STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JAY DEE SOUTH,

Defendant-Appellant.

UNPUBLISHED
December 21, 1999

No. 208968
Genesee Circuit Court
LC No. 96-054907 FC

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

A jury convicted defendant of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), involving persons under the age of thirteen. The trial court sentenced defendant as a second habitual offender, MCL 769.10; MSA 28.1082, to concurrent terms of twenty-five to forty years' imprisonment for the CSC-1 conviction and fifteen to twenty-two and one-half years' imprisonment for the CSC-2 conviction. Defendant appeals as of right. We affirm.

Defendant lived with his girlfriend and her four daughters, three of whom are complainants, almost continuously from the summer of 1988 to September 1995. The oldest complainant testified that, shortly after defendant moved in with them when she was seven, he began touching her sexually, that the touching eventually led to more than twenty instances of vaginal penetration, and that the intercourse and touchings continued until she was twelve years old. The second complainant, who is learning disabled, testified that defendant touched her "in the wrong spots", "put his private in my private" more than twenty times, and made her put "his private" in her mouth when she was between the ages of three and ten years old. The youngest complainant testified that while she and defendant were bathing together when she was five years old, he "touched her in her private" for a short time with his hand.

Defendant was charged in a single information with CSC-1 against the first complainant based on the last incident in the summer of 1993, CSC-1 against the second complainant based on the last incident in September 1995, and CSC-2 against the third complainant based on the incident in September 1995. Following the preliminary examination, defendant filed a motion for separate trials on

each charge referencing MRE 404(b) and arguing that trying all three counts before a single jury would be so highly prejudicial that he could not receive a fair trial on the individual charges. In response, the prosecutor clarified that defendant's motion was governed by the standard set forth in MCR 6.120 and that joinder was proper because the separate counts charged the "same" conduct and were part of a "single scheme or plan." The trial court denied defendant's motion, finding first that the evidence would be admissible in a single trial for the purpose of showing "scheme, common plan, or system in doing an act as well as absence of mistake or accident," and pursuant to the same analysis, found that the offenses were "related" under MCR 6.120(B) "based on a series of connected acts or acts constituting part of a single scheme or plan."

Initially, we note that the sole issue raised on appeal and presented in defendant's question is whether the trial court erred in denying his motion for severance pursuant to MCR 6.120. To the extent the trial court engaged in a separate ruling regarding the admissibility of other acts evidence pursuant to MRE 404(b), defendant does not challenge that ruling and concedes on appeal that his case "does not deal with MRE 404(b)." *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1996) (issue not raised in statement of question involved on appeal as required by MCR 7.212(C)(5) is not preserved for review). MRE 404(b) and severance under MCR 6.120 are separate questions which require separate analyses.[1] See, e.g., *People v Daughenbaugh*, 193 Mich App 506, 510-511; 484 NW2d 690, modified in part on other grounds, 441 Mich 867; 490 NW2d 886 (1992); *People v Miller*, 165 Mich App 32, 40-45; 418 NW2d 668 (1987), reaff'd on remand 186 Mich App 660; 465 NW2d 47 (1991). Accordingly, our review is limited to the joinder issue raised on appeal.

Defendant first argues that the trial court erred in denying his motion for separate trials because the offenses were not "related." We disagree. This Court reviews a trial court's decision on a motion for separate trials for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). An abuse of discretion occurs when the decision is "so grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, and the exercise of passion or bias." *People v Gadomski*, 232 Mich App 24, 33; 592 NW2d 75 (1998).

A criminal defendant is entitled to separate trials on unrelated offenses pursuant to MCR 6.120(B), which provides:

> On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
>
> (1) the same conduct, or
>
> (2) a series of connected acts or acts constituting part of a single scheme or plan.

"The court rule is a codification of the Supreme Court's earlier decision in *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977)." *Daughenbaugh*, *supra* at 509. Citing the commentary to the American Bar Association (ABA) Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance (Approved Draft, 1968) Standard 1.1(b) on which MCR 6.120(B)

is based in part, the *Tobey* Court summarized the three circumstances under which offenses may be deemed "related":

> The commentary accompanying the [ABA Standards Relating to Joinder and Severance] explains that *"same conduct"* refers to multiple offenses "as where a defendant causes more than one death by reckless operation of a vehicle." *"A series of acts connected together"* refers to multiple offenses committed "to aid in accomplishing another, as with burglary or larceny or kidnapping and robbery." *"A series of acts * * * constituting parts of a single scheme or plan"* refers to a situation "where a cashier made a series of false entries and reports to the commissioner of banking, all of which were designed to conceal his thefts of money from the bank." [*Id.* at 151-152 (emphasis added).][2]

In this case, it is apparent that the charges against defendant were not based upon "the same conduct" or "upon a series of acts connected together" as these standards have been applied by our courts. See *Tobey*, *supra* at 152-153; *Daughenbaugh*, *supra* at 510; *Miller*, *supra* at 45; *People v Solak*, 146 Mich App 659, 666-667; 382 NW2d 495 (1985); *People v Beets*, 105 Mich App 350; 352-353; 306 NW2d 508 (1981); *People v Loukas*, 104 Mich App 204, 208; 304 NW2d 532 (1981); *People v Smith*, 90 Mich App 20, 26; 282 NW2d 227 (1979); *People v Ritchie*, 85 Mich App 463, 468-470; 271 NW2d 276 (1978). The relevant inquiry, therefore, is whether the offenses constitute "part of a single scheme or plan." In *People v McCune*, 125 Mich App 100, 103; 336 NW2d 11 (1983), this Court quoted the commentary to successor ABA Standard 13-1.2 relating to "common plan offenses," on which MCR 6.120(B) is also based:

> Common plan offenses are the most troublesome class of related offenses. These offenses involve neither common conduct nor interrelated proof. Instead, the relationship among offenses (which can be physically or temporally remote) is dependent upon the existence of a plan that ties the offenses together and demonstrates that the objective of each offense was to contribute to the achievement of a goal not attainable by the commission of any of the individual offenses. A typical example of common plan offenses is a series of separate offenses that are committed pursuant to a conspiracy among two or more defendants. Common plan offenses may also be committed by a defendant acting alone who commits two or more offenses in order to achieve a unified goal." (Footnotes omitted).

In *Miller*, *supra*, this Court held that the defendant was not entitled to separate trials on charges of CSC-1 and CSC-2 involving the five-year-old victim over a four-month period. *Id.* at 36, 43, 45. The Court determined that the alleged touching of the victim's penis and the alleged penetration of the victim's rectal area were akin to a series of acts constituting parts of "a single plan or scheme on the part of defendant to sexually molest the victim when the opportunity presented itself" because the incidents occurred during warm weather and at a learning center in locations of seclusion. *Id.* at 45.

We similarly conclude that the testimony in the instant case indicates that the acts allegedly committed against the individual complainants constitute "part of a single scheme or plan" on

defendant's part to engage in an unbroken chain of sexual contact with the young members of his household whenever the opportunity arose. The preliminary examination testimony established that defendant began fondling the first complainant shortly after he moved in with them, and after a few years, began to simultaneously molest the second complainant; that defendant continued to molest the first complainant until another sister told their mother that she saw defendant touching the first complainant's bare breasts, complainants' mother reported that incident to the police, and the first complainant was placed in foster care; and, that defendant continued to molest the second complainant for approximately two more years and then began with the third complainant until defendant was asked to leave their home.

The testimony further revealed that defendant began molesting each complainant at a very early age, that the alleged acts all occurred in the family home when complainants' mother was at work or late at night when she was sleeping, and, that defendant, who was at all times an authority figure and disciplinarian, warned the first two complainants not to reveal the molestations to anyone. While defendant notes a two-year gap between the charging incident for the first complainant and the charging incidents for the second and third complainants, temporal proximity is not a requirement for establishing a single scheme or plan under MCR 6.120(B). *McCune*, *supra* at 103. In our view, this evidence sufficiently establishes that the individual acts committed against complainants constituted part of a single plan or scheme within the meaning of MCR 6.120(B) on defendant's part to engage in continuous sexual activity with the young members of the same household whenever the opportunity arose. *Miller*, *supra* at 45. Accordingly, the offenses were related and defendant was not entitled to separate trials.

