STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2008
v	No. 276849 Ottawa Circuit Court
CARL RICHARD REED, Defendant-Appellant.	LC No. 06-030129-FC

Before: Murphy, P.J., and Bandstra and Beckering, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). The trial court sentenced defendant to concurrent sentences of 180 to 480 months' imprisonment. Defendant appeals as of right. We affirm.

I. Factual Background

Until she was in the sixth grade, the victim, defendant's daughter, spent every other weekend with defendant. Defendant lived with his wife, Melinda Reed, and their two children, the victim's younger half-sister and half-brother. The victim's visitation with defendant became less frequent when she was in middle school, and she completely stopped visiting defendant when she was in the eighth grade. The victim, who was 18 years old at the time of trial, testified that, when she was in the second grade, defendant began sexually abusing her. Sitting next to the victim on the couch in the living room, defendant would ask the victim to take off her underwear. He would then insert his finger into her vagina. If the victim told defendant that it hurt, defendant would lick his finger to allow his finger to go in easier. Defendant digitally penetrated the victim at least 20 times. According to the victim, it occurred "[a]bout every time" she visited defendant. It generally occurred when Melinda was at work and the victim's half-siblings were in their upstairs bedrooms sleeping. Defendant told the victim that he was helping her prepare to lose her virginity, that she had nothing he had never seen before, and that, because he had "made" her, it was okay. Even though defendant never instructed her not to tell anyone, the victim did not tell her mother. She was scared and she did not know if defendant's actions were wrong.

One time, defendant showed the victim a pornographic movie depicting a mother and son performing oral sex on each other. Defendant then pulled down his pants, showed the victim his penis, and told her that is what a man looks like. The victim also testified that, when she took

showers at night, defendant would come into the bathroom. He would open the shower curtain and watch her. Defendant told the victim she was beautiful. The victim could not keep defendant from coming into the bathroom because the bathroom door could not be locked from the inside of the bathroom.

When the victim was in the third grade, her class was shown a "video of a younger girl, something happening to her." After the video ended, the victim told the school counselor she needed to talk. The counselor brought the victim to her office, where a police officer was waiting. The police officer, however, knew defendant and Melinda and, therefore, the victim did not tell the counselor about being sexually abused by defendant. She was scared the officer would tell defendant and Melinda.

One evening shortly thereafter, defendant ordered the victim to stand on a two-step, step stool in the garage, which was also defendant's woodshop. Defendant pulled down the victim's pants, explaining that he needed to see if she was washing herself correctly. Defendant then performed oral sex on the victim. He licked her vagina. The victim did not tell anyone about the incident.

The victim, while in middle school, took steps to make sure that defendant no longer had chances to sexually abuse her. She showered in the morning, rather than at night, so that defendant would not have a chance to come into the bathroom. She also made sure that she was never alone with defendant. In addition, the victim started sleeping upstairs in her half-sister's room. Previously, she had slept downstairs in the living room on a bed, a couch, or an air mattress.

The victim told her mother about the sexual abuse the summer before her freshman year in high school. The victim's mother let her choose whether to report defendant to the police. The victim chose against reporting defendant because she did not want to take defendant away from her half-siblings. She was not afraid that defendant would abuse her half-sister, who was four years younger than her, because her half-sister was a "good kid." Soon after telling her mother about the sexual abuse, the victim learned she was pregnant. Because she did not want defendant to have any contact with her baby, the victim asked her stepfather to adopt her, which he did four days after the victim gave birth to a daughter.

Approximately four years after she decided against reporting defendant to the police, the victim changed her mind. She learned that defendant had sexually abused her half-sister.[1] The victim contacted Detective Albino Rios, the officer assigned to her half-sister's case.

According to Melinda, the only time defendant was ever alone with the victim was when defendant transported the victim to and from her mother's house to their house. They did everything together as a family. No one in the house ever had one-on-one time together except Melinda and defendant. The children were not permitted to be alone with defendant in the garage and he did not keep a step stool in the garage. The victim and her half-sister shared a

[1] Sometime before trial, the victim's half-sister recanted her allegations that she was sexually abused by defendant.

bedroom with three beds. Melinda and defendant owned a rollaway bed, but it was only used if a friend from out of town spent the night. Melinda further testified that no child ever slept on the living room couch unless it was really hot upstairs. And, when it was really hot upstairs, all of the children slept in the living room.

