STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2001
v	No. 207358 Calhoun Circuit Court
ROBERT EDWARD HINE, Defendant-Appellant.	LC No. 97-000307-FC ON REMAND

Before: Sawyer, P.J., and Hood and Whitbeck, JJ.

PER CURIAM.

This case concerning the admissibility of other acts evidence[1] under MRE 404(b)(1) comes to us on remand from the Supreme Court. We reverse and remand for a new trial.

I. Basic Facts And Procedural History

The first opinion in this case set out the pertinent facts:

> This case involves the sudden death of two-and-a-half-year-old Caitlan McLaughlin on November 7, 1996. Hine and Caitlan McLaughlin's mother, Meagan McLaughlin, were in a dating relationship and the three lived together in Hine's home. Hine, who was out of work at the time, cared for Caitlan McLaughlin while Meagan McLaughlin was working.
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> Caitlan McLaughlin had a number of small accidents and illnesses in the two or so weeks before she died. In late October, she attended a birthday party and fell off a small bicycle or tricycle. At the party, Caitlan McLaughlin's six-year-old cousin also tried to scare her by jumping out of a closet, and while doing so, inadvertently caused the doorknob to hit her head, leaving a "goose egg" bruise on her forehead. The week preceding her death, while Hine was looking after her, she had several episodes of vomiting and fainting. This was, evidently, not unusual because she had a history of viral illnesses dating back to her birth

[1] We use the terms other acts evidence, prior acts evidence, and prior bad acts evidence interchangeably.

that caused these symptoms to recur. Caitlan McLaughlin also had several accidents, which she voluntarily described to family members, including incidents when she fell against a bathtub and a wooden toy box, causing her to sustain several bruises, a cut on her ear, as well as a swollen nose.

On November 7, Caitlan McLaughlin vomited after lunch and then fainted. Hine shook her shoulders until she regained consciousness, and then he called Meagan McLaughlin to report what had happened. Meagan McLaughlin came home from work a short time later and Caitlan McLaughlin continued vomiting. Caitlan McLaughlin finally was able to drink juice around 6:30 p.m. While Meagan McLaughlin was assisting Caitlan McLaughlin in the bathroom, she discovered that Caitlan McLaughlin had bruises on her buttocks, and confronted Hine about them. Hine admitted that he had spanked Caitlan McLaughlin earlier when she had defecated in her pants. They apparently resolved their tensions and after dinner Meagan McLaughlin helped Caitlan McLaughlin get ready for bed, at which time she discovered that Caitlan McLaughlin had some bruises on her arms and stomach; Meagan McLaughlin did not ask Hine about these bruises.

At around 9:00 p.m., Hine, Meagan McLaughlin, and Caitlan McLaughlin began watching a movie, with Meagan McLaughlin sitting on Hine's lap and Caitlan McLaughlin lying on a couch. About a half hour later, Meagan McLaughlin went to make a telephone call and Hine checked on Caitlan McLaughlin. He discovered that she was gagging and her eyes had rolled back. Hine picked Caitlan McLaughlin up and took her to Meagan McLaughlin, who was speaking on the phone. He handed Caitlan McLaughlin to Meagan McLaughlin and called 911. While on the telephone with the 911 operator, he attempted to follow the directions regarding how to resuscitate Caitlan McLaughlin. Emergency services personnel arrived within five minutes but could not revive her.

At trial, the medical evidence did not point to a single, conclusive cause of Caitlan McLaughlin's death. Postmortem photographs showed what appeared to be significant bruising to her body, but a police officer who responded to the 911 call was not sure that the marks were bruises and a paramedic who tried to revive Caitlan McLaughlin admitted that lividity, meaning discoloration, can occur naturally after death. Indeed, Meagan McLaughlin later told the police that the discoloration of Caitlan McLaughlin's body in police photographs was much worse than she had personally observed before her daughter died.