Alternatively, defendant contends that even if the offenses were related, the trial court abused its discretion in joining the charges for a single trial because the nature of the evidence prevented the jury from assessing each count individually and was unduly prejudicial. Again, we disagree. A trial court may sever "related" offenses on the motion of either party where "severance is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." MCR 6.120(C); see also *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). In making this determination, relevant factors include:

> The timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial. [MCR 6.120(C)]

After a thorough review, we are not convinced that the trial court's decision denied defendant a fair trial on the separate charges. There is no indication that the nature of the evidence or the number of charges created the potential for confusion or unfair prejudice. The court informed the jury on two separate occasions of the three counts pertaining to each complainant, the court instructed the jury that they must consider the three charges separately even though they were being tried together, and the testimony presented by the numerous witnesses was severable as to each complainant. Further, while the nature of the charges inherently cast defendant in a negative light, the manner in which the evidence was presented enabled the jury to distinguish the evidence and to apply the law intelligently as to each

offense. *McCune, supra* at 106. This is evidenced by the verdict in which the jury convicted defendant of the charged offense as to the second complainant, convicted him of a lesser offense as to the first complainant, and acquitted him of the charge against the third complainant. See *People v Phillips*, 20 Mich App 103, 111; 173 NW2d 804 (1969), aff'd 385 Mich 30; 187 NW2d 211 (1971) (addressing joinder of multiple defendants in a single prosecution for rape against the same victim). We further reject defendant's argument that consolidation was highly prejudicial because complainants bolstered each others' testimony where defendant took full advantage of the opportunity to impeach complainants, and where each complainant admitted that they had not seen defendant act inappropriately with the others. Finally, separate trials would have required repeated testimony from complainant's mother, the examining physician, police officer, three employees of the Family Independence Agency, a psychologist, as well as from defendant and his witnesses in all or at least two trials. Consequently, the trial court's decision promoted fairness to the parties and did not restrict a fair determination of defendant's guilt or innocence on each offense. We find no abuse of discretion.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Henry William Saad

[1] We note that both defendant and the trial court appear to have operated under the assumption that the proofs necessary to show "acts constituting part of a single plan or scheme" under MCR 6.120(B) and those required to show a "scheme, plan, or system in doing an act" under MRE 404(b) relating to other acts evidence are identical. This assumption, however, is not supported by our case law. Establishing the standard set forth in MRE 404(b) generally requires a high degree of similarity between the prior acts and the charged offenses. See, e.g., *People v Sabin*, 223 Mich App 530, 535-536; 566 NW2d 677 (1997), reaff'd on remand 236 Mich App 1; 600 NW2d 98 (1999) ("Typically, common-scheme evidence is admissible only where the defendant commits a series of crimes in a unique, regular, or regimented manner"); *People v Lee*, 212 Mich App 228, 245-246; 537 NW2d 233 (1995); *Miller, supra* at 663-664. In contrast, MCR 6.120(B) does not require "common conduct", but rather, "a plan that ties the offenses together and demonstrates that the objective of each offense was to contribute to a goal not attainable by the commission of any of the individual offenses." *People v McCune*, 125 Mich App 100, 103; 336 NW2d 11 (1983), quoting the commentary to ABA Standard 13-1.2.

[2] The Commentary to ABA Standard 1.1 provided:

> Thus, joinder is clearly allowed for offenses arising out of the same conduct, as where a defendant causes more than one death by the reckless operation of a vehicle. (In some cases, as where there is a theft of goods belonging to more than one person, the question may arise whether more than one crime has been committed; that is a question of substantive law and is not dealt with here.) Joinder is allowed of offenses within a close time-space sequence, as with the killing of several people with successive shots from a gun or the successive burning of several structures. The same is true where

one offense is committed to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery. Finally, joinder is allowed for offenses which are part of a single scheme, even if considerable time passes between them. Illustrative is . . . where a cashier made a series of false entries and reports to the commissioner of banking, all of which were designed to conceal his thefts of money from the bank. *Tobey, supra* at 152 n 15, quoting the commentary to Standard 1.1(b), pp 12-13, *supra* (citations omitted).]