STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED November 20, 2007
v	No. 278193 Oakland Circuit Court
STEVEN MICHAEL BROOK, Defendant-Appellee.	LC No. 2006-210634-FH

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

The prosecution appeals by leave granted the trial court's denial of its motion to admit certain evidence of prior bad acts at defendant's trial. We reverse.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). However, we review de novo preliminary questions of law regarding the admissibility of evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

MCL 768.27a is a constitutional, legislative rule of evidence. *People v Pattison*, ___ Mich App ___; ___ NW2d ___ (2007) (Docket No. 276699, released September 11, 2007), slip op at 3. The statute provides that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." MCL 768.27a. Pursuant to MCL 768.27a(2)(a), a "[l]isted offense" is any offense defined in MCL 28.722(e).

Defendant was charged with child sexually abusive activity, MCL 750.145c(2), for allegedly taking sexually explicit photographs of a minor female victim in 1996. The prosecution sought to introduce evidence that defendant had fondled and sexually assaulted a different minor female victim while she slept in 2001 and 2002. Defendant had not been convicted of this alleged 2001 and 2002 sexual misconduct, but he was facing a pending charge

of fourth-degree criminal sexual conduct for the alleged 2001 and 2002 activity in a separate criminal case.[1]

Child sexually abusive activity, MCL 750.145c(2), and fourth-degree criminal sexual conduct, MCL 750.520e, are both "listed offense[s]." MCL 28.722(e)(*i*); MCL 28.722(e)(*x*). In other words, defendant is presently "accused of committing a listed offense against a minor," and the prosecution seeks to admit "evidence that the defendant committed another listed offense against a minor . . . ." Evidence of the alleged fourth-degree criminal sexual conduct that occurred in 2001 and 2002 falls within the scope of MCL 768.27a, and is admissible at defendant's trial.

Defendant contends that the evidence of his prior bad acts is irrelevant. MRE 402. The trial court agreed, but we do not. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The relevancy "threshold is minimal: 'any' tendency is sufficient probative force." *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998). We conclude that evidence of defendant's alleged 2001 and 2002 sexual misconduct against a minor is at least minimally relevant to the present case. MRE 401.

Defendant also argues that the evidence of his prior bad acts should be excluded as unfairly prejudicial. Although the trial court did not reach this issue, we consider it because it presents a question of law and is necessary to a proper determination of the case. *People v Giovannini*, 271 Mich App 409, 414-415; 722 NW2d 237 (2006).

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 . . . ." MRE 403. Indeed, when examining the admissibility of evidence under MCL 768.27a, the trial court must "take seriously [its] responsibility to weigh the evidence's probative value against its undue prejudice in each case before admitting the evidence." *Pattison*, *supra*, slip op at 4. The inquiry under MRE 403 is whether the evidence was *unfairly* prejudicial because, presumably, all evidence presented by the prosecution is prejudicial to the defendant to some degree. *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994).

"Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, *supra* at 398. It is true that this danger is particularly prevalent in the context of prior bad acts evidence. *Id*. However, in addition to being generally admissible under MCL 768.27a, the challenged evidence in the instant case is also highly probative of defendant's modus operandi in surreptitiously assaulting minor victims. On de novo review, *Lukity*, *supra* at 488, we conclude that the

[1] MCL 768.27a does not apply only to convicted conduct, but allows introduction of any "evidence that the defendant committed another listed offense against a minor . . . ." Assuming arguendo that the alleged 2001 and 2002 sexual misconduct was perpetrated in the manner described by the prosecution and victim—by the element of surprise while the victim slept—it would indeed constitute fourth-degree criminal sexual conduct under MCL 750.520e(1)(b)(*v*) (sexual contact achieved through concealment or by the element of surprise).

probative value of the evidence of defendant's alleged sexual misconduct in 2001 and 2002 is not substantially outweighed by the danger of unfair prejudice. MRE 403.

Reversed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane M. Beckering