STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2004
v	No. 247948 Oakland Circuit Court
ALPHONSO GERALD MILLS, Defendant-Appellant.	LC No. 2002-186340-FC

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of six counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), for sexually abusing the twin four-year-old daughters of his girlfriend, with whom he lived. Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of thirty to sixty years in prison for each conviction. He appeals as of right. We affirm.

I

Defendant first argues on appeal that the trial court abused its discretion and committed error requiring reversal by admitting other acts evidence. We disagree.

The charges brought in the instant case stemmed from incidents that occurred between November 1998 and May 1999, while defendant was living with his girlfriend and her twin daughters in Oak Park, in Oakland County. Prior to trial, the prosecutor filed a motion seeking admission of evidence that defendant continued to sexually assault the same complainants while they lived together in Canton, in Wayne County, from May 2000 until June 2002. The prosecution also sought to admit evidence that defendant sexually assaulted his own biological daughter during the same time frame he abused the twins, while living in Oak Park. In a separate jury trial preceding the instant trial, defendant was acquitted of charges that he sexually abused his biological daughter.

The record indicates that defense counsel did not contest the prosecution's motion to admit the other acts evidence concerning defendant's alleged abuse of the twins while they lived in Wayne County because, as a matter of strategy, the defense wanted to bring out inconsistencies in the complainants' testimony. However, defense counsel objected to the admission of any allegations of abuse regarding defendant's biological daughter. The trial court

nonetheless held that evidence regarding the sexual assaults by defendant against his daughter was admissible at trial.

At trial, defendant's daughter testified that she lived with defendant, his girlfriend, and her twin daughters in Oak Park starting in November 1998. She testified that, during this time period, when she was fifteen years old, defendant asked her if she was a virgin, pulled down her pants and stuck his finger in her vagina. Thereafter, defendant had sexual intercourse with her approximately twenty times over several months. She eventually told a friend what her father had been doing to her.

Defendant now contends on appeal that the trial court abused its discretion by admitting this other acts evidence concerning defendant's alleged sexual assault of his daughter.[1] Defendant maintains that his daughter's uncorroborated allegations were highly prejudicial given the lack of physical or medical evidence of the assaults in the instant case and the serious questions regarding the complainants' credibility. Defendant also argues that the alleged assaults on his daughter had no probative value because they were not similar to the charged acts; his daughter was fifteen years old at the time of the alleged assaults, whereas the twins were only four years old. Further, the manner of the alleged assaults differed.

We review a trial court's decision to admit other acts evidence for an abuse of discretion. *People v Sabin (On Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v McCray*, 245 Mich App 631, 634-635; 630 NW2d 633 (2001). An abuse of discretion is found when an unbiased person, reviewing the same facts on which the trial court acted, would conclude there is no justification or excuse for the ruling made. *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998). Even if properly preserved, an error in the admission of other acts evidence does not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Knapp*, 244 Mich App 361, 378-379; 624 NW2d 227 (2001).

Use of other acts evidence reflecting on character is limited by MRE 404(b) to avoid the danger of conviction based on past conduct. *People v Starr*, 457 Mich 490, 494-495; 577 NW2d 673 (1998). MRE 404(b)(1) provides in pertinent part:

> 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. It may, however, 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, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

[1] On appeal, defendant does not contest that portion of the trial court's evidentiary ruling that allowed the introduction of evidence that he sexually assaulted the complainants while they lived in Wayne County. As previously noted, the record indicates that defendant wanted such evidence to be admitted in order to challenge the complainants' credibility.

To be admissible, the evidence (1) must be offered for a proper purpose under MRE 404(b); (2) it must be relevant under MRE 402, as enforced through MRE 104(b); (3) the probative value of the evidence must not be substantially outweighed by the unfair prejudice under the balancing test of MRE 403; and (4) the trial court may provide a limiting instruction if requested. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *VanderVliet, supra* at 74-75.

In the instant case, the prosecution offered the other acts evidence for a purpose deemed proper under MRE 404(b): to prove a scheme, plan, or system. Defendant argues the evidence is inadmissible because there were dissimilarities between the other acts (the alleged sexual abuse of his biological daughter) and the assaults against the complainants in this case. We disagree.

In *Sabin, supra* at 63, our Supreme Court, focusing on the exception in MRE 404(b) for evidence showing a "scheme, plan, or system," held that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." The *Sabin* Court cautioned that "[l]ogical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot," and that "[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Id.* at 64. There must be such a concurrence of common features so that the charged acts and the other acts are logically seen as part of a general plan, scheme, or design. *Id.* at 64-65. See also *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). Distinctive and unusual features are not required to establish the existence of a common design or plan; the evidence of uncharged acts "needs only to support the inference that the defendant employed the common plan in committing the charged offense." *Hine, supra* at 253, citing *Sabin, supra* at 65-66.

Here, defendant had a father-daughter relationship with the MRE 404(b) witness and the complainants. See *Sabin, supra* at 66. Defendant was the biological father of the proffered other acts witness, and she lived with him at the time of the assaults. Although defendant was not the biological father of the complainants, he lived with them, and they called him "daddy" or "dad." Defendant committed the assaults on the complainants and his daughter during the same time frame, while all were living together in the same house. Moreover, defendant committed the assaults while his girlfriend, the mother of the complainants, was at work. He held a position of authority over the complainants and his teenage daughter. Although his biological daughter was approximately ten years older than the complainants, she did not live with defendant when she was younger, and only started living with him when she was fourteen. Consequently, defendant did not have the opportunity to commit the abuse on his daughter when she was younger. The sexual assaults defendant perpetrated on the complainants and his daughter, which included vaginal penetration, occurred on several occasions. They were not isolated incidents. One could infer from these common features that defendant had a system that involved taking advantage of the parent-child relationship, particularly his control over his daughters, to perpetrate the abuse. The common features of the charged acts and the other acts support the prosecution's theory that

defendant devised a plan or scheme and used it to sexually assault young female relatives in his household.

While we agree with defendant that there were dissimilarities between the acts, i.e., the nature of the sexual acts differed, at most, reasonable persons could disagree on whether the charged and uncharged acts contained sufficient common features to infer the existence of a common system used by defendant in committing the acts. See *Sabin, supra* at 67. A mere difference of opinion on a close evidentiary question will not qualify as an abuse of discretion. *Sabin, supra* at 67; *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). As in *Sabin, supra*, this Court cannot find that the trial court abused its discretion in finding the evidence admissible under a theory of logical relevance. *Id.* at 68.[2]

We further conclude that the probative value of the other acts evidence was not substantially outweighed by unfair prejudice. *VanderVliet, supra*. Where the complainants' credibility was at issue and under attack, the evidence served to rebut defendant's claims of fabrication and explained the complainants' delay in reporting the sexual assaults. See *Starr, supra* at 503. Moreover, the trial court gave a limiting instruction to the jury, cautioning that the other acts evidence could only be considered for a limited purpose, not to show that defendant was a bad person, thereby lessening any prejudicial effect of the evidence. It is well established that jurors are presumed to follow their jury instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Based on the evidence of record, we cannot conclude that the trial court's decision to admit the other acts evidence was an abuse of discretion. *Crawford, supra*.

II

Defendant next contends that the evidence presented at his trial was insufficient to sustain his convictions on six counts of first-degree criminal sexual conduct. Defendant argues that the testimony of the two complainants was weak and incredible; one of the twins was found by the trial court to be incompetent to testify, and she contradicted her prior preliminary examination testimony in numerous particulars. Defendant alleges that the other victim's testimony was likewise questionable, and notes that there were neither eyewitnesses to any of the alleged sexual assaults nor medical or physical trace evidence to support the allegations that defendant had penetrated the two complainants anally, orally, and vaginally.

This Court reviews claims regarding the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found all the elements of the crime proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime. *Id.* "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make

[2] The fact that defendant was acquitted of sexually abusing his daughter does not destroy the relevance of the evidence. A bad act need not be proven beyond a reasonable doubt to be admitted under MRE 404(b). See *People v Cooper (After Remand)*, 220 Mich App 368, 375; 559 NW2d 90 (1996).

credibility choices in support of the jury verdict." *Id*. at 400. The prosecution need not negate every reasonable theory consistent with innocence; instead, "it need only convince the jury 'in the face of whatever contradictory evidence the defendant may provide.'" *Id.*, quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995). This Court will not interfere with the jury's role in determining the weight of evidence or credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

The elements of first-degree criminal sexual conduct are that a defendant engaged in sexual penetration with another, and that the other was under thirteen years of age. MCL 750.20b(1)(a); *People v Hammons*, 210 Mich App 554, 57; 534 NW2d 183 (1995).

In this case, defendant contends that the evidence was insufficient, particularly in light of the fact that the trial court found one of the twins to be incompetent to testify. However, due to tactical decisions by defense counsel, this victim's testimony was not stricken.[3] Defense counsel was thus able to impeach her trial testimony with her former testimony at the preliminary examination and at the district court proceedings in Wayne County. Although there were some inconsistencies in the victim's testimony, the main focus of her testimony was clear – defendant sexually abused her on several occasions while his girlfriend was at work. The victim testified in detail that went well beyond her years that defendant put his private part in her bottom, mouth, and vagina.

The second victim testified that, under similar circumstances and during the pertinent time period, defendant put his private part in the area where she urinates, more than ten times. She further testified in graphic detail that defendant also put his penis in her mouth and in her bottom. While the twins were living in Oak Park, they both complained to their mother that their bottoms hurt. Although there was no physical evidence of abuse, the examining physician testified that this was not unusual. Both victims told the emergency room nurse about the abuse. In June 2002, the victims disclosed to their grandmother that defendant had sexually assaulted them and had threatened them in order to maintain their silence.

The testimony of a victim is sufficient evidence from which a trier of fact can infer that a sexual penetration occurred. MCL 750.520h; *People v Robideau*, 94 Mich App 663, 674; 289 NW2d 846 (1980), aff'd on other grounds, 419 Mich 458 (1984). Moreover, as previously noted, the issue of the credibility of the complainant's testimony is for the trier of fact, and we will not resolve credibility issues anew on appeal. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Here, viewing the above evidence in a light most favorable to the

[3] During the cross-examination of one of the twins, the trial court declared her to be incompetent to testify because she was unresponsive and unable to adequately understand or communicate. However, defense counsel indicated that he was not going to ask to strike her trial testimony because defendant wanted the jury to assess her credibility. Defendant also asked to use her preliminary examination testimony to impeach her trial testimony. Consequently, the victim's trial testimony was supplemented by reading her testimony from the preliminary examination to the jury. A portion of the victim's testimony from the Wayne County proceedings was also read into the record.

prosecution, we conclude the evidence was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that defendant engaged in multiple acts of oral, anal, and vaginal sexual penetration with his four-year-old twin daughters, so as to sustain his convictions on six counts of first-degree criminal sexual conduct.

III

Finally, defendant argues that, in light of his relatively young age (thirty-eight) at the time of sentencing and the purportedly questionable reliability of the evidence on which he was convicted, his sentence of thirty to sixty years on each count constitutes cruel and/or unusual punishment in violation of both the state and federal constitutions. The United States Constitution prohibits the infliction of "cruel and unusual" punishment, but the Michigan Constitution provides greater protection, prohibiting "cruel *or* unusual" punishment. See Const 1963, art I, § 16; US Const, Am VIII; *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992); *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996). Consequently, if a punishment is not "cruel or unusual" under the Michigan Constitution, "then it necessarily passes muster under the federal constitution." *People v Nunez*, 242 Mich App 610, 618 n 2; 619 NW2d 550 (2000).

Because defendant did not challenge his sentence on this basis in the trial court, this issue has not been properly preserved. *People v McLaughlin*, 258 Mich App 635, 669-670; 672 NW2d 860 (2003). However, defendant's failure to assert this argument below does not preclude appellate review under the plain error doctrine set forth in *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). *Id*. at 670; *People v Kimble*, 252 Mich App 269; 275-276; 651 NW2d 798 (2002).

In *McLaughlin*, this Court rejected the defendant's argument that his sentence was disproportionate and constituted cruel and unusual punishment where the defendant's minimum sentence fell within the statutory guidelines:

> When the minimum sentence is within the range provided by the statutory sentencing guidelines, this Court must affirm unless the trial court erred in scoring the guidelines or relied on inaccurate information. MCL 769.349(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). Except as otherwise provided in the statute, MCL 769.34 requires that the trial court impose a sentence within the guidelines range, but permits departures from the guidelines for substantial and compelling reasons. MCL 769.34(2)-(3); *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001).
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> As defendant recognizes, his minimum sentence of nine years was at the low end of the sentencing guidelines range for his offense. MCL 777.62. Accordingly, defendant's argument is without merit because of the statutory limitation on appellate review of sentences. MCL 769.34(10). *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). [*Id.* at 670-671, footnote omitted.]

In the instant case, defendant acknowledges that his sentences fall within the statutory guidelines range. Defendant neither alleges error in the scoring of the guidelines nor does he argue that the trial court relied on inaccurate information in determining his sentence.

Defendant's sentences are therefore presumptively proportionate and must be affirmed. *Id*.; *Babcock*, *supra* at 261 (a sentence within the guidelines range is not subject to review for proportionality); MCL 769.34(10). Defendant's argument that his sentences are cruel and/or unusual is thus outside the limited scope of review as provided by statute. *McLaughlin, supra*.

In any event, we note that defendant is a third habitual offender, with a criminal record consisting of six felony convictions. He previously pleaded guilty in Wayne circuit court to sexually assaulting the victims in the instant case. Defendant sexually molested twin four-year-old sisters, the daughters of his girlfriend. As previously noted, the molestation included oral, vaginal, and rectal sex. Given the egregious nature of the sexual assaults and defendant's extensive criminal history, defendant's sentence of thirty to sixty years on each of the six counts of CSC I, a crime for which a maximum penalty of life imprisonment may be imposed, is clearly proportionate in this case. It is well established that a proportionate sentence is not cruel and unusual punishment. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002); *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). Thus, defendant's sentence did not constitute cruel and/or unusual punishment under either constitutional provision.

Affirmed.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood