

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES BRADFORD MORRISON,

Defendant-Appellant.

UNPUBLISHED

July 28, 2000

No. 213822

Saginaw Circuit Court

LC No. 96-013249-FH

Before: Owens, P.J., and Murphy and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The trial court sentenced defendant as an habitual offender, second offense, to concurrent terms of 7 to 22½ years' imprisonment on each count. Defendant appeals as of right. We affirm the convictions but remand for correction of a clerical error in the judgment of sentence.

The charges arose as the result of defendant's fondling of the ten-year-old victim. The victim and her siblings were friends of defendant's three sons. On various occasions during the summer of 1996, the victim and her siblings stayed overnight at defendant's home. The victim testified that on four of those occasions defendant left his bedroom in the middle of the night and laid down next to the victim and fondled her vagina. At trial, the court allowed the prosecutor to introduce defendant's statement to Illinois police in a 1991 investigation, in which defendant admitted fondling a six-year-old child and fondling other children twelve years earlier. Defendant alleges error in the admission of this other acts evidence pursuant to MRE 404(b).

Defendant first contends that the prosecutor gave defective and insufficient notice of intent to use this other acts evidence. We conclude that notice was not defective under MRE 404(b)(2) where, although the prosecutor furnished no explanation regarding how the evidence fit within each specific category, a list of purposes for which he would use the other acts evidence was properly detailed in the notice.

Next, defendant argues that the evidence pertaining to his prior history of child molestation was improperly admitted under MRE 404(b). Admissibility of evidence is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Use of other acts evidence reflecting on a defendant's character is limited by MRE 404(b), so as to avoid the danger of conviction based on past misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). To be admissible, other acts evidence must (1) be offered for a proper purpose, (2) be relevant, (3) have a probative value that is not substantially outweighed by its potential for unfair prejudice, and (4) be accompanied by a limiting instruction if requested. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993).

The trial court held that defendant's statement to the police in the Illinois case satisfied the four-pronged test of *VanderVliet*. The court determined that the evidence was offered for the proper purposes of showing defendant's intent, motive, common scheme, plan or system, and to rebut the inference of fabrication. The trial court stated that it recognized that defendant would incur some prejudice as a result of the evidence, but found that the probative value of the evidence was not substantially outweighed by unfair prejudice.

Defendant in part contends that because he claimed he did not commit the crime, the evidence should not have been admitted to show intent or lack of accident or mistake. Although a general denial of guilt puts in issue all the elements of a charged offense, *Starr, supra* at 501, before other acts evidence may be admitted the trial court must ensure that the proffered evidence is truly probative of something other than a defendant's propensity to commit the crime. *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998). The prosecutor must demonstrate a non-character inference linking the evidence to the ultimate issue. *Id.* In this case, there was no question regarding the intent with which defendant did the acts. Rather, the question was whether defendant did the acts at all. The evidence was improperly used to establish that it was more likely that defendant actually committed the acts because he had committed similar acts before.

Defendant also asserts that the trial court erred in admitting the evidence to rebut an implied charge of fabrication. Although this was deemed to be a proper purpose in *Starr, supra* at 501, there the other acts evidence was logically relevant in that it explained why the victim's mother was suddenly concerned about the subject of sexual abuse and it justified the timing of a delayed allegation of abuse. Here, in contrast, the prosecutor merely asserted that the evidence of defendant's previous acts countered the suggestion of fabrication because the fact that defendant had committed similar acts bolstered the victim's credibility. This again was an improper, character based use of other acts evidence.

The trial court's final basis for admission of this other acts evidence was its relevance to the proper purpose of demonstrating defendant's common scheme, plan or system in assaulting his victims. The prosecutor argued that defendant took advantage of young girls who were playmates of his sons, creating situations where the victims could be at his home and thus affording himself access and opportunity. The prosecutor also noted the similarity of the extent of defendant's actions, limited to fondling the victims' vaginas. Though we believe that this theory represents the most reasonable and plausible of the asserted bases for admission, resolving this close question we conclude that the separate

acts lack necessary aspects of uniqueness or distinction. See *People v Sabin (On Remand)*, 236 Mich App 1, 9; 600 NW2d 98 (1999), lv gtd 461 Mich 896 (1999).

Accordingly, we find that the trial court did err in admitting the contested other acts evidence. Because, however, we additionally find that plaintiff cannot establish the high standard of prejudice required for reversal by *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), we conclude that this error was harmless. A preserved, nonconstitutional error is not a ground for reversal unless, on examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Id.* In the absence of this improperly introduced evidence, defendant's trial would have been a classic credibility contest between himself and the victim. Having reviewed the entire record, we conclude that the case was devoid of substantial evidence that would lead one to conclude that the victim was either lying or mistaken. The victim's consistent and plausible testimony regarding the assaults, combined with the factual background surrounding her decision to come forward with the allegations, demonstrates no malice or other reason to lie. In fact, the victim's reason for raising the allegations when she did - her concern that defendant was initiating similar abuse with her younger sister - was utterly credible. Therefore, while we acknowledge that the erroneously admitted evidence was potentially damning in its own right, the error was ultimately harmless under *Lukity*, *supra*.¹

Defendant additionally argues that the trial court erred in allowing the victim's mother to testify that on one occasion defendant encouraged her younger daughter to go with her brother to defendant's house. Defendant failed to object to this testimony at trial, thus the issue is unpreserved and subject to review for manifest injustice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). We conclude that no manifest injustice occurred because the testimony was independently relevant as factual background explaining the victim's decision to belatedly come forward with allegations of defendant's improper sexual contact.

Defendant finally argues that the trial court erred in denying his motion for mistrial after an expert witness for the defense defined the term "pedophile." We will not reverse the trial court's grant or denial of a mistrial unless there was an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). A mistrial should be granted only for an irregularity that prejudices the defendant's rights and impairs his ability to a fair trial. *Id.* The expert's definition of a pedophile was given in general terms and cannot be said to have been a diagnosis of defendant. Because the testimony did not prejudice defendant's rights nor impair his right to a fair trial, the trial court properly denied the

¹ Defendant also asserts error with regard to the jury instructions concerning this other acts evidence. This issue is essentially moot given our conclusion that admission of this evidence was erroneous, yet harmless. We note, however, that because at trial defendant raised no objection to the instructions, the issue is also unpreserved. Were it necessary to the instant disposition for us to rule on this issue, we would find that the instructions adequately protected defendant's rights by informing the jurors of the limited purpose for which they could use other acts evidence. *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995). Accordingly, no manifest injustice occurred. *Id.* at 210; *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

motion. Similarly, because defendant was not denied a fair trial, there was no prosecutorial misconduct. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Lastly, we note that defendant's judgment of sentence incorrectly states that his maximum sentence on each count is 170 months. The court in fact imposed a maximum sentence of 22¹/₂ years, or 270 months. Where there is a ministerial error in a judgment of sentence, the error may be corrected on remand. *People v Avant*, 235 Mich App 499, 521-522; 597 NW2d 864 (1999). We accordingly remand to the trial court for the limited purpose of correcting the judgment of sentence to accurately reflect defendant's true maximum sentence of 270 months.

Defendant's convictions and sentence are affirmed. We remand for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Helene N. White