

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS EUGENE MOORE,

Defendant-Appellant.

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UNPUBLISHED

December 13, 2007

No. 273238

Oakland Circuit Court

LC No. 2005-204094-FC

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13), and sentenced to 25 to 50 years' imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises out of the sexual assault of "AT," age ten at the time of trial. While babysitting AT in July 2005, defendant took her to the beach. She testified that thereafter, while in defendant's truck, he pulled her bathing suit bottoms down and "started French kissing [her] private" with his mouth and tongue. Defendant stopped when AT began to cry and told her that if she told anyone about what he had done, he would go to jail and would no longer be able to see his daughter.

I Evidentiary Rulings

Defendant argues that several of the trial court's evidentiary rulings denied him his constitutional rights to confrontation and to present a defense. We disagree.

A. Standard of Review

We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 714 NW2d 506 (2005). The abuse of discretion standard acknowledges that there may be more than one reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *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. *Maldonado*, *supra* at 388; *Babcock*, *supra* at 269. To the extent that the trial court's evidentiary rulings implicated defendant's rights to confrontation and to present a defense, our review is de novo.

*People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002); *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

## B. Analysis

Generally, all relevant evidence is admissible and irrelevant evidence is inadmissible. MRE 402; *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001), lv den 465 Mich 952 (2002). “Relevant evidence” is “evidence having 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. Even if relevant, evidence may be excluded if the danger of unfair prejudice, confusion of the issues, or the considerations of undue delay or waste of time substantially outweigh the evidence. MRE 403; *Aldrich*, *supra* at 113.

In *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006), our United States Supreme Court recognized the broad latitude of state and federal lawmakers to establish rules such as those contained in the Michigan Rules of Evidence excluding evidence from criminal trials. The Court cautioned, however, that such latitude has limits and must not deny a defendant “a meaningful opportunity to present a complete defense.” *Id.* (quotations and citations omitted). The Court acknowledged that rules such as those barring evidence if its probative value is outweighed by unfair prejudice, confusion of the issues, or the potential to mislead the jury, have been applied with respect to “evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged.” *Id.* at 326-327. The Court recognized that rules in this context have pertained to evidence that is speculative or too remote and opined that such rules are widely accepted. *Id.* at 327.

### 1. Evidence that Third Party Committed Offense

Defendant contends that the trial court erred by precluding evidence that AT’s mother’s boyfriend, Danny Lovelace, sexually molested AT and that persons influenced AT to falsely accuse defendant instead of Lovelace. The record shows that this theory, however, was merely speculative. Although defense counsel sought to question AT regarding her interactions with Lovelace, counsel admitted immediately before trial that his theory was that AT *could have been* sexually assaulted by someone else and blamed it on defendant. In *People v McCracken*, 172 Mich App 94, 98-99; 431 NW2d 840 (1988), this Court upheld a trial court ruling excluding evidence of third-party culpability on the basis that it was merely speculative. Further, this Court has previously held that evidence tending to incriminate another person is admissible if it creates more than a mere suspicion that someone else was the perpetrator. *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987). Here, any evidence of Lovelace’s possible culpability was merely speculative and based on mere suspicion. Thus, it was properly excludable.

In any event, defense counsel was permitted to explore the notion during trial that Lovelace may have sexually assaulted AT. Counsel questioned AT regarding whether Lovelace lived with she and her mother at the time of the offense, but AT did not remember. In addition, AT’s mother testified that she and Lovelace broke up in early May 2005, and that he was not living with her on July 13, 2005, the date of the offense. Counsel also elicited from AT’s mother that the police never requested a DNA sample from Lovelace, never interviewed him regarding AT’s allegations, and never asked AT’s mother if AT had been abused previously. Defense counsel also inquired of Deputy Georgia Willyard whether she investigated Lovelace or any

other persons who may have had access to AT. Willyard responded that she did not. Accordingly, the record shows that defendant was provided an opportunity to confront witnesses against him and to assert his defense that Lovelace actually perpetrated the offense alleged against defendant.

## 2. Evidence of AT's Home Environment

Defendant also argues that the trial court erred by precluding him from introducing evidence of AT's home environment that may have raised doubts concerning the reliability of her testimony. Defense counsel sought to introduce evidence that AT's mother worked as an "exotic dancer," that pornography was present in the home, that "live sexual acts" or "open sexuality" was practiced in the home, and that Lovelace had a history of domestic violence and drug use.

The trial court properly excluded evidence of AT's mother's occupation on the basis that it was not relevant, but rather, involved an extrinsic or tangential issue. The court also properly excluded as irrelevant evidence of a domestic assault that Lovelace may have committed against AT's mother. Defendant's remaining assertions were purely speculative. Although defense counsel claimed that Lovelace had a cocaine addiction, he made no offer of proof regarding whether drugs were used in the home. Moreover, counsel maintained that there was *likely* pornography in the home that the adults *may* have viewed around the children and that there was *possibly* live sex acts that the adults *may* have performed in front of the children. Thus, the evidence was merely speculative. Nevertheless, defense counsel elicited from AT's mother that the police never asked her whether AT had access to pornography in the home, whether AT witnessed any sex acts being performed, or whether there was drug use in the home. Accordingly, counsel was permitted to explore these issues to some extent and argued during closing argument, in accordance with defendant's expert witness testimony, that these factors could have prompted AT to make a false accusation.

