STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2004
v	No. 235372 Mason Circuit Court
DENNIS RAY JENSEN, Defendant-Appellant.	LC No. 00-015696 ON RECONSIDERATION

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree home invasion, MCL 750.110a(2), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under thirteen-years-old). Defendant was sentenced to concurrent prison terms of five to twenty years for the first-degree home invasion conviction and thirty-eight months to fifteen years for the CSC II conviction. We affirm.

I

The complainant, who was twelve years old at the time of trial, testified that she knew defendant as her landlord. When the complainant was home alone on July 29, 2000, defendant came to her residence and asked if he could use the bathroom. He entered the residence and walked to the bathroom, then stated that he had to retrieve something from his car. Defendant returned to the apartment and asked the complainant if she wanted to dance. When the complainant declined, defendant pulled the complainant toward him, put one of his hands on her shoulder and the other on her hips, and they swayed back and forth. The complainant got away from defendant, but he eventually positioned himself so she could not get away again. Defendant kissed her, then put his hand on and rubbed her "private part between [her] legs" and brought his hand up to her breast. Defendant told the complainant that she was cute and commented "[i]t's our little secret" before leaving the complainant's home.

Defendant testified that though he went to the complainant's and her family's residence on July 29, 2000, he never entered the residence and was never alone in the residence with the complainant that morning. Defendant also expressly denied touching the complainant inappropriately. Defendant testified that he had given the complainant's family at least three warnings regarding past due rent, that he "had the documents completed" to begin eviction proceedings against complainant's family for non-payment of rent, and that he had showed the

documents to the complainant's stepfather on July 27, 2000, two days before he was alleged to have sexually assaulted the complainant. The complainant's stepfather disputed defendant's assertions about eviction and non-payment of rent, testifying that defendant only verbally warned him once about being evicted if they failed to become current with the rent.

Detective Randall testified that she prepared an envelope addressed to the Ludington Police Department, placed "tell-tell powder" inside it, took the envelope to complainant's residence, and left the envelope on the kitchen table. During her interview of defendant, she observed that defendant had "tell-tell powder" in the nail beds of his hands. Defendant admitted to Detective Randall that he had opened the envelope in question, telling her that he was at the residence to collect the rent and that he was "really, really, curious" when he saw the envelope. Detective Randall further testified that defendant initially denied having been alone with the complainant in her residence, but later admitted being alone with the complainant a few times. Defendant acknowledged being aware that he was not supposed to be in complainant's apartment when she was home alone. Though he denied sexually assaulting the complainant, defendant admitted that on one occasion he gave complainant a hug because he thought she was upset.

II

Defendant first argues that the Confrontation Clauses of the United States and Michigan Constitutions[1] were violated by a police officer's hearsay testimony about a complaint that led to defendant's prior conviction of fourth-degree criminal sexual conduct (CSC IV). We agree.

At trial, Lieutenant Wolter testified on direct examination that when he was previously employed as a road trooper at the Newaygo post of the state police, he received a complaint from a female who was thirteen years old or younger alleging that defendant engaged in nonconsensual sexual contact with her involving above-the-clothes fondling of her chest and buttocks area. Lieutenant Wolter testified that the victim in that case was a neighbor of defendant, that it was reported there was no other adult present in the apartment at the time of the assault, and that the victim reported that defendant told her that she had "a nice butt." Lieutenant Wolter further testified that he believed defendant had pled guilty to and was convicted of CSC IV in that prior incident.[2]

In *People v Bell*, ___ Mich App ___ ; ___ NW 2d ___ (Docket Nos. 209269 and 209270, released October 7, 2004), slip op, p 4, this Court discussed the recent decision of the United States Supreme Court regarding the admissibility of testimonial evidence:

> In [*Crawford v Washington*, 541 US __ ; 124 S Ct 1354; 158 L Ed 2d 177 (2004)], the United States Supreme Court held that to admit testimonial evidence against a defendant, the declarant must be unavailable and the defendant must have had "a prior opportunity for cross examination" of the declarant.

[1] US Const Am VI; Const 1963, Art 1, § 20.

[2] The judgment of sentence for this prior conviction showed that defendant actually pleaded no contest to the charge.

Here, because the statements of the victim in the prior CSC case were in the nature of "a formal statement to government officials," see *Crawford, supra* at 541 US ___; 124 S Ct at 1364, the prior victim's statements are clearly testimonial. Because there is no evidence that defendant had a prior opportunity to cross-examine those statements, the admission of those statements through the testimony of Lieutenant Wolter violated defendant's confrontation rights.

