

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES FREDERICK HOLZBERGER,

Defendant-Appellant.

UNPUBLISHED

August 21, 2007

No. 269998

St. Clair Circuit Court

LC No. 05-001192-FC

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13), and sentenced to 3 to 15 years' imprisonment. He appeals as of right. We affirm.

I. FACTS

Defendant's conviction arises out of the sexual assault of "BL," a young boy who lived next door to defendant. Defendant was also charged with two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13), three additional counts of second-degree criminal sexual conduct, and one count of disseminating sexually explicit matter to a minor, MCL 722.675, involving BL and his sisters, "MH" and "TK," all of whom were under the age of 13 when the alleged conduct occurred. At trial, all three children testified regarding multiple instances of sexual contact and penetration involving defendant. Defendant denied their allegations and theorized that their mother coerced them into fabricating the allegations for the purpose of obtaining a financial settlement from him. The jury convicted defendant of one count of second-degree criminal sexual conduct involving BL and acquitted him of the remaining charges.

II. EXCLUSION OF EVIDENCE UNDER THE RAPE-SHIELD STATUTE

Defendant first argues that the trial court abused its discretion by excluding evidence of BL's prior sexual activity under the rape-shield statute, MCL 750.520j. We disagree.

A. Standard of Review

We review for an abuse of discretion a trial court's decision to preclude evidence under the rape-shield statute. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). The abuse of discretion standard acknowledges that there may be more than one reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Id.* at 269.

B. Analysis

Under the rape-shield statute, “[e]vidence of specific instances of the victim’s sexual conduct . . . shall not be admitted,” except in limited circumstances not applicable in this case. MCL 750.520j. In certain situations, however, evidence that does not fall under the specific enumerated exceptions to the rape-shield statute “may not only be relevant, but its admission may be required to preserve a defendant’s constitutional right to confrontation.” *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). These limited situations include the proffer of evidence of a complainant’s prior sexual history to show his or her bias. *Id.* Further, in *People v Morse*, 231 Mich App 424, 436; 586 NW2d 555 (1998), this Court recognized that evidence of a complainant’s sexual history may be admissible to show that his or her age-inappropriate sexual knowledge was not learned from the defendant. This Court cautioned, however, that in order for such evidence to be admissible, the prior sexual conduct must be significantly similar to the conduct underlying the instant case. *Id.* at 437. In exercising its discretion in determining the admissibility of evidence, a “trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant’s sexual conduct where its exclusion would not unconstitutionally abridge the defendant’s right to confrontation.” *Hackett, supra* at 349. Further, the application of the rape-shield statute should be determined on a case-by-case basis, balancing the rights of the victim and the defendant in each case. *Morse, supra* at 433.

Here, the trial court did not abuse its discretion by excluding the proffered evidence involving BL’s sexual assaults of his younger sisters, the sexual assault perpetrated on BL by another resident at the Maxey Boys Training Facility, and BL’s consensual sexual relationship with a boy of similar age. Defendant argues that the trial court should have allowed such evidence to explain BL’s age-inappropriate sexual knowledge and bias. The court properly excluded the evidence for the purpose of showing BL’s alleged age-inappropriate sexual knowledge because the prosecutor did not argue or seek to introduce evidence that BL possessed age-inappropriate sexual knowledge. BL was 13 years old at the time of the in camera hearing and at trial. Although he was relatively young, he was not so young that his testimony gave rise to the inference that his sexual knowledge must have been acquired from defendant. See *Morse, supra* at 433-434. Therefore, the trial court did not abuse its discretion in concluding that there existed no obvious inference that BL’s sexual knowledge could have derived solely from defendant’s alleged conduct.

In addition, the trial court properly excluded the proffered evidence to show BL’s bias. Our Supreme Court has recognized that a complainant’s bias “is almost always material . . .” *People v Arenda*, 416 Mich 1, 14; 330 NW2d 814 (1982). The trial court concluded, however, that the evidence was not relevant to show BL’s bias against defendant, and defendant has not clarified on appeal how the evidence was probative of bias against defendant. In recognizing that a defendant’s reliance on a complainant’s prior sexual history to show bias is almost always

material and should be admitted, our Supreme Court relied on a case in which it was argued that the complainant's allegations against the defendant were fabricated to serve the complainant's purposes. *Hackett*, *supra* at 348. In *Commonwealth v Joyce*, 382 Mass 222, 224; 415 NE2d 181 (1981), the defendant alleged that the complainant falsely accused him of rape to avoid further prosecution for prostitution. Unlike *Joyce*, defendant in the instant case fails to explain how BL's prior sexual history led to his allegations against defendant. Accordingly, the trial court did not abuse its discretion by denying admission of the evidence to show bias.

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that he was denied a fair trial because the prosecutor improperly shifted to him the burden of proof and repeatedly argued that the complainants had no reason to fabricate the allegations against defendant, knowing that the trial court had excluded the evidence necessary to rebut this argument under the rape-shield statute. We disagree.

A. Standard of Review

"We review for an abuse of discretion a trial court's decision on a motion for a mistrial." *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). Further, we review claims of prosecutorial misconduct de novo to determine whether a defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005).

B. Analysis

A motion for a mistrial should be granted "'only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.'" *Bauder*, *supra* at 195, quoting *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999). Thus, absent a showing of prejudice, reversal is not warranted. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). Moreover, this Court considers issues of prosecutorial misconduct on a case-by-case basis, evaluating the prosecutor's remarks in context and in light of defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Arguments that merely point out the weaknesses in a defendant's case, and do not burden his right not to testify or allocate to him the burden of disproving an element of an offense, do not shift the burden of proof. *People v Fields*, 450 Mich 94, 112-113; 538 NW2d 356 (1995).

Defendant contends that the prosecutor impermissibly alluded to the evidence excluded under the rape-shield statute. Defendant refers in particular to the prosecutor's question of Detective Terry Baker regarding why BL never underwent a medical examination as a result of his allegations against defendant. Defendant argues that BL did not undergo an examination because of his sexual relationship involving anal intercourse with another boy his age. The trial court disallowed the admission of such evidence under the rape-shield statute. Defendant's argument is meritless because the record reflects that the trial court sustained defendant's objection to this question, and Detective Baker did not answer it. Similarly, the trial court sustained defendant's objection when the prosecutor asked defendant whether the complainants' mother told him why BL left the family residence. Therefore, defendant was not deprived of a fair and impartial trial based on these claims of misconduct.

Defendant also relies on the following remarks that the prosecutor made during closing and rebuttal arguments:

And throughout the course of this trial and during all of the testimony that you've heard the Defense cannot or did not explain why these children would say these things. Can't explain it, and –

MR. LORD [Defense counsel]: Your Honor, I'm going to have to object to that line of argument. That is indicating there's a burden of proof on the Defendant, and that's inappropriate. The burden never shifts. It's not our –

THE COURT: That remark sort of troubled me, because it has that sort of appearance that –

MRS. KEYES [Prosecutor]: Your Honor, however –

THE COURT: I want to be sure the Jury understands that the Defendant does not have any burden.

MRS. KEYES: No, they don't, your Honor. However, if they do call witnesses they can examine that witness testimony and what they heard.

* * *

THE COURT: I'm talking right now. Yeah, all I'm, I have no concern with what we're, what you're suggesting here Mrs., Mrs. Keyes. And I am honoring Mr. Lord's objection. I want to be sure the Jury understands, however, that the Defendant does not have the obligation to prove. It's the Prosecutor's obligation to prove. And we're on the same page here.

MRS. KEYES: Absolutely.

THE COURT: Okay.

MRS. KEYES: And, ladies and gentlemen, out of all the witnesses, and I'll make it clear, after all the witness testimony, after all of the people that testified, no one has explained why these kids would say these things. And you as a Jury, the fact finders are to judge the Defense's proofs just as you would our proofs.

* * *

And when we talk about the evidence in this case and when we talk about inconsistencies, when we talk about whether or not these kids are, are telling the truth because, because to find the Defendant not guilty, ladies and gentlemen, you do have to find that each of these children lied. Each of these children made these allegations up against the Defendant, and there has been no evidence, there's no reason why these kids would make this up. They have nothing –

MR. LORD: Your Honor –

MRS. KEYES: -- to gain.

Defendant argues that the prosecutor's remarks shifted the burden of proof by suggesting that defendant was required to present evidence explaining why the complainants would have fabricated their allegations.

Defendant's theory of defense was that the allegations against him were fabricated. The prosecutor's arguments that the complainants had no reason to lie responded to that theory. "[A] prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Thomas, supra* at 455. The trial court correctly concluded that the prosecutor was not precluded from asserting this argument merely because "[d]efendant possessed inadmissible evidence that he believed would somehow rebut the argument." In any event, as previously discussed, defendant has not explained how the evidence involving BL's sexual history gave rise to a motive to fabricate the allegations.

Further, the prosecutor's arguments did not shift the burden of proof to defendant. In *Fields, supra* at 115, our Supreme Court stated:

[W]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof.

Therefore, because defendant advanced the theory of fabrication during trial, the prosecutor's argument that the complainants had no motive to lie did not shift the burden of proof. Moreover, to the extent that the prosecutor's arguments can be characterized as commenting on defendant's failure to present evidence, the trial court instructed the jury that defendant did not have the burden of proof. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

IV. MRE 404(b) EVIDENCE

Defendant next contends that the trial court abused its discretion by admitting similar acts evidence under MRE 404(b). We again disagree.

A. Standard of Review

This Court reviews the admission of other acts evidence for an abuse of discretion. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). Generally, a decision on a close evidentiary question cannot be an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

B. Analysis

MRE 404(b)(1) governs the admission of prior bad acts evidence. Whether other acts evidence is admissible under MRE 404(b)(1) depends on four factors. First, the evidence must be offered for a permissible purpose, i.e., one other than showing character or a propensity to commit the charged crime. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). “Second, ‘the evidence must be relevant under MRE 402.’” *Id.*, quoting *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended by 445 Mich 1205 (1994). Third, unfair prejudice must not substantially outweigh the probative value of the evidence under MRE 403. *Id.* Fourth, the trial court, if requested, may provide a limiting instruction to the jury under MRE 105. *Id.*

The trial court admitted evidence involving defendant’s interactions with Jessie Taylor, the complainants’ stepsister, and her friend, Ashley Vayko, as well as with his nieces, Carissa Holzberger and Marshale Holzberger. Defendant argues that the other acts evidence was inadmissible to show a common plan, scheme, or motive because the uncharged conduct was not sufficiently similar to the charged conduct.

“[E]vidence 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.” *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). “‘To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual [I]t need only exist to support the inference that the defendant employed that plan in committing the charged offense.’” *Id.* at 65-66, quoting *People v Ewoldt*, 7 Cal 4th 380, 403; 867 P2d 757 (1994). Further, in order to be admissible, there need not exist an impermissibly high level of similarity between proffered other acts evidence and the charged acts as long as the evidence is probative of something other than the defendant’s character or propensity to commit the charged offense. *Knox, supra* at 511.

The trial court did not abuse its discretion by admitting the other acts evidence. The evidence was probative of defendant’s system or plan in grooming the children and young adults to acquiesce to his sexual advances. Regarding Jessie and Ashley, defendant used shopping trips, food, and clothing to entice them to spend time with him. He made comments regarding bras and underwear that they were looking at while he shopped with them, asked them to model bras for him, and purchased bras for both girls. He also told them that they could spend the night at his home and indicated to Jessie that they could watch movies together on his king-size waterbed. On one occasion, he told Jessie that a lingerie item that he had in his basement would look good on her. He also asked his 20-year-old niece, Carissa, to try on lingerie in his basement after serving her alcoholic drinks. Although defendant never engaged in sexual contact with Jessie, Ashley, or Carissa, his conduct evidenced his common plan in grooming individuals to submit to his sexual advances as demonstrated by TK’s allegations. She alleged that he convinced her, then only nine years old, to model lingerie for him in his basement. She further alleged that he thereafter engaged in sexual contact with her and showed her pornographic magazines.

In addition, the trial court did not abuse its discretion by admitting the other acts evidence involving Marshale. Although defendant did not entice Marshale to his home with clothing and did not ask her to model lingerie for him, the evidentiary hearing testimony showed that he

provided her with alcoholic beverages when she spent the night at his house. She was 22 years old at the time and intended on cleaning defendant's house to earn extra money. After she became drunk, defendant suggested that she sleep in his bedroom, and she awoke to find her jeans and underwear at her ankles and defendant rubbing his penis against her buttocks. Therefore, the evidence was probative of defendant's plan to coerce persons at his home to engage in sexual activity.

Although the other acts evidence in some respects did not mirror the conduct giving rise to the charged offenses, an "impermissibly high" level of similarity between the charged and uncharged conduct is not necessary. *Knox, supra* at 511. Contrary to defendant's argument that the sole purpose of the evidence was to demonstrate his propensity to commit the charged offenses, the evidence was probative of "the existence of a plan rather than a series of similar spontaneous acts" *Sabin, supra* at 65-66, quoting *Ewoldt, supra* at 403. In *People v Ackerman*, 257 Mich App 434, 437; 669 NW2d 818 (2003), the defendant was convicted of first-degree criminal sexual conduct regarding his conduct involving three girls under the age of 13. This Court upheld the admission of evidence involving the defendant's conduct with two teenagers who had reached the age of consent because their experiences with the defendant were sufficiently similar to those of the victims. In particular, this Court held that the defendant's activity with the teenagers evidenced a common plan, scheme, or system to desensitize and seduce young women who frequented a particular youth facility into sexual activity with him. *Id.* at 441. Similarly, in the instant case, defendant's conduct evidenced his plan to coerce or desensitize children and young women into engaging in sexual activity.

Defendant further argues that the prejudicial effect of the evidence far outweighed its probative value. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). "The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself." *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). The probative value of the other acts evidence was relevant to show defendant's plan or scheme and to rebut his theory that the allegations were fabricated. *Sabin, supra* at 71. Thus, the evidence was not merely marginally probative, but was probative of the ultimate issue, i.e., whether defendant committed the offenses alleged. See *Sabin, supra* at 71. Further, the trial court's limiting instruction directed the jury not to consider the evidence as showing that defendant is a bad person or that he acted in conformity with his previous conduct. Such an instruction generally protects a defendant's right to a fair trial. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Accordingly, the trial court did not abuse its discretion by admitting the other acts evidence under MRE 404(b). *Johnigan, supra* at 465.

Affirmed.

/s/ Alton T. Davis
/s/ Bill Schuette
/s/ Stephen L. Borrello