STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 5, 2004
v	No. 249294 Tuscola Circuit Court
DUSTIN EVERETT NOWICKI, Defendant-Appellant.	LC No. 01-8289-FH

Before: Judges Whitbeck, CJ, and Owens and Schuette, JJ

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of two counts of third-degree criminal sexual conduct (CSC 3rd), MCL 750.520d(1)(a). Defendant was sentenced to concurrent terms of 5 years, 11 months to 15 years' imprisonment, with credit for 663 days served. This case arose when the victim alleged that when she was fourteen, defendant digitally penetrated her vagina and penetrated her mouth with his penis. We affirm in part, reverse in part, and remand.

Defendant first argues that the trial court should have dismissed the instant charges against him pursuant to MCL 780.133 and MCL 780.131 (the 180-day rule). We disagree.

A court's assignment of responsibility for delay is reviewed for clear error. *People v Crawford*, 232 Mich App 608, 612; 591 NW2d 669 (1998). A finding is clearly erroneous when, although there is evidence to support it, upon reviewing the entire record, the appellate court is left with a definite and firm conviction that a mistake was made. *People v McSwain*, 259 Mich App 654, 682-683; 676 NW2d 236 (2003). The purpose of the 180-day rule is to "'dispose of untried charges against prison inmates so that sentences may run concurrently.'" *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). MCL 780.133 provides that if the trial is not started within this 180-day period, the trial court must dismiss the pending charges with prejudice. The 180-day period begins when the prosecutor knows that a person for whom a warrant has been issued is incarcerated or detained to await incarceration in prison. *Crawford, supra* at 613, citing MCR 6.004(D)(1)(a).

Defendant initially pleaded no contest and a plea of guilty was entered on his behalf. However, defendant was permitted to withdraw his guilty plea on March 4, 2002; on the same date that his guilty plea was withdrawn, he was sentenced to 14 to 60 months' imprisonment for a probation violation for a previous conviction. The prosecutor knew that defendant was

incarcerated on March 4, 2002, for violation of his probation because defendant was sentenced in the prosecutor's presence. Therefore, the commencement date with respect to the 180-day period was March 4, 2002, because this was the first date that defendant was simultaneously incarcerated and facing new charges.

One hundred eighty days from March 4, 2002, is August 31, 2002. Defendant's trial did not begin until March 25, 2003, 386 days after March 4, 2002, and 206 days after the time period specified in MCL 780.131. Nevertheless, delays attributable to defendant are excluded from the calculation of the 180-day time period. *Crawford, supra* at 614-615. Because defendant initially waived his right to a preliminary examination when he pleaded guilty, *People v Dobine,* 371 Mich 593, 595; 124 NW2d 795 (1963), and was not automatically entitled to a preliminary examination once his plea was vacated, MCR 6.312, the delay caused by remand for a preliminary examination was properly attributable to defendant.

Nevertheless, defendant claims that the length of delay was unreasonable and unexplained; he argues that unexplained delays should be attributed to the prosecutor. "All adjournments without reason and unexplained delays are chargeable to the prosecution." *People v England,* 177 Mich App 279, 285; 441 NW2d 95 (1989), citing *People v Patterson,* 170 Mich App 162, 167; 427 NW2d 601 (1988), remanded on other grounds 437 Mich 895 (1991). Defendant's motion for remand was heard March 18, 2002. There is no indication in the lower court docket that a proposed order of remand was submitted before September 13, 2002. At the January 13, 2003 hearing on defendant's motion to dismiss charges, defendant explained that an earlier stipulated order of remand had been prepared, but the order had disappeared and had to be replaced with a revised order. While neither party could explain what happened to the revised order, the reason for the delay – that an order had not been filed – was apparent.