We review preserved Confrontation Clause violations to determine whether they were harmless beyond a reasonable doubt. *People v McPherson*, 263 Mich App 124, 131; ___ NW2d ___ (2004). To show that a constitutional violation is harmless beyond a reasonable doubt, "the beneficiary of the error [must] prove, and the court [must] determine, beyond a reasonable doubt that there is no " 'reasonable possibility that the evidence complained of might have contributed to the conviction.' " *People v Anderson*, 446 Mich 392, 406; 521 NW2d 538 (1994) (internal footnotes omitted), quoting *Chapman v California*, 386 US 18, 23; 87 S Ct 824; 17 L Ed 2d 705 (1967). The defendant's own statements or confessions may be considered in assessing whether a Confrontation Clause violation was harmless. *People v Etheridge*, 196 Mich App 43, 47; 492 NW2d 490 (1992).

After comprehensive review of the record, we conclude that the prosecution has met its burden in this case, and that the error in admitting the prior victim's testimonial statements was harmless beyond a reasonable doubt. Notwithstanding the erroneously admitted evidence, the prosecution presented evidence that defendant admitted that he had been previously convicted of fourth-degree criminal sexual conduct, and admitted to Detective Randall that he had engaged in the conduct leading to his conviction. The prosecution also introduced evidence that defendant admitted to Lieutenant Wolter during the previous investigation that he had deep sexual feelings for young females, that he had problems keeping these feelings under control, and that he had to undergo psychological treatment as a result. Defendant's own admissions and statements, together with the testimony of the complainant in the present case, the testimony that defendant initially lied to the police about having been alone with the complainant in her apartment, and the remaining circumstantial evidence in the case, is such that it is reasonable to conclude that the prior victim's statements did not contribute to the conviction in this case.

Defendant also claims that evidence of his prior fourth-degree criminal sexual conduct conviction should have been excluded under MRE 404(b), and that the trial court abused its discretion in admitting this evidence. We disagree. The admission of evidence of prior similar acts under MRE 404(b) is within the trial court's discretion, and will only be reversed on appeal when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 843 (1998). "An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). Furthermore, if the trial court erred in admitting the evidence, "defendant has the burden of establishing that, more probably than not, a miscarriage of justice has occurred because of the error." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

MRE 404(b)(1) provides:

> (1) 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.

MRE 404(b) is a rule of inclusion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Other acts evidence may be admitted under MRE 404(b) if (1) the evidence is offered for a proper purpose under the rule, (2) the evidence is relevant, and (3) the probative value of the evidence is not substantially outweighed by unfair prejudice. On request, the trial court may provide a limiting instruction to the jury. *People v Sabin* (*After Remand*), 463 Mich 43, 55-56; 614 NW2d 888 (2000); *People v Vandervliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

The prosecution offered the evidence to show a plan, system or scheme by defendant to surreptitiously enter the apartment of a family he had access to, either as a neighbor or the landlord of the apartment complex, in order to be alone with and sexually assault a young girl. On the record before us, we cannot conclude that the trial court abused its discretion in admitting the evidence on this basis. Moreover, even if the trial court erred in admitting the evidence, because of the overwhelming evidence against him, defendant has not shown that it is more probable than not that any such error resulted in a miscarriage of justice.

Defendant next contends that the trial court erred by ruling in limine that, if defendant's son testified about his opinion of defendant's ability to tell the truth and be honest, the prosecution would not be precluded from inquiring on cross-examination about defendant's belated admission to his son that he had slept with his son's underage girlfriend. Defendant claims this ruling improperly permitted the introduction of evidence in violation of MRE 404(b). We disagree. We review for an abuse of discretion a trial court's evidentiary rulings. *People v Brownridge*, 459 Mich 456, 460; 591 NW2d 26, amended 459 Mich 1276 (1999). MRE 405(a) provides:

> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross examination, inquiry is allowable into reports of relevant specific instances of conduct.

Because defendant was seeking to offer testimony that defendant was a truthful person, the trial court properly ruled that the prosecution could offer evidence of specific instances of conduct that would rebut this testimony. *People v Lukity*, 460 Mich 484, 498-499; 596 NW 2d 607 (1999). Contrary to defendant's assertion, the prosecution's proposed evidence, that for many years defendant had concealed from his son the fact that he (defendant) had had a sexual liaison with his son's underage girlfriend, would directly rebut the son's testimony that defendant was a truthful person. Accordingly, the trial court did not err in ruling that the evidence would be admissible.

Affirmed.

/s/ Hilda R. Gage
/s/ Kurtis T. Wilder