Defendant also contends that the trial court erred by prohibiting evidence regarding AT's abandonment issues resulting from her father's desertion of the family. The record shows that the trial court did not prohibit such evidence. Over the prosecutor's objection, the trial court permitted defense counsel to inquire of AT about her father to ascertain whether she had feelings of abandonment and was seeking attention. AT testified that her father was incarcerated in Arkansas and would not be released until she was at least 12 years old. Defense counsel also elicited from AT's mother that AT had seen her father only twice in her life. Thus, the record belies defendant's contention that the trial court prohibited such evidence.

## 3. In Camera Review of AT's Psychiatric Records

Defendant further argues that the trial court improperly denied his pretrial request for an in camera review of AT's psychiatric records. The record shows that the trial court's ruling was proper because defendant was unable to make the threshold showing warranting an in camera review of the records. In order to warrant such a review, a defendant must demonstrate "a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense." *People v Stanaway*, 446 Mich 643, 677; 521 NW2d 557 (1994); see also MCR 6.201(C)(2).

In support of his motion, defendant argued that AT made inconsistent statements. One of the statements concerned what defendant had told her immediately after the offense, and the other involved defendant allowing her to drive his truck. The statements pertained to different subject matters and were not inconsistent. Although defendant argued that AT's credibility was critical, a generalized assertion of a need to attack an accuser's credibility does not establish the threshold showing of a reasonable probability that psychological records contain information material to the defense. *Stanaway, supra* at 650. Therefore, the trial court properly denied defendant's request for an in camera review of AT's psychological records.

#### 4. Defendant's Sexual Character and Morals

Defendant next contends that the trial court erred by disallowing evidence of specific instances involving his good sexual character and morals. He sought to present evidence that he did not sexually assault other children and thus never acted in a way to suggest that he is a pedophile.

MRE 404(a)(1) provides that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." Further, MRE 405 provides:

**(a) Reputation or Opinion.** 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.

**(b) Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

In *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986), our Supreme Court characterized MRE 404(a)(1) as a "mercy rule" that "allows a criminal defendant an absolute right to introduce evidence of his character to prove that he could not have committed the crime." Under MRE 405(a), however, an accused may present favorable evidence only in the form of reputation or opinion testimony. MRE 405(a); *Whitfield, supra* at 130.<sup>1</sup> Here, the trial court permitted defendant to present opinion and reputation testimony regarding his good sexual character and morals. Moreover, evidence of specific instances of conduct, or nonconduct, was not admissible under MRE 405(b) because defendant's character or a trait of character was not an essential element of the charge, claim, or defense. Accordingly, the trial court's ruling excluding evidence of specific instances of conduct was not erroneous.

#### 5. Prior Incident of Child Molestation

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<sup>1</sup> Our Supreme Court decided *Whitfield* before a 1991 amendment to MRE 405(a) allowing opinion evidence. At the time of the Court's decision, MRE 405(a) allowed only reputation evidence.

Defendant next argues that the trial court erred by allowing the prosecutor to elicit testimony concerning a prior incident of child molestation involving defendant. We disagree.

During defense counsel's cross-examination of AT's mother, he asked her if she had heard of anything that led her to believe that defendant had an interest in children. She responded that she had recently heard "something new." On redirect, the prosecutor elicited that AT's mother had heard that defendant made a little girl play with his penis while on a fishing trip.

Defendant argues that the testimony was improperly admitted because it was hearsay. Hearsay is defined as an out-of-court statement offered "to prove the truth of the matter asserted." MRE 801(c). Here, the testimony was not offered for its truth. Rather, it was offered as evidence of a specific instance of conduct involving defendant's character. Thus, the testimony was not hearsay and was admissible under MRE 405(a).

Defendant contends that the testimony was also improper because it was not elicited of his character witnesses. Because defendant did not object on this basis or otherwise raise this argument in the trial court, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Defendant relies on *People v Champion*, 411 Mich 468, 471; 307 NW2d 681 (1981), in which the Court held that MRE 405(a) was violated when the prosecutor inquired into specific instances of conduct during the direct examination of a rebuttal witness. Here, the challenged testimony was not elicited from a rebuttal witness. Rather, defense counsel attempted to use AT's mother as a favorable character witness by asking her whether she had heard anything that would lead her to believe that defendant had an interest in children. AT's mother did not respond negatively, as counsel apparently expected. Because counsel attempted to portray AT's mother as a favorable character witness, the prosecutor's inquiry into specific instances of conduct under MRE 405(a) did not constitute plain error affecting defendant's substantial rights.

Defendant also contends that before the prosecutor inquired into specific instances of conduct, the trial court was required to assess several factors including whether the probative value of the questioning substantially outweighed the danger of unfair prejudice and the prosecutor's belief that the matter inquired into actually occurred. Because defendant did not raise this argument in the trial court, our review is limited to plain error affecting his substantial rights. *Carines*, *supra* at 763, 774.

Defendant's argument is misplaced. He relies on a passage from *Whitfield*, *supra*, at 133-134, pertaining to the procedure to be employed upon retrial *of that case*. There is no indication that the Court intended for such a procedure to be employed in every case. Defendant failed to establish plain error affecting his substantial rights in this regard.

## 6. Cumulative Error

Finally, defendant contends that the cumulative effect of the asserted individual errors

denied him a fair trial. Because we have found no individual error, however, there can be no cumulative effect of errors denying him a fair trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

Affirmed.

/s/ William C. Whitbeck  
/s/ Helene N. White  
/s/ Brian K. Zahra