

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY MICHAEL COMSTOCK,

Defendant-Appellant.

UNPUBLISHED

March 7, 2000

No. 211945

St. Joseph Circuit Court

LC No. 96-8047

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was acquitted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). Defendant was sentenced to a term of imprisonment of 10 to 15 years. Defendant appeals as of right from his conviction and sentence. We affirm.

The charges against defendant under first-degree CSC alleged that defendant engaged in sexual intercourse with his daughter when she was twelve years old. The charges against defendant under third-degree CSC alleged that defendant engaged in sexual intercourse with her when she was fourteen years old. At trial the prosecutor stated that although defendant was charged with two specific incidents of sexual abuse upon his daughter, there were numerous instances where he had been sexually abusing her from the time she was five years old until she left the family home to live with her grandparents. The prosecutor explained that the two incidents with which defendant was charged were singled out because the victim could give a specific time frame for those incidents.

Defendant first argues that the trial court erred by allowing other bad acts evidence to be introduced at trial. We disagree. The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

At a hearing on defendant's motion to suppress other acts evidence, defendant objected to allowing the prosecutor to elicit testimony that other sexual conduct occurred between defendant and the victim from the time she was five years old until the time she was fourteen years old. The court ruled

that the evidence was admissible to show the overall circumstances of the victim's environment and related to the credibility of the victim. The Court determined that it would be difficult for a jury to believe, without knowing all of the surrounding circumstances, how there could be two isolated sexual abuse incidents. The court reasoned that the danger of unfair prejudice seemed to be the proof of defendant's character and the probative value related to establishing the context in which the charged acts occurred. The court then gave equal weight to each factor and concluded that the danger of unfair prejudice did not substantially outweigh its probative value.

MRE 404(b), which governs admission of evidence of bad acts, provides:

(1) 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.

To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). A limiting instruction to the jury may also be provided by the trial court upon request. *Id.*

In this case, the prosecution offered the testimony to explain the overall surrounding circumstances, the environment of the victim, the opportunity of defendant to commit the crime, and the credibility of the victim. The evidence was not offered to show defendant's "inclination to wrongdoings or to prove that defendant committed the conduct in question." *Id.* Instead, the evidence was offered to rebut defendant's allegation that his daughter fabricated the charges against him to get even with him for spanking her with a belt.

Additionally, the testimony regarding the long-term continuous sexual abuse upon the victim was offered in conjunction with the testimony of an expert witness in the area of child sexual abuse,¹ to explain why the victim denied the abuse when asked by friends and relatives if her father ever sexually abused her. It was not until long after the sexual abuse had stopped and after the victim had formed a trusting relationship with a family friend that she revealed that defendant had been sexually abusing her since she was five years old. Absent the testimony that the sexual abuse had occurred over a period of years and the surrounding circumstances of the victim's environment, the prosecution could not effectively rebut defendant's claim that the charges were groundless and fabricated by the victim. As the Supreme Court found in *Starr*, "[w]ithout such evidence, the factfinder would be left with a chronological and conceptual void regarding the events." *Starr, supra* at 502.

We find that the proffered evidence was probative to refute the defendant's allegations of fabrication of charges and also to refute defendant's allegations that he never had an opportunity to sexually abuse the victim. We further find that the evidence was substantially more probative than

prejudicial. The charges were filed a long time after the abuse had stopped and there was no medical evidence to substantiate the victim's claims. The bad acts evidence is the only evidence that effectively refutes the claim of fabrication and explains the delay in reporting the crime. Therefore, we cannot conclude that the trial court abused its discretion when it admitted evidence of other acts under MRE 404(b).

Next, defendant argues that the trial court erred by admitting expert testimony during trial. We disagree. Decisions regarding admission of evidence are reviewed for an abuse of discretion. *People v Adair*, 452 Mich 473, 484; 550 NW2d 505 (1996).

Defendant objected to the testimony of the prosecutor's expert witness, who opined that it is not unusual for victims of sexual abuse to deny that it occurred. Defendant argued that one of the key ways of explaining to the jury the falsity of the claim was the fact that the victim had been inconsistent in her story that when asked about sexual abuse many times, many times she denied it ever happened to her and then later said that it really did happen to her. Defendant argued that it was outside the purview of the expert witness to testify that people making real claims will often deny them at first.

If the trial court determines that specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert may testify to the knowledge by opinion or otherwise. MRE 702, *People v Peterson*, 450 Mich 349, 362; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995). An expert may not testify that sexual abuse occurred, may not vouch for the truthfulness of a victim, and may not testify that the defendant is guilty. *Id.* at 352. However, "(1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Id.* at 352-353.

In this case, Dr. James Henry testified as an expert witness in the prosecution's case in chief. The prosecution gave Dr. Henry several hypothetical situations which paralleled the alleged incidents between the victim and defendant. Dr. Henry stated that it was not unusual for a child who was being sexually abused to deny it. He testified that reasons for not reporting the sexual abuse can be a lack of development of trust, a feeling of powerlessness and a feeling of shame. He also testified that in delayed reporting situations the child often feels responsible for the abuse, has no one to trust because that trust has been violated, and the child feels powerless because of having been victimized. Dr. Henry testified that oftentimes it will be anywhere from two years and beyond before a child will disclose the sexual abuse to anyone. We find that Dr. Henry's testimony was properly admitted. Dr. Henry testified regarding typical symptoms of child sexual abuse and did not opine that the victim was telling the truth. Therefore, we find no abuse of discretion.

Finally, defendant argues that his sentence of ten to fifteen years' imprisonment was disproportionate because the trial court exceeded the minimum guidelines range of three to six years. We disagree. We review disproportionality of a defendant's sentence for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence constitutes an abuse of

discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and offender. *Id.*

Under *Milbourn*, the “key test” of proportionality is whether the sentence reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). It is possible that a sentence which falls within the guidelines could still be disproportionate because it is either too high or too low. *Id.* “In the absence of factors legitimately considered at sentencing and not adequately considered by the applicable guidelines, a departure from the recommended range indicates a possibility that a sentence may be disproportionate.” *Id.* Sentencing judges are not required to adhere to the guidelines because guidelines may not perfectly represent the principle of proportionality, they are not legislatively mandated, and strict adherence to them would prevent their evolution. *Id.*

In this case, there were several aggravating factors that were not accounted for in the sentencing guidelines. First, the trial court determined that, even though defendant was acquitted of first-degree criminal sexual conduct and convicted of third-degree criminal sexual conduct that conservatively the sexual abuse happened a dozen times per year and it continued for a nine year period. The court reasoned that when there are one or two incidents, the guidelines become important because the harm can then be quantified, but in this case, where the abuse occurred many times per year for many years, “the guidelines are meaningless because they’re absolutely valueless in quantifying.” Second, the guidelines fail to account for the family relationship between the defendant and the victim which is an archetype justification for such departure. *Houston, supra* at 323. In this case, defendant was the victim’s own father. Third, the guidelines failed to account for defendant’s lack of insight, empathy or remorse and little chance at rehabilitation, which factors have been found to be legitimate considerations when determining a sentence. *Id.* Fourth, the court found defendant to have been dishonest in both his oral interview and written testing during his psychological evaluation. The psychologist determined that outpatient therapy would not deter defendant’s behavior from reoccurring because defendant cannot accept and does not recognize the abuse and dysfunction in his family. Fifth, the victim was exploited by defendant and was cast from her immediate family.

We find that defendant’s sentence did not constitute an abuse of discretion because the offense involved circumstances not accounted for in the guidelines.

Affirmed.

/s/ Brian K. Zahra

/s/ Michael J. Kelly

/s/ Gary R. McDonald

¹ The prosecution’s expert witness opined that it is not unusual for a child who is being sexually abused to deny it.