

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTHA ZIRKER,

Defendant-Appellant.

UNPUBLISHED

December 28, 2004

No. 250333

Washtenaw Circuit Court

LC No. 02-001577-FC

Before: Meter, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree criminal sexual conduct, MCL 750.520(b)(1)(a) and three counts of second-degree criminal sexual conduct, MCL 750.520(c)(1)(a). Defendant was acquitted of count two for first-degree criminal sexual conduct and now appeals as of right from her jury trial convictions of one count of first-degree criminal sexual conduct, MCL 750.520(b)(1)(a), and three counts of second-degree criminal sexual conduct, MCL 750.520(c)(1)(a). Defendant was sentenced to 14 to 30 years' imprisonment for the first-degree criminal sexual conduct, and 6 to 15 years' imprisonment for each conviction of second-degree criminal sexual conduct, the sentences to run concurrently. We affirm.

I. FACTS

Defendant was a friend of the victim's mother and temporarily resided in their apartment. Defendant babysat for the victim and his siblings. The victim testified that on various occasions, defendant would touch him in uncomfortable ways and on two occasions, placed his penis in her vagina. These incidents occurred in various areas of the apartment, including in the victim's bedroom where his siblings were sleeping and while his parents slept in the bedroom next door. Defendant also kissed or touched the victim's penis in various other locations including a hotel where his family temporarily stayed, his step-grandmother's house, in the car, as well as other locations. The victim never told anyone of this incident while living in Ypsilanti. However, while living in Oklahoma, the victim exhibited odd behavior that prompted his parents to inquire. It was then that the victim told his parents what defendant had done. After the victim's mom confronted defendant, defendant admitted that there were some incidents and that she knew that it was not right.

II. STANDARD OF REVIEW

Defendant argues that the trial court abused its discretion when it allowed into evidence a photograph of the victim at the age when the incidents between defendant and the victim occurred, over defendant's objection. The victim was ten years old when the incidents at issue took place, and was twelve when he testified at trial. We disagree. The decision whether to admit evidence is within the trial court's discretion; we only reverse such decisions where there is an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1988); reh den 459 Mich 1203 (1998). However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. We review questions of law de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998)

III. ANALYSIS

Defendant's claim that the trial court abused its discretion in allowing the photograph of the victim at age ten lacks merit because the photograph is relevant and probative of his age and maturity at the time the incidents occurred. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. Evidence is admissible if it is helpful in shedding light on any material point. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001); lv den 465 Mich 952 (2002). However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

Defendant argues that the photograph is inadmissible because it does not clarify any material point in issue. Evidence is admissible if it is helpful in throwing light on any material point. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). In support, defendant cites *People v Midgyett*, 49 Mich App 663; 212 NW2d 754 (1973). Defendant claims that plaintiff's true motive behind offering the photograph was for a sympathy ploy to the jury.

Although defendant characterizes plaintiff's reasoning behind the request to admit the photograph as solely to explain the victim's delay in making the allegations against defendant, an additional premise behind offering the photograph was to illustrate that the victim was younger and of a lower maturity level at ten years old than he was testifying at age twelve. During the trial, defense counsel emphasized the victim's delay in reporting the incidents both in his opening statement, and on his cross examination of the victim, by asking him if he had reported the incident as he questioned the victim on each incident. The victim was described in defense counsel's opening statement as "a young man who is now in a new place," and stated that the jury should be "looking at the young man very carefully." Further, in defense counsel's closing statement, he twice referred to the victim as being "very intelligent and well-spoken," and stated, "I don't think in hearing what [the victim] had to say and seeing [the victim], even though it's two years later, that you get a sense that he was a young man who could not speak out." This places the victim's age and maturity level while testifying and at the time of the incidents at issue, and it was not unfairly prejudicial for plaintiff to offer a photograph of the victim at age ten so the jury could see him at the age when he was abused.

Defendant next claims that the photograph is not probative of the victim's delay in making the allegations against defendant. Defendant compares the present case to *People v Wallach*, 110 Mich App 37; 312 NW2d 387 (1981), vacated on other grounds 417 Mich 937; 331 NW2d 730 (1983), where we held that photographs of two brutally murdered victims were not probative to the issues of premeditation and deliberation. *Id.* at 65. In *Wallach*, our decision was based on the inability of the photographs to distinguish the type of homicide that occurred. *Id.* at 67. In the present case, the photograph was not offered to distinguish between types of criminal sexual conduct, and its content was not gruesome in nature. It was offered to show the victim's age when the incidents occurred, and its relevance is heightened because of defendant's use of arguments placing the victim's age and maturity at issue, which would prompt the jury to view the victim as of age twelve rather than ten. We hold, therefore, that the trial court did not abuse its discretion in allowing into evidence the photograph of the victim at age ten.

Affirmed.

/s/ Patrick M. Meter

/s/ Kurtis T. Wilder

/s/ Bill Schuette