STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 27, 2000
v	No. 218345 Ostego Circuit Court
THOMAS EDWARD POIRIER, Defendant-Appellant.	LC No. 98-002318-FC

Before: Kelly, P.J., and Whitbeck and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count each of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to thirty to sixty years' imprisonment for the CSC I conviction and to fifteen to thirty years' imprisonment for the CSC II conviction. Defendant appeals as of right. We affirm.

Defendant's sole argument on appeal is that the trial court denied him a fair trial when it admitted testimony from defendant's sister, nephew, and niece, that defendant sexually assaulted them when they were between the ages of five and twelve years old. Defendant contends that the alleged other acts were not sufficiently similar to the charged acts to be probative of a common plan, scheme, or system, and that the prejudicial effect of the evidence far outweighed any potential probative value. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). This Court will not find an abuse of discretion merely because it determines that it would have ruled differently on a close evidentiary question. *Smith*, *supra* at 550.

The standard regarding the admissibility of other acts evidence under MRE 404(b) is set forth in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Other acts evidence 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. However, the evidence is admissible if it is offered for a proper purpose under MRE 404(b)[1]; it is relevant under MRE 402, as enforced through MRE 104(b); and, under the balancing test of MRE 403, its probative value is not substantially outweighed by unfair prejudice. *Id.* at 74-75. In addition, the trial court may provide a limiting instruction if requested. *Id.* at 75.

In this case, the trial court admitted the other acts evidence for the purpose, among others, of showing a scheme, plan, or system in doing an act. In *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000), our Supreme Court discussed the degree of similarity necessary between the charged acts and the proffered other acts to support an inference of a scheme, plan, or system. Citing *People v Ewoldt,* 7 Cal 4th 380, 403; 867 P2d 757 (1994), the Court explained that "the necessary degree of similarity is greater than that needed to prove intent, but less than that needed to prove identity." *Sabin*, *supra* at 65. In *Sabin,* the defendant was charged with sexual abuse of his daughter, and the trial court admitted testimony by the victim's half-sister regarding earlier sexual abuse of her by the defendant, her stepfather. *Id.* at 47, 49-50. Noting that the defendant and both of the alleged victims had a father-daughter relationship, that the victims were similar in age at the time of the abuse, and that the defendant "played on his daughters' fears of breaking up the family to silence them," the Court concluded that the trial court did not abuse its discretion in admitting the other acts evidence because "[o]ne could infer from these common features that defendant had a system that involved taking advantage of the parent-child relationship, particularly his control over his daughters, to perpetrate abuse." *Id.* at 66.

Here, the complainant testified that defendant is her uncle and that he lived with his parents, the complainant's grandparents. The complainant would often visit at her grandparents' home while defendant was there. When the complainant was three or four years old and visiting at her grandparents' home, defendant took her to his bedroom, put a car battery in front of the door, pulled down her pants and underwear, and inserted his finger into her vagina. After the complainant cried, defendant stopped, but told her that if she told anyone, "he'd do somethin' to me." The complainant further testified that on another occasion in defendant's bedroom, defendant showed the complainant Playboy magazines and asked her to undress like the people in the magazine, and that when she was seven or eight, defendant took her into his bedroom, touched her in her vaginal area, and grabbed her hand and tried to get her to touch his penis. The complainant also testified that at a family camping get-

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[1] MRE 404(b)(1) provides:

> 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.

together to celebrate her ninth birthday, defendant offered to give the complainant a quarter if he could touch her vaginal area.

Defendant's nephew testified that on numerous occasions when he was between the ages of six and ten and was spending the night at his grandparents' house, defendant would take him into defendant's bedroom and show him Playboy magazines, touch his penis, and ask him to touch defendant's penis. He further testified that defendant told him not to tell anybody about these encounters because the defendant would get in trouble.

Defendant's sister testified that when she was about seven years old, very early in the morning when she was in the bathroom in their home, defendant came in, used a mop to bar the bathroom door shut, and touched her breasts and vaginal area. She testified that her parents were home when this occurred and that defendant told her after the incident that she was not to tell anyone or she would "get in trouble."

Finally, defendant's niece testified that defendant touched her inappropriately over fifteen times when she was between the ages of five and twelve years old. She further testified that defendant attempted anal penetration and oral sex on her. She testified that defendant offered her jello, ice cream bars, and popsicles to prevent her from telling anyone about the incidents, and that some of the incidents occurred while she was visiting at defendant's residence when defendant's parents were in the house.

Here, as in *Sabin*, the common features of the uncharged other acts and the charged acts suggest a scheme, plan, or system by defendant. The alleged victims were of a similar age and defendant gained access to them because they were present in his home (his sister lived there; his nieces and nephew often visited), or at family functions. He took advantage of the privacy of his bedroom or the bathroom to accomplish the alleged acts, and he sought the cooperation and/or silence of his alleged victims by warnings or offers of rewards, such as candy or money. Although defendant points out that the testimony of the complainant and defendant's other niece differed in that the acts testified to by the complainant involved touching and digital penetration, while his other niece testified to attempted anal and oral sex, we note that similarity of the acts involved is not necessary to a finding of a common scheme, plan, or system. See *Sabin*, *supra* at 67. Because one could infer from the common features of the charged and uncharged acts that defendant had a scheme, plan, or system in accomplishing the alleged assaults, we find that the trial court did not abuse its discretion in finding the other acts evidence relevant for a proper purpose.

We also conclude that the trial court did not abuse its discretion in finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Here, the defense contended that the complainant was coached or had fabricated the allegations on her own. Because the other acts evidence showed a system by defendant to accomplish the alleged sexual assaults, it was probative in rebutting the defense of fabrication. See *Sabin*, *supra* at 71. Although the other acts evidence had a high potential for prejudice, and

we may have found differently if sitting as the trial court, where, as here, the question is a close one, we will not find an abuse of discretion. *Id.* at 67.

Affirmed.

/s/ Michael J. Kelly
/s/ William C. Whitbeck
/s/ Jeffrey G. Collins