STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 30, 2007
v	No. 269980 Macomb Circuit Court
THOMAS LENNART HELLSTROM, Defendant-Appellant.	LC No. 2003-001464-FC

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

PER CURIAM.

Defendant was convicted by a jury of five counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and sentenced to concurrent prison terms of 57 months to 15 years for each conviction. He appeals as of right. We affirm.

I. FACTS

Defendant was arrested and charged with multiple counts of criminal sexual conduct on March 7, 2003. Several days later, an amended search warrant led to the discovery of child pornographic material on the defendant's home computers. Before trial, defendant moved to suppress the child-pornography evidence. An evidentiary hearing was held on December 5, 2003, following which the trial court denied defendant's motion. The trial court concluded that sufficient probable cause existed and that the warrant was not overly broad.

Defendant filed an interlocutory appeal to this Court, which affirmed the trial court's decision on October 21, 2004, in *People v Hellstrom*, 264 Mich App 187; 690 NW2d 293 (2004). This Court found that the search was valid on the basis of the good-faith exception to the Fourth Amendment exclusionary rule, as set forth in *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004). Therefore, this Court affirmed the trial court's decision but for a different reason.

On November 10, 2004, defendant moved for reconsideration, arguing that *Goldston* could not be applied retroactively and did not apply to the search warrants. On December 10, 2004, this Court denied defendant's motion for reconsideration. On January 18, 2005, defendant appealed to the Supreme Court, renewing the argument made in the interlocutory appeal and motion for reconsideration in this Court. On September 15, 2005, the Supreme Court denied leave to appeal. *People v Hellstrom*, 474 Mich 862; 703 NW2d 189 (2005).

On December 2, 2005, defendant filed a renewed motion to suppress in the trial court, relying on the recent decision in *United States v Laughton*, 409 F3d 744 (CA 6, 2005). Defendant also sought relief based on the fact that this Court never considered whether it was proper to apply the good-faith exception retroactively to this case and that *Goldston* should not be applied retroactively. In a January 9, 2006 opinion and order, the trial court denied defendant's renewed motion to suppress. The court ruled that *Laughton* did not require a different result and that it was unable to consider whether this Court erroneously relied on *Goldston*.

On January 30, 2006, after a jury trial, defendant was acquitted of the three first-degree criminal sexual conduct charges, but convicted of the five counts of second-degree criminal sexual conduct. Defendant's convictions arise from sexually molesting a neighborhood girl when she was between 8 and 11 years old. The victim testified that defendant befriended her and invited her into his house where they would play games and engage in other playful activities. She testified that on several occasions while playing games, defendant would rub his private area against her private area or her back. These incidents occurred in the basement or defendant's son's bedroom, and sometimes while they were playing with defendant's dog.

At trial, the prosecution presented the testimony of the victim's friend JJ, who also lived in defendant's neighborhood. JJ testified that defendant sexually molested her on two occasions while she was at defendant's home. The first incident occurred in defendant's son's bedroom, when defendant rubbed his penis against JJ's tailbone while JJ was kneeling over the bed to look at an eel. The second incident occurred in the basement, when defendant grabbed JJ's waist and rubbed his penis on her after asking her to play a game that involved touching her toes. The prosecution also presented evidence that images of child pornography were found on computers in defendant's home.

On March 28, 2006, defendant was sentenced to concurrent prison terms of 57 months to 15 years for each second-degree criminal sexual conduct conviction. Defendant appeals as of right.

II. ADMISSIBILITY OF EVIDENCE

Defendant argues that JJ's testimony concerning uncharged acts of sexual misconduct and the evidence of child pornography was improperly admitted at trial. We disagree.

A. Standard of Review

The admissibility of prior bad acts evidence is within the trial court's discretion and the court's decision will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

B. Analysis

The trial court found that this evidence was admissible under both MCL 768.27a and MRE 404(b). Although the statute did not become effective until January 1, 2006, several years after the charged acts were committed, the trial court determined that application of the statute did not violate the Ex Post Facto Clause, US Const, art 1, § 10, cl 1, because it did not affect any

vested rights or the quantum of evidence necessary to obtain a conviction, but rather only affected what type of evidence could be introduced at trial. The trial court also rejected defendant's argument that the statute impermissibly infringed on the Supreme Court's exclusive rulemaking authority with regard to matters of practice and procedure because it conflicted with MRE 404(b).

