STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2004
v	No. 247713 Wayne Circuit Court
MALACHI HAKEEM WASHINGTON, Defendant-Appellant.	LC No. 02-012707

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of kidnapping (by enticement), MCL 750.350 and nine counts of first-degree criminal sexual conduct (during felony), MCL 750.520b(1)(c).[1] The trial court sentenced him concurrently to fifteen to thirty-five years for the kidnapping conviction and fifteen to thirty-five years for the CSC-1 convictions. Defendant appeals as of right his convictions and sentence. We affirm.

I. Basic Facts

In September 2002, the thirteen-year-old victim was living with her mother and two sisters aged seventeen and twenty. Defendant began visiting the oldest sister. Ultimately, he frequented the house so often that he was considered a family member. The middle sister testified that defendant attempted to have a relationship with her, but she "sort of" opposed it and decided to stop talking to him. But defendant continued to come over and help around the house. The victim testified that defendant was her oldest sister's friend and then became her friend as well.

On September 22, 2002, defendant called the victim and told her to meet him the next day on the bridge over the Lodge Freeway before school. He promised her clothes and games as well as a new hair-do, shoes, a pager, and a cell phone. When the victim met defendant at the bridge, he grabbed her by the arm and took her to an apartment. The victim wanted to go home, but became afraid to try because defendant threatened to report the disrepair of her mother's

[1] Defendant was originally charged with kidnapping and eleven counts of first-degree criminal sexual conduct.

house to protective services. Over the next several days, defendant raped the victim multiple times and forced her to perform various sex acts. The victim was recovered on October 1, 2002, when her father saw her walking with defendant.

II. Great Weight of the Evidence

Defendant argues that he is entitled to a new trial because the verdict was against the great weight of the evidence.[2] We disagree.

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). In determining whether a new trial should be granted on this basis, we consider whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski,* 232 Mich App 24, 28; 592 NW2d 75 (1988).

Defendant's argument is based solely on a challenge to the victim's credibility. If the evidence conflicts, the issue of credibility ordinarily should be left for the trier of fact; in deciding a motion for new trial, the court should not sit as the thirteenth juror. *People v Lemmon,* 456 Mich 625, 642-642; 576 NW2d 129 (1998). The Court recognized the unique opportunity for the jury to assess witness credibility in this regard. *Id*. at 646. Although the victim's testimony was impeached with her previous statement to police that she ran away from home, the jury heard this evidence along with the victim's testimony that defendant lured her away and threatened her with calling protective services on her mother. Also, while the victim's testimony was inconsistent with regard to the dates and specific sex acts, the charged crimes took place over several days and, as such, the victim's lack of clarity on these points is understandable. Furthermore, a variance as to the time of the offense is not fatal "unless time is of the essence of the offense." MCL 767.45(1)(b). Time is generally not of the essence, nor a material element, in a criminal sexual conduct case, particularly when the victim is a child. *People v Stricklin,* 162 Mich App 623, 634; 413 NW2d 457 (1987). We conclude there were no exceptional circumstances that would allow this Court to substitute its view of the victim's credibility for that of the jury. Therefore, we hold that defendant's convictions were not against the great weight of the evidence and he is not entitled to a new trial.

III. 404(b) Evidence

Defendant next argues that the trial court erred in admitting evidence of other acts under MRE 404(b). We disagree.

"The trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion." *People v Spanke,* 254 Mich App 642, 644; 658 NW2d 504 (2003). For evidence to be properly admitted under MRE 404(b), there are three requirements: (1) the evidence is offered for a proper purpose under MRE 404(b); (2) it is relevant under MRE 402; and (3) its probative value is not substantially outweighed by any unfair prejudice. *People*

[2] Defendant moved in this Court for remand to file a motion for new trial. This Court denied his motion.

VanderVliet, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). MRE 404 (b) states, in relevant part, that while evidence of other crimes, wrongs or acts may not be used to prove bad character or a propensity to commit a crime, it may be admissible for other purposes, such as proof of motive, intent, common scheme, plan, or system in doing an act, or absence of mistake or accident. MRE 404(b)(1).

On the second day of trial, the prosecutor moved to amend his witness list to include the middle sister because her name was inadvertently left off the original witness list though she had given testimony at the preliminary examination and she had made a statement, which was part of discovery. Her proposed testimony was, in relevant part, that "[d]efendant first was trying to date her older sister, then her, and then the younger sister." Defense counsel objected for lack of relevance and inadmissibility under MRE 404(b). Defense counsel specifically argued:

> To bring the sisters and their relationship, what's the purpose? The purpose can only be to show that my client has some sort of fixation on the family or did it in a serial fashion. That's character evidence. It should not be admissible. It should be excluded under 404 of the evidence.

The prosecutor argued that it was not character evidence or "bad character evidence" because the older sister is "of age." He also argued that it was relevant to show:

> . . . how he befriended the family and was able to get close to the younger sister and how he was first trying to pursue the older sister and was turned down, went to the middle sister and was turned down and them went to the much younger sister who was much more impressionable. I submit it goes to his intent.

The trial court ruled that it was not character evidence under MRE 404(b) because "it's not wrongful conduct for the Defendant to talk to or attempt to try to date the sisters who are of age." If further found that the evidence was relevant to show how defendant's "dealings with the family" and how defendant built up the confidence and trust of the family and his attempt to isolate the youngest daughter.

To begin with, MRE 404(b) states that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Thus, the fact that defendant's attempt to date the other sisters who were "of age" does not render this evidence outside the scope of MRE 404(b) simply because it was not evidence of other "crimes" or "wrongs." Because it is evidence of another act, it should be excluded unless it was not offered to prove character in order to show action in conformity therewith.

We conclude that the evidence was admissible under the "res gestae exception" to MRE 404(b), which allows the admission of evidence of other crimes or acts if they are connected to the charged crime in such a way to require the admission of the evidence to give the jury "the complete story." *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978); see also *People v Robinson*,128 Mich App 338, 340; 340 NW2d 303 (1983). The prosecutor offered the evidence to show how defendant befriended the family, attempted to date the victim's sisters, and ultimately became close enough with the victim to lure her away. These actions were so entwined with the crime charged that the

testimony was necessary to give the jury the "complete story." Therefore, the trial court did not abuse its discretion in admitting this evidence.

IV. Sentencing

Defendant next argues that he should be resentenced because the trial court improperly scored offense variable (OV).[3] We disagree.

Because the kidnapping offense occurred in September 2002, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). If a sentencing issue requires the application of the instructions in the legislative sentencing guidelines, it is a question of law reviewed by this Court de novo. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002).

With regard to OV 3, MCL 777.33(1)(d) provides that ten points are to be assessed if "bodily injury requiring medical treatment occurred to the victim." At sentencing, defendant argued that OV 3 should not be scored because he was not tested for chlamydia. But the victim testified that she contracted chlamydia from defendant and that she received treatment for the condition at Children's Hospital. Because there was evidence to support the trial court's assessment of ten points for OV 3, it did not abuse its discretion.

Affirmed.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Kirsten Frank Kelly

[3] Contrary to the prosecution's assertion, defendant objected to the scoring of OV 3 at the sentencing hearing and also provided this Court with a copy of the presentence investigation report.