STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JON PATRICK KITTLE,

Defendant-Appellant.

UNPUBLISHED
August 11, 2000

No. 211628
Kent Circuit Court
LC No. 97-011715-FC

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b). He was sentenced to four concurrent terms of 30-70 years of imprisonment. Defendant appeals as of right. We vacate defendant's first-degree criminal sexual conduct convictions and remand for entry of a judgment of conviction of four counts of third-degree criminal sexual conduct and resentencing.

Defendant first argues that reversal of his convictions is required because the trial court failed to read the jury instructions for first-degree criminal sexual conduct in their entirety. Specifically, the court failed to include the aggravating circumstance alleged in this case: that defendant was a member of the same household as the complainant. However, defendant failed to preserve this issue because he did not object to, but approved, the instructions given. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Therefore, in order to avoid forfeiture of this unpreserved, constitutional issue, *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999), defendant must demonstrate plain error that affected defendant's substantial rights, i.e, defendant must show that the error affected the outcome of the trial. *Id.* at 763-764. We conclude that defendant has demonstrated plain error that affected his substantial rights.

Generally, jury instructions must include all the elements of the offense and must not exclude any material issues, defenses, or theories if the evidence supports them. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). See also *People v Lenkevich*, 394 Mich 117, 123-124; 229 NW2d 298 (1975). To establish first-degree criminal sexual conduct against a person who is at least thirteen but less than sixteen years old, the prosecutor must prove beyond a reasonable doubt the following

elements: 1) that the defendant engaged in sexual penetration with the individual, and 2) that the individual was at least thirteen but less than sixteen years of age and the defendant was a member of the same household, related to the victim by blood to the fourth degree, or in a position of authority over the victim. MCL 750.520b; MSA 28.788(2); see also CJI2d 20.1, 20.4.

Here, the trial court instructed the jury that defendant was charged with first-degree criminal sexual conduct and that to prove the charge, the prosecutor must prove "that defendant engaged in a sexual act that involved entry into the complaining witness's anus or mouth by the defendant's penis" at the time the complainant was either thirteen, fourteen, or fifteen. The trial court failed to state that the prosecution must also prove defendant was a member of the same household as the complainant. Because the aggravating circumstance was omitted, the instruction given was that appropriate for a charge of third-degree criminal sexual conduct. MCL 750.520d(1)(a); MSA 28.788(4)(1)(a); see also CJI2d 20.12, 20.14. This was plain error, i.e., error that is clear or obvious. See *Carines, supra* at 763, citing *United States v Olano,* 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

The error also affected defendant's substantial rights. The aggravating circumstances listed in a charge of first-degree criminal sexual conduct distinguish first-degree criminal sexual conduct from third-degree criminal sexual conduct. Because there was conflicting testimony with regard to when defendant moved into the complainant's household, i.e., whether it was before or after he turned sixteen, we have no idea whether the jury believed the defendant to be a member of the complainant's household at the time the charged acts occurred. In other words, by finding defendant guilty after instruction on third-degree criminal conduct, the jury did not necessarily find that defendant was a member of the complainant's household at the time the alleged acts took place. Because defendant was convicted of first-degree criminal sexual conduct and sentenced accordingly, when it is not clear that the jury found that the prosecution had proved all elements of that crime beyond a reasonable doubt, we conclude that the court's error in instructing the jury affected defendant's substantial rights. See *Lenkevich, supra.*

However, it is not necessary to order a new trial. Rather, because the jury returned a verdict on what were proper instructions for third-degree criminal sexual conduct, we vacate defendant's convictions of first-degree criminal sexual conduct and remand for entry of a judgment of conviction of four counts of third-degree criminal sexual conduct. See *People v Coddington,* 188 Mich App 584, 606; 470 NW2d 478 (1991); *People v Garrett,* 161 Mich App 649, 652; 411 NW2d 812 (1987). The prosecutor may, in his discretion and upon notice to the trial court before resentencing, have the third-degree criminal sexual conduct convictions vacated and have defendant retried on the first-degree criminal sexual conduct charges. See *Coddington, supra; Garrett, supra.*

Defendant's second argument on appeal is that the trial court abused its discretion when it admitted evidence that defendant had sexually abused another male, similar in age to the complainant in this case, a number of years earlier. We disagree. The admissibility of MRE 404(b) "other 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). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

At trial, the complainant testified that his father introduced him to defendant when the complainant was about twelve years old. Defendant would sometimes accompany the complainant to his baseball games and then afterward take the complainant back to his apartment where he would massage the complainant and ask the complainant to massage him. The complainant testified that when he was about thirteen or fourteen, defendant moved into his home. He took the complainant to movies, bought him things, and let him use his truck. The body massages continued, and then defendant performed oral sex on the complainant and had the complainant perform oral sex on him. Defendant would put Vaseline, baby lotion, or lotion on the complainant's thighs and then masturbate. He attempted anal intercourse once. The complainant also testified that defendant had taken pictures of him coming out of the shower and sleeping naked.

Similarly, the other young man testified that when he was about twelve years old, defendant began dating his sister. Defendant would often take the witness out to see movies or out to eat. The witness testified that after defendant moved into the house with the witness and his sister, he began to molest the witness. Sometimes defendant would ask the witness to give him back massages. He would put Vaseline on the witness's buttocks and legs and then masturbate by rubbing on the witness. The witness further testified that defendant performed oral sex on the witness, had the witness perform oral sex on him, and attempted anal intercourse once. Defendant also took photographs of the witness during at least one assault. These episodes sometimes took place at defendant's apartment and sometimes at the witness's house. Following the witness's testimony, the court gave a limiting instruction.

Under MRE 404(b), other acts evidence is admissible if it is offered for a proper purpose, it is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). However, it is not admissible if offered solely to show the criminal propensity of an individual and that he acted in conformity with that propensity. *Id.* at 65. In addition, the trial court may provide a limiting instruction if requested. *Id.* at 75.

Here, the prosecutor offered the other acts evidence for proper purposes under MRE 404(b): to establish the absence of mistake or accident or to show defendant's "modus operandi." While the court indicated that it was admitting the evidence to show "modus operandi," it instructed the jury that they could only consider whether the other acts evidence "tends to show that the defendant used a common method of preparation or a plan, system, or characteristic scheme that he used previously in committing similar acts." We conclude that the evidence was admissible for the proper, noncharacter purpose of showing show defendant's "scheme, plan, or system in doing an act." MRE 404(b); *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998).

Defendant denied that the instances of molestation alleged by the complainant ever took place. Thus, all elements of first-degree criminal sexual conduct were at issue, and therefore, material. *Id.* at 500-501. Defendant also maintained that the complainant manufactured the claims of abuse because defendant had reported to the complainant's mother that he had discovered several liquor bottles under the complainant's bed. Defendant pointed to the complainant's failure to complain earlier about the alleged sexual abuse, his withdrawal of his claims of abuse after he did say something, and his father's

failure to act on the complainant's earlier and abandoned claims of abuse, in support of his claim of fabrication. Thus, the other acts evidence was relevant to show defendant's common scheme, plan or system to rebut defendant's claim of fabrication. *Id.* at 501. The physical similarity of acts alleged by both young men and similarities in defendant's manner of approaching and treating them makes it more probable that the complainant was not manufacturing the allegations of abuse than it would be without the evidence. MRE 401; *Crawford, supra* at 387; see also *People v Terry Miller (On Remand),* 186 Mich App 660, 663-664; 465 NW2d 47 (1991). Cf. *People v Sabin,* 223 Mich App 530, 535-536; 566 NW2d 677 (1997).

Finally, although the evidence was prejudicial to defendant, we do not believe its probative value was substantially outweighed by the danger of unfair prejudice. The probative value of the evidence was substantial and the court gave an extensive limiting instruction. We conclude, therefore, that the trial court did not abuse its discretion in admitting the other acts evidence.

We vacate defendant's first-degree criminal sexual conduct convictions and remand for entry of a judgment of conviction of four counts of third-degree criminal sexual conduct and resentencing. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jeffrey G. Collins