On appeal, we find it unnecessary to address defendant's constitutional challenges involving the scope and application of MCL 768.27a to this case. As previously indicated, the trial court found that the evidence was independently admissible under MRE 404(b). Therefore, because we conclude that the trial court did not abuse its discretion in admitting the evidence under MRE 404(b), we decline to address defendant's arguments regarding admission of the evidence under MCL 768.27a.[1]

MRE 404(b)(1) governs the admission of evidence of other bad acts. This rule 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.

To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant to an issue of fact of consequence at trial, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993); *People v Dobek*, 274 Mich App 58, 85; 732 NW2d 546 (2007).

In this case, we agree with the trial court that JJ's testimony was admissible to show defendant's scheme, plan, or system in committing sexual abuse against young neighborhood girls, a proper purpose under MRE 404(b)(1). The victim and JJ were both neighbors of defendant, and they were of similar age at the time of the incidents. Additionally, the alleged conduct occurred in the same areas of defendant's house, under the guise of playing a game or interacting with pets. The circumstances and conduct described by both girls shared sufficient common features to permit the inference of a plan, scheme, or system, beyond the mere commission of acts of sexual molestation. Further, in light of the trial court's cautionary instruction advising the jury on the limited purpose of JJ's testimony and the court's instruction that the jury was not to consider her testimony for an improper purpose, such as to decide that

[1] We further note that another panel of this Court has been directed by our Supreme Court to consider the issue raised by defendant—whether MCL 768.27a conflicts with MRE 404(b), and if so, whether the statute prevails over the court rule. *People v Watkins*, ___ Mich ___; 734 NW2d 600 (2007).

defendant was a bad person or was likely to commit crimes, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Accordingly, the trial court did not abuse its discretion in admitting JJ's testimony under MRE 404(b).

We also conclude that the trial court did not abuse its discretion in admitting evidence of child pornography found on defendant's home computers. This evidence was offered to show defendant's intent, a proper purpose under MRE 404(b). Defendant was charged with second-degree criminal sexual conduct. To establish this offense, the prosecutor was to prove that defendant engaged in "sexual contact" with the victim, which is defined as "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(o); *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). The evidence that defendant indulged in viewing child pornography was relevant to, and probative of, whether the acts described by the victim involved a touching by defendant for the purpose of sexual arousal or gratification. Further, because the trial court excluded the actual pornographic images and gave a cautionary instruction limiting the jury's consideration of this evidence to a proper purpose, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403.

Also, defendant claims that the child pornography evidence should not have been admitted because it could not be linked to defendant. This argument is unavailling because defendant's argument in this regard implicates the weight the evidence should be given rather than its admissibility. See, e.g., *People v McGhee*, 268 Mich App 600, 611-612; 709 NW2d 595 (2005).

The trial court did not abuse its discretion in admitting JJ's testimony and the evidence of child pornography under MRE 404(b); therefore, it is unnecessary to determine whether MCL 768.27a could serve as an additional basis for allowing the evidence in this case. Even if it would have been improper to admit the evidence under the statute, the error would have been harmless beyond a reasonable doubt.[2] *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005).

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[2] With regard to JJ's testimony, we note that the trial court determined that the evidence was admissible under MCL 768.27a in order to show that the two complainants were close in age and that both matters occurred in defendant's home while he was playing games. At trial, in addition to instructing the jury that JJ's testimony could be considered to show "a scheme, plan, or system of doing the act," the trial court also instructed that the jury that it could consider the testimony to "think about whether this evidence tends to show the two complainants were close in age, both matters occurred in the defendant's home while he was playing games, . . ." This latter purpose was the only purpose articulated by the trial court independent of its decision to also allow the testimony under MRE 404(b). However, whether the two complainants were close in age and whether the alleged conduct occurred in defendant's home while playing games were proper considerations in determining whether defendant's conduct was a manifestation of a common scheme, plan, or system. Thus, the trial court's instructions did not allow the jury to consider

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III. SUPPRESSION OF EVIDENCE

Next, defendant argues that the trial court erroneously denied his motion to suppress the child-pornography evidence on the ground that it was unlawfully seized. Defendant previously raised this issue in an interlocutory appeal. This Court held that suppression was not warranted because the search was valid on the basis of the good-faith exception to the Fourth Amendment exclusionary rule. *Hellstrom*, *supra* at 187. This Court's decision in *Hellstrom* is the law of the case. *Reeves v Cincinnati, Inc* (*After Remand*), 208 Mich App 556, 559; 528 NW2d 787 (1995). Although defendant argues that this Court's prior decision was erroneous, we are not persuaded that reconsideration of this issue is warranted. *Bennett v Bennett*, 197 Mich App 497, 500; 496 NW2d 353 (1992).

