

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM F. KELLY, III,

Defendant-Appellant.

UNPUBLISHED

July 7, 1998

No. 205249

Oakland Circuit Court

LC No. 96-147812-FH

Before: Jansen, P.J., and Kelly and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and was sentenced to two and one-half to fifteen years' imprisonment. Defendant appeals as of right and we affirm.

Defendant first argues that the trial court abused its discretion in admitting evidence that he had committed prior acts of criminal sexual conduct with the victim. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The Michigan Rules of Evidence provide that evidence of other crimes, wrongs, or acts is not admissible to prove the character of an individual in order to show that the individual acted in conformity with that character. MRE 404(b). However, such evidence is admissible whenever it is relevant regarding a non-character theory, that is, the evidence is probative of something other than the person's criminal propensity. *People v VanderVliet*, 444 Mich 52, 65-66; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Such situations include, but are not limited to, proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake when it is material to the conduct at issue. MRE 404(b)(1); *VanderVliet*, *supra* at 66. Relevant evidence of other acts does not violate MRE 404(b) unless it is offered *solely* for the purpose of showing the criminal propensity of a person and to establish that he acted in conformity therewith. *VanderVliet*, *supra* at 65.

In *VanderVliet*, *supra* at 74, our Supreme Court set out a four-part test for admitting evidence under MRE 404(b): (1) the evidence must be offered for a proper purpose; that is, the prosecution must offer the evidence under something other than a conformity with character theory; (2) the evidence must be relevant; (3) the trial court must perform a balancing test pursuant to MRE 403; (4) the trial court may, upon request, give a limiting instruction to the jury that the other acts evidence be considered only for the proper purpose for which it was admitted.

Under the test set forth in *VanderVliet*, we find that the evidence was properly admissible. It was relevant and admitted for a proper purpose. The fact that both incidents occurred in the bathroom and in the exact same manner as the charged crime indicates a common plan or system of touching the victim. The fact that the exact same kind of touching occurred between defendant and the victim on at least two separate occasions apart from the charged crime negates defendant's argument that this was an accident or a mistaken touching. After hearing argument from counsel outside the presence of the jury, the trial court determined that the probative value concerning plan, scheme, or method and lack of mistake or accident outweighed any prejudicial effect. Such questions concerning the admission of evidence by definition ordinarily cannot be considered an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Accordingly, we find that the trial court did not abuse its discretion in admitting the other acts evidence.

Next, defendant argues that the trial court erroneously calculated his guideline score. Specifically, he asserts that Offense Variable (OV) 25 was improperly scored. He also contends that his sentence violates the principle of proportionality.

Our Supreme Court has held that appellate relief is not available for claims of error based on alleged misinterpretation or misapplication of the scoring guidelines. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997); *People v Raby*, 456 Mich 487, 497; 572 NW2d 641 (1998). The current sentencing guidelines used by the trial courts do not have the force of law. *Mitchell*, *supra* at 175; *Raby*, *supra* at 496. Therefore, a claim of a miscalculated variable is not in itself a claim of legal error. *Mitchell*, *supra* at 175; *Raby*, *supra* at 496. Application of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. *Mitchell*, *supra* at 177; *Raby*, *supra* at 497. Defendant's claims do not meet these requirements.

Regardless of the score for OV 25 and the guidelines range¹, defendant's sentence is not disproportionately harsh as he contends. Here, defendant admittedly assaulted his four-year-old, emotionally impaired daughter on at least three occasions. Based on the background of the offender and the nature of the offenses, we cannot conclude that defendant's sentence is disproportionately harsh. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995); *People v Lemons*, 454 Mich 234, 260; 562 NW2d 447 (1997). The trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Kathleen Jansen

/s/ Michael J. Kelly

/s/ Jane E. Markey

¹ The guidelines range, as calculated by the trial court, was twelve to forty-eight months. Defendant's proffered range would be zero to thirty-six months. Under either calculation, defendant's sentence would still be within the guidelines range.