The medical examiner identified numerous minor bruises on Caitlan McLaughlin's body and two major injuries, one to her head that caused her brain to swell, and one to her liver that caused hemorrhaging. The head injury was likely from a forceful blow, not shaking, within the three days before Caitlan McLaughlin died, but there was no external mark demonstrating such a blow. In his opinion, the liver injury probably occurred three to seven days before Caitlan McLaughlin died and would have caused Caitlan McLaughlin to become weak,

her blood pressure would have fallen, and it was possible that she could have been clumsy as a result. Although there was no evidence that anyone used a weapon or instrument against Caitlan McLaughlin, he thought that some of the bruising could have come from mild blows with a fist. He agreed that not all the marks on her body were actually bruises, but a lay person might reach that conclusion. He did not observe any mouth injuries or evidence that someone had "head-butted" Caitlan McLaughlin. The medical examiner could not conclude that any single injury caused her death, but concluded that Caitlan McLaughlin's death was a homicide because of the number of injuries and because they did not appear to be self-inflicted.

Caitlan McLaughlin's family doctor testified that she did not recall seeing evidence of abuse during her office visits. She agreed that a liver injury could have caused Caitlan McLaughlin's symptoms the week before she died, but that an accident two weeks before death was unlikely to cause her injuries. She did believe, however, that Caitlan McLaughlin's abdominal injuries should have been investigated further.

The prosecutor's expert in pediatric critical care, who specialized in child abuse cases, concluded that some of Caitlan McLaughlin's injuries, such as the injuries to her nose, were probably from an accident. He hypothesized on the basis of the police report, photographs, and autopsy report that the injuries to her chin and jaw were caused by someone grabbing her face and lifting or throwing her, and not during an effort to resuscitate her. He also suggested that the superficial injuries to Caitlan McLaughlin's cheek could have resulted from someone "raking" his or her fingers on the inside of her mouth, and that her abdominal injuries resulted from punches with a knuckle or fist. He believed that the head injury was what killed Caitlan McLaughlin. However, he did not examine Caitlan McLaughlin's body and admitted on cross-examination that he reached these conclusions only after being told that Meagan McLaughlin had lied about an accident occurring before Caitlan McLaughlin's death; he assumed that there was no accident. He also conceded that an impalement injury from a fall off a bicycle could cause a liver injury that would have produced vomiting, lethargy, and weak coordination, but not all the injuries Caitlan McLaughlin sustained.

Hine's theory was that Caitlan McLaughlin died from the injuries she sustained in the accidents in the weeks preceding November 7, 1996 and not from any action on his part. He presented numerous witnesses who testified that they never saw Hine act inappropriately and that Caitlan McLaughlin was always comfortable around him. Meagan McLaughlin also testified that she thought Hine had tried his best to care for Caitlan McLaughlin and that she had never seen any indication that he would hurt her. There was no direct evidence that Hine abused or killed Caitlan McLaughlin.

The trial court, over defense objection,[1] permitted Meagan McLaughlin and two of Hine's former girlfriends, Sherri Overbeck and Laura Diehl, to testify

to instances when he allegedly assaulted them or exhibited violent tendencies toward them.[2] Meagan McLaughlin claimed that she and Hine had a history of fighting. When she would not talk to him, he would pin her down until she responded. He also "head-butted" her on the forehead two or three times, once hit her on the lip with his knee, and he once "fish-hooked" her mouth. She also said that Hine had poked or pushed her frequently, but they had been getting along very well for some time before Caitlan McLaughlin died.

Overbeck, the mother of Hine's son Kalija, testified that he assaulted her several times. For instance, she said, he would grab her arms, pin her down, threaten her, and grab her neck, pressing her necklace into her skin. He allegedly "head-butted" her, bloodying her nose, and he raped her while she was pregnant with their son. Yet, she never saw Hine even discipline Kalija, much less abuse him.

Diehl stated that one time when she and Hine were drunk he used his fingers to spread her mouth as wide as it would go. The next morning, she claimed, Hine threatened to "bust" a chair over her head, but did not actually do so. Several weeks later he threatened to blacken her eyes, but again, did not fulfill the threat. Diehl also recalled two other incidents where Hine harmed her, but which she concluded were accidents: one time she fell against his knee injuring her nose, and the second time he dropped her while carrying her. Diehl never saw Hine abuse her two children, who lived with them, or Kalija.

At the close of trial, the court instructed the jury to consider Meagan McLaughlin, Overbeck, and Diehl's testimony regarding the abuse only to the extent that it demonstrated Hine's intent to act, his pattern in doing an act, or the absence of a mistake.[2][3]

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[1] The trial court ruled the testimony admissible before trial commenced.

