STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 14, 2002
v	No. 224722 Shiawassee Circuit Court
DAVID GADDIS STUCKEY, Defendant-Appellant.	LC No. 99-003399-FH

Before: Bandstra, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was sentenced to probation for forty-eight months, the first twelve to be served in jail. He appeals as of right. We affirm.

The prosecutor presented evidence that defendant engaged in tickling and other physical playfulness with his daughter and her friend, the complaining witness. Next, the complainant testified that while defendant's daughter was distracted, he tried to kiss the complainant and twice grabbed her breasts under her shirt. The complaining witness and another young girl who complained of similar conduct at defendant's hands under similar circumstances eventually expressed their concerns to a school teacher, who reported the matter to authorities.

On appeal, defendant first argues that the trial court abused its discretion by denying his motion for a new trial because the prosecution withheld from discovery prior inconsistent statements of certain witnesses. We agree with the trial court that what defendant was seeking, if it existed at all, was the prosecutor's undiscoverable work product. Defendant's argument is that the prosecutor's office took over the criminal investigation from the police, and that the defense was therefore entitled to the prosecuting attorney's notes of interviews with witnesses that would normally be considered privileged work product. The defense conceded to the trial court that there was no allegation of deliberate misconduct in the matter, but suggested that the prosecutor's investigation before issuance of a warrant was a discoverable part of the investigatory process and not privileged work product. However, defendant agreed with the trial court that the defense had an opportunity to discover any violation of discovery rules during earlier litigation of an evidentiary motion, but protested that the issue did not occur to him until a police witness testified at trial that he interviewed the witnesses but briefly.

"A new trial may be granted only for certain legally cognizable reasons. Although MCL 770.1 . . . authorizes a trial court to grant a new trial when it shall appear to the court that justice has not been done, the statute has been construed as limited to those circumstances where the defendant has been denied a fair trial." *People v Yono*, 103 Mich App 304, 308; 303 NW2d 4 (1981) (citations and quotations omitted).

Defendant cites no authority for the proposition that if the prosecutor acts as one of the principal investigators the prosecutor's work product must then be discoverable for that reason. Well established, however, is that the prosecutor's privilege against disclosing work product—deliberative or otherwise—is a very broad one. See generally *Messenger v Ingham Co Prosecutor*, 232 Mich App 633; 591 NW2d 393 (1998) (establishing the prosecutor's work product as absolutely privileged from disclosure under MFOIA). More specifically, in *People v Holtzman*, 234 Mich App 166; 593 NW2d 617 (1999), this Court held that a prosecutor's notes of interviews with witnesses are not subject to the general disclosure requirements of MCR 2.601(A)(2), citing both the attorney work-product rule, and the ethical problem that would arise if the people's advocate at trial were obliged to take the stand and explain his or her notes. *Holtzman*, *supra* at 168-169.

Further, the prosecuting attorney stated in argument that she did not think that she had made any notes of the sort defendant was seeking. Defendant in any case fails to point to any reason beyond his own speculation to suppose that any notes of the prosecutor fairly constituting a witness' statement ever existed.

For these reasons, we agree with the trial court that defendant suffered no miscarriage of justice for the lack of disclosure of any of the prosecutor's interview notes.

Defendant next argues that he is entitled to a new trial because the trial court seated a jury that included a relative of the judge.[1] We disagree. Defense counsel personally commented on the relationship between the judge and the juror while questioning the latter, and elicited that the juror had no bias in the matter. Counsel never challenged the juror, and ultimately expressed satisfaction with the jury as seated. The defense thus affirmatively waived this issue, extinguishing it as a basis for appellate relief. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Further, because a judge plays the role of a neutral and detached magistrate, see *Cain v Dep't of Corrections*, 451 Mich 470, 509; 548 NW2d 210 (1996), any inclination that a juror may have to share in a relative's biases should not be a factor where the relative is the judge. See also MCR 2.003(B) (grounds for judicial disqualification do not include relative on the jury). Thus, the presumption of juror competence and impartiality is not disturbed under these circumstances. See *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001) (O'Connell, J., with M.J. Kelly, J., concurring in the result only), citing *People v Collins*, 166 Mich 4, 8-9; 131 NW 78 (1911), and *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987).

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[1] Evidently the juror in question was the judge's sister-in-law.

Defendant next argues that the trial court abused its discretion by allowing another young friend of both defendant's daughter and the complainant to testify that that defendant had tickled and otherwise touched her, including in ways that made her feel uncomfortable. We disagree.

MRE 404(b)(1) establishes that evidence of other bad acts is not admissible to prove a person's character, or behavior consistent with those other wrongs, but provides that such uncharged conduct may 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 . . . ."

The potential for unfairness to the defendant in the presentation of evidence of prior bad acts is "not that it is irrelevant, but, to the contrary, that using bad acts evidence can 'weigh too much with the jury and . . . so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.'" *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998), quoting *Old Chief v United States*, 519 US 172, 181; 117 S Ct 644, 651-652; 136 L Ed 2d 574 (1997), and *Michelson v United States*, 335 US 469, 476; 69 S Ct 213; 93 L Ed 168 (1948). Evidence of prior bad acts is admissible if it is offered for a proper purpose, if it is relevant, and if its probative value is not substantially outweighed by unfair prejudice. Further, the trial court may, upon request, provide a limiting instruction to the jury. *Crawford*, *supra* at 385, citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

In this case, the witness in question was a friend who joined the complainant in coming to their teacher with their concerns about what they had experienced at defendant's house. This witness testified at trial that she went to defendant's daughter's house once or twice a week between January and February, 1999. Asked if anything happened that she felt uncomfortable about, the witness replied, "Her father would tickle me in spots that I felt uncomfortable with," elaborating, "[a]round the bottom of my legs," "[l]ike on my bottom," and "[a]round my stomach area." The witness stated that, at first, she thought defendant was merely playing, and that this happened almost every time she visited. On appeal, defendant makes issue of the following excerpt from direct examination:

> Q. Was there anything else that ever happened at the Stuckeys that made you feel uncomfortable besides the tickling and tickling on your leg and bottom that you told us about?
>
> A. No.
>
> Q. You can recall anything else?
>
> A. No.
>
> Q. Did you tell anything else to Detective/Sergeant Ash when you made that statement to him?
>
> A. No.

Defendant's argument is that no testimony suggested that he engaged in, or attempted, any sexual conduct with this witness; thus, the latter's testimony was not sufficiently probative of defendant's plan or scheme in engaging in CSC as to justify its introduction. We disagree.

The witness testified that defendant tickled both her and his daughter, and that this and similar supposed playfulness extended to where the witness felt that defendant was touching her in inappropriate ways, causing her to feel uncomfortable. This testimony went directly to defendant's "opportunity, . . . scheme, plan or system in doing an act," MRE 404(b)(1), in that it suggested that defendant attempted to cover his inappropriate advances, or secure plausible deniability for himself in the matter, by operating within a context ostensibly of innocent playfulness, which even included his daughter. The testimony was also relevant to "absence of mistake or accident," contradicting defendant's argument that he merely crossed that indefinite line from acceptable physical playfulness into making his daughter's other young friend feel uncomfortable. This evidence suggests it was no one-time excess or misunderstanding.

Further, despite defendant's implications to the contrary, the trial court carefully instructed the jury on the limited use of the MRE 404(b) evidence. At the close of proofs, the court's instructions included the following:

> You heard evidence that was introduced to show that the Defendant . . . committed improper acts for which he is not on trial. If you believe this evidence you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show that the Defendant acted purposefully, that is not by accident or mistake, or because he misjudged the situation, or you may only think about whether the evidence tends to show that the Defendant used a characteristic scheme that he used before. 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. All the evidence must convince you beyond a reasonable doubt that the Defendant committed the alleged crime for which he's on trial, or you must find him not guilty.

This instruction should well have steered the jury away from considering the other-bad-acts evidence improperly. *Crawford*, *supra* at 385; *VanderVliet*, *supra* at 55. For these reasons, we reject this claim of error.

Finally, defendant argues that he is entitled to a new trial because the complaining witness referred to her dreams when asked how she remembered what defendant had done to her. We disagree. The testimony in question came by way of cross-examination:

Q. Was your memory better last summer or is it better now?

A. Now.

Q. It's better now?

A. Yes, because I've had dreams about it.

Q. You've had what?

A. Dreams.

Q. You've had dreams about it. So your testimony's built on dreams? Is that what you're telling this Court?

A. No. I know what happened, but when I have the dreams I know exactly what happened.

Q. The dreams are exactly what happened?

A. Yes.

Q. Are they exactly what happened when you told Sergeant Ash, or are they what happened when you talked today, or are they what happened when you talked last summer?

A. Today.

Q. Today?

A. Yes.

Q. So we can discount anything you told Sergeant Ash or you testified to last summer because today is right and anything you said before, yes or not, is wrong. Would that be what you're telling us today?

A. No.

Q. But your memory is better today?

A. From when I talked to Sergeant Ash, yes.

Not only was this issue not preserved, but in fact it was the defense that elicited the testimony at issue. Thus, the onus was on the defense to clarify the complainant's testimony to the extent needed, or to raise doubts, before the court or the jury or both, about the reliability of testimony potentially influenced by dreams. Indeed, to the extent defense counsel was able to get the possible influence of dreams before the jury, this was a sound strategic attempt to instill doubts about the complaining witness' credibility, and a bit of ambiguity in this regard may have helped defendant more than it hurt him. In any event, a criminal defendant may not assign error on appeal to something the defendant's own lawyer deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

Defendant further argues that the evidence suggests that defendant's daughter was present when the alleged improper conduct took place, but did not observe anything of the sort. Although the daughter did indeed testify that she saw no improprieties between defendant and the complainant, this evidence was not uncontroverted. The complainant reported that when defendant touched her breasts for the second time with the daughter nearby, the latter "said, like

'Dad,' in a way of scolding him." Further, of course, the jury was not obliged to believe any of the daughter's testimony, favorable to her father or otherwise. "It is the province of the jury to . . . assess the credibility of witnesses." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). For these reasons, we reject this claim of error.

Affirmed.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell