

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM PAUL RACINE,

Defendant-Appellant.

UNPUBLISHED

May17, 2007

No. 268843

Marquette Circuit Court

LC No. 05-042778-FC

Before: Schuette, P.J., O’Connell and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of assault with intent to murder, MCL 750.83, domestic violence, MCL 750.81(2), and stalking, MCL 750.411h. He was sentenced to concurrent prison terms of five to ten years for the assault with intent to murder conviction, 90 days for the domestic violence conviction, and 90 days for the stalking conviction. We affirm.

This case involves a charge that defendant assaulted his wife with a large kitchen knife. Defendant claims that the jury was improperly swayed to find he intended to kill her by the admission of evidence that he had, nearly ten years before, thrown a cup of coffee at her and then told the police afterwards that the next time he was arrested it would be for something more serious than a thrown cup of coffee. We disagree.

A trial court’s decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A preliminary question of law regarding the admissibility of evidence is reviewed de novo. *Id.*

MRE 404(b)(1) sets forth the standards for the admission of other acts evidence. It provides 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 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.

Use of other acts evidence is generally precluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 494-495; 577 NW2d 673 (1998). However, the rule is one of inclusion, not exclusion, because only one use of other acts evidence is excluded, while several other permissible uses of such evidence are identified. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994). Other acts evidence is only to be excluded under MRE 404(b) where its value as evidence is solely to show defendant is a bad sort of person who has done, or is likely to do, a certain course of conduct based on that character. *Id.*

For evidence to be admissible under MRE 404(b), it must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than showing the defendant's propensity to commit the offense. *VanderVliet*, *supra* at 74. The prosecutor has the burden of showing the evidence is relevant. *Knox*, *supra* at 509. Admission of the evidence would be unfairly prejudicial if there is a danger that marginally probative evidence will be given undue weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

The prior domestic violence incident was introduced to show a plan or intent, which is a proper purpose under MRE 404(b)(1). According to Trooper Wachnicki, defendant stated that the next domestic violence incident "wouldn't be over spilled coffee, it would be for something more serious." An attempted stabbing to the heart is certainly more serious than a thrown cup of coffee. Thus, the first prong of the *VanderVliet* test was met. This prior incident is relevant both to defendant's intent to do something more serious to his wife and also to his plan to escalate the violence in a future domestic violence incident. Thus, the second prong of the *VanderVliet* test was met.

Consideration of the third prong, whether this incident's probative value was substantially outweighed by its prejudicial effect, is a little less clear cut at first glance, because the incident, while relevant and illustrative of defendant's intentions, was also almost ten years prior to the alleged assault in this case. That would seem to reduce the probative value of the act because if defendant had truly planned on escalating domestic violence with his wife, one would think that he would not wait ten years to do it. But this large gap of time was also made clear to the jury, so the prejudicial effect was equally diminished by the time gap, because a juror would seem likely to wonder why, if defendant really meant it, it took almost ten years for him to take more drastic action. Further, the prior incident itself, throwing a beverage, is not a particularly severe form of abuse relative to attempting to stab someone in the chest with a large knife. It seems unlikely that this prior incident nearly ten years before would have been significantly prejudicial. Finally, the primary prejudicial value of the statement was defendant's statement of future intent to do something more serious to his wife, which makes it hardly unfair prejudice when it is used to show his intentions to do exactly that during a later violent incident. Thus, that prior incident's probative value was not substantially outweighed by any unfair prejudicial effect, meeting the third prong of the *VanderVliet* test.

Thus, all three prongs of the *VanderVliet* test for admissibility of prior bad acts were satisfied. Therefore, the trial court did not abuse its discretion when it admitted evidence related to the prior domestic violence incident.

Affirmed.

/s/ Bill Schuette
/s/ Peter D. O'Connell
/s/ Alton T. Davis