[2] The trial court barred Kim Bailey, a waitress in a bar who claimed to have seen Hine acting rude[ly] and aggressive[ly], from testifying.

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[2] *People v Hine*, unpublished opinion of the Court of Appeals (Docket No. 207358, issued February 25, 2000), slip op at 1-4 ("*Hine*").

[3] We note that in the application for leave to appeal to the Supreme Court and in the supplemental brief on remand to this Court, the prosecutor disputes certain of these facts. None of the disputed facts are, however, relevant to the issue on remand: whether the trial court abused its discretion in concluding that the alleged similarities between the peculiarities in the assaultive conduct of Hine against three adult witnesses and the injuries suffered by Caitlan McLaughlin justified admission of the evidence in question under a "scheme, plan, or system" theory. We have not, therefore, changed our description of the facts.

The jury convicted Robert Hine of first-degree felony-murder[4] and first-degree child abuse,[5] but acquitted him of open murder.[6]

Hine then appealed as of right to this Court. This Court reversed his convictions and remanded for a new trial, reasoning that the other acts evidence was not admissible under any of the theories the prosecutor advanced and that it should have been excluded under MRE 403.[7] This Court also noted briefly that, if it did not have other grounds to reverse, it would have vacated Hine's conviction of first-agree child abuse, the predicate felony for his felony-murder conviction, on double jeopardy grounds.[8]

The prosecutor subsequently appealed to the Supreme Court.[9] The Supreme Court held the prosecutor's application for leave to appeal in abeyance while it considered *People v Sabin*. Several months later, the Supreme Court vacated this Court's opinion in *Hine* and remanded the case to this Court for reconsideration in light of the opinion it had just issued in *Sabin (After Remand)*[10] with the following instructions:

> On remand, the Court of Appeals is specifically directed to address, among the issues raised, whether the trial court abused its discretion in concluding that alleged similarities between the peculiarities in the assaultive conduct of defendant against the three adult witnesses and the injuries suffered by the victim justified admission of the evidence in question under a "scheme, plan, or system" theory. The Court of Appeals shall allow the parties to file supplemental briefs. If the Court of Appeals rejects defendant's arguments regarding the admission of the prior acts evidence, then it shall consider the remaining issues raised in defendant's appeal.[11]

II. *Sabin (After Remand)*

In *Sabin* the defendant was charged with committing criminal sexual conduct against his thirteen-year-old daughter.[12] At trial, the prosecutor moved to introduce evidence that the defendant had sexually assaulted his former stepdaughter for approximately eight years and that he was under a parole order not to have contact with anyone under age seventeen.[13] The

[4] MCL 750.316(b).

[5] MCL 750.136b.

[6] MCL 750.316.

[7] *Hine, supra* at 7-9.

[8] *Id*. at 9.

[9] *People v Hine*, 620 NW2d 308 (2000) ("*Hine Order*").

[10] *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000).

[11] *Hine Order, supra*.

[12] *Sabin (After Remand), supra* at 47.

[13] *Id*. at 47-49.

prosecutor claimed that the stepdaughter's testimony would prove the defendant's motive and intent, absence of mistake, and that it was relevant "to support the complainant's credibility, and to aid the jurors in their evaluation of the evidence by demonstrating that an adult can be sexually attracted to and actually accomplish a sex act with, a child."[14] The trial court ruled the evidence admissible and cautioned the jury in a preliminary instruction only to consider the stepdaughter's testimony as evidence of a scheme, plan, or system.[15] Concerning the no-contact parole order, the prosecutor argued that the evidence was relevant to explain the complainant's actions following the sexual assault and the trial court ruled that evidence admissible.[16] This Court reversed,[17] the prosecutor appealed, and the Supreme Court held the case in abeyance until it issued its decision in *People v Starr*.[18] After its decision in *Starr*, the Supreme Court remanded for reconsideration in light of *Starr* and *People v Crawford*.[19] On remand,[20] this Court again reversed,[21] the prosecutor again appealed, and the Supreme Court reversed.

The Supreme Court began its analysis of the trial court's evidentiary rulings by examining the text of MRE 404(b)(1). It then explained the analytical framework it had created for evidentiary issues arising under MRE 404(b)(1) in *People v VanderVliet*.[22] The Supreme Court outlined the three prerequisites to determining whether to admit or exclude prior bad acts evidence. First, a "prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory."[23] Second, the evidence must be logically relevant to a matter at trial.[24] Third, the trial court must determine whether the evidence is substantially more prejudicial than probative, meriting exclusion under MRE 403.[25] Though not part of the admissibility analysis itself, once a trial court determines that prior bad acts evidence is admissible, it may instruct the jury on the limited purpose of the evidence.[26] In commenting on this analysis, the Supreme Court emphasized that, though inadmissible for one reason, a piece of evidence may nevertheless be admissible under other theories.[27]

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[14] *Id*. at 49, 50.

[15] *Id*. at 50-51.

[16] *Id*. at 51.

[17] *People v Sabin*, 223 Mich App 530; 566 NW2d 677 (1997).

[18] *People v Starr*, 457 Mich 490; 577 NW2d 673 (1998).

[19] *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998).

[20] *People v Sabin (On Remand)*, 236 Mich App 1; 600 NW2d 98 (1999).

[21] Judge Whitbeck dissented, *id.* at 9, *et. seq.*

[22] *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993).

[23] *Sabin (After Remand)*, *supra* at 55; see *id*. at 56-57.

[24] *Id*. at 55.

[25] *Id*. at 55; see *id*. at 57-58.

[26] *Id*. at 56.

[27] *Id*.

The Supreme Court then explained a variety of theories of relevance under which prior bad acts evidence may be admissible.[28] The explanation of the first such theory, scheme, plan, or system, is directly applicable here. In discussing scheme, plan, or system, the Supreme Court first examined *People v Engelman*.[29] The Court commented that *Engelman* focused on a situation in which the charged and uncharged acts are constituent parts of a plan in which each act is a piece of a larger plan. The Court concluded that such a situation was not present in *Sabin.* Rather, the Court[30] stated that the situation in *Sabin* was one where the defendant allegedly "devis(ed) a plan and us(ed) it repeatedly to perpetrate separate but very similar crimes."[31] The Court then

> clarif[ied] that evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.[32]

The Court noted that general similarity between the charged and uncharged acts does not, by itself, establish a plan, scheme, or system used to commit the acts.[33] The Court cited to the emphasized language from Wigmore:

> The added element, then, must be, not merely a similarity in the results, but *such a concurrence of common features that the various acts are natural to be explained as caused by a general plan of which they are the individual manifestations.* [34]

In illustrating the common features between the uncharged and charged act necessary to support an inference of a plan, scheme, or system, the Court again cited to Wigmore:

> [T]he difference between requiring similarity, for acts negativing innocent intent, and requiring *common features indicating common design,* for acts showing design, is a difference of degree rather than of kind; for to be similar involves having common features, and to have common features is merely to have a high degree of similarity . . . .
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> The clue to the difference is best gained by remembering that in the one class of cases the act charged is assumed as done, and the mind asks only for

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[28] *Id*. at 61.

[29] *People v Engelman*, 434 Mich 204; 453 NW2d 656 (1990).

[30] Citing to *State v Lough*, 125 Wash 2d 847, 855; 889 P2d 487 (1995).

[31] *Sabin (After Remand), supra* at 63.

[32] *Id*. citing to *People v Ewoldt*, 7 Cal 4th 380; 867 P2d 757 (1994).

[33] *Id.* at 64-65.

[34] 2 Wigmore (Chadbourn rev), Evidence, § 304, p 249; emphasis in the original.

> something that will negative innocent intent; and the mere prior occurrence of an act similar to its gross features – i.e., the same doer, and the same sort of act, but not necessarily the same mode of acting nor the same sufferer – may suffice for that purpose. But where the very act is the object of proof, and is desired to be inferred from a plan or system, the combination of common features that will suggest a common plan as their explanation involves so much a higher grade of similarity as to constitute a substantially new and distinct test. [35]

While noting that the uncharged and the charged acts in *Sabin* were dissimilar in many respects, the Court concluded that the trial court did not abuse its discretion when it determined that defendant's alleged assault of the complainant and alleged abuse of his stepdaughter shared sufficient common features to infer a plan, scheme, or system to do the acts. The Court concluded:

> This case is one in which reasonable persons could disagree on whether the charged and uncharged acts contained sufficient common features to infer the existence of a common system used by defendant in committing the acts. As we have often observed, the trial court's decision on a close evidentiary question such as this one ordinarily cannot be an abuse of discretion . . . . We therefore conclude that the trial court did not abuse its discretion in determining, under the circumstances of this case, that the evidence was admissible under this theory of logical relevance.[36]

III. Application of *Sabin (After Remand*)

A. The *VanderVliet* Framework

The Court in *Sabin (After Remand)* based it decision – as do most of the post-1994 decisions in this much-litigated area – on the seminal *VanderVliet* case. *VanderVliet* set out a four-legged test for the consideration of other acts evidence under MRE 404(b):

> 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.[37]

Here, we are concerned with the second leg, relevance. Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the

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[35] Wigmore, *id.* at 250-251.

[36] *Sabin (After Remand)*, *supra* at 67, citations omitted.

[37] *VanderVliet*, *supra* at 55.

actions more probable or less probable than it would be without the evidence."[38] Only relevant evidence is admissible at trial.[39]

B. Scheme, Plan, or System

(1) MRE 404(b)(1)

MRE 404(b)(1) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, *scheme, plan, or system* in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.[40]

(2) System

The prosecutor here argues that the testimony of the other witnesses was material to "showing [Hine's] plan or pattern of abusing Caitlan McLaughlin." The prosecutor goes on to argue that the "other acts testimony was admitted, not to distinguish ages or gender or to show similarity of victims, but to display a similarity of the injuries themselves, which displayed [Hine's] 'plan, scheme or system.'"

The prosecutor's use of the rubric of "plan, scheme or system" somewhat obscures, we observe, the basic thrust of the argument. Insofar as we are able to ascertain, the prosecutor does not argue that Hine had a "plan" or "scheme" to injure or kill Caitlan McLaughlin. Rather, the prosecutor argues that the testimony of the other acts testimony of the three witnesses, McLaughlin, Overbeck and Diehl, showed a pattern, a method of acting, a *system* in which Hine would become violent when he was frustrated, annoyed, or upset. Specifically, the prosecutor argues that Hine would violently abuse his victims by threatening them, poking them, grabbing them, "fish-hooking" them in the mouth, and head-butting them. The prosecutor then points to the injuries that such abuse would cause and describes them as "strikingly similar" to Caitlan McLaughlin's injuries.

Thus, as in *Sabin*, the prosecutor does not argue that the situation is similar to that in *Engelman*, where the charged and uncharged acts were constituent parts of a plan in which each act is a piece of a larger plan. Rather, the prosecutor argues that Hine employed a *system* to perpetrate separate but very similar crimes. The prosecutor also does not argue, to use Wigmore's distinction, for similarity as negativing innocent intent. Hine did not defend on the

[38] MRE 401.

[39] MRE 402.

[40] Emphasis supplied.

basis that he accidentally or innocently injured Caitlan McLaughlin; rather, he claimed that he did not injure her at all. Here, then, the "very act is the object of proof" and that act is the injury itself. The prosecutor, again to use Wigmore's distinction, desires that Hine's commission of that act be inferred from his *system* of inflicting other but similar injuries on other victims.

Wigmore comments that such an explanation "involves so much a higher grade of similarity as to constitute a substantially new and distinct test." The Supreme Court used a somewhat different formulation when[41] it stated that "the necessary degree of similarity is greater than that needed to prove intent, but less than that needed to prove identity."[42] To paraphrase *People v Ewoldt*, the system need not be unusual or distinctive; it need only exist to support the inference that Hine employed that system in committing the charged offense.

Here, it is unfortunate but true that there is nothing, within the universe of violent assaults, particularly unusual or distinctive in threatening a person, poking that person, grabbing that person, "fish-hooking" that person in the mouth, or head-butting that person. The focus must, therefore, be on the similarities of the uncharged acts involving McLaughlin, Overbeck and Diehl and the charged act involving Caitlan McLaughlin. We observe that the degree of similarity is, at least roughly, inversely related to the degree of specificity by which one describes the acts. At a low level of specificity of description there will be a high level of similarity; at a high level of specificity of description there is a lower level of similarity.

We illustrate this inverse relationship through the use of the facts here. At a low level of specificity of description, the testimony of McLaughlin, Overbeck and Diehl demonstrated that Hine would become violently abusive when he was frustrated, annoyed, or upset. The prosecutor's theory is that Hine became similarly frustrated, annoyed, or upset with Caitlan McLaughlin and that he therefore similarly become violently abusive toward her to the point that he fatally injured her. At this low level of specificity of description, the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common system.

We believe, however, that *Sabin (On Remand)* requires a higher level of specificity. The prosecutor attempts to provide that higher level of specificity by pointing to the collective testimony of McLaughlin, Overbeck and Diehl that Hine would violently abuse them by threatening them, poking them, grabbing them, "fish-hooking" them in the mouth, and head-butting them. We observe the specifics of these attacks – again, the uncharged misconduct – in terms of time, place, method, or purpose, cannot be related to the specifics of any attack on Caitlan McLaughlin – again, the charged offense – for the simple reason that we have *no* specifics of any such attack on Caitlan McLaughlin, by Hine or anyone else. Indeed, but for the inference from the uncharged misconduct, there is precious little evidence that there was a criminal act involving Caitlan McLaughlin at all. Conversely, there is evidence from which a reasonable person could infer that Caitlan McLaughlin's injuries resulted from accidents that did not involve Hine. Perhaps recognizing this, the prosecutor urges us to compare the *injuries*

[41] Citing to *People v Ewoldt*, *supra*.

[42] *Sabin (After Remand)*, *supra* at 65.

Caitlan McLaughlin suffered to the *injuries* McLaughlin, Overbeck and Diehl suffered as a result of Hine's attacks on them.

Here, we have an evidentiary mismatch. According to the prosecutor, Diehl testified that Hine put his hand in her mouth "bruising her gums." According to the prosecutor, Overbeck testified that Hine head-butted her once, "causing her nose to bleed." According to the prosecutor, McLaughlin testified that Hine "bruised [her] arms frequently." Thus, we have only the most general testimony as to the injuries of McLaughlin, Overbeck, and Diehl as a result of Hine's attacks on them. By contrast, we have extensive, credible, and specific testimony and evidence of Caitlan McLaughlin's injuries.

We have a similar evidentiary mismatch with respect to Hine's system of abuse. We have extensive, credible, and specific testimony from McLaughlin, Overbeck, and Diehl as to Hine's propensity for, and method of carrying out, violent abuse when he was frustrated, annoyed, or upset. By contrast, we have *no* evidence of Hine's violent abuse of Caitlan McLaughlin. Indeed, we have the testimony by McLaughlin, Overbeck, and Diehl that they never saw Hine threaten or assault their children or his son.

Thus, we remain convinced that the prior bad acts evidence was inadmissible. That evidence did not, even under the prosecutor's theory of similar *injuries*, demonstrate a common scheme, plan, or *system*. The prosecutor, in essence, asks us to make two inferences. The first inference is that Hine had a system whereby he abused mature women when he was frustrated, annoyed, or upset. The evidence supports this inference but, standing alone, it has no probative value whatever. The second inference is that, using this system, Hine inflicted injuries on Caitlan McLaughlin, a two-year old female child, that were "strikingly similar" to those he inflicted on McLaughlin, Overbeck, and Diehl. The evidence does not support this inference but it is at the heart of the prosecutor's case. We conclude that the lack of specificity of the description of the injuries suffered by McLaughlin, Overbeck, and Diehl simply does not allow for a rational comparison with the injuries suffered by Caitlan McLaughlin.

We observe, however, that the prior bad acts evidence did, clearly, demonstrate that Hine was a "bad man," with a propensity for abusive, violent assault. Indeed, we note that the trial court came very close to saying that it was admitting the evidence on a propensity theory:

> On the other hand, certainly it is strongly probative to the prosecution's case when you are talking about any evidence of someone's *propensity for engaging in assaultive conduct* and certainly arguments about similarities between other incidents and perhaps what happened to the victim based upon the evidence the prosecution has.[43]

In short, the evidence proved Hine's bad character – his "propensity for engaging in assaultive conduct" – in order "to show action in conformity therewith." We therefore again conclude that the trial court abused its discretion in admitting such propensity evidence.

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[43] Emphasis supplied.

Reversed and remanded for new trial. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Harold Hood
/s/ William C. Whitbeck