

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EDWARD DEAN,

Defendant-Appellant.

UNPUBLISHED

December 21, 2001

No. 226601

Oakland Circuit Court

LC Nos. 99-167152-FC,

99-167559-FC

Before: Murphy, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of three counts of first-degree criminal sexual conduct, in violation of MCL 750.520b. The trial court sentenced defendant to ten to thirty years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant first asserts that the trial court erred when it allowed plaintiff to introduce prior bad acts evidence. We disagree.

The admissibility of prior 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).

To be admissible under MRE 404(b), prior bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose under MRE 404(b), (2) it must be relevant under MRE 402, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55, 74; 508 NW2d 114 (1993), mod 445 Mich 1205; 520 NW2d 338 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id.*, p 74. In addition, "the trial court may, upon request, provide a limiting instruction to the jury. *Id.*, p 55.

First, in its motion to admit the evidence, and at trial, plaintiff expressed that this evidence was being offered to bolster the credibility of the victim's testimony and to show that defendant had a common system for committing the acts of misconduct. The prosecution clearly offered the evidence for proper purposes.

Second, the evidence was relevant, under the circumstances of the case. Defendant's general denial places all the elements of the crime charged at issue. *Id.*, p 78. However, contrary to plaintiff's apparent assertion,

[t]hat the prosecution has identified a permissible theory of admissibility and the defendant has entered a general denial, however, does not automatically render the other acts evidence relevant in a particular case. The trial court must still determine whether the evidence, under a proper theory, has a tendency to make the existence of a fact of consequence in the case more or less probable than it would be without the evidence. [*People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000); see also MRE 401.]

In this case, the trial court properly determined that the evidence of prior acts was relevant. Similar acts evidence is logically relevant to the prosecution of the charged crime, where the prior acts and the charged conduct are similar enough to "support an inference that they are manifestations of a common plan, scheme, or system." *Id.*, p 63.

The trial court did not abuse its discretion in finding sufficient similarity to lead to a common plan or scheme. In both the multiple acts committed against the victim and the act committed against the victim's cousin, defendant gained access to the alleged victims because they were at his house or at family events. Also, both alleged victims were of similar age and possessed a grandfather-granddaughter relationship.

In addition, prior acts of sexual misconduct by defendant against the victim are admissible for the purpose of bolstering her credibility. *Sabin, supra*, pp 69-70; *People v DerMartex*, 390 Mich 410, 413-415; 213 NW2d 97 (1973). Therefore, the victim's testimony concerning additional sexual misconduct committed against her by defendant was relevant for the purpose of supporting her allegations regarding the acts charged. *Id.* However, our Supreme Court in *People v Jones*, 417 Mich 285, 289; 335 NW2d 465 (1983), made a distinction between previous acts of defendant involving the complainant and previous acts involving others. In this case, as we have concluded, the testimony of victim's cousin was relevant to help show a common plan or scheme.

Finally, the probative value of the evidence is not substantially outweighed by prejudice to defendant. The evidence of defendant's prior acts was probative in demonstrating defendant had a system of accomplishing the alleged sexual assaults, and probative of rebutting any defense offered by defendant that the victim fabricated the acts of sexual misconduct. The trial court did not abuse its discretion in finding that the probative value of the evidence outweighed any prejudicial impact on defendant. In addition, the trial court gave a limiting instruction to the jury concerning the proper use for the evidence.

Defendant next argues that a new trial is warranted because the jury's verdict was against the great weight of evidence. We disagree.

We review the trial court's grant or denial of a motion for new trial for abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993), overruled in part on other grounds in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). Defendant argues that the complainant's testimony was implausible and should not have been believed by the jury.

“[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility ‘for the constitutionally guaranteed jury determination thereof.’” *Lemmon, supra*, pp 642-643. Defendant has failed to demonstrate that such exceptional circumstances exist in this case. Therefore, the trial court did not abuse its discretion in denying defendant’s motion for new trial.

Defendant’s third assertion is that he was denied effective assistance of trial counsel. Again, we disagree.

To establish that the defendant’s right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, this Court must find that counsel’s representation fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 302-03; 521 NW2d 797 (1994).

Defendant raises numerous claims of ineffective assistance of trial counsel and also argues that the cumulative effect of the claimed errors entitle him to a new trial. Our review of the record and the relevant case law lead us to agree with the trial court’s conclusion after the *Ginther* hearing¹ that counsel vigorously pursued a well-conceived strategy on defendant’s behalf at trial. Defendant’s arguments to the contrary are without merit.

Defendant finally argues that his sentence was disproportionate to the seriousness of the crime and his criminal history. We disagree.

A trial court’s decision regarding sentencing will not be reversed absent an abuse of discretion. *People v Milbourn*, 435 Mich 630, 665-666; 461 NW2d 1 (1990). An abuse of discretion occurs when a trial court violates the principle of proportionality. A sentence must be proportionate to the seriousness of the crime and the defendant’s prior record. *Id.*, pp 650-652.

The sentence fell within the guidelines range. Sentences that fall within the guidelines range are presumed to be neither excessively severe nor unfairly disparate. *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000). Therefore, defendant’s sentence is presumed to be proportionate. *People v McCray*, 210 Mich App 9, 13; 533 NW2d 359 (1995). Nevertheless, a sentence within a guidelines range can conceivably violate proportionality in unusual circumstances. *Milbourn, supra*, p 661. Defendant has failed to present any unusual circumstances, demonstrating that his sentence is disproportional. Therefore, defendant’s sentence was not disproportionate.

Affirmed.

/s/ William B. Murphy

/s/ Janet T. Neff

/s/ Joel P. Hoekstra

¹ Pursuant to a remand order of this Court a hearing was held on defendant’s motion for new trial based on ineffective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).