

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
December 19, 2017

v

MARTIN ANTONIO SOLOMON,
Defendant-Appellee.

No. 339178
Wayne Circuit Court
LC No. 16-007639-01-FC

Before: METER, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendant is charged as a fourth-habitual offender, MCL 769.12, with one count of kidnapping, MCL 750.349, two counts of first-degree criminal sexual conduct (CSC-I) during a felony, MCL 750.520b(1)(c), and one count of third-degree fleeing from a police officer, MCL 257.602a(3). Prior to trial, the prosecution, relying on MRE 404(b), moved to admit testimony from 12 individuals¹ who it claims were sexually assaulted by defendant on prior occasions as well as an audiotape purported to be that of a rape in progress against an unknown female. The trial court ruled that testimony from VS, SG, CL, and KE were admissible but that the rest were not. The prosecutor sought leave interlocutory leave to appeal which we granted.² We reverse the trial court's decision excluding prior acts testimony from EH, DP, JS, and RS, but affirm its decision to exclude prior acts testimony from TC, JB, and CB.³ We also affirm its decision to exclude the audio tape.⁴

¹ Only 11 are at issue in this appeal as the prosecution has not argued in its brief that testimony from MA should be admitted.

² *People v Solomon*, unpublished order of the Court of Appeals, entered August 17, 2017 (Docket No. 339178).

³ Defendant has not argued that the trial court erred by admitting evidence regarding these three prior acts noting that the decision is governed by the abuse of discretion standard.

⁴ We review a trial court's decision to admit or exclude evidence for an abuse of discretion, and we review de novo whether a rule of evidence precludes the admission of evidence. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013). An abuse of discretion occurs when the trial

I. FACTS

This case arises from the alleged sexual assault of the 17-years-old complainant by defendant on July 17, 2016, and the following three paragraphs describe the evidence proffered by the prosecution.

The complainant first met defendant three weeks before the incident when she was walking on the freeway and defendant was sitting in a U-Haul on the freeway. Defendant gave the complainant a ride home. On July 16, 2016, defendant texted the complainant and asked her to go to an event with him, but she declined. On the day of the incident, defendant called the complainant on her aunt's cellphone and asked for the address. Defendant came to the aunt's house with the same U-Haul truck, and picked up the complainant in order to give her a ride home. When defendant took a wrong route to the complainant's house, she informed him that he was going the wrong way but defendant did not respond. Defendant later told the complainant that they were going to "ride and cruise and smoke," which she assumed meant that they were going to smoke marijuana.

Defendant then pulled into alley, and while in the truck, made a phone call during which the complainant heard him say, "[Y]ou might as well kill that nigger because he been owning me." Concerned, the complainant asked defendant to take her home, but defendant pulled at her waist and tried to kiss her. When she rejected the advance, defendant got angry and told her that he "gets what he want[s]," and that she was "messing with a real king." The complainant had her phone in her hand and texted her cousin that she did not feel safe. When the complainant continued to insist that defendant should take her home, defendant threatened that he could take his gun and kill her. Defendant then raped the complainant and performed oral sex on her. During the rape, the complainant texted her cousin that defendant was raping her.

After the rape, defendant's mood changed from "grumpy and aggressive" to a "whole different mood," which the complainant described as "really nice out of nowhere." Defendant then promised to take the complainant home, and told her that he would pay \$200 for her to get her hair done and take her to Kay Jewelers. When defendant dropped the complainant off, he told her to call him in 30 minutes, and that he would come back to pick her up. Defendant recorded this conversation and several of their prior conversations. The complainant reported the rape to the police and defendant was arrested.

After defendant was bound over on the charges, the prosecution filed a notice of intent⁵ to introduce MRE 404(b) other acts evidence during defendant's trial. In the notice, the prosecution sought to admit the testimony of 12 alleged victims of sexual assault by defendant, 8 of which are at issue in this appeal. The prosecution also sought to admit an audio recording, recovered from defendant's phone, between defendant and an unknown woman.

court's decision falls "outside the range of principled outcomes." *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010) (quotation marks and citation omitted).

⁵ The prosecution subsequently filed an amended notice of intent on April 12, 2017.

The prosecution argued that it intended to offer these witnesses and the audio recording to prove identity and lack of consent. Defendant objected to the admission of the evidence arguing that the other acts evidence did not show proof of a scheme, plan, or system in doing an act, and that it was more unfairly prejudicial than probative because it was propensity evidence.

The trial court held that it would allow the evidence of four of the witnesses but excluded the evidence of the remaining witnesses on the grounds that defendant was either not prosecuted for the crime against the witnesses, the cases were dismissed, or that defendant was acquitted. Regarding the authentication and foundation for the admission of the audio recording of the unknown woman, the court stated that even if the prosecution could produce a witness to identify defendant's voice, the prosecution had not produced a witness that could identify the voice of the unknown woman on the tape. Accordingly, the trial court excluded the audio recording finding that the requirements of voice identification and authentication were not met.

II. LEGAL ANALYSIS

A. OTHER-ACTS EVIDENCE

The prosecution argues that the testimony from the alleged victims of other sexual assaults was admissible under MRE 404(b) because the prior bad acts are relevant to identity and consent neither of which defendant concedes, at least to date. 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 “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 Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). 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.* (quotation marks and citations omitted). “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” MRE 403.

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) (citation omitted). MRE 404(b)(1) provides as follows:

Evidence of other crimes, wrongs, or action 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 crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence of other crimes or acts is admissible under MRE 404(b) if such evidence: (1) is offered for a proper purpose and not to prove the defendant’s character or propensity to commit the

crime; (2) is relevant to an issue or fact of consequence at trial; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205; 520 NW2d 338 (1994). The prosecution has the burden of establishing the relevance of the prior act evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

After reviewing the record, we conclude that the evidence concerning the assaults against EH, DP, JS, and RS demonstrates a distinctive common scheme, plan, or system consistent with defendant's alleged actions in this case. Because the issues of identity and consent are in dispute, the prosecution may present testimony of these prior victims that defendant sexually assaulted them and the plan or scheme he used to do so.

The proffered evidence in the instant case shows that prior to the sexual assault, defendant was initially kind to the complainant by offering to give her rides, which made her assume that defendant was her friend. Similarly, the prosecution proffers that EH, DP, JS, and RS will testify that defendant was also initially kind to them and offered them rides. Defendant introduced RS to his parents and his cousin on their first date, and introduced DP to his mother. Defendant met EH in a gas station and offered her a ride in his vehicle. And after JS declined to go on a date with him, defendant offered to give her a job cleaning houses for \$10 an hour, before she exchanged numbers with him.

Like the complainant in this case, who alleges that defendant drove to a secluded place where the sexual assault occurred, EH, DP, JS, and RS will testify that defendant drove them to a secluded place where he sexually assaulted them. Specifically, the prosecution presented evidence that defendant drove EH to an abandoned house, drove to several locations with DP before finally parking close to a house making it impossible for her to exit the passenger door, drove JS to an abandoned home, and drove RS to parking lot behind an apartment complex where he locked the door and parked the car with the passenger side next to a large dumpster to prevent her from leaving the vehicle. Once alone with the victims, he would become threatening. Like the complainant in this case, who defendant allegedly threatened with pulling out his gun unless she had sex with him, EH, DP, JS, and RS each will testify that they were threatened when they refused sexual contact with defendant. Specifically, he threatened to kill or shoot each of them. In addition, he brandished a gun on RS, placed JS in a chokehold, and threatened to pull out his "9" on DP, which she assumed to mean his gun. Notably, just like in the present case, after the sexual assault, the assailant's demeanor would change and he would become nice to the victims. In the present case, it is alleged that after assaulting the complainant, defendant offered to give her \$200 to get her hair done and to take her to Kay Jewelers. Similarly, after assaulting the other victims, their assailant made offer of gifts to them. He offered EH a job, offered to buy DP breakfast and marijuana, and offered to help JS pay the tags for her car. In addition, after the sexual assault occurred in this case, defendant recorded the conversation with the complainant where he promised to pay to get her hair done and take her to Kay Jewelers. In the same way, DP's assailant recorded the conversation between himself and DP, after the sexual assault, during which he promised to buy her breakfast and some weed. Likewise, defendant recorded the conversation with JS where he promised to pay for her car tags.

The similarities between this case and the facts regarding EH, DP, JS, and RS are sufficient to admit the evidence of the prior acts pursuant to MRE 404(b). The admissibility of MRE 404(b) evidence is contingent on the similarity of the facts, rather than whether the facts are identical. *Knox*, 469 Mich at 511.

The trial court declined to admit evidence as to several of these prior assaults on the basis that defendant had been accused of these assaults but the charges were dismissed or he was acquitted.⁶ However, the Supreme Court rejected this in *People v Oliphant*, 399 Mich 472, 495; 250 NW2d 443 (1976), where the defendant argued that the admission of evidence from two prior rape charges in which he was acquitted violated his Fifth Amendment right against double jeopardy. The Supreme Court found that the evidence of the prior rapes was not offered to convict the defendant of these crimes, but rather, to show his scheme, plan, or system. *Id.* at 499. Therefore, it did not violate his Fifth Amendment right. *Id.* at 500. *Oliphant* was relied upon by this Court in *People v Bolden*, 98 Mich App 452, 461; 296 NW2d 613 (1980), which provided:

The prosecution must produce evidence sufficient to show that defendant “probably committed the other acts.” If he or she can satisfy that burden, the jury should not be confused by the additional information of an acquittal which could mislead them into believing that the defendant absolutely did not commit the prior similar acts. The fact that another jury harbored a reasonable doubt as to defendant’s guilt of the other offense does not negate the substantive value of the testimony to establish identity, scheme, plan, etc. in the case at bar. [*Id.* (quotation marks and citation omitted).]

Thus, the fact that defendant was acquitted or the case was dismissed regarding the sexual assaults does not preclude the admission of the prior acts evidence under MRE 404(b). *Oliphant*, 399 Mich at 498 n 14.

In addition to being offered for a proper purpose and being relevant under MRE 402, the prosecution must also demonstrate that the probative value of the prior acts evidence from the witnesses is not substantially outweighed by the danger of unfair prejudice under MRE 403. *Knox*, 469 Mich at 509 (citation omitted). The evidence of these prior acts is highly probative, especially given their number and high degree of similarity. In addition, their probative value is of particular significance given the lack of any witnesses in this case other than defendant and the complainant. We agree that the evidence has a significant degree of prejudice, as well, given the danger that detailed descriptions of the prior assaults may lead the jury to conclude that defendant is a man who should be punished regardless of his guilt of the charges in this case. However, on balance, we conclude that the prejudice does not outweigh the probative value and

⁶ Defendant was charged for sexual assaults of RS, DP, JS, and EH. However, defendant was found not guilty by a jury in RS’s case after a surveillance video was played showing RS calmly leaving defendant’s car after the alleged assault. DP’s case was dismissed for insufficient evidence after defendant played a recording in his phone where he offered to buy her marijuana and breakfast. JS’s case was dismissed after she failed to appear for a jury trial, and EH’s case was dismissed when she did not appear at a preliminary examination after an adjournment.

rely on the trial court to limit the description of irrelevant aspects of the assaults so as to minimize that prejudice. Similarly, we rely on the trial court to give an appropriate limiting instruction to the jury to alleviate the risk of unfair prejudice and to protect defendant's right to a fair trial, *People v Kahley*, 277 Mich App 182, 185; 744 NW2d 194 (2007).

On the other hand, we conclude that the trial court did not abuse its discretion in excluding the evidence of assaults against CB, TC, and JB. We have held that “[t]here must be *such a concurrence of common features* that the charged acts and the other acts are logically seen as part of a general plan, scheme, or design.” *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009). And as to these prior acts, we do not find a concurrence of common features with the charges in this case. CB and her assailant were in a dating relationship. On the day of the assault, after CB and her date returned to her house, she stated that she was tired, and went straight to bed. The man then became angry and forcefully penetrated her. TC and JB are both male and were sexually assaulted by defendant while incarcerated with defendant in prison. They bear only limited resemblance to the methods used in the other assaults.

B. AUDIO RECORDING

Finally, the prosecution argued that the audio recording is admissible because (a) it can be authenticated under MRE 901 and (b) because it contains interactions between defendant and an unknown victim that are similar to the interactions contained in a recording that defendant took of his interaction with the complainant of this case. The trial court held it to be inadmissible and we agree.⁷

Evidence must be authenticated before it is admitted at trial. *People v McDade*, 301 Mich App 343, 352; 836 NW2d 266 (2013). “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” *Id.*, quoting MRE 901(a). MRE 901(b)(5) provides that an audio recording of a voice may be authenticated as follows:

Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

An audio recording can be “authenticated by having a knowledgeable witness identify the voices on the tape.” *People v Berkey*, 437 Mich 40, 50; 467 NW2d 6 (1991).

Here, the prosecution did not provide any witness who could identify the unknown female voice on the audio recording. The prosecution argument that because the complainant and the other MRE 404(b) witnesses could identify defendant's voice on the tape, the audio recording was admissible because MRE 901 does not require that every voice on a recording

⁷ A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion, and we review de novo whether a rule of evidence precludes the admission of evidence. *Burns*, 494 Mich at 110.

need be identified for it to be admissible is unpersuasive. In *Berkey*, the witness was able to identify both the victim's and the defendant's voices in the audio recording. *Berkey*, 437 Mich at 46. The Supreme Court provided that a tape may be authenticated when a knowledgeable witness identifies the "voices" contained therein. *Id.* at 50. Because no witness could authenticate the unknown female's voice, the audio recording was inadmissible.

In addition, playing an audiotape of defendant committing a different sexual assault has extraordinary potential for prejudice. MRE 403. After listening to defendant committing an uncharged but real-time violent assault on tape, it would be very difficult, if not impossible, for a jury not to be inclined to convict defendant even if they harbor reasonable doubt about his guilt in the instant charges. Therefore, even if the tape could be properly authenticated, it would not be admissible.

CONCLUSION

We reverse the trial court's decision excluding prior acts testimony from EH, DP, JS, and RS, but affirm its decision to exclude prior acts testimony from TC, JB, and CB. We also affirm its decision to exclude the audio tape. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Douglas B. Shapiro