Melinda also testified that it was her job to get the children bathed and ready for bed. Defendant never helped the victim take a shower. In 1999, Melinda worked second shift for five months. When she was at work, defendant, along with a neighbor or a licensed babysitter, watched the children. Another adult was always in the home when Melinda was at work because one of their foster children was previously abused, and they needed to "protect" defendant. When Melinda worked second shift, the victim and her half-sister stopped taking showers at night. They began taking showers in the morning because they liked it better. There was a lock on the bathroom door and Melinda and defendant always told the children to lock the door when they used the bathroom.

A. R., one of defendant's daughters, is approximately a year and a half older than the victim. When A. R. was approximately 13 years old, and in the eighth or ninth grade, she began visiting defendant and Melinda every other weekend. The victim was usually at defendant's house when she visited. According to A. R., she had a bedroom at defendant's house. There was also a bed for the victim in that room and the victim slept there. Defendant never touched A. R. inappropriately, and he never showed her pornographic movies.

At trial, defendant's half-sister testified that when she was about six years old, defendant, who was nine or ten years older than her, began sexually abusing her when her parents were out of the house. Defendant would digitally penetrate her vagina. Defendant told his half-sister that she was doing him a favor and that she should not tell her parents. He told her that, if she told her parents, she would be spanked. Over time, defendant "progressed" to performing oral sex on his half-sister. There were even a few times when defendant penetrated her with his penis. Defendant also showed her pornographic magazines.

II. "Other-Acts" Evidence

Defendant first argues that the trial court erred in admitting evidence that he sexually assaulted his half-sister. Specifically, defendant argues that MCL 768.27a constitutes an ex post facto law as applied in the present case, that MCL 768.27a is an unconstitutional statutory rule of evidence, and that his half-sister's testimony violated MRE 404(b). We note that the trial court admitted the testimony under MRE 404(b), and not MCL 768.27a.

We review a trial court's decision to admit "other-acts" evidence for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). A trial court abuses its discretion when it fails to select a principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant argues that, because only general similarities existed between the charged acts against the victim and the uncharged acts against his half-sister, the uncharged acts were not relevant to whether he committed the charged acts. To be admissible under MRE 404(b), other-acts evidence must satisfy three requirements: (1) the evidence must be offered for a purpose other than to prove the defendant's character or propensity; (2) the evidence must be relevant;

and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

In this case, the prosecutor offered the evidence of defendant's uncharged acts against his half-sister to prove that defendant acted in accordance with a common plan or scheme when he sexually abused the victim. Establishing a common plan or scheme in doing an act is a proper purpose for the admission of other-acts evidence. MRE 404(b); *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). Uncharged acts may be admissible to show that the charged acts occurred if the uncharged acts and the charged acts are sufficiently similar to support an inference that they are manifestations of a common plan or scheme. *Sabin*, *supra* at 63. Distinctive and unusual features are not required. *Id.* at 66. Upon review of the record, we conclude that the charged acts against the victim and the uncharged acts against defendant's half-sister contained common features beyond the mere commission of sexual acts. See *Id.* Defendant stood in a familial relationship with the victims and the victims were of a similarly young age when the sexual assaults began. Defendant generally performed the sexual acts in the family house when other authority figures were absent from the home. The sexual acts began with defendant digitally penetrating the victims, and over the course of time, defendant "progressed" to performing oral sex on the victims. Defendant also showed both victims pornography. In addition, defendant justified the sexual acts to the victims. We recognize that there are differences between the charged acts and the uncharged acts, i.e., defendant never threatened the victim in the present case, nor did he penetrate her vagina with his penis. However, there is sufficient similarity between the charged acts and the uncharged acts to support an inference that defendant engaged in a common plan or scheme. See *Id.* at 63.

Moreover, because the circumstances surrounding defendant's sexual acts with his half-sister supported an inference that defendant acted in accordance with a common scheme or plan, the evidence was relevant to whether defendant committed the charged acts. See *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). Further, we find that the probative value of the other-acts evidence was not substantially outweighed by the danger of unfair prejudice. Evidence is unfairly prejudicial if there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Here, the challenged evidence was highly probative because it was relevant to the ultimate issue at trial, whether defendant committed the charged acts. In addition, the trial court instructed the jury that it was to consider the other-acts evidence only for the purpose of determining whether defendant acted in accordance with a common plan or scheme. Such a limiting instruction was sufficient to protect defendant's right to a fair trial. *People v Smith*, 243 Mich App 657, 675; 625 NW2d 46 (2000). Accordingly, we find that the trial court did not abuse its discretion in admitting evidence that defendant engaged in sexual acts with his half-sister. See *McGhee*, *supra*.

