STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 27, 2004
v	No. 242363 Oakland Circuit Court
ANGELO JOSEPH AMADOR, Defendant-Appellant.	LC No. 01-177540-FC

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant Angelo Joseph Amador appeals as of right from his jury-trial conviction of two counts of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a) (victim under thirteen).[1] Defendant was sentenced to 47 months' to 22 ½ years' imprisonment for these convictions with fifty-one days credit. We affirm.

Defendant first contends that the trial court abused its discretion by permitting the prosecutor to present MRE 404(b) evidence. This Court reviews a trial court's decision to admit MRE 404(b) evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). "An abuse of discretion exists when an unprejudiced person, considering the facts upon which the trial court acted, would say there was no justification of excuse for the ruling." *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997), citing *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

MRE 404(b) "is a rule of inclusion that contains a nonexclusive list of 'noncharacter' grounds on which evidence may be admitted. This rule permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct." *Starr, supra* at 496. Trial courts are required to utilize a four-part standard to determine if MRE 404(b) evidence is properly admissible and this Court utilizes the same standard to review the trial court's decision. The standard requires that the trial court determine:

[1] Defendant was charged with two counts of second-degree CSC, but was bound over and tried on one count of second-degree CSC and one count of first-degree CSC, MCL 750.520b. The jury convicted defendant of two counts of second-degree CSC.

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*People v VanderVliet,* 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).]

The prosecutor asserted that the MRE 404(b) evidence was relevant on the issues of intent, absence of mistake, and common scheme, plan or system. These are proper, noncharacter bases for the admission of the evidence. Defendant premised his defense, at least in part, on a theory that the victim's mother fabricated the charges. In its ruling admitting the evidence, the trial court stated that there were "striking similarities" between the testimony of the prior acts victims and the victim in this case, and that the evidence was "probative to refute Defendant's allegations of fabrication." Therefore, the prosecutor offered relevant, noncharacter reasons to justify the admission of the evidence.

Defendant argues that the prosecutor never claimed that the MRE 404(b) evidence was being proffered to rebut an allegation of fabrication. But in *People v Knox,* 256 Mich App 175, 189; 662 NW2d 482 (2003), this Court held that our Supreme Court's decision in *People v Sabin (After Remand),* 463 Mich 43, 59 n 6; 614 NW2d 888 (2000),[2] "permit[ed] prosecutors to articulate a proper purpose for the evidence at any time, whether at trial or on appeal." Pursuant to *Knox*, then, the prosecutor may properly justify the use of the MRE 404(b) evidence at trial by arguing on appeal a different "proper purpose" than those articulated before trial.[3] See also *Starr, supra* at 500-501 (admission of MRE 404(b) evidence probative to refute the defendant's allegations of fabrication where those allegations arose at trial and prosecutor never offered fabrication as a pre-trial justification for admission of the evidence).

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[2] Our Supreme Court stated in *People v Sabin*, 463 Mich 43, 59 n 6; 614 NW2d 888 (2000): "[*People v*] *Crawford*, [458 Mich 376; 582 NW2d 785 (1998),] should not be read as imposing a heightened requirement for establishing the theory of admissibility or suggesting that the prosecution's failure to identify at trial the purpose that supports admissibility requires reversal. The requirement under MRE 404(b)(2) that the prosecution provide notice of the general nature of the other acts evidence and rationale for admitting the evidence is designed to ensure that the defendant is aware of the evidence and to provide an enlightened basis for the trial court's determination of relevance and decision whether to exclude the evidence under MRE 403. See *VanderVliet, supra* at 89, n 51. The prosecution's recitation of purposes at trial does not restrict appellate courts in reviewing a trial court's decision to admit the evidence." This conclusion is equally applicable to this case.

[3] Particularly in situations such as the one presented by this case, such a rule makes eminent sense. Defendant did not accuse the child's mother of fabricating the claim of sexual molestation until the trial had already begun; but the prosecutor sought admission of the evidence well *before* trial. The Supreme Court's ruling decreases the likelihood that a defendant will "sandbag" the prosecutor by refusing to disclose the true theory of the defense until after trial has begun. And in those cases where such "sandbagging" does occur, the prosecutor is protected because he or she may justify the use of the evidence after the fact by reference to the defense that was actually presented at the trial.

Moreover, the trial court properly ruled that the evidence was admissible as evidence of a common scheme, plan, or system because it found – and defendant has admitted in his objection to admission of the evidence in the trial court[4] – that the MRE 404(b) acts were "substantially similar" to the acts related by the victim. Each of the children was assaulted at roughly the same age; the assaults all took place in the home where the child was staying; although the locations sometimes varied, on at least one occasion with each girl, defendant assaulted them in the bedroom of the dwelling; on at least one occasion with each girl, defendant laid them on a bed and attempted to forcibly penetrate them; the manner of each assault was similar; as with the victim in this case, defendant assaulted one of the prior acts victims while she was in bed with someone else; and defendant had either an explicit or implicit parental relationship with each child. The similarities exhibited in this case compare favorably with those identified by our Supreme Court in *Sabin, supra* at 66, as justifying the admission of the MRE 404(b) evidence in that case.

In order to reject admission of MRE 404(b) evidence, the trial court must conclude that the probative value of the evidence is *substantially outweighed* by the danger of unfair prejudice. MRE 403. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The trial court concluded that the evidence was "substantially more probative than prejudicial." Although this is a slightly different statement of the MRE 403 analysis, it is clear that if the probative value of the evidence substantially outweighed the potential prejudice caused by its admission, the danger of unfair prejudice could not have substantially outweighed the probative value of the evidence. The MRE 404(b) evidence in this case was extremely probative in defeating defendant's claim of fabrication and was also very probative of defendant's common plan, scheme, or system of sexually assaulting young girls.

Additionally, the trial court gave the jury a limiting instruction regarding the use of this evidence. Although, as defendant points out, this instruction said nothing about use of the evidence to defeat a claim of fabrication, defendant may not be heard to complain on appeal because he requested the instruction and he did not object to it; he therefore waived any claim regarding the sufficiency or propriety of the limiting instruction. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Therefore, we conclude that the trial court did not abuse its discretion by admitting the MRE 404(b) evidence.

Defendant also contends that the trial court abused its discretion by denying him funds to hire an expert witness. We find no abuse of discretion. *People v Tanner*, __ Mich __; 671 NW2d 728 (2003), slip op, 6. Defendant twice requested funds to hire Dr. Michael Abramsky as an expert witness. The trial court twice denied the request without prejudice and defendant did not renew his request for an appointed expert. Moreover, he listed Dr. Abramsky on his witness

[4] Defendant cannot make an admission in the trial court and then disavow it on appeal. See *Flint City Council v State of Michigan*, 253 Mich App 378, 395; 655 NW2d 604 (2002) ("a party may not seek redress on appeal on the basis of a position contrary to that it took in the proceedings under review.").

list and during trial he identified Dr. Abramsky as his expert, but indicated he would not be presenting him because he was unavailable.

We also reject defendant's argument because he failed to demonstrate that the expert's testimony "would likely benefit the defense." *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995), quoted in *Tanner, supra*, slip op at 7. Defendant has informed this Court that he "cannot detail to this Court exactly what an expert would have testified to in his behalf at the trial, for the simple reason that he was without funds to hire such an expert." In moving for appointment of an expert before trial, however, defendant claimed that Dr. Abramsky had preliminarily concluded that defendant did not have the characteristics of a pedophile, that the victim appeared to have been coached, and that the proper protocol was not followed in questioning the child. These unsupported "preliminary" allegations amounted to "a mere possibility of assistance from the requested expert." *Tanner, supra,* slip op at 7.

We also reject this claim because defendant evidently obtained Dr. Abramsky as a witness, but decided not to call him at trial because he was unavailable. Therefore, the trial court did not abuse its discretion in denying defendant's request for funds for an expert witness.

Affirmed.

/s/ Donald S. Owens
/s/ Bill Schuette
/s/ Stephen L. Borrello