STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROSS KENNEDY,

Defendant-Appellant.

UNPUBLISHED
December 12, 1997

No. 190106
Recorder's Court
LC No. 94-010996 FC

Before: Saad, P.J. and O'Connell and Matuzak*, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by jury of first-degree criminal sexual conduct. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He was sentenced to twenty to forty years' imprisonment. We reverse and remand.

In October 1993, defendant was hired to paint the home of complainant's parents. Complainant, who was four years old at the time of the alleged incident, claims that defendant molested her during the course of his employment. She did not tell her mother about the incident until approximately one week later. Complainant's mother then took her to the hospital; the emergency room physician did not find any evidence of sexual assault. On October 24, 1993, complainant's mother reported the incident to the police. Defendant was charged with first-degree criminal sexual conduct and was subsequently convicted of that charge.

On appeal, defendant first argues that the trial court abused its discretion by admitting a statement that he gave to police sixteen years prior involving defendant's participation in sexual acts with teen-aged boys. Prior to trial, the prosecutor moved to admit the sixteen-year-old statement under MRE 404(b), claiming that the statement would show a common scheme or plan on the part of defendant. Specifically, the statement was intended to show that defendant would ingratiate himself with families that had small children and that he would then use that relationship (opportunity) to sexually molest the children of the families. Defense counsel objected to admission of the statement, arguing that the probative value of the evidence was outweighed by unfair prejudice and that there were factual

* Circuit judge, sitting on the Court of Appeals by assignment.

differences between the incidents in the statement and the charge pending. The trial court held that the people could introduce the statement to show defendant's "signature." We review this issue for an abuse of discretion. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992).

MRE 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove a person's character or to show that the person acted in conformity with that character. Such evidence may be admissible, however, to show a common scheme, plan or system. *Id.* In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), the Supreme Court stated that other acts evidence is admissible if it is (1) offered for a proper purpose (other than to prove defendant's character or propensity to commit the crime), (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to withstand the balancing test set forth in MRE 403 (probative value not outweighed by unfair prejudice). *Id.*

Initially, we note that the purpose for which the prosecution allegedly offered the statement was proper under MRE 404(b). Common scheme evidence is admissible where the defendant commits a series of crimes in a "unique, regular, or regimented manner." *People v Sabin*, 223 Mich App 530, 535; 566 NW2d 677 (1997). At a pretrial hearing on this matter, the prosecution argued that the similarities between the acts included the fact that the prior incident involved children under thirteen, oral sex, and the exploitation of a relationship with an adult in order to gain access to the children. However, even a cursory reading of defendant's prior statement reveals that the statement does not refer in any way to a relationship between defendant and the parents of the children.[1] On appeal the prosecutor concedes that the statement did not establish what it was introduced to prove, i.e., the scheme that defendant would ingratiate himself with families with small children and then molest the children. In fact, the statement suggests only that defendant had a propensity to commit the crime.

We conclude that the only effect of the statement was to establish that defendant had the propensity to engage in sexual acts with minor children. As the Supreme Court stated in *VanderVliet*, *supra*, evidence is not admissible to show propensity as to the ultimate issue in the case. Therefore, since we find that the statement does not pass the *VanderVliet* test, it follows that the trial court erred in admitting the statement into evidence.

Even though we conclude that the trial court abused its discretion in admitting defendant's sixteen-year-old statement, reversal of defendant's conviction is not automatic. *Sabin, supra*. This Court follows the harmless error analysis set forth in *People v Hall*, 435 Mich 599, 609, n 8; 460 NW2d 520 (1990):

> Certain constitutional violations require automatic reversal. See, E.G., *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963) (denial of counsel at trial). Other constitutional violations are measured by the standard that requires a court to be convinced "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v California* 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967) (commenting on defendant's failure to testify at trial could be harmless error); *Rose v Clark* 478 US [570]; 106 S Ct 3101; 92 L Ed 2d 460 (1986) (jury instruction shifting the burden of proof to the defendant can be harmless

> error). Nonconstitutional violations, such as that alleged in the instant case, are measured by a third standard in the federal system: The defendant must show a reasonable probability that the error affected the outcome of the trial. See *United States v Mechanik*, 475 US 66; 106 S Ct 938; 89 L Ed 2d 50 (1986) (no reversal for grand jury error unless the error affected the outcome of the trial).

Issues involving the admissibility of evidence fall in the category of nonconstitutional errors. *People v Mateo*, 453 Mich 203, 206; 551 NW2d 891 (1996). Thus, this Court must determine the likely effect of the error in light of the evidence. *Id*., at 206. In this case, the only evidence tending to establish defendant's guilt, besides the erroneously admitted statement, was the testimony of the six-year-old complainant,[2] testimony contradicted in significant detail by another prosecution witnesses, the complainant's mother. Under these circumstances, we conclude that it was highly probable that this inadmissible statement affected the outcome of the trial. *Mateo, supra* at 218-219. Therefore, the error was not harmless.

Defendant also raises several other allegations of error involving ineffective assistance of counsel and the proportionality of his sentence. Because we find that admission of defendant's prior statement denied defendant a fair trial and that reversal is warranted on this basis, we do not address the remainder.

Reversed and remanded for a new trial.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak

[1] The officer testified in the instant case that she took the following statement from Defendant in question and answer form:

> Okay. My question: "Have you ever made sexual advances to a child?" Mr. Kennedy's answer: "There was an incident with Eddie while I was living upstairs from her mother on Clairmont."
>
> My question: "Anyone else?" Mr. Kennedy's answer: "Some years ago, I was staying across the street from Mrs. Jewel's mother with a Mrs. Love. She has two boys and a nephew. They were 12, 14 and 13 at the time. I made sexual advances, put my mouth on their privates, nothing else.
>
> My question: "Did you ever force any of these children to accept your advances?" Mr. Kennedy's answer: "No."

My question: "When did you last make advances to Eddie?" Mr. Kennedy's answer: "Last year just before Christmas; he's seven or eight."

[2] A few examples are illustrative of the problematic nature of the complainant's testimony. Whereas the complainant testified that she was five years old when this happened, her mother testified that she was four years old. The complainant testified that she was wearing pants when the incident happened, but her mother testified that she was wearing a nightgown. The complainant testified that she told her mother about the incident immediately after it occurred, but her mother stated that she did not hear about the incident until ten days after it happened.