IV. WITNESS CREDIBILITY

Defendant next argues that reversal is required because the victim's mother improperly vouched for the victim's credibility, and the prosecutor referred to this evidence in her closing rebuttal argument. We disagree.

A. Standard of Review

"Questions of misconduct by the prosecutor are decided case by case. On review, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial." *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

B. Analysis

It is improper for a witness to give an opinion about the credibility of other witnesses. *People v Williams*, 153 Mich App 582, 590; 396 NW2d 805 (1986). Here, the victim's mother testified about her daughter's medication history, but this testimony did not involve any direct opinion on her daughter's credibility. Thus, the testimony did not constitute improper vouching and the prosecutor was entitled to comment on the evidence. *People v Lee*, 212 Mich App 228, 255-256; 537 NW2d 233 (1995). Later, however, the witness testified that she believed her daughter was telling the truth. Although this testimony may have been improper, it was brief and isolated. Under the circumstances, it is not more probable than not that this error affected the outcome of the trial in light of the weight and strength of the properly admitted evidence. *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003). Therefore, the error, if any, was harmless.

V. DISCOVERY OF THE VICTIM'S MEDICAL RECORDS

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JJ's testimony for any purpose not already permitted by MRE 404(b). Similarly, the trial court instructed the jury that the evidence of child pornography could be considered only to determine whether defendant's intent in touching the victim was for sexual arousal or gratification, a purpose permitted by MRE 404(b). Accordingly, there is no basis for concluding that the trial court's reliance on MCL 768.27a expanded the jury's consideration of the challenged evidence beyond that permitted by MRE 404(b).

Defendant also argues that he was entitled to discovery of the victim's medical records under *People v Stanaway*, 446 Mich 643, 649-650; 521 NW2d 557 (1994). We disagree.

A. Standard of Review

This Court reviews a trial court's decision regarding discovery requests for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998).

B. Analysis

Defendant failed to show that the records contained material information necessary to his defense. Therefore, the trial court did not abuse its discretion in denying defendant's request for disclosure. *Stanaway*, *supra* at 649-650.

VI. SENTENCING

We also reject defendant's argument that the trial court improperly engaged in judicial fact-finding at sentencing when it scored ten points for offense variable 4, MCL 777.34(2) (psychological injury requiring professional treatment). Defendant's reliance on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), to argue that the trial court could not properly consider facts not found by the jury or admitted by defendant is misplaced because *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 160-161, 164; 715 NW2d 778 (2006). Here, the ten-point score was supported by the victim's impact statement, which disclosed that the victim had actually sought counseling and was still having problems relating to men because of defendant's sexual abuse.

VII. RESTRICTION ON CROSS-EXAMINATION

Lastly, defendant argues that the trial court erred by restricting his cross-examination of the victim's father and direct-examination of defendant's wife. Again, we disagree.

A. Standard of Review

A trial court's decision whether to admit or exclude evidence and whether to limit cross-examination for bias is reviewed for an abuse of discretion. *People v Layher*, 464 Mich 756, 765; 631 NW2d 281 (2001); *McGhee*, *supra* at 636.

B. Analysis

At trial, defense counsel asked defendant's wife whether there was a time when she needed a personal protection order. The prosecutor raised a relevancy objection, which the trial court sustained. Also, during defense counsel's questioning of the victim's father, the trial court refused to allow defense counsel to delve into the issue of Conlon's anger with defense counsel, or question Conlon about whether he had in fact chased a defense investigator away. The court sustained the prosecutor's objections that the questions were irrelevant and beyond the scope of her examination. Defendant argues that the excluded evidence was admissible because it was relevant to the issue of the victim's family's bias.

A witness's bias is always relevant, and a defendant is entitled to have the jury consider any fact that may have influenced the witness's testimony. *McGhee*, *supra* at 637. Bias refers to the relationship between a party and a witness that might lead the witness to slant his testimony in favor or against a party. Bias may be induced by a witness's "like, dislike, or fear of a party, or by the witness'[s] self-interest." *Layher*, *supra* at 763. In this case, it was reasonable for the trial court to conclude that the proferred testimony did not establish bias and was irrelevant. Therefore, the court did not abuse its discretion by foreclosing the proffered cross-examination.

Affirmed.

/s/ Bill Schuette
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter