evidence of his conduct in the case in issue,” *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998) (quotation marks and citation omitted). Accordingly, while there may be an overlap between an examination of whether offenses are related because they are part of “a series of acts constituting parts of a single scheme or plan” for purposes of MCR 6.120(B)(1) and whether evidence of other acts is admissible in order to show the use of a “scheme, plan, or system in doing an act,” MRE 404(b)(1), the legal frameworks to be applied by a trial court in determining whether to join cases and whether to exclude other-acts evidence are different.

MRE 404(b) is “a rule of inclusion, allowing relevant other-acts evidence as long as it is not being admitted solely to demonstrate criminal propensity.” *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2003). When considering whether to admit evidence offered under MRE 404(b)(1), a trial court must apply a four-pronged test for admissibility:

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 on other grounds 445 Mich 1205 (1994).]

MRE 402 provides that “[a]ll relevant evidence is admissible, except as otherwise provided” Evidence is relevant if it has a tendency “to make the existence of any factual consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401; see also *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). “Relevant evidence thus is evidence that is material[ly] related to any fact that is of consequence to the action and has probative force.” *People v Mills*, 450 Mich 61, 66-68; 537 NW2d 909 (1995). A material fact “need not be an element of a crime or cause of action or defense but it must at least be ‘in issue’ in the sense that it is within the range of litigated matters in controversy.” *Id.* “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” MRE 403.

By contrast, “MCR 6.120 permits joinder if offenses are ‘related.’ ” *People v Williams*, 483 Mich 226, 233; 769 NW2d 605 (2009), citing MCR 6.120(B)(1). Offenses are related if

they comprise either “the same conduct” or “a series of connected acts or acts constituting part of a single scheme or plan.” *Id.*; MCR 6.120(B)(1). “To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute ‘related’ offenses for which joinder is appropriate.” *Williams*, 483 Mich at 231.

When considering whether joinder was appropriate, the trial court did not consider the *VanderVliet* factors with regard to the specific other-acts evidence the prosecution wished to introduce in each case. Yet, in later granting defendant’s motion to exclude other-acts evidence, the court simply relied upon its decision on the prosecution’s motion for joinder. While the test for joinder requires the court to “find the relevant facts,” the test for the admission of evidence under MRE 404(b) requires the trial court to determine whether the evidence is relevant to a proper, nonpropensity purpose. Further, while MCR 6.120(B)(1) requires the court to find the existence of a scheme or plan, MRE 404(b) requires the court to determine whether the evidence is relevant to the existence of a scheme or plan, or indeed relevant to other proper purposes; in this case, for example, the prosecution offered the other-acts evidence as proof of defendant’s intent to use his position as the victim’s employer to perpetuate a sexual assault, as well as his intent to use his control of the surroundings to gain “the element of surprise.” The trial court did not address whether these stated purposes were proper, whether the proffered evidence was relevant to any of those purposes, whether even if relevant the evidence should nonetheless be excluded as unfairly prejudicial, or whether a limiting instruction could be given. *VanderVliet*, 444 Mich at 55. Thus, the court’s other-acts analysis was not undertaken under the proper legal framework. *Kelly*, 317 Mich App at 643-644.

We accordingly vacate the trial court’s order granting defendant’s motion to exclude evidence and remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Michael F. Gadola