

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

No. 159612

vs

DEXTER TAYLOR,

Defendant-Appellant.

Wayne Circuit No. 16-007780
Court of Appeals No. 340028

PLAINTIFF-APPELLEE'S
SUPPLEMENTAL BRIEF ON APPEAL

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research,
Training and Appeals

AMY M. SOMERS (P65223)
Assistant Prosecuting Attorney, Appeals
1441 St. Antoine, Suite 1106
Detroit, Michigan 48226
Phone: (313) 224-8109

TABLE OF CONTENTS

Table of Contents i

Index of Appendices iii

Index of Authorities iv

Counterstatement of Jurisdiction 1

Counterstatement of Question Presented 2

Introduction 3

Counterstatement of Facts 9

Argument 17

I. When a stranger rapist is identified by DNA and his only means of defense is consent, the mere fact that he committed a prior, violent sexual assault against another stranger victim—similarities aside—is logically relevant to prove nonconsent. Here, another woman besides the complainant reported that she also had been walking alone when a stranger forced her to perform vaginal intercourse under the threat of a weapon—and defendant's DNA was linked to both crimes. Evidence that defendant had raped someone else was logically relevant to prove that the charged victim did not consent to the sexual act.17

Standard of Review 17

Discussion 18

A. Other acts evidence does not have to be “strikingly similar” to the charged act when the defendant’s identity is not at issue. 23

TABLE OF CONTENTS

B. Even if the other acts evidence did have to be “strikingly similar” to the charged act under *Denson*, the Court of Appeals properly found that it was.30

C. The evidence was admissible to prove defendant’s intent, regardless of whether he employed a common scheme, plan, or system. 32

D. The evidence was properly admitted under the doctrine of chances. 35

E. The evidence was not substantially more unfairly prejudicial than probative, and the trial court’s limiting instruction was sufficient to cure any prejudicial effect.. . . . 37

F. If there was evidentiary error, the error was harmless. 39

Relief 42

INDEX OF APPENDICES

Trial Transcript 12-14-16. 1b-94b
Sentencing Transcript 6-27-17.95b-113b

**INDEX OF AUTHORITIES
FEDERAL CASES**

United States v Foster,
652 F3d 776 (CA 7, 2011).28

STATE CASES

California v Ewoldt,
7 Cal 4th 380 (1994). 7, 26

People v Babcock,
469 Mich 247 (2003).17

People v Bauder,
269 Mich App 174 (2005). 7, 32

People v Blackston,
481 Mich 451 (2008) 37-38

People v Brownbridge,
459 Mich 456 (1999).8

People v Crawford,
458 Mich 376 (1998). 19-21, 30, 35-36

People v Denson,
500 Mich 385 (2017). 5, 16, 21, 23-24, 30-31

People v Eliason,
300 Mich App 293 (2013).21, 38

People v Engelman,
434 Mich 204 (1990). 20

People v Golochowicz,
413 Mich 298 (1982).6, 25, 38

People v Knapp,
244 Mich App 361 (2001).28-29

**INDEX OF AUTHORITIES
STATE CASES**

People v Knapp,
465 Mich 934 (2001). 29

People v Lukity,
460 Mich 484 (1999)17-18, 40

People v Mardlin,
487 Mich 609 (2010). 17, 19, 30, 35-37

People v Murphy (On Remand),
282 Mich App 571 (2009).21, 38

People v Nicholson,
501 Mich 1027 (2018). 27

People v Oliphant,
399 Mich 472 (1976). 20, 26

People v Pesquera,
244 Mich App 305 (2001).26

People v Sabin,
463 Mich 43 (2000). 6-7, 15, 17, 19, 26, 27, 32, 35, 38

People v Starr,
457 Mich 490 (1998). 38

People v Taylor,
Unpublished opinion of the Court of Appeals,
COA #340028 (March 26, 2019). 7, 14-16, 22

People v Taylor,
937 NW2d 123 (Mich 2020). 16

People v VanderVliet,
444 Mich 52 (1993).19, 21-22, 24-25, 30-31, 33, 36, 38

**INDEX OF AUTHORITIES
STATUTES, COURT RULES AND OTHER AUTHORITY**

2 Wigmore Evidence (Chadbourn rev) § 304. 27

Imwinkelried, Uncharged Misconduct Evidence, § 3:11. 33, 35

McCormick, Evidence (2d ed), § 190. 25

MCL 750.520b 9

MCL 768.27(b) 19, 41

MCL 769.12 9

MRE 401 21

MRE 402 22

MRE 403 37

MRE 404(b) 18, 20

Wright & Graham, 22 Federal Practice & Procedure, § 5246. 33

COUNTERSTATEMENT OF JURISDICTION

The People concur with defendant's statement of appellate jurisdiction.

COUNTERSTATEMENT OF QUESTION PRESENTED

I.

When a stranger rapist is identified by DNA and his only means of defense is consent, the mere fact that he committed a prior, violent sexual assault against another stranger victim—similarities aside—is logically relevant to prove nonconsent. Here, another woman besides the complainant reported that she also had been walking alone when a stranger forced her to perform vaginal intercourse under the threat of a weapon—and defendant's DNA was linked to both crimes. Was evidence that defendant had raped someone else logically relevant to prove that the charged victim did not consent to the sexual act?

The trial court answered, “Yes.”

The People answer, “Yes.”

The defendant answers, “No.”

INTRODUCTION

In February 1994 and July 1996, respectively, Erica Doak and Rachell Davis independently reported to police that they had been sexually assaulted. G220a; H307a, 318a-320a, 433a-438a, 442a-447a. In both instances, the women had been walking alone, had been enticed or forced by their attacker into his car, had been driven to an isolated location and threatened by him with a weapon, and then forcibly vaginally penetrated. G220a, 230a-235a, 237a, 239a; H307a, 309a-310a, 313a-315a, 363a. The assault left Davis with abrasions on her right knee, shoulders, back, and buttocks, and a knot on her forehead where her attacker struck her with a bat. H349a-350a, 363a-365a. Doak, who was six months pregnant at the time, was not otherwise injured by the perpetrator. H311a, 314a. Neither victim knew who the rapist was: although Davis recognized the man from her neighborhood she didn't know his name; Doak had no idea who he was. G231a-233a, 240a, 251a; H309a-310a.

Both women underwent a sexual assault examination, and then both women's rape kits sat abandoned in a warehouse for 20 years, as their cases went unsolved. G245a, G247a-248a; H318a.

When the kits were finally tested in 2016, defendant's sperm was identified in both of them, and on that basis he was charged in this

case—Davis’s—with first-degree criminal sexual conduct. I551a-555a, 575a-576a. Despite the DNA evidence, however, the jury hung after defendant maintained through his attorney that, despite Davis’s injuries, the sex was likely consensual. A4a; 39b-46b. According to the defense theory, Davis was probably a drug addict who was either lying or did not remember having consensual sex with the man she had voluntarily gotten into a car with to smoke crack. 39b-46b.

At the retrial, the prosecutor offered Doak’s testimony under MRE 404(b). According to the prosecutor, Doak’s experience with defendant made his consent defense far less plausible. J669a-671a, 714a-715a. That is, it was highly unlikely that two unrelated women would both either misremember or misrepresent what they claimed to be sexual assault. Similarly, the fact that Doak had been threatened by defendant with a knife made it more likely that he had used a bat on Davis, as she claimed. And the fact that Doak had been forced to submit made it more likely that Davis had also not consented to being vaginally penetrated. In other words, the evidence surrounding Doak’s rape proved defendant’s violent intent regarding Davis and negated his claim of consent. Correspondingly, Doak made it more likely that Davis had, as she claimed, been isolated, beaten, and forcibly penetrated. Most of all, Doak’s testimony exposed as utter nonsense the supposition that

defendant had been falsely accused of rape despite doing nothing wrong: no one was going to believe that he had suffered this same misfortune twice.

In that light, this court’s first question in granting leave—whether the two assaults were “strikingly similar”—is a non-starter. Doak’s testimony was not offered to prove that defendant *was the perpetrator*, because the DNA already established that as a scientific fact. But other-acts evidence must be strikingly similar to the charged crime only when introduced to prove the defendant’s identity as the perpetrator.

When the defendant does not contest doing the act, and the only question that remains is what his intent was, all that is necessary for the admission of evidence under rule 404(b) is that the other acts be relevant to that intent. In other words, under *People v Denson*, “striking similarity” is only required where the prosecution’s theory itself *depends* on similarity.¹

The striking similarity requirement under *Denson* is akin to the *Golochowicz* test for proving identity through modus operandi, which requires that the other act must be “[s]o nearly identical in method as to

¹*People v Denson*, 500 Mich 385, 403 (2017).

earmark [the charged offense] as the handiwork of the accused.”² When proving identity, the similarities between the two crimes “must be so unusual and distinctive as to be like a signature.”³ *Denson* should not be read to require striking similarity merely to prove a defendant’s intent.

People v Sabin, not *People v Denson*, establishes the threshold similarity requirement when the defendant’s identity is known and the evidence is only being offered to prove nonconsent. When the defendant’s identity is not at issue, sufficient similarity between the other acts evidence and the charged act is all that is required.⁴ *People v Denson* did not overrule *Sabin*. And, even under *Denson*, the “striking similarity” requirement would not apply here, because proving nonconsent does not rely on similarity between the acts. The other act could have been committed under wholly different circumstances from the charged act, and it could still be probative of nonconsent, as long as neither victim willingly participated in the sexual act.

The Court of Appeals properly found that the other act in this case was sufficiently similar to the charged offense to be admissible as

²*People v Golochowicz*, 413 Mich 298, 310-311 (1982) (internal quotation and citation omitted).

³*Id.*

⁴*People v Sabin (After Remand)*, 463 Mich 43, 63 (2000).

evidence of defendant's common scheme, plan, or system and under the doctrine of chances. In both cases, defendant targeted women who were walking alone, isolated them before sexually assaulting them, used a weapon to perpetrate the assaults, and left the weapon behind afterwards.⁵ Moreover, there is little chance that the acts were consensual, when both women claimed to have been violently sexually assaulted.

But even if the evidence had been inadmissible under these theories, it was admissible to prove defendant's intent—with an even lesser threshold showing of similarity.⁶ Under the theory of multiple admissibility, upon which the entire *VanderVliet* analytical framework rests, the trial court should not be overruled as long as the evidence was properly admitted under at least one theory. This is true even if the evidence was improperly admitted under another theory.⁷ Further, this

⁵*People v Taylor*, unpublished opinion of the Court of Appeals, COA #340028 (March 26, 2019) (N789b-797b).

⁶*Sabin, supra*, at 65, citing *California v Ewoldt*, 7 Cal 4th 380, 402-403 (1994) (The degree of similarity required to show intent is less than what is required to show common scheme, plan, or system or identity).

⁷*People v Bauder*, 269 Mich App 174, 187-188 (2005), overruled on other grounds.

Court generally does not reverse when a lower court reaches the right result for the wrong reason.⁸

Lastly, if this Court does find evidentiary error, the error was harmless. Taking out the other acts evidence altogether, the remaining evidence was sufficient to prove defendant's guilt beyond a reasonable doubt. Defendant admitted, and the scientific evidence proved, the sexual penetration; plus the victim reported it immediately, and she had obvious injuries. There was no doubt that defendant raped her.

⁸*People v Brownbridge*, 459 Mich 456, 462 (1999).

COUNTERSTATEMENT OF FACTS

Defendant was charged with first-degree criminal sexual conduct.⁹ He was charged as a fourth-habitual offender.¹⁰ The charges arose out of defendant's criminal sexual assault on the victim, Rachell Davis, that occurred on July 25, 1996. G220a. Defendant's case was charged after the victim's rape kit was discovered along with thousands of other abandoned kits that had not been tested. G247a-248a. The criminal sexual conduct charge was based on three alternative theories: (1) the sexual penetration occurred under circumstances that involved another felony,¹¹ that being felonious assault, (2) defendant was armed with a weapon when he committed the offense,¹² and (3) defendant caused personal injury to the victim through the use of force or coercion.¹³ J681a-683a. Defendant's first trial resulted in a hung jury. A4a. Before defendant's second trial, the prosecutor filed a notice of intent to admit

⁹MCL 750.520b.

¹⁰MCL 769.12.

¹¹MCL 750.520b(1)(c).

¹²MCL 750.520b(1)(e).

¹³MCL 750.520b(1)(f).

other acts evidence pursuant to MRE 404(b). D19a-28a. The prosecutor had not presented MRE 404(b) evidence in defendant's first trial.

At a pretrial motion hearing on April 13, 2017, the court heard arguments regarding the People's notice. In the notice, which was filed with the court, the prosecutor sought to admit testimony from an MRE 404(b) witness, Erica Doak. The purpose for which the evidence was being offered, according to the prosecutor's written motion, was to prove defendant's motive, intent, and common plan, scheme, or system in doing an act. The prosecutor also sought to admit the testimony under the doctrine of chances and to prove nonconsent. D19a-28a.

At the motion hearing regarding the MRE 404(b) evidence, the prosecutor argued that the MRE 404(b) case was similar to the instant case for the following reasons: (1) both women were walking alone when they encountered defendant, (2) both women were threatened with a weapon—Doak with a knife and Davis with a baseball bat, (3) defendant left both weapons behind after he committed the crimes, (4) both women were taken to abandoned locations—Doak to an abandoned home and Davis to an old K-Mart building, and (5) both women were forced to engage in vaginal penetration. The prosecutor also argued that the evidence was admissible to prove nonconsent and under the doctrine of chances. F49a-52a. After hearing arguments, the court ruled that the

prosecutor could introduce the MRE 404(b) evidence at trial, for the purposes cited in the written notice. F54a-59a.

The victim, Rachell Davis, testified at trial that she was walking alone in the city of Ecorse when she encountered defendant. G220a, 230a-231a. Defendant asked her if she wanted to get high and she said that she did. The victim voluntarily got into defendant's car. She was familiar with defendant from seeing him around the neighborhood. G231a-233a. Defendant drove the victim to an old K-Mart building in Melvindale. He parked behind a dumpster in the loading dock area behind the building. There was nobody around. G234a; H363a. Defendant ordered the victim to get out of his car, pushed her down on the ground, ripped her shirt, pulled her pants off, and vaginally penetrated her. G235a. Then, defendant grabbed a baseball bat and started hitting her with it. Defendant told the victim that he should have killed her. After defendant left, the victim crawled to the front of the building on Outer Drive and called for help. G237a, 239a.

An off-duty Melvindale police officer, John Diffatta, was driving by the K-Mart when he heard a woman in distress. H328a-330a. He called police dispatch for assistance and waited for officers to arrive. H330a-331a. Melvindale Police Officer Chad Hayse responded to the location. He observed a distraught female standing near the sidewalk in front of

the building. H408a-409a. He went to investigate the loading dock area where the assault had occurred. He observed a piece of paper with what appeared to be fecal matter on it. H413a. Melvindale Police Officer David Taft went to the scene and recovered a baseball bat from the victim. H439a.

The victim was transported via ambulance to Oakwood Hospital in Dearborn. G244a. A rape kit was performed. The victim was also diagnosed with trichomoniasis. G245a. The victim suffered bruising on her shoulder and legs where she had been struck with the bat. G240a. She also had a knot on her forehead. G251a. The examining nurse, Valerie Taylor, testified to the victim's medical records. It was noted that the victim had abrasions on her right knee, shoulders, back, and buttocks. The victim was also suffering from pain in her left shoulder. H349a-350a. The victim's head injury was not documented, but the records indicated that a bat was used during the assault. H363a-365a.

Officer Taft met with the victim in the hospital. The victim told him that she had defecated on herself and wiped herself off with garbage from the loading dock. H433a-438a, 442a-447a. Taft went back to the scene and observed a tissue with feces on it. H437a. The fecal matter was taken into evidence by other officers. H452a.

In September of 2016, defendant's DNA was identified on the vaginal swabs from the victim's rape kit. I521a-523a. At trial, the victim identified defendant in the courtroom. G241a-242a. She had been unable to identify him at a prior hearing. H267a.

Erica Doak, the MRE 404(b) witness, testified that on February 17, 1994, she had gotten off the bus at Outer Drive and Fort Street in the city of Detroit. H307a. An unknown male approached her from behind and put a knife in her side. H309a-310a. Doak was six months pregnant at the time. H311a, 314a. The man led Doak into a house and told her to lay down in the basement. There was only a mattress and some other random things in the room. H313a. Doak laid down on the mattress and the male took her pants off and forced vaginal intercourse. H314a-315a. The knife was laying on the floor right beside the mattress. H314a. When the man was finished, he told Doak not to leave the basement and not to contact anyone. He then left, after robbing Doak of her jewelry and money. H315a.

Eventually, Doak left and went to a pay phone to call her mother. She was unable to reach her mother, so she called her best friend's father for help. H316a-317a. Doak was taken to Oakwood Hospital, where a rape kit was performed. H318a. Police came to the hospital to interview Doak. She led police to the location where she had been raped and they

recovered the knife from the basement. H320a. In October of 2016, defendant's DNA was identified on the swabs from Doak's rape kit through a case-to-case association with the instant victim's rape kit in CODIS. I551a-555a, 575a-576a. Doak did not know defendant and she was not able to identify him in the courtroom. H321a.

Defendant was convicted as charged and was sentenced to thirty-seven years to eighty years imprisonment. 110b-111b.

Defendant appealed his conviction to the Court of Appeals, and on March 26, 2019, Judges Shapiro, Beckering, and Kelly affirmed his convictions.¹⁴ In its opinion, the Court of Appeals noted that the prosecution was seeking the admission of the other acts evidence under the theory that it was relevant to show defendant's "intent, motive, and system in doing an act and that it was also relevant to show a lack of consensual sexual activity." The Court found that the prosecutor had established "many similarities" between the uncharged conduct and the charged conduct in order to support the admission of the other acts evidence. Both cases involved the following commonalities from which a factfinder could determine that defendant utilized a common plan, scheme or system in raping women: "(1) targeting young women walking alone in a specific and limited geographical area, (2) taking the women

¹⁴*People v Taylor*, unpub op at 4.

to an isolated or abandoned location, (3) sexually assaulting the women, and (4) using a weapon to enable him to perpetrate sexual abuse on them before leaving the scene and the weapon behind.”¹⁵

The Court also addressed the dissimilarities between the charged and uncharged conduct. For example, in the victim’s case, defendant used a bat. In Doak’s case, he used a knife. Doak, unlike the victim, was pregnant and did not want to smoke crack cocaine with defendant. And, Doak was robbed during the course of the sexual assault, while the victim in the instant case was not robbed. But the Court did not find these differences to be “fatal to the admissibility of the uncharged act.”¹⁶

The Court recited the rule from *Sabin*, which says that when the other acts evidence is being offered to show a defendant’s common plan, scheme, or system in doing an act, the “plan revealed need not be distinctive or unusual.”¹⁷ The Court then went on to explain that, under *People v Denson*, “[i]f the prosecution creates a theory of relevance based on the alleged similarity between a defendant’s other act and the charged offense, we require ‘striking similarity’ between the two acts to find the

¹⁵*Id* at 5.

