# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 8, 2001 |
| v | No. 221173<br>Oakland Circuit Court |
| RICHARD GLENN SMITH,<br><br>Defendant-Appellant. | LC Nos. 99-164784-FC<br>99-164785-FC |

Before: K. F. Kelly, P.J., and Smolenski, and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and three counts of third-degree criminal sexual conduct (CSC III), MCL 750.520(d)(1)(a); MSA 28.788(4)(1)(a). The trial court sentenced him to concurrent prison terms of fifteen to thirty years for the CSC I conviction, five to fifteen years for the CSC II conviction, and ten to fifteen years each for the CSC III convictions. We affirm.

The charges in this matter arose out of incidents that occurred between defendant and his stepdaughter in 1992 and 1998. The prosecutor alleged that in 1992, defendant sexually penetrated and later sexually touched the victim. Defendant was charged with CSC I and CSC II with respect to these incidents, because the victim was nine years old when they occurred. The prosecutor alleged that in 1998, defendant sexually penetrated the victim three times. Defendant was charged, in a separate case, with three counts of CSC III with respect to these incidents, because the victim was between the ages of thirteen and fifteen when they occurred. The cases were tried jointly.

Defendant first claims that the trial court erred by allowing the prosecutor to present evidence of other sexual acts between defendant and the victim. We review the admission of evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). We find no abuse of discretion here.

To be admissible under MRE 404(b), other-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 Crawford*,

458 Mich 376, 385; 582 NW2d 785 (1998); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Defendant does not claim that the other acts evidence was not offered for a proper purpose. Nor does he argue that the other acts evidence was irrelevant. Defendant argues only that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. In any event, it is clear that the prosecutor articulated a proper non-character purpose for the admission of the evidence: to show a context in which the charged offenses occurred. See *People v DerMartzex*, 390 Mich 410, 412-415; 213 NW2d 97 (1973), and *People v Jones*, 417 Mich 285, 288-289; 335 NW2d 465 (1983). This was a legitimate basis on which to offer the evidence. *Id.* Additionally, the evidence was clearly relevant to the charges against defendant because it had a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Evidence of a pattern of sexual abuse put the 1992 and 1998 charges against defendant in context and was relevant to rebut defendant's assertion that the victim fabricated the allegations against him.

Moreover, in light of the significant probative value of the evidence, we conclude that the trial court did not abuse its discretion in concluding that the probative value of the evidence was not *substantially* outweighed by the danger of unfair prejudice. See *People v Starr*, 457 Mich 490, 499; 577 NW2d 673 (1998). As stated in *People v Watson*, ___ Mich App ___ (Docket No. 218218, issued 5/4/01), slip op, p 4, citing *Starr*, *supra* at 500, the danger the other-acts rule seeks to avoid is that of *unfair* prejudice, not prejudice stemming only from the abhorrent nature of the type of crime involved. Moreover, the trial court instructed the jurors as follows:

> You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the Defendant is a bad person, or that he is likely to commit crimes. You must not convict the Defendant here because you think he is guilty of other bad conduct.

Especially in light of this cautionary instruction, we find no basis for reversal.

Next, defendant argues that the trial court improperly admitted the testimony of Amy Allen regarding common characteristics or behaviors of sexually abused children. Allen did not specifically testify that it was her opinion that the sexual abuse occurred, that the victim was credible, or that defendant was guilty. She merely testified regarding typical and relevant symptoms of child sexual abuse. This was not improper. *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1994), amended 450 Mich 1212 (1995). See also *People v Lukity*, 460 Mich 484, 500; 596 NW2d 607 (1999). Indeed, an expert may testify regarding typical and relevant symptoms of child sexual abuse for the 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. *Peterson, supra* at 352-353. Without Allen's testimony, the jury might have misconstrued the fact that the victim did not report some of the sexual abuse for several years or the fact that she had difficulty providing details regarding the sexual abuse. Moreover, defense counsel attacked the victim's credibility in his opening statement by mentioning that the victim had "suddenly" accused defendant of sexual abuse that had allegedly been happening for years. This credibility attack opened the door for Allen's testimony that young sexual abuse victims

who have been abused by family members often delay reporting the abuse. See *Lukity, supra* at 500-501. The trial court did not abuse its discretion in admitting Allen's testimony.

Defendant additionally argues that the trial court erred by admitting Detective Michael O'Hala's testimony that pornographic videotapes were found in defendant's home. Defendant did not object to this testimony. Accordingly, reversal is unwarranted unless a clear or obvious error occurred that affected the outcome of the case. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), and *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). We find no clear or obvious error here. Indeed, an argument could be made that the evidence was actually more exculpatory than inculpatory, inasmuch as it provided an explanation for why a nine-year-old victim would know about and describe sexual acts. In fact, defendant told the investigating officer about the existence of the pornography for this very reason: to try to explain why his stepdaughter had attributed sexual acts to him. Appellate relief is unwarranted.

Next, defendant argues that the trial court erred by failing to sua sponte instruct the jury with regard to the lesser-included offenses of CSC III and CSC IV. However, defendant makes no attempt to coherently explain *why* instructions on lesser-included instructions were applicable or to explain to which specific charges the stated lesser-included offenses applied. A party may not leave it up to this Court to rationalize his claims or elaborate his arguments. *People v Mackle*, 241 Mich App 583, 604, n 4; 617 NW2d 339 (2000); *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998). Therefore, we need not address this issue. Moreover, defense counsel expressed satisfaction with the trial court's instructions and therefore waived this issue for appeal. *People v Carter*, 462 Mich 206, 215-216, 219-220; 612 NW2d 144 (2000). In any event, given the evidence introduced at trial and the jury's clear rejection of defendant's theory that the victim fabricated the allegations, we discern no miscarriage of justice resulting from the instructions as given. See MCL 769.26; MSA. ("[n]o . . . verdict shall be set aside . . . on the ground of misdirection of the jury . . . unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice").

Next, defendant argues that his constitutional right to remain silent was infringed upon when Detective Ronald Tuski testified that defendant failed to respond to Tuski's repeated attempts to contact defendant during the early stages of the 1998 investigation. We review constitutional issues de novo. *People v Eaton*, 241 Mich App 459, 461; 617 NW2d 363 (2000).

In support of his claim, defendant relies on *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973). *Bobo*, however, is limited to situations involving interrogation. *Id*. at 361. See also *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Here, defendant was neither under arrest, subject to police interrogation, or formally accused at the time he failed to respond to Detective Tuski's requests to contact him. At trial, Officer Tuski merely stated that he attempted to contact defendant but that defendant did not respond to his attempts. Defendant's right to remain silent was not violated in this case because no interrogation had begun at the time of the silence about with Officer Tuski testified.

Next, defendant argues that the trial court should have severed the case involving the 1992 incidents from the case involving the 1998 incidents. We review a trial court's decision

regarding severance for an abuse of discretion. See, e.g., *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

MRE 6.120(B) provides:

> (B) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
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> (1) the same conduct, or
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> (2) a series of connected acts or acts constituting part of a single scheme or plan.

Even assuming, arguendo, that defense counsel properly preserved this issue for appeal by requesting severance of the cases, we find no basis for reversal. Indeed, the various charges could reasonably be construed as constituting a single plan or scheme to sexually assault the victim. See *People v Miller*, 165 Mich App 32, 45; 418 NW2d 668 (1987), remanded on other grounds 434 Mich 915 (1990). In light of *Miller*, the trial court was not required to sever the two cases.[1]

Next, defendant argues that his trial counsel rendered ineffective assistance. To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and resulted in prejudice. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To show prejudice, a defendant must establish a reasonable probability that, but for his counsel's error, the result of the proceedings would have been different. *People v Johnnie Johnson, Jr.*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant perfunctorily suggests that counsel erred because he "failed to exclude evidence of prior crimes, failed to exclude unfair evidence and failed to request lesser included offenses." However, defendant does not develop a coherent argument with regard to these claims and therefore has failed to present properly these claims for appellate review. See *Mackle*, *supra* at 604, n 4, and *Palo Group*, *supra* at 152. In any event, we note that (1) contrary to defendant's suggestion, counsel did in fact object to the admission of other-acts testimony; and (2) counsel's failure to object to the testimony regarding pornography and his failure to request lesser-included offenses did not reasonably affect the outcome of the case. Reversal based on these claims is unwarranted.

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[1] Moreover, we note that because other-acts evidence would have been admissible in each separate trial, defendant cannot legitimately claim prejudice resulting from the joinder. See *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). We acknowledge that *Duranseau* is contradicted by another panel of this Court in *People v Daughenbaugh*, 193 Mich App 506, 510-511; 484 NW2d 690, modified 441 Mich 867 (1992). Nonetheless, *Duranseau* provides some support for the prosecutor's argument in this appeal.

Defendant additionally contends that counsel erred by failing to seek severance of the two cases. However, given the existing evidence in this case, there is no reasonable probability that the result of the proceedings would have differed if defense counsel had successfully sought severance. Moreover, because we addressed the severance issue in this appeal as if it had been preserved for appellate review, defendant cannot establish that counsel's failure to preserve the issue hampered his appeal.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Patrick M. Meter