

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD EUGENE CRANDELL,

Defendant-Appellant.

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UNPUBLISHED

December 28, 2001

No. 221035

Montcalm Circuit Court

LC No. 98-000209-FH

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of second-degree criminal sexual conduct, MCL 750.520c(1)(b), and third-degree criminal sexual conduct, MCL 750.520d(1)(a). The convictions stemmed from allegations that defendant, who was then the young complainant's mother's live-in boyfriend, fondled the complainant's breasts and committed digital-vaginal penetration with her while on a camping trip. The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to concurrent sentences of 14 to 22½ years' imprisonment on each conviction. We affirm.

Defendant first argues that the trial court erred by admitting other-acts evidence. Specifically, he claims that the trial court should not have admitted evidence of earlier abusive hugs with the complainant or evidence of earlier sexual fondling with his own daughter. We review the admission of evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists if an unprejudiced person, considering the facts on which the trial court acted, would find no justification for the ruling made. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

To be admissible under MRE 404(b), evidence of other acts 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 Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000).

In *Sabin*, *supra* at 47-50, the trial court admitted evidence that the defendant, who was charged with having sexual intercourse with his daughter, had previously performed oral sex on his stepdaughter on several occasions. The Supreme Court held that the trial court did not abuse

its discretion in admitting the other acts evidence to show that the defendant employed a common scheme or plan in molesting the girls. *Id.* at 61-67. Similarly, in the instant case, the evidence of defendant's prior abuse of his daughter was relevant to show a common scheme or plan in molesting the girls. At best, defendant's challenge presents a close evidentiary question, and "the trial court's decision on a close evidentiary questions such as this one ordinarily cannot be an abuse of discretion." *Sabin, supra* at 67; see also *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Moreover, the determination of relevancy and prejudice under MRE 403 are best left to the contemporaneous assessment of the trial court, and we defer to its justifiable decision here that the challenged evidence was relevant and admissible. *Sabin, supra* at 70-71.

The Supreme Court has held that of the proffered theories under MRE 404(b), "only one needs to be a proper, noncharacter reason that compels admission for the testimony to be admissible." *Starr, supra* 501. Thus, we need not examine the prosecutor's other proffered theories of admissibility.

With regard to the evidence about earlier abusive hugging between defendant and the complainant, we note that defendant does not appropriately cite to the record where this testimony occurred. Therefore, we need not review the claim. See, e.g., *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001), and MCR 7.212(C)(7). Nevertheless, we find no abuse of discretion in admitting the testimony. Further, in light of the properly-admitted evidence, we do not find a reasonable probability that the testimony about the improper hugging affected the outcome of the case. See *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000) (an evidentiary error does not merit reversal in a criminal case unless it affirmatively appears that it is more probable than not that the error was outcome-determinative).<sup>1</sup>

Defendant next argues that the trial court erred by excluding a witness' testimony as a sanction for a discovery violation after defendant failed to disclose the witness' written statement to the prosecutor before trial. We conclude that we need not decide whether the trial court abused its discretion by excluding the testimony, because the exclusion of the testimony was harmless. MCR 2.613(A) provides that an error of the trial court is not grounds for granting a new trial unless refusal to do so appears to the court inconsistent with substantial justice, which involves a showing of prejudice. *People v Mateo*, 453 Mich 203, 212-215; 551 NW2d 891 (1996). Likewise, an evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome-determinative. *Smith, supra* at 680. In the instant case, assuming arguendo that an error occurred, the error was not outcome-determinative because the proposed testimony was largely cumulative to that presented by other witnesses and because defendant's theory of the case was adequately presented by other witnesses and arguments. We do not find it more probable than not that the potential error was outcome-determinative.

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<sup>1</sup> Defendant asks this Court to impose a requirement that an evidentiary hearing be held whenever a prosecutor asks to introduce MRE 404(b) evidence. Defendant does not develop this argument or cite to appropriate authority and has therefore waived the issue for appeal. See *Central Cartage Co v Fewless*, 232 Mich App 517, 529; 591 NW2d 422 (1998).

Defendant also argues that counsel's failure to disclose the witness' statement to the prosecutor constituted ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant did not meet this burden because, as noted earlier, there is no reasonable probability that the absence of the witness' testimony affected the outcome of the case.

Next, defendant argues that the trial court erred by failing to order the prosecutor's expert to develop a written report outlining his proposed testimony and by failing to appoint an expert witness for defendant. Whether the trial court could compel the prosecutor to provide a written statement from its expert is a question of law; this Court reviews questions of law de novo. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). A decision on a motion to procure a witness at state expense is left to the discretion of the trial court. *People v Thornton*, 80 Mich App 746, 752; 265 NW2d 35 (1978).

Defendant has cited no binding Michigan authority requiring an expert witness to provide a written summary of his testimony. Accordingly, the argument warrants no appellate relief. See *Cartage, supra* at 529. Nor does defendant's argument regarding a potential defense expert warrant relief. MCL 775.15 authorizes payment of the fees for an expert witness on a showing by the accused "that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to trial. . . ." See also *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995). A defendant must demonstrate a nexus between the facts of the case and the need for an expert. *Jacobsen, supra* at 641. The *Jacobsen* Court concluded that for the motion to be granted there must be some showing that the expert testimony would likely benefit the defense. *Id.*

In denying defendant's motion in the instant case, the trial court found that defendant had failed to show who his proposed expert was, what the anticipated testimony would be, and the relevance of the proposed testimony. Without an indication that the expert testimony would likely have benefited the defense, there was no error in denying the request because defendant failed to establish a nexus between the facts of the case and the need for an expert. *Jacobsen, supra* at 641.

Finally, defendant argues that the trial court erred in limiting defendant's cross-examination of the prosecutor's expert witness. Once again, defendant does not cite to the portion of the record in which the trial court allegedly limited his cross-examination in the manner he complains of on appeal. Therefore, we need not review this issue. See, e.g., *Eldred, supra* at 150, and MCR 7.212(C)(7). Nevertheless, our review of the record and the trial court's rulings indicates that the trial court *allowed* defendant to ask about prior sexual assaults committed against the complainant by a different perpetrator and about the alleged physical abuse committed against the complainant by her mother. Accordingly, defendant's argument is without merit.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter