

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL LEE FIELDS,

Defendant-Appellant.

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UNPUBLISHED

September 28, 2004

No. 249137

Lenawee Circuit Court

LC No. 02-010151-FC

Before: Murphy, P.J., and O’Connell and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for three counts of first-degree criminal sexual conduct, MCL 750.520b(1) (multiple variables).<sup>1</sup> The trial court sentenced defendant to 225-360 months in prison on each conviction. We affirm.

In 1999, defendant shared a basement bedroom with Jimmy in a three-story house. Defendant was forty-two or forty-three years old at the time, and Jimmy, who is “slow” and completed special education, was twenty or twenty-one years old. Defendant’s sister moved into the house with her boyfriend and his son, who is the victim in this case. The victim was eighteen years old at the time. Also living in the house were defendant’s mother, defendant’s son, and several other adults. The occupants of the house changed often, and many younger occupants were “slow,” had mental problems, or were estranged from their families. Defendant “ran the show,” collecting rent from everyone, handling money, and assigning chores. Defendant was a registered nurse and counselor who conducted counseling sessions in his basement office until 1997, when he underwent surgery for rectal cancer. Defendant also received a kidney transplant in 1999.

The victim, who lived in a basement bedroom, has an IQ of 62 and is considered to have mild mental retardation. He functions at the cognitive age of a seven- or eight-year-old. Although he has the normal sexual needs and desires of a man his age, he does not have the

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<sup>1</sup> We note that the Judgment of Sentence does not specify which subsection of MCL 750.520b(1) under which defendant was convicted. The Judgment of Sentence identifies only MCL 750.520b(1) (multiple variables) as the statutory reference.

maturity and skills that normally accompany these desires. Any decisions that the victim makes concerning sex are based on the skill levels of an eight- to ten-year-old.

At trial, the victim testified that, on two separate occasions, he watched defendant's pornographic movies with defendant and Jimmy in defendant's bedroom. They ate popcorn, drank beer, and smoked marijuana. In the movies, naked men were "puttin' the peters up the butts." Each time they watched the movies, defendant inserted his penis into the victim's anus and mouth, and put his mouth on the victim's penis. Jimmy and the victim also put their mouths on one another's penises. All three men ejaculated during these encounters. Defendant did not force the victim to participate in these sexual encounters, nor did he make any threats. After these encounters, the victim began to have nightmares and became afraid of defendant.

Defendant argues that the trial court abused its discretion in allowing three witnesses to testify about prior acts under MRE 404(b). The decision to admit certain other acts evidence under MRE 404(b) "is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "An abuse of discretion occurs when an unprejudiced person, considering the facts on which the court acted, would conclude that there was no justification or excuse for the court's ruling." *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002), citing *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000). An abuse of discretion involves far more than a difference of opinion, and a trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Whether the trial court abused its discretion by admitting the prior acts evidence is determined by applying MRE 404(b)(1), which provides:

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.

This Court follows the analytical approach to other acts evidence announced in *People v VanderVliet*, 444 Mich 52, 508 NW2d 114 (1992), employing the evidentiary safeguards already present in the rules of evidence.

First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a determination must be made whether the danger of undue prejudice substantially outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403. Finally, the trial court, upon request, may provide a limiting instruction under

MRE 105. *People v Sabin, (On Remand)*, 463 Mich 43, 56; 63; 614 NW2d 888 (2000).

“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.” *Sabin, supra* at 63. “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. However, relevant evidence must be related to a fact that is of consequence to the action. *Sabin, supra* at 57.

In the instant case, the prosecutor offered evidence of defendant’s other homosexual acts with an adolescent, a child, and Jimmy under a theory of common plan or scheme pursuant to MRE 404(b). Jimmy, who was admittedly “slow” and completed “special education,” testified that when he was twenty, he had problems with his parents and permanently moved in with defendant. During the four years that he lived with defendant, Jimmy would regularly help defendant with his kidney treatments, and engage in oral sex with him afterwards. Jimmy admitted that he viewed pornographic films with defendant and watched defendant engage in oral sex with the child, the adolescent, and the victim in this case. Jimmy testified that defendant did not have difficulty in getting or maintaining an erection, and that defendant used a penis pump for enlargement purposes only. Jimmy’s testimony was properly admitted because it is relevant to the issue of capability and counters the defense of impossibility that defendant raises in response to the instant allegations. During his closing argument, defense counsel argued that defendant suffered from erectile dysfunction and was incapable of committing the charged crime. Accordingly, the probative value of the evidence is great and substantially outweighs any undue prejudice to defendant.

The adolescent, a neighbor of defendant, testified that he went to defendant’s house regularly after school to hang out, watch TV, and work on the lawn. The adolescent had “difficulty in school,” and defendant was like a “father figure” to him. When he was fifteen, defendant showed him a film with naked people and then performed oral sex on him. This incident occurred in defendant’s bedroom with Jimmy in the room watching and participating. The adolescent’s testimony was relevant because the sexual encounter between him and defendant took place under the same circumstances and in the same place as the instant offense. Thus, the testimony was probative of defendant’s common pattern of homosexual encounters with troubled or retarded youths.

Finally, the child, who is either defendant’s grandson or step-grandson, testified that he lived with defendant in his home. Although the record does not contain the child’s exact age at the time he lived with defendant, it is apparent that the child was six years old at the time of the 404(b) hearing. He recalled going into defendant’s bedroom one time with Jimmy and watching a “bad movie,” in which people touched each other’s “front parts” and “back parts.” The child stated that while he watched the movie, defendant touched the bare skin on his “bottom,” put a “stick” on his “back part” and put “glue” in his butt. This testimony is relevant because it is sufficiently similar to the charged acts between the victim and defendant. Indeed, this homosexual episode involving defendant, Jimmy, and the child occurred under the same conditions as did the instant case.

Because defendant has a history of taking advantage of vulnerable and troubled boys, it becomes more probable that he engaged in oral and anal sex with the victim. The testimony of the adolescent, the child, and Jimmy corroborated the victim's testimony because of the similar circumstances under which the alleged sexual misconduct took place. Their testimony was highly probative of the common scheme that defendant uses to draw his victims into a sexual relationship. Defendant welcomed the victim into his home, and developed a familial relationship with him.<sup>2</sup> Then he used his position of authority and trust to take advantage of the victim sexually. Just as he did with Jimmy, the adolescent, and the child, defendant engaged in homosexual acts with the victim while watching a pornographic film in his bedroom. The trial court did not abuse its discretion because an unprejudiced person, considering the facts on which the court acted, would find that its decision to admit the evidence was justified. *Taylor, supra* at 521.

Defendant also argues that the trial court erred in denying his motion for a new trial on the basis of newly discovered evidence. A trial court's decision to grant or deny a motion for new trial is reviewed for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). "A mere difference in judicial opinion does not establish an abuse of discretion." *Id.* A trial court's factual findings are reviewed for clear error. MCR 2.613(C). "In reviewing the trial court's decision, due regard must be given to the trial court's superior opportunity to appraise the credibility of the recanting witness and other trial witnesses." *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992).

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *Cress, supra* at 692.

Michigan courts are reluctant to grant new trials based on recantation testimony because "where newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as suspect and untrustworthy." *Canter, supra* at 559. In the instant case, defense counsel filed a motion for a new trial based on newly discovered evidence that the victim allegedly perjured himself at trial. At the hearing on defendant's motion for a new trial, the victim testified that he called defense counsel on the telephone to tell him that his trial testimony was untrue, and that he lied because Jimmy had threatened to kill him otherwise. The victim acknowledged that after making these statements to defense counsel, he told Trooper Weakland that he did not lie at trial. At the hearing, however, when asked if he lied in the trial against defendant, the victim answered "yes." Upon being cross-examined, the victim admitted that Jimmy never threatened him, and that his father's girlfriend made him feel bad about defendant being in prison. He acknowledged that his father's girlfriend received letters from defendant

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<sup>2</sup> The record indicates that the victim referred to defendant as his uncle even though they were not technically related because the marriage between the victim's father and defendant's sister was unlawful.

trying to persuade him to say that the incident with defendant never happened. On redirect examination, the victim admitted that he was scared of being in court and was willing to tell whoever asked him questions whatever they wanted to hear.

Q. . . . [A]re you just plain scared about being in court?

A. Yes.

Q. Do you just want to testify and tell whoever is asking you questions whatever it is they want to hear? Is that what you want to do?

A. Yes.

The trial court did not accept the victim's recantation of his prior testimony concerning defendant, and did not believe that Jimmy threatened him. The record indicates that Jimmy was incarcerated in January 2002, but the instant investigation did not commence until April 2002. There was no evidence presented of any contact between the victim and Jimmy through phone calls, visits, or any sort of intermediary. The trial court stated:

I'm convinced that the testimony here today elicited by defendant is a pure sham, it's false, it's perjured, no basis whatsoever for it. I'm convinced that [the victim] was pressured by [his father's girlfriend] to tell the story here today that the defendant wanted, that he couldn't hold to that story because it wasn't true.

We are mindful that the trial court is in the best position to appraise the credibility of a recanting witness. *Canter, supra* at 559. Because the trial court did not accept the victim's recantation as valid, a different result is improbable on retrial. *Cress, supra* at 692. Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant a new trial.

Affirmed.

/s/ William B. Murphy  
/s/ Peter D. O'Connell  
/s/ Hilda R. Gage