¹⁶*Id.*

¹⁷*Id*, quoting *Sabin, supra*, at 65-66.

other act admissible.”¹⁸ But, at the same time, the Court did not interpret *Denson* to mean that the uncharged acts need to be “identical” to the charged act to be admissible under MRE 404(b): “Accordingly, just because the acts were not identical does not mean that they are not strikingly similar enough to establish that [defendant] used a common plan or scheme to perpetrate both acts.”¹⁹

Defendant filed an application for leave to appeal before this Court. In an Order dated January 24, 2020, this Court granted defendant’s application and asked the parties to address “(1) whether the other-acts evidence offered to show a common plan, scheme, or system contained a ‘striking similarity’ to the charged act as required by *People v Denson*, 500 Mich 385, 403 (2017); (2) whether the other-acts evidence was admissible under the ‘doctrine of chances,’ see *People v Mardlin*, 487 Mich 609, 616-617 (2010); and (3) if the evidence was not offered for a proper purpose, whether its admission was harmless.”²⁰

¹⁸*Id* at 4-5, quoting *People v Denson*, 500 Mich 385, 403 (2017).

¹⁹*Id* at 5, citing *Denson*, *supra*, at 403.

²⁰*People v Taylor*, 937 NW2d 123 (Mich 2020).

ARGUMENT

I.

When a stranger rapist is identified by DNA and his only means of defense is consent, the mere fact that he committed a prior, violent sexual assault against another stranger victim—similarities aside—is logically relevant to prove nonconsent. Here, another woman besides the complainant reported that she also had been walking alone when a stranger forced her to perform vaginal intercourse under the threat of a weapon—and defendant's DNA was linked to both crimes. Evidence that defendant had raped someone else was logically relevant to prove that the charged victim did not consent to the sexual act.

Standard of Review

A trial court's evidentiary rulings are reviewed for abuse of discretion.²¹ An abuse of discretion occurs when a trial court's decision falls outside the range of principled outcomes.²² A trial court's decision on a close evidentiary question is generally not an abuse of discretion.²³ Whether a rule or statute precludes the admission of evidence is a question of law that this Court reviews de novo.²⁴

²¹*People v Lukity*, 460 Mich 484, 488 (1999).

²²*People v Babcock*, 469 Mich 247, 269 (2003).

²³*People v Sabin (After Remand)*, 463 Mich 43, 67 (2000).

²⁴*People v Mardlin*, 487 Mich 609, 614 (2010).

Preserved evidentiary errors do not require reversal unless the defendant can establish a miscarriage of justice under a “more probable than not” standard.²⁵ The effect of the error must be evaluated in light of the untainted evidence in order to determine whether, absent the error, it is more probable than not that a different outcome would have resulted.²⁶

Discussion

The trial court did not abuse its discretion in granting the prosecution’s motion to admit other acts evidence in order to prove defendant’s common scheme, plan, or system under MRE 404(b),²⁷ because the other acts evidence was sufficiently similar to the charged offense to support an inference of defendant’s pattern in raping women. The evidence was also admissible under the doctrine of chances.

²⁵*Lukity, supra*, at 495-496.

²⁶*Id.*

²⁷MRE 404(b) provides: 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.

MRE 404(b) is not intended to bar the admission of otherwise relevant evidence just because it might lead to a character inference. Under the rule, even where the proffered evidence reflects on a defendant's character for propensity, it is not automatically deemed inadmissible. Rather:

Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity. Stated another way, the rule is not exclusionary, but is inclusionary, because it provides a nonexhaustive list of reasons to properly admit evidence that may nonetheless also give rise to an inference about the defendant's character.²⁸

Determining the admissibility of other acts evidence under MRE 404(b) requires a four-part analysis. First, the evidence must be offered for a proper purpose under MRE 404(b); second, the evidence must be relevant under MRE 401 and 402; third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403; and fourth, the trial court may, upon request, provide a limiting instruction to the jury.²⁹

²⁸*People v Mardlin*, 487 Mich 609, 615-616 (2010) (emphasis in original) (citing *People v Crawford*, 458 Mich 376, 385 (1998); *People v VanderVliet*, 444 Mich 52, 63-65 (1993); and *Sabin, supra*, at 56). It is also worth noting that, if defendant were to be retried now, the other acts evidence would be admissible for any relevant purpose—including propensity—as long as the evidence is not otherwise excluded under MRE 403. See MCL 768.27(b), which went into effect on March 17, 2019.

²⁹*VanderVliet, supra*, at 55.

Under MRE 404(b), evidence of other crimes, wrongs, or acts may be admissible to prove 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.³⁰ But this list is not intended to be exhaustive. For example, proof that the act was committed is not expressly listed as a theory of relevance within the rule, but it is a permissible purpose for which other acts evidence can be offered.³¹ Similarly, in some circumstances, other acts evidence can be offered to prove nonconsent in a rape case.³² As long as the proffered evidence is relevant and does not relate *solely* to the defendant's propensity to commit the instant offense, it is admissible under MRE 404(b).

But it is not enough that the other acts be offered for one or more of the enumerated purposes under the rule. This Court has said that “[m]echanical recitation of ‘knowledge, intent, absence of mistake, etc.’ without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b).”³³ Rather, the

³⁰MRE 404(b).

³¹*People v Engelman*, 434 Mich 204, 215 (1990).

³²*People v Oliphant*, 399 Mich 472, 490-491 (1976).

³³*People v Crawford*, 458 Mich 376, 387 (1998).

prosecution must explain how the evidence is relevant to a proper purpose by establishing “some intermediate inference, other than the improper inference of character, which in turn is probative of the ultimate issues in [the] case....”³⁴ This is not to say that the evidence must be excluded if it tends to show the defendant’s propensity to commit crime. As long as the evidence is relevant, and it is not offered solely for the purpose of showing criminal propensity, it is admissible under MRE 404(b).³⁵

Evidence is relevant if it has “any tendency 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.”³⁶ “Alternatively stated, the general rule is that evidence is admissible if helpful in throwing light upon any material point in issue. A material fact is one that is ‘in issue’ in the sense that it is within the range of litigated matters in controversy.”³⁷ In the context of MRE 404(b) evidence, “[t]he relationship of the elements of the charge, the theories of

³⁴*People v Denson*, 500 Mich 385, 402 (2017), quoting *People v Crawford*, 458 Mich 376, 391 (1998).

³⁵*VanderVliet*, supra, at 65.

³⁶MRE 401; *People v Eliason*, 300 Mich App 293, 301 (2013).

³⁷*People v Murphy (On Remand)*, 282 Mich App 571, 580 (2009) (internal quotation marks and citations omitted).

admissibility, and the defenses asserted governs what is relevant and material.”³⁸ All relevant evidence is admissible, unless otherwise deemed inadmissible.³⁹

Here, the other acts evidence was offered to prove defendant’s motive, intent, and common scheme, plan, or system in doing an act. The evidence was also offered under the doctrine of chances and to rebut any claim of consent. D19a-28a. As the Court of Appeals properly found, the prosecutor did not merely engage in a recitation of proper purposes under the rule. To the contrary, the prosecutor “highlighted the similarities between the charged and uncharged crimes and argued that its probative value was not substantially outweighed by unfair prejudice.”⁴⁰

Specifically, Doak’s testimony corroborated the victim’s claims that she had been violently sexually assaulted. Doak’s testimony helped to paint a picture of defendant’s plan, which was to obtain sexual gratification without the women’s consent. Simply put, defendant’s scheme was to target vulnerable women who were walking alone, isolate them away from others to prevent them from being able to call for help, and threaten them with a weapon in order to force them to engage in vaginal intercourse against their will. And the fact that he used that

³⁸*VanderVliet, supra*, at 75.

³⁹MRE 402.

⁴⁰*People v Taylor*, unpub op at 3.

scheme with Doak made it more likely that he used it again with Davis. Even if the two crimes were not particularly similar, the very fact that defendant's DNA was found inside of another, non-consenting victim is highly probative of defendant's intent to rape Davis.

A. Other acts evidence does not have to be “strikingly similar” to the charged act when the defendant’s identity is not at issue.

This Court has asked the parties to address whether, under *People v Denson*, the other acts evidence was “strikingly similar” to the charged offense to be probative of a common scheme, plan, or system. In *Denson*, this Court held that the trial court improperly admitted evidence of a prior assault in order to “rebut [the] defendant’s claims of self-defense and defense of others” because the prior assault was not “strikingly similar” to the charged crime.⁴¹ The People submit that *Denson* misapplied the “striking similarity” requirement based on a conclusion that the prosecution had “built a theory of relevance centered upon the supposed similarity.”⁴²

This Court found that the evidence of Denson’s prior assault was not relevant under the second prong of the *VanderVliet* test, because it was not probative of whether Denson acted in self-defense or defense of

⁴¹*People v Denson*, 500 Mich 385, 393 (2017).

⁴²*Id* at 406-409.

others. The crux of this Court’s opinion in *Denson* was that the prosecution had not adequately explained how the evidence was relevant to a proper purpose by establishing a non-character inference that was probative of the issue of self-defense.⁴³ Citing *VanderVliet*, the Court determined that because the prosecutor had “particularly” relied on the similarities between the acts,⁴⁴ there needed to be a “striking similarity” between the acts in order for them to be admissible.⁴⁵

Denson’s application of *VanderVliet* in this manner is misplaced. It is important to note that, under *VanderVliet* and *Denson*, striking similarity between the acts is only required where the prosecution’s theory depends on similarity. Otherwise, striking similarity is not required.⁴⁶ For example, *VanderVliet*’s discussion of the striking similarity requirement pertained to the use of other acts to prove *identity* through *modus operandi*.⁴⁷ Proof of identity through *modus operandi* is subject to the more stringent similarity requirements set forth in *People*

⁴³*Id* at 402.

⁴⁴The prosecutor did not allege that the acts were particularly similar. The only similarity alleged was that both crimes were assaults in which *Denson* was apparently the aggressor. The prosecutor offered the evidence not based on particular similarities, but only to rebut *Denson*’s claim of self-defense. *Denson, supra*, at 392-395.

⁴⁵*Id* at 402-409.

⁴⁶*Id* at 403, citing *VanderVliet, supra*, at 67.

⁴⁷*VanderVliet, supra*, at 66-67.

v Golochowicz. Under *Golochowicz*, when other acts evidence is being used to prove identity, the two acts must be “[s]o nearly identical in method as to earmark [the charged offense] as the handiwork of the accused. Here much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The [commonality of circumstances] must be so unusual and distinctive as to be like a signature.”⁴⁸

As *VanderVliet* acknowledged, “the *Golochowicz* approach to modus operandi cases to prove identity is not a ‘conceptual template’ to ‘mechanically test’ all misconduct evidence barring use of other permissible theories of logical relevance.”⁴⁹ Instead, the “method of analysis to be employed depends on the purpose of the offer and its logical relevance.”⁵⁰

People v Sabin, not *People v Denson*, establishes the threshold requirement for the admission of common scheme, plan, or system evidence where the defendant’s identity is not at issue. For this type of evidence, uncharged misconduct need only be “sufficiently similar [to the charged offense] to support an inference that they are manifestations of

⁴⁸*People v Golochowicz*, 413 Mich 298, 310-311 (1982), quoting McCormick, *Evidence* (2d ed), § 190, p 449.

⁴⁹*VanderVliet*, *supra*, at 67.

⁵⁰*Id.*

a common plan, scheme, or system.”⁵¹ Common plan, scheme, or system evidence is not limited to proving identity through *modus operandi*. It can also be probative of nonconsent in a rape case,⁵² to rebut a claim of fabrication,⁵³ or as proof that the charged act—here, a nonconsensual sexual penetration—occurred.⁵⁴

Sabin was a case where, as here, the perpetrator’s identity was known. In that circumstance, the degree of similarity required in order to prove that the defendant used a common scheme, plan, or system is greater than what is required to prove intent, but less than what is required to prove identity through *modus operandi*.⁵⁵ Because in the former instance, the doing of the charged act is “assumed as done, and the mind asks only for something that will negative innocent intent[.]” In the latter instance, “the very act is the object of proof, and is desired to be inferred from a plan or system[.]”⁵⁶ Thus, when offered to prove identity,

⁵¹*Sabin, supra*, at 63-64.

⁵²See *People v Oliphant*, 399 Mich 472, 488-495 (1976).

⁵³See *People v Pesquera*, 244 Mich App 305, 319-320 (2001).

⁵⁴*Sabin, supra*, at 63-64.

⁵⁵*Sabin, supra*, at 65, citing *California v Ewoldt*, 7 Cal 4th 380, 402-403 (1994).

⁵⁶*Id* at 65.

there must be “so much higher a grade of similarity as to constitute a substantially new and distinct test.”⁵⁷

Justice McCormack’s concurrence in *People v Nicholson*, decided after *Denson*, further explains the distinction between modus operandi evidence and evidence that is merely offered to show a defendant’s common scheme, plan, or system. Where a defendant’s identity is not at issue, a high degree of similarity is not required: “To establish a common design or plan, however, it is not necessary to show either distinctive and unusual features or a high degree of similarity between the charged act and the other acts.”⁵⁸

Instead, the degree of similarity required for the admission of common scheme or plan evidence requires a case-by-case determination. When looking at other acts evidence, the focus must always be on the theory of relevance sought to be proven. While some theories require a high degree of similarity, others do not. In analyzing the federal rule, the Seventh Circuit put it this way:

[Q]uestions about “how similar is similar enough” ... do not have uniform answers; these answers ... depend on the theory that makes the evidence admissible, and must be reached on a case-by-case basis. Thus, similarity means more than sharing some common characteristics; the

⁵⁷*Id.*, quoting 2 Wigmore Evidence (Chadbourn rev) § 304, p 250-251.

⁵⁸*People v Nicholson*, 501 Mich 1027; 908 NW 2d 310, 311 (2018), internal citation and quotations omitted.

common characteristics must relate to the purpose for which the evidence is offered. *United States v. Torres*, 977 F.2d 321, 326 (7th Cir.1992) (emphases added); *United States v. Vargas*, 552 F.3d 550, 555 (7th Cir.2008) (explaining that “we analyze whether the prior conduct is similar enough on a case-by-case basis, a determination that ‘depend[s] on the theory that makes the evidence admissible’ ”), quoting *United States v. Wheeler*, 540 F.3d 683, 692 (7th Cir.2008). This is why such a high degree of similarity is required when Rule 404(b) evidence is offered to prove *modus operandi*, *United States v. Smith*, 103 F.3d 600, 603 (7th Cir.1996), while less similarity is required when such evidence is offered for other purposes, see *United States v. Wheeler*, 540 F.3d 683, 692 (7th Cir.2008).⁵⁹

In *People v Knapp*, the prosecutor offered evidence that the defendant had been previously convicted of sexually assaulting a male student in order to prove that he used a common scheme or plan in sexually assaulting the victim, who was also his student. The defendant in *Knapp*, as in the instant case, did not contest doing the charged act. Instead, he claimed that he was merely demonstrating a Reiki⁶⁰ technique.⁶¹

⁵⁹*United States v Foster*, 652 F3d 776, 785 (CA 7, 2011) (defendant’s prior check fraud required little similarity to the charged robbery crime, where the prosecution was offering it to prove the defendant’s relationship with a co-conspirator).

⁶⁰At the defendant’s trial, Reiki was defined as “an ancient healing art that involves “energy centers” in the body called chakras. Reiki practitioners use various hand positions to activate internal healing powers in their patients. The hand positions used by Reiki therapists may involve, but do not require, physical contact with the person undergoing Reiki therapy. *People v Knapp*, 244 Mich App 361, 365 (2001).

⁶¹*Knapp, supra*, at 365-367, 379-380.

Though the defendant’s prior conviction was twenty years old, the Court of Appeals found it to be “highly probative of [the] defendant’s prior scheme” because the defendant’s conduct in approaching and isolating his victims was the same in both cases. The defendant targeted young boys who were his students. He would then isolate them and engage them in masturbation.⁶² The Court of Appeals also found that the evidence was relevant to show that the defendant’s intent was not innocent—that is, he was touching the victim for his own sexual gratification and not demonstrating a therapy technique.⁶³ This Court denied leave to appeal in *Knapp*.⁶⁴

Here, as in *Knapp*, the MRE 404(b) evidence clearly demonstrated defendant’s common scheme, plan, or system in raping women and it was relevant on the crucial issue of consent. In both instances, defendant approached the women while they were walking alone. He then took each of them to an isolated location, where his demeanor changed to violent. G220a, 230a-231a, 234a, 237a, 239a; H307a, 309a-310a, 313a-315a, 363a. In both instances, defendant used a weapon, which he then left behind after the assault. G237a, 246a; H309a-310a, 314a, 320a. In both cases,

⁶²*Knapp, supra*, at 379-380.

⁶³*Knapp, supra*, at 380.

⁶⁴*People v Knapp*, 465 Mich 934 (2001).

defendant forced the women to engage in vaginal penetration. G235a; H314a-315a.

There was no other reason for defendant to target these women, isolate them, or use a weapon if the women had wanted to engage in consensual intercourse. The fact that defendant used the same plan with Doak, who also claimed she was raped, makes it less likely that defendant's encounter with Davis was consensual. The evidence directly rebutted defendant's claim of consent.

Because defendant's identity had already been established by DNA, the mere fact that Doak also claimed to have been raped would have been enough to establish the relevancy of Doak's testimony. The other acts evidence was sufficiently similar to the charged offense under *Sabin*, and *Denson* does not require a different result.

B. Even if the other acts evidence did have to be “strikingly similar” to the charged act under *Denson*, the Court of Appeals properly found that it was.

Even if striking similarity was required under *Denson*, that does not mean that the other acts evidence has to be identical to the charged offense in order to be “strikingly similar.” Even under *Denson*, the degree of similarity required “depends on the manner in which the prosecution intends to use the other-acts evidence.”⁶⁵ Again, the rule is that “[w]hen

⁶⁵*Denson, supra*, at 402-403, citing *Mardlin, supra*, at 616, 790; *Crawford, supra*, at 395 n 13; *VanderVliet, supra*, at 67.

the prosecution's theory of relevancy is not based on the similarity between the other act and the charged offense, a 'striking similarity' between the acts is not required."⁶⁶

Here, the prosecution was offering the evidence under multiple theories of admissibility, but the purpose for which the evidence was being offered was ultimately the same—to prove that the sexual act was not consensual and that defendant used force or a weapon, or both. The prosecutor's theory was reflected in her closing argument. Defendant's trial counsel argued in closing that the victim had smoked crack, which may have caused her to consent to the sexual act when she otherwise might not have. J695a. He also argued that there was no evidence of a forceful sexual encounter. J688a. The prosecutor in turn argued that the circumstances surrounding the assault—such as the fact that it happened behind a dumpster, the fact that the victim was injured, and the fact that defendant had used the same scheme before with Doak—were evidence that defendant knew exactly what he was doing, that there was no mistake, and that the victim did not consent. J669a-671a, 714a-715a. The purpose for which the evidence was offered and the nature of the prosecutor's argument are what governs its admissibility.

⁶⁶*Id* at 403, citing *VanderVliet, supra*, at 67.

The other acts evidence was sufficiently similar to the charged act to be admissible under *Denson*, and it was not solely offered to prove defendant's propensity to commit crimes. Rather, it was offered to prove that the act in question—which defendant never contested doing—was not consensual.

C. The evidence was admissible to prove defendant's intent, regardless of whether he employed a common scheme, plan, or system.

Regardless whether defendant employed a common scheme, plan, or system, the trial court could not have abused its discretion for admitting the other acts evidence, because it was admissible to prove his intent. Under the theory of multiple admissibility, “only one proper theory under which the evidence is admitted is required.”⁶⁷ Further, “evidence that is properly admissible for one purpose need not be excluded because it is not admissible for another purpose.”⁶⁸ As this Court said in *Sabin*, MRE 404(b) itself was founded on the theory of multiple admissibility as reflected in the *VanderVliet* analytical framework itself.⁶⁹ Therefore, as long as one of the theories relied on by

⁶⁷*People v Bauder*, 269 Mich App 174, 187-188 (2005), overruled on other grounds.

⁶⁸*Id.*, citing *See People v Sabin (After Remand)*, 463 Mich 43, 56 (2000) (discussing the theory of multiple admissibility).

⁶⁹*Sabin (After Remand)*, *supra*, at 56.

the trial court was correct, the evidence was admissible and there can be no abuse of discretion.

The threshold similarity requirement for evidence being offered to prove intent is less than what is required when proving common scheme, plan, or system or identity. “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.’”⁷⁰ The degree of similarity required to prove intent depends upon the theory of relevance being asserted. Wright and Graham explained this principle as follows:

Some cases have added a requirement that other crimes evidence used to prove intent involve crimes that are similar to the crime charged... This is not necessarily so. Whether the offenses must be similar and the degree of similarity required turns upon the theory on which the other crime is relevant to prove intent. Suppose that the defendant claims that he was too insane or intoxicated to have had the requisite intent. Evidence that at about the same time he had committed a wholly dissimilar crime requiring even greater mental cogency than [the] crime charged would be relevant on the issue of intent. Or take a case in which the defendant claims that a crime was committed under duress. Proof that she engaged in other criminal acts to aid her accomplices in the absence of any duress from them would be relevant on the issue of intent without regard to the similarity or dissimilarity of the two crimes.⁷¹

⁷⁰*VanderVliet, supra*, at 79-80, quoting Imwinkelried, *Uncharged Misconduct Evidence*, § 3:11, p 23.

⁷¹Wright & Graham, *22 Federal Practice & Procedure*, § 5246, p 490-493.

Here, defendant was not claiming that he did not engage in the sexual act with the victim. Rather, he was claiming that the act was consensual and that he did not use or threaten force. Two sexual acts could be committed under very different circumstances, but the fact that neither victim consented—even if the acts themselves were different—would still be probative of the defendant’s intent. On the other hand, if the other acts evidence was offered to show that defendant was the person who *committed the crime*, the mere fact that another victim was sexually assaulted without her consent would not suffice for that purpose.

Here, the issue of consent—not identity—was logically relevant and material. Defendant’s DNA was found inside of the victim. Defendant’s trial counsel conceded in closing that the sexual contact occurred. He argued that, although it was undisputed that defendant had intercourse with the victim, it was not done by force or violence. J688a. The MRE 404(b) evidence was offered to prove that the charged act was not consensual. In other words, defendant’s intent was not innocent. In both instances, defendant used physical force in conjunction with a weapon in order to effectuate a sexual assault. In the instant case, defendant forcefully pushed the victim to the ground, penetrated her, and beat her with a baseball bat. G235a, 237a, 239a. In the case of the MRE 404(b) victim, defendant held a knife to her side and led her to a vacant

house, told her to lay on a mattress, and then raped her. All the while, the knife was laying beside the mattress. H309a-310a, 313a-315a.

The issue of consent goes hand in hand with whether or not defendant's intent was innocent and the MRE 404(b) evidence was highly probative in that regard. Lastly, there can be no abuse of discretion when the trial court makes a close evidentiary call.⁷²

D. The evidence was properly admitted under the doctrine of chances.

The doctrine of chances is a theory of logical relevance based on objective probabilities. Under this theory, if an out-of-the ordinary event occurs with unusual frequency, evidence of prior occurrences can be probative of a defendant's criminal intent or absence of mistake or accident, because "it is objectively improbable that such events occur so often in relation to the same person due to mere happenstance."⁷³ "Where material to the issue of mens rea, as here, [the doctrine] rests on the premise that 'the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently.'"⁷⁴ The doctrine does not even implicate a defendant's

⁷²*Sabin, supra*, at 67.

⁷³*Mardlin, supra*, at 617.

⁷⁴*Crawford, supra*, at 393, quoting Imwinkelried, *Uncharged Misconduct Evidence*, § 3:11, p 45.

character, because it relies on objective rather than subjective probabilities.⁷⁵

Application of the doctrine of chances “varies with the issue for which it is offered.”⁷⁶ “The method of analysis to be employed depends on the purpose of the offer and its logical relevance.”⁷⁷ Unlike other theories of relevance, such as *modus operandi*, other acts evidence offered to prove intent or absence of mistake under the doctrine of chances “need not bear striking similarity to the offense charged if the theory of relevance does not itself center on similarity.”⁷⁸

Under the doctrine of chances, much like the common scheme, plan, or system theory, Doak’s testimony was offered to prove that defendant’s intent was not innocent. In other words, he could not have believed that Davis consented to the sexual acts. The fact that defendant previously raped another woman goes directly to prove nonconsent. What is the likelihood that not one, but two women would come forward with the false allegation that defendant violently raped them? Neither of the women had any motive to lie, especially Doak, since she did not even know defendant. That is precisely the type of situation contemplated by

⁷⁵*Id* at 393.

⁷⁶*VanderVliet, supra*, at 79 n. 35.

⁷⁷*Id* at 67.

⁷⁸*Mardlin, supra*, at 620.

the doctrine of chances. “[T]he very function of the doctrine of chances is to permit the introduction of events that might appear accidental in isolation, but that suggest human design when viewed in aggregate.”⁷⁹

Therefore, the evidence was admissible under the doctrine of chances.

E. The evidence was not substantially more unfairly prejudicial than probative, and the trial court’s limiting instruction was sufficient to cure any prejudicial effect.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.⁸⁰ Making this determination requires a consideration of the following factors under MRE 403: (1) the time required to present the evidence and the possibility of delay, (2) whether the evidence is needlessly cumulative, (3) how directly the evidence tends to prove the fact for which it is offered, (4) how essential the fact sought to be proved is to the case, (5) the potential for confusing or misleading the jury, and (6) whether the fact can be proved in another manner without as many harmful collateral effects.⁸¹ For example, unfair prejudice may be found “where there is a danger that the evidence will be given undue or preemptive weight by the jury or

⁷⁹*Mardlin, supra*, at 625.

⁸⁰MRE 403.

⁸¹*People v Blackston*, 481 Mich 451, 462 (2008).

where it would be inequitable to allow use of the evidence.”⁸² But the mere fact that evidence is damaging to a defendant does not make the evidence unfairly prejudicial.⁸³ A determination under MRE 403 is “best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony.”⁸⁴

In the context of MRE 404(b) evidence, there will always be some degree of prejudice to the defendant. But “[t]he danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself.”⁸⁵ In *Sabin*, this Court held that other acts evidence tending to prove the system used by the defendant in sexually assaulting his daughters, although prejudicial, was probative of whether sexual penetration had occurred and to rebut defendant’s claim of fabrication by the victim. Therefore, the probative value outweighed the potential for prejudice.⁸⁶

Here, the evidence was helpful to the jury in deciding the crucial issue of consent. It was not cumulative or a waste of time. The evidence

⁸²*Id.*

⁸³*Murphy, supra*, at 582-583; *Eliason, supra*, at 302.

⁸⁴*VanderVliet, supra*, at 81.

⁸⁵*People v Starr*, 457 Mich 490, 500 (1998), citing *Golochowicz, supra*, at 326.

⁸⁶*Sabin, supra*, at 71.

went beyond tending to show that defendant raped another woman. The evidence was probative of defendant's common scheme or plan in raping victims and his methodology in doing so. And, the evidence was probative to rebut any claim by defendant that the act was consensual. Therefore, the probative value of the evidence outweighed any unfair prejudice.

Lastly, the court's limiting instruction was sufficient to cure any prejudicial effect from the evidence, as it informed the jury that they were not to consider the evidence to decide that "the defendant is a bad person or that he is likely to commit crimes" or that he must be "guilty of other bad conduct." J724a-725a.

F. If there was evidentiary error, the error was harmless

Even if the trial court erred in admitting the other acts evidence to prove defendant's common scheme, plan, or system or under the doctrine of chances, the error was harmless because the evidence was properly admitted to show defendant's intent. So, if there was prejudicial error in this case, it was in the trial court's instructions to the jury as to

how they should consider the MRE 404(b) evidence.⁸⁷ It was not in the admission of the evidence itself.

But even if this Court finds that the evidence was not properly admitted for any purpose, including intent, the error was still harmless. Preserved evidentiary errors are subject to harmless error analysis under *People v Lukity*. The burden is on the defendant to establish a miscarriage of justice under a “more probable than not” standard.⁸⁸ The effect of the error must be evaluated in light of the untainted evidence in order to determine whether, absent the error, it is more probable than not that a different outcome would have resulted.⁸⁹

Taking out the other acts evidence altogether, the remaining “untainted” evidence was sufficient to prove defendant’s guilt beyond a

⁸⁷The trial court instructed the jury as follows: “You have heard evidence that was introduced to show that the defendant committed a crime or an improper act for which he is not on trial. If you believe this evidence you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show that the defendant acted purposefully, that is, not by accident, or mistake, or because he misjudged the situation, that the defendant used a plan, system or characteristic scheme that he has used before or since. You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime or you must find him not guilty.” J724a-725a.

⁸⁸*Lukity, supra*, at 495-496.

⁸⁹*Id.*

reasonable doubt. Defendant's DNA was found in the victim's rape kit, so there was no question that the sexual act occurred. I521a-523a. After she was sexually assaulted and beaten with a baseball bat behind a garbage dumpster, the victim was crawling on her hands and knees and calling out for help. G234a-235a, 237a, 239a; H363a. The victim was described as being "distraught" and "in distress" after the sexual assault occurred. H329a, 409a. She told police that she had defecated on herself. H437a-438a, 442a-447a. She was taken to the hospital via ambulance, where she was treated for visible injuries. G244a-245a, 240a, 251a; H349a-350a, 363a-365a. The victim's testimony, along with the DNA evidence, proved beyond a reasonable doubt that defendant raped her.

Lastly, if defendant were to be retried now, the other acts evidence would be allowed into evidence—whether it shows defendant's propensity to commit crimes or not—under MCL 768.27(b). The statute, which went into effect on March 17, 2019, allows evidence of other acts to be admitted for any relevant purpose—including propensity—as long as its probative value is not substantially outweighed by a danger of unfair prejudice.⁹⁰

In other words, if this Court were to grant relief, the exact same trial would be held on remand. That cannot be a justifiable use of judicial resources.

⁹⁰MCL 768.27(b).

RELIEF

Wherefore, the People respectfully request that this Court affirm the Court of Appeals' decision.

Respectfully submitted,

KYM WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research,
Training, and Appeals

/s/ Amy M. Somers
AMY M. SOMERS
Assistant Prosecuting Attorney
1441 St. Antoine
Detroit, Michigan 48226
(313) 224-8109

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AMS