Because the trial court did not abuse its discretion in admitting evidence of defendant's other acts under MRE 404(b), we need not address whether the other-acts evidence was

admissible under MCL 768.27a[2] and whether MCL 768.27a is unconstitutional. We note, however, that we have previously held that MCL 768.27a does not violate the constitutional prohibition against ex post facto laws, nor is it an unconstitutional infringement on the Supreme Court's exclusive rulemaking authority. See *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007).

III. Alleged Prosecutorial Misconduct

Next, defendant argues that the prosecutor improperly elicited testimony that defendant was being investigated for sexually abusing the victim's half-sister. We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Reversal is warranted only if plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). Thus, we will not find error requiring reversal if a timely objection and a curative instruction could have alleviated the prejudicial effect of the prosecutor's comments. *Id*. at 449; *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). We review claims of prosecutorial misconduct on a case by case basis. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007).

During her opening statement, the prosecutor stated that the victim reported defendant to the police when she heard that he was under investigation for sexually abusing her half-sister. Later, during direct examination, the prosecutor asked the victim whether, after telling her mother of defendant's sexual abuse and deciding not to report him to the police, she later changed her mind. The victim replied that she changed her mind because she heard that "it" had happened to her half-sister.

A claim for prosecutorial misconduct cannot be predicated on a prosecutor's good faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecutor is entitled to attempt to introduce evidence that she legitimately believes will be accepted by the trial court. *Id.* at 660-661. In this case, the challenged testimony was not precluded by MRE 404(b)(1). The testimony was probative of something other than defendant's

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[2] MCL 768.27a states:

> (1) Notwithstanding section 27, 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. . . .
>
> (2) As used in this section:
>
> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act . . . MCL 28.722.
>
> (b) "Minor" means an individual less than 18 years of age.

character or propensity to commit the charged acts. *Knox, supra* at 509; *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Specifically, it explained why the victim chose to disclose defendant's sexual abuse to the police when she did, thereby rebutting defendant's claim that the victim fabricated the sexual abuse allegations. See *People v Starr*, 457 Mich 490, 502; 577 NW2d 673 (1998).

However, contrary to MRE 404(b)(2), the prosecutor never provided defendant with notice that she intended to introduce defendant's alleged sexual abuse of the victim's half-sister to explain, in part, the victim's delayed disclosure. MRE 404(b)(2) "unambiguously requires notice to the defense at some time *before* the prosecutor introduces the prior bad acts evidence." *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001) (emphasis in original).

Even if we assume it was error to reference this other-acts evidence in the opening statement, we are not persuaded that a timely objection and curative instruction would have been insufficient to cure any resulting prejudice to defendant. *Knapp, supra*. Jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and instructions are presumed to cure most errors, *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005). Further, we have previously held that a trial court's instruction to the jury that it was to disregard certain testimony was sufficient to cure any resulting prejudice when the prosecutor elicited other-acts evidence in violation of MRE 404(b). *People v Abraham*, 256 Mich App 265, 278-279; 662 NW2d 836 (2003).[3] A curative instruction would have cured any prejudice in this case.

In reaching our conclusion, we note that, during Detective Rios's testimony, the jury heard additional evidence that defendant was investigated for sexually abusing the victim's half-sister. When the prosecutor asked the detective whether he received a telephone call from the victim and about the nature of the call, he testified that he had received a telephone message from the victim stating that she had heard about an investigation regarding defendant and her half-sister. At that point, defendant objected to Detective Rios's testimony, and the trial court sustained the objection.[4] It is clear to us based on the prosecutor's reaction to the objection, that she had not intended to elicit any testimony from Detective Rios regarding the victim's half-sister. Accordingly, the prosecutor did not question the detective in bad faith. *Noble, supra*. In any event, a curative instruction by the trial court following defendant's objection would have

[3] If we reviewed defendant's claim of prosecutorial misconduct as an unpreserved evidentiary error, we would reach the same result, concluding that there was no error requiring reversal. The prosecutor's failure to provide notice of her intent to use defendant's other acts regarding the victim's half-sister did not affect defendant's substantial rights. The evidence was admissible under MRE 404(b) to explain the victim's delay in reporting the sexual abuse, thereby rebutting defendant's claims of fabrication, and defendant has not asserted how he would have acted differently if the prosecutor had given notice. See *Hawkins, supra* at 455-456.

[4] Defendant's objection to the detective's testimony does not preserve for appellate review the issue of prosecutorial misconduct because he stated no basis for the objection. *Ackerman, supra* at 446.

been sufficient to cure any resulting prejudice. *Graves*, *supra*; *Abraham, supra*. Therefore, we find that the prosecutor did not deny defendant a fair and impartial trial.

Affirmed.

/s/ William B. Murphy
/s/ Richard A. Bandstra
/s/ Jane M. Beckering