Logic and common practice indicate that unless otherwise agreed, the prevailing party will typically prepare the order, especially where the prevailing party is also the moving party. And defendant in the instant case did prepare the order. By seeking remand, defendant indicated that he intended to waive the 180-day requirement. See, for example, *Crawford, supra* at 614-615 (stipulated adjournments, requested adjournments, and delays caused by requests for new counsel are attributable to a defendant). Although a defendant may not have an affirmative responsibility to bring himself to trial, *England, supra* at 286, a defendant may not fail to preserve his rights, then claim on appeal that the resulting action was error, *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999); *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). We are not left with a definite and firm impression that the court made a mistake when it attributed the entire delay to defendant.

Defendant next argues that the trial court abused its discretion when it admitted other-acts evidence because the prosecution's only purpose in presenting the evidence was to show defendant's bad character. We disagree.

A trial court's decision to admit other-acts evidence is reviewed for an abuse of discretion. *People v Sabin (After Remand),* 463 Mich 43, 60; 614 NW2d 888 (2000). An abuse of discretion occurs only when an unprejudiced person would find that there was no justification for the ruling. *People v Rice (On Remand),* 235 Mich App 429, 439; 597 NW2d 843 (1999). Before other-acts evidence may be introduced, the prosecution must satisfy a three-part test: (a) there must be a reason for admitting the evidence, other than to show bad character or a

propensity to act accordingly, (b) it must be relevant, and (c) the danger of undue prejudice cannot substantially outweigh the evidence's probative value, especially where there are other means of proof. *Sabin, supra* at 55-56. In the case at hand, the reasons stated in the prosecutor's brief were "to show defendant's intent, scheme, system of doing an act and lack of mistake or accident." The reasons stated were proper because they did not involve inadmissible character or propensity evidence, and MRE 404b(1) specifically provides for them.

However, our Supreme Court has cautioned that the prosecution cannot mechanically recite a proper purpose under MRE 404(b) without explaining how the evidence is relevant. *People v Crawford,* 458 Mich 376, 387; 582 NW2d 785 (1998). Evidence is relevant when it has a tendency to make a material fact more or less probable. *Sabin, supra* at 60. Relevance involves two elements, materiality and probative value. *Crawford, supra* at 388. Materiality refers to whether the fact was truly at issue. *Id.* at 388. "The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material." *People v VanderVliet, supra,* 444 Mich 52, 75; 508 NW2d 114 (1993).

The prosecutor must prove each element of a crime beyond a reasonable doubt, and a not-guilty plea puts every element at issue. *VanderVliet, supra* at 77-78. To prove CSC 3rd, the prosecutor must show that the defendant penetrated the victim for a sexual purpose. *People v Hunt,* 442 Mich 359, 364; 501 NW2d 151 (1993). The court admitted the similar acts to show a common plan, design or scheme. System, plan, or scheme can be proven by demonstrating that the defendant "'devis[ed] a plan and us[ed] it repeatedly to perpetrate separate but very similar crimes.'" *Sabin, supra* at 63, quoting *State v Lough,* 889 P2d 487 (1995). Where other acts evidence is offered to establish a plan, scheme, or system, the acts must be sufficiently similar to the charged conduct, not merely generally similar. *Sabin, supra* at 63-65.

The incident with the victim was similar to the prior acts for several reasons. With one exception, defendant targeted girls aged thirteen or fourteen. With one exception, defendant's mode of contact with the girls was through his cousin's apartment.[1] With one exception, defendant had not known the girls for very long when the sexual acts occurred.[2] With one exception, each girl indicated initially that she did not consent.[3] Although defendant points out the dissimilarities between the other acts and the act charged, the incidents were similar enough

[1] The sexual act with one girl occurred at defendant's mother's house rather than his cousin's; however, the incident was similar in several respects. Defendant did not normally live with his mother or his cousin. Defendant asked the girl to come in the bedroom the same way he asked the other girls. No testimony was presented indicating that defendant made the girls aware of his sexual intent before they went with him in the bedroom.

[2] Although one girl testified that she had known defendant since third grade, she also indicated that she had not seen defendant for six years, and that she had only become reacquainted with him nine months before the sexual incident occurred.

[3] Although one girl did not testify that she did not consent, she also did not testify that the sexual act was consensual. She did testify that defendant was not a friend, she had only known him a few months, and she never had sexual contact with him again. Her actions did not indicate that the sexual act was consensual.

that reasonable persons could have found that defendant had a common plan to molest young girls whom he barely knew. Where reasonable people can disagree whether the charged act and the prior acts were sufficiently similar to infer a common system, the court's decision on a close evidentiary question is ordinarily not an abuse of discretion. *Sabin, supra* at 67.

The third criterion is whether the danger of undue prejudice from the other-acts evidence substantially outweighed its probative value. Unfair prejudice exists when there is a tendency that the evidence will be given too much weight by the jury. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod 450 Mich 1212 (1995). The trial court took the request to admit other-acts evidence under advisement. Thus, the court considered the parties' arguments and weighed the potential for prejudice against the evidence's probative value before making a decision. Whether other-acts evidence is more prejudicial than probative is best left to the contemporaneous assessment of the trial court. *Sabin, supra* at 71. Further, after final argument, the court limited any prejudicial effect by giving a limiting instruction. There was no abuse of discretion.

Defendant next argues that the court improperly scored offense variable (OV) 11 at twenty-five points. We agree.

A trial court's imposition of a sentence within the legislative guidelines range must be affirmed absent an error in scoring or reliance on inaccurate information. *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003), citing MCL 769.34(10). The trial court's scoring of individual variables is reviewed for an abuse of discretion. *McLaughlin, supra* at 671. Issues of statutory interpretation are reviewed de novo. *Id.* The legislative sentencing guidelines, rather than the Supreme Court's sentencing guidelines, apply to offenses committed on or after January 1, 1999. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

MCL 777.22(1) provides that OV 11 should be scored for all crimes against a person. Because CSC 3rd is classified as a crime against a person, MCL 777.16y, it was proper to score OV 11 in this case. Where a single criminal sexual penetration in addition to the penetration that formed the basis for the conviction occurred, and the penetration arose out of the sentencing offense, twenty-five points must be assigned to OV 11. MCL 777.41(1)(b), (2)(a). Where no additional penetrations occurred no points are assigned, MCL 777.41(1)(c). Sexual penetration is defined as "'any . . . intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body.'" *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995), quoting MCL 750.520a(1). Nevertheless, MCL 777.41(2)(a) requires the non-offense penetration to arise out of the sentencing offense. Arise out of has been described as "at the same place, under the same set of circumstances, and during the same course of conduct." *People v Mutchie*, 251 Mich App 273, 277; 650 NW2d 733 (2002), aff'd in part on other grounds 468 Mich 50 (2003).

The victim testified that one of the incidents occurred in the afternoon on October 30, 1999, while the second incident occurred later that evening; between the two incidents, she was at her grandmother's or trick or treating with a friend. This indicates that the two penetrations did not occur during the same course of conduct or under the same circumstances. We note, by way of comparison, that MCL 777.42(2) defines a contemporaneous act as one that occurs within twenty-four hours of the sentencing offense. Where a provision included in one part of a statute is omitted from another part, the omission should be construed as intentional. *People v Rahilly*, 247 Mich App 108, 112; 635 NW2d 227 (2001). Because MCL 777.41(2) does not mention

contemporaneous penetrations, the Legislature did not intend to attribute points for a second penetration that occurred several hours after the first penetration occurred. Therefore, the court erroneously attributed twenty-five points to OV 11.

With respect to defendant's remaining challenges, these were not preserved. Moreover, the record supports the trial court's finding with respect to OV 10, and defendant concedes that OV 13 is properly scored. Defendant's argument with respect to *Blakely v Washington*, 543 US ___; 124 S Ct 2531; ___ L Ed 2d ___ (2004), is unpersuasive because the trial court did not sentence defendant beyond the statutory maximum of fifteen years. See in *People v Claypool*, ___ Mich ___, ___; ___ NW2d ___ (2004), slip op at 17 n 14.

Affirmed in part, reversed in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette