STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 29, 2002
v	No. 227297 Van Buren Circuit Court
CHRISTOPHER SPEER, Defendant-Appellant.	99-011613-FC

Before: Griffin, P.J., and Holbrook, Jr. and Hoekstra, JJ.

PER CURIAM.

The present case stems from allegations of sexual molestation by the victim, who was fifteen at the time of trial, against her father. Following a jury trial, defendant was convicted of second-degree criminal sexual conduct,[1] MCL 750.520c, and was sentenced to a prison term of eighty-six months to fifteen years. Defendant appeals as of right. We affirm.

On appeal, defendant first contends that the jury verdict should be reversed because the prosecution failed to prove proper venue. We disagree.

The victim testified that some of the instances of molestation occurred when defendant drove her somewhere out in the country in his car, took off her shirt, and touched her breasts. Defendant maintains that the prosecution did not offer any proofs with respect to where the alleged offense occurred and that there are at least three other counties where the alleged conduct could have occurred. However, defendant has not properly preserved this issue for appellate review. MCL 767.45(1)(c) provides, in pertinent part, "[n]o verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury." Here, defendant first objected to the alleged failure of the prosecution to prove venue by moving for a judgment notwithstanding the verdict. Because defendant did not raise the issue before the case was submitted to the jury, he has forfeited the issue on appeal, and this Court need not review it. *People v Flaherty*, 165 Mich App 113, 120; 418 NW2d 695 (1987).

[1] Defendant was also charged with one count of first-degree criminal sexual conduct, MCL 750.520b. The jury acquitted defendant of this charge.

Defendant next contends that the trial court denied him due process of law when it denied his motion for mistrial following the allegedly improper admission of prior bad acts evidence at trial. MRE 404(b)(1). Defendant also maintains that the prosecution failed to give proper notice of its intent to offer other acts evidence, as required under MRE 404(b)(2). At trial, the victim testified that after enduring the alleged molestation for a period of time, she finally told her aunt and a contact person for Van Buren County Child Protective Services about it because she "was scared he [defendant] was going to do it to the other kids [the victim's siblings] and [she] found out that he had done it to them."

The admissibility of other acts evidence is reviewed for an abuse of discretion. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). Likewise, a trial court's grant or denial of a mistrial will not be reversed on appeal in the absence of an abuse of discretion. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996). Whether evidence may be properly admitted under a specific rule of evidence is a question of law reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Although defendant claims a due process error, not all trial errors present a constitutional violation. *People v Toma*, 462 Mich 281, 296; 613 NW2d 694 (2000). The admission of other acts evidence reflecting on a defendant's character is limited by MRE 404(b), to avoid the danger of conviction based on a defendant's history of other misconduct rather than on the evidence of his conduct in the case in issue. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). To be admissible, other acts evidence must (1) be offered for a proper purpose, (2) be relevant, (3) have a probative value that is not substantially outweighed by its potential for unfair prejudice, and (4) be accompanied by a limiting instruction if requested. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). If an error is found, a defendant has the burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error. *Lukity, supra* at 495; *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). No reversal is required for a preserved, nonconstitutional error "unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Lukity, supra* at 496. An error is deemed to have been "outcome determinative" if it undermined the reliability of the verdict. *Id.*; *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).[2]

In the instant case, the evidence was offered for the proper purpose of establishing the victim's motive for disclosing the abuse in a belated manner and, as the trial court recognized, the challenged testimony was relevant to establish that the victim's late disclosure of the allegations of sexual abuse was not because she contrived them, but because she was concerned for her siblings, thereby rebutting defendant's claims of fabrication. *Sabin, supra* at 72; *Starr, supra* at 502.

Nevertheless, if the danger of unfair prejudice substantially outweighs the probative value of the challenged bad acts evidence, it is inadmissible. *VanderVliet, supra* at 74. Although the trial court in the present case acknowledged that the victim's testimony was both "highly relevant" and "highly prejudicial," after balancing its probative value with its prejudicial effect,

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[2] The prosecution's alleged noncompliance with 404(b)(2) is likewise subject to the harmless error rule. See *People v Hawkins*, 245 Mich App 439, 453-456; 628 NW2d 105 (2001).

it ultimately denied defendant's mistrial motion and took precautions to limit the scope of the witness's testimony. After our thorough review, we conclude that the trial court did not abuse its discretion in regard to this ruling.

Further, even if we were to find the evidence inadmissible, the error, if any, in the admission of this evidence was harmless. *Lukity*, *supra* at 496. We can glean no substantial evidence from our review of the record that would indicate that the victim was either mistaken in her allegations or lying. The victim's testimony was consistent and credible; when considered in conjunction with the factual circumstances surrounding her decision to divulge the allegations and the dearth of evidence favorable to defendant, her testimony demonstrates no reason to fabricate the charges. Indeed, the victim's stated justification for disclosing the abuse when she did – to prevent similar abuse by defendant with her siblings – was an entirely plausible explanation. Thus, although we are cognizant of the prejudicial effect of the other acts evidence, it is not "more probable than not" that the error, if any, affected the verdict. *Lukity, supra*.

Our conclusion in this regard is bolstered by our rejection of defendant's next argument – that the trial court erred when it denied his motion for a directed verdict and his motion for a judgment notwithstanding the verdict because the evidence presented at trial was insufficient to support his conviction.

When reviewing a trial court's denial of a motion for directed verdict and the sufficiency of the evidence, this Court reviews "the record de novo and consider[s] the evidence presented by the prosecution in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999); *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994). Likewise, in reviewing a decision on a motion for judgment notwithstanding the verdict, this Court must view the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

We hold that, viewing the evidence in a light most favorable to plaintiff, a reasonable factfinder could have found that plaintiff established the essential elements of second-degree criminal sexual conduct, MCL 750.520c(1), beyond a reasonable doubt.[3] The victim's trial

[3] MCL 750.520c(1) provides, in pertinent part, as follows:

> A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:
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> * * *
>
> (b) That other person is at least 13 but less than 16 years of age and any of the following:

(continued…)

testimony established that she was fifteen years of age at the time of trial and that defendant is her father. In addition, her testimony established that she lived with her father, mother, and seven brothers and sisters until April 21, 1999. Moreover, six weeks before April 21, 1999, defendant took her for a drive in the country, took off her shirt and touched her breasts. In addition, shortly before she moved out of the house in April 1999, she went to defendant's bedroom, and defendant took off her shirt, touched her breasts, and told her he loved her. This testimony was sufficient to convince a rational trier of fact that the prosecutor established all elements of second-degree criminal sexual conduct beyond a reasonable doubt. Although defendant points to a number of inconsistencies between the victim's prehearing testimony, her trial testimony, and her statements to others, defense counsel made the jury aware of those inconsistencies. It is the province of the jury to determine questions of fact and assess the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). We do not resolve such credibility questions anew on appeal. *Id*.

Defendant also argues that he was denied his state and federal constitutional right to effective assistance of counsel because his trial counsel failed to call an expert witness to testify concerning false memory and to rebut the testimony of plaintiff's expert witness. 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 the defendant as to deny him a fair trial. *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

We conclude that defendant has not overcome the presumption that his trial counsel's failure to call an expert witness was sound trial strategy. The decision whether to present expert testimony at trial is presumed to be a matter of trial strategy. *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). To overcome the presumption of sound trial strategy, a defendant must show that the failure to call the witnesses deprived him of a substantial defense which would have affected the outcome of the proceeding. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Here, there was no evidentiary hearing to determine how an expert for the defense might testify. Limiting review to the record below, there is no indication that an

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(…continued)

(i) The actor is a member of the same household as the victim.

(ii) The actor is related by blood or affinity to the fourth degree to the victim.

Moreover, MCL 750.520a defines "sexual contact" to include the intentional touching of the victim's intimate parts for the purpose of sexual gratification. In addition, MCL 750.520a defines "intimate parts" to include the breast of a human being.

expert would have testified that the victim's testimony was influenced or tainted by outside sources. Likewise, whether an expert witness would have testified that psychotherapy can actually convince a child that he or she was sexually abused although it never happened is also not apparent from the record. Thus, because defendant has not overcome the presumption that his trial counsel's failure to call an expert witness was not sound trial strategy, we find no merit to his claim that he was denied effective assistance of counsel.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra