STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2008
v	No. 276821 Oakland Circuit Court
JASON WILLIAM STEINER, Defendant-Appellant.	LC No. 2006-211672-FC

Before: Zahra, P.J., and Whitbeck and Beckering, JJ.

PER CURIAM.

A jury convicted defendant Jason Steiner of two counts of second-degree criminal sexual conduct (CSC),[1] indecent exposure,[2] and furnishing obscene material to a minor.[3] The trial court sentenced Steiner to concurrent terms of 5 to 15 years' imprisonment for each second-degree CSC conviction, and 90 days in jail for the indecent exposure and furnishing obscene material convictions. Steiner appeals as of right. We affirm.

I. Basic Facts And Procedural History

Steiner's convictions stemmed from his sexual assault of his daughter, age six at the time of trial. Steiner and his daughter's mother were not married, but at times they lived in the same household, and Steiner often cared for the child while her mother was at work. The child testified that when she was four years old, she went into her parents' bedroom because she was frightened by a thunderstorm. The mother asked Steiner to sleep in the child's room, so that the child could remain in bed with her mother. When the child awakened, her mother was getting ready for work and Steiner was in the bed. The child claimed that Steiner later turned on a "sex movie" that showed a nude girl and boy having sex. Steiner also went into the closet and retrieved a "fake light pink penis."[4] Steiner then unzipped his pants, revealed his penis, and used

[1] MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age).

[2] MCL 750.335a.

[3] MCL 750.142.

[4] The mother testified that she taught the child the word "penis."

the fake penis to touch the child's "tunie" "under her clothes." The child explained that the term "tunie" described the body part she used to "go potty," and the trial court noted for the record that the child pointed to her vagina. The child indicated that while the movie was still playing, Steiner touched her "tunie" with his hands under her clothing. The child further indicated that, at one point, Steiner moved his hand up and down on his penis and later "milk" came out and spilled on the floor. The child testified that Steiner touched her "tunie" two times with the fake penis and once with his hand. Although Steiner warned the child not to disclose what had occurred, she told her mother and her babysitter.

The mother testified that in May 2005, her child told her that Steiner watched a "sexing movie," exposed his penis, and rubbed his penis, but that the child did not initially disclose that Steiner had touched her. Subsequently, the mother observed the child engaging in certain troublesome behaviors, such as urinating in the corner of her bedroom and lying on top of dolls. In August 2005, the mother found the child and another minor under the sheets; the child claimed to be "playing husband and wife." The child then disclosed that Steiner had touched her.

The mother testified to later finding a container of pornographic materials in a closet and the child describing the container as the location of Steiner's "sexin'" books. The mother also found a collection of pornographic magazines addressed to Steiner hidden in various clandestine places around the home, a receipt for pornographic movies in Steiner's name, pictures of nude women on the computer, and a cable bill showing that pornography had been ordered. Some of the pornographic materials involved young people.

The mother's 19-year-old niece, who lived with the family, testified that she kept a fake pink plastic penis in her drawer and, after the child's disclosure, noticed that the object and other similar items were missing.

The child's babysitter cared for the child from ages three to five. The babysitter explained that she and the mother ceased contact after she argued with the mother about Steiner having pornography on the computer and about his making a videotape of the mother's 19-year-old niece. The babysitter explained that when she was at the residence to baby-sit, she would frequently observe Steiner on the computer. The babysitter testified that the child also told her that she had seen "child porn." According to the babysitter, in 2006 Steiner called her and offered to make it "worth her while" if she falsely testified that the mother had physically abused the child. The babysitter refused the offer and reported the call to the mother.

II. Sufficiency of the Evidence

A. Standard Of Review

Steiner argues that the evidence was insufficient to sustain his convictions for second-degree CSC because the child's testimony was not credible and contained several discrepancies. A claim of insufficiency of the evidence invokes a defendant's constitutional right to due process

of law, which we review de novo on appeal.[5] When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[6] Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime.[7] We must resolve all conflicts in the evidence in favor of the prosecution.[8]

B. Elements Of The Crime

A person is guilty of second-degree CSC if the person engages in sexual contact with a person less than 13 years old.[9] "Sexual contact" includes "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 . . . ."[10] "Intimate parts" includes "the primary genital area."[11]

C. Evaluating The Evidence

Viewed in a light most favorable to the prosecution, we conclude that the evidence was sufficient to permit a rational trier of fact to find that Steiner committed two acts of second-degree CSC. There is no dispute that the child was less than 13 years old at the time of the charged incident. The "sexual contact" element was satisfied by the child's detailed testimony that Steiner touched her vagina once with his hands and once with a fake penis. The mother's niece, who lived with the family, testified that her plastic fake pink penis was missing. Further, a jury could reasonably infer from the evidence that the sexual contact was done intentionally and for sexual arousal or gratification. The child indicated that, during the episode in which the touching occurred, Steiner was watching a pornographic movie, and also exposed and rubbed his penis. Also, the mother testified that she found pornographic movies in the home, and a cable bill revealing that pornography had been ordered. From this evidence, the jury could reasonably conclude that Steiner sexually assaulted the victim. Nevertheless, Steiner argues that the evidence was insufficient because the child was not credible and her testimony contained discrepancies. This argument suggests that this Court ignore the child's testimony and resolve credibility issues anew on appeal. It is well established that absent compelling circumstances,

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[5] *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

[6] *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

[7] *People v Truong* (*After Remand*), 218 Mich App 325, 337; 553 NW2d 692 (1996).

[8] *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

[9] MCL 750.520c(1)(a).

[10] MCL 750.520a(o).

[11] MCL 750.520a(d).

which are not present here, the credibility of witnesses is for the jury to determine.[12] Further, there is no requirement that physical evidence or eyewitnesses corroborate a victim's testimony. Rather, a victim's uncorroborated testimony is sufficient to convict a defendant of CSC.[13] Consequently, the evidence was sufficient to sustain Steiner's convictions of two counts of second-degree CSC.

III. Other Acts Evidence

A. Standard Of Review

Steiner argues that we should reverse his convictions because the trial court improperly admitted evidence of other uncharged sexual incidents involving another minor, AB, contrary to MRE 404(b). We review for an abuse of discretion a trial court's decision whether to admit evidence.[14] A decision on a close evidentiary question ordinarily cannot be an abuse of discretion.[15] If there is an underlying question of law, such as whether admissibility is precluded by a rule of evidence, we review de novo that question of law.[16]

B. AB's Testimony

AB, aged 22 at the time of trial, testified that when she was 13 years old, she engaged in a sexual relationship with Steiner, who was then between 19 and 21 years old. She further testified that Steiner knew her age and that their relationship lasted four months. During AB's testimony, defense counsel objected, arguing that the testimony was irrelevant and prejudicial. The prosecution indicated that the testimony was being offered under MCL 768.27a and that it had provided the required notice to Steiner. The trial court concluded that the testimony was admissible under MCL 768.27a.

C. MCL 768.27a

Steiner primarily contends that the evidence was inadmissible because it was irrelevant, any probative value was substantially outweighed by the danger of unfair prejudice, and it was also inadmissible under MRE 404(b). However, because the evidence was offered and admitted under MCL 768.27a, Steiner's argument that the evidence was not admissible under MRE 404(b) is inapposite.

MCL 768.27a is a constitutional, legislative rule of evidence.[17] MCL 768.27a provides, in relevant part, that "in a criminal case in which the defendant is accused of committing a listed

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[12] See *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); *Wolfe*, *supra* at 514.

[13] MCL 750.520h; *Lemmon*, *supra* at 632 n 6.

[14] *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

[15] *People v Sabin* (*After Remand*), 463 Mich 43, 67; 614 NW2d 888 (2000).

[16] *McDaniel*, *supra* at 412.

[17] *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007).

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."

All of the sexual assaults at issue here are "listed offenses" under MCL 768.27a. A "[l]isted offense" is any offense defined in MCL 28.722(e).[18] Steiner was charged with second-degree CSC in this case, which is a listed offense,[19] and his conduct of engaging in a sexual relationship with the then 13-year-old AB constituted third-degree CSC,[20] which is also a listed offense.[21] Although the jury did not convict Steiner of the third-degree sexual misconduct, MCL 768.27a does not require that evidence of the other listed offense stem from a conviction; MCL 768.27a allows introduction of any "evidence that the defendant *committed* another listed offense against a minor . . . ."[22] Therefore, we conclude that the trial court did not abuse its discretion in relying on MCL 768.27a in admitting the evidence.

D. Relevancy And Prejudice

When considering the admission of evidence under MCL 768.27a, this Court has cautioned that courts are obligated to "take seriously their responsibility to weigh the probative value of the evidence against its undue prejudicial effect in each case."[23]

Although the trial court did not weigh the issue of relevancy and prejudice on the record, we consider it because it presents a question of law and is necessary to a proper determination of the case.[24] 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."[25] The relevancy "threshold is minimal: 'any' tendency is sufficient probative force."[26] AB's testimony assisted the jury in weighing the child's credibility, particularly where Steiner argued that she was not credible and that, if defendant did touch her, it was not done for sexual gratification. We therefore conclude that the evidence was relevant for purposes of MCL 768.27a.

Further, the evidence was not inadmissible simply because the nature of the evidence is prejudicial when Steiner has not demonstrated that he was *unfairly* prejudiced by the evidence.[27]

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[18] MCL 768.27a(2)(a).

[19] MCL 28.722(e)(x).

[20] MCL 750.520d(1)(a) (involving a child of at least 13 but less than 16 years of age).

[21] MCL 28.722(e)(x).

[22] (Emphasis added).

[23] *Pattison, supra* at 621, citing MRE 403.

[24] *People v Giovannini*, 271 Mich App 409, 414-415; 722 NW2d 237 (2006).

[25] MRE 401.

[26] *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998).

[27] See MRE 403.

All evidence is prejudicial to one degree or another. Here, while the acts described are serious and incriminating, such characteristics are inherent in the underlying crimes for which Steiner was accused. The danger that MRE 403 seeks to avoid is that of *unfair* prejudice.[28] We conclude that the probative value of the evidence was not substantially outweighed by the prejudicial effect. Consequently, this issue does not warrant reversal.

IV. Scoring of Offense Variable 13

A. Standard Of Review

Steiner argues that he is entitled to resentencing because the trial court improperly scored offense variable ("OV") 13. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score."[29] We review de novo the proper interpretation and application of sentencing guidelines.[30] A scoring decision "for which there is any evidence in support will be upheld."[31]

B. OV 13

MCL 777.43 directs a trial court to score 25 points for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person."[32] "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction."[33]

At sentencing, Steiner acknowledged that he was charged and convicted of two counts of second-degree CSC. Therefore, to score 25 points under OV 13, the trial court had to find that Steiner committed one additional crime against a person. The trial court's score of 25 points for OV 13 was based on evidence that Steiner committed the crime of eavesdropping for videotaping the mother's 19-year-old niece in the shower. Defense counsel challenged this scoring on the basis that the prosecution did not proceed with the case involving the niece. But MCL 777.43 explicitly states that a crime need not have resulted in a conviction in order to be counted in the scoring of OV 13.[34] Therefore, there is no merit to Steiner's contention that to be counted there must be evidence that he committed the crime by a preponderance of the evidence.

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[28] *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994).

[29] *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

[30] *People v Gullett*, 277 Mich App 214, 217; 744 NW2d 200 (2007).

[31] *Endres*, *supra* at 417 (citation omitted).

[32] MCL 777.43(1)(b).

[33] MCL 777.43(2)(a).

[34] MCL 777.43(2)(a).

However, because the crime of eavesdropping is a crime against the public order rather than a "crime against a person[,]" evidence relating to that crime should not have been admitted. Nevertheless, the child testified at trial that Steiner actually touched her three times, two times with the fake penis and one time with his hand. Therefore, the trial testimony supported the scoring, and we conclude that, albeit for the wrong reason, the trial court did not abuse its discretion by scoring 25 points for OV 13.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Jane M. Beckering