

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD LEON LEE,

Defendant-Appellant.

UNPUBLISHED

May 12, 2000

No. 216244

Washtenaw Circuit Court

LC No. 97-008561-FC

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), arising out of acts of sexual penetration perpetrated by him on his minor daughter. He was sentenced to concurrent life sentences. Defendant appeals as of right. We affirm.

Defendant first argues that error requiring reversal occurred when the prosecution solicited other bad-acts evidence in violation of MRE 404(b). Because defendant failed to object to the admission of the evidence, this issue is unpreserved, and defendant must demonstrate outcome-determinative plain error in order to avoid forfeiture of this issue. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In this case, there is plain error. The prosecutor elicited evidence of another bad act committed by defendant against the victim without providing the proper notice under MRE 404(b)(2). In addition, we find entirely disingenuous the prosecution's argument that the defendant opened the door to the line of questioning by which the prosecutor elicited the other bad-acts evidence. Moreover, the evidence was not proper under MRE 404(b)(1), even if reasonable notice had been given. The prosecution failed to articulate a proper purpose and failed to make any demonstration at all that the evidence was truly probative of something *other* than defendant's propensity to commit sexual assaults upon his daughter. *People v Crawford*, 458 Mich 376, 387-390; 582 NW2d 785 (1998). The articulated reasons for the admission of the other bad-acts evidence were that it would negate lack of accident or mistake, negate innocent intentions, and demonstrate sexual gratification. Here, the prosecution did not have to show sexual gratification because defendant was charged under MCL 750.520b(1)(a); MSA

28.788(2)(1)(a). See *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). In addition, defendant denied the sexual penetrations for which he was charged. He did not argue mistake or accident. Thus, the other bad-acts evidence was not necessary to prove lack of mistake or accident. And, finally, while defendant admitted to penetration while allegedly placing medication on the victim's vaginal area, this penetration fits squarely within the definition of sexual penetration, MCL 750.520a(l); MSA 28.788(1)(l), and thus, the prosecution did not have to negate any alleged innocent intent.

While we find that there was plain error in this case, we nevertheless affirm. Defendant has failed to demonstrate that the plain error affected the outcome of the lower court proceedings. *Carines, supra*. The evidence against defendant was overwhelming. Numerous instances of sexual penetration of the victim by defendant were placed on the record. The record does not support a conclusion that that the references to any previous assault occurring in Jackson were given any undue weight in light of the other testimony. In addition, we find that the admission of the improper bad-acts evidence in this case did not result in the conviction of an actually innocent defendant and did not seriously affect the “fairness, integrity or public reputation of judicial proceedings.” *Id.*

Defendant also argues that the evidence was insufficient to sustain his conviction. When reviewing claims of insufficient evidence, we view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). We find no grounds for reversal.

A conviction under MCL 750.520b(1)(a); MSA 28.788(2)(1) requires proof of sexual penetration of a victim under the age of thirteen. *Lemons, supra*. Viewing the testimony of the victim and the other witnesses in a light most favorable to the prosecution, there was sufficient evidence from which a reasonable jury could have found that the elements of three counts of first-degree criminal sexual conduct were proved beyond a reasonable doubt. The victim testified to three distinct penetrations, including two penile/vaginal penetrations, one of which occurred around Halloween of 1996 and the other around Christmas of 1996. She also testified that defendant placed his hand in her vagina. A Michigan State Police trooper testified that the victim indicated that defendant engaged in both penile and digital penetration of her vagina. In addition, two other witnesses testified that they observed defendant engage in acts of digital penetration. The prosecutor presented evidence sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant sexually penetrated the victim on three occasions.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Michael R. Smolenski