STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 22, 2008
v	No. 272688 Macomb Circuit Court
RICHARD DEAN HENSLEY, Defendant-Appellant.	LC No. 2005-002755-FC

Before: Talbot, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

This case involves allegations that defendant had sexual relations with his biological daughter, (AH), and aided and abetted AH in a sexual assault of her friend, (AD). In a 12-count complaint, defendant was charged with six counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b), three counts of second-degree CSC, MCL 750.520c(1)(b), and three counts of third-degree CSC, MCL 750.520d(1)(d). Four of the first-degree CSC counts relate to events that allegedly involved AH, specifically three claims of penile/vaginal penetration (counts one to three) and one claim of cunnilingus (count four). The other two first-degree CSC counts allege defendant, in Armada, aided and abetted AH in engaging in cunnilingus of AD (count 11) and digital penetration of AD (count 12). The three counts of second-degree CSC relate to alleged sexual contact with AH that occurred in St. Clair Shores (counts eight to ten). The three counts of third-degree CSC relate to alleged sexual contact with AH that occurred in Armada, specifically two claims of penile/vaginal penetration (counts five and seven) and one claim of cunnilingus (count six).

The jury heard from 16 witnesses, including both complainants and defendant, presented over 10 days of trial. This case turned on the weight afforded the competing testimony, as there was no physical evidence to substantiate any sexual assault. AH testified in detail to repeated specific instances of sexual contact with defendant. AH also testified that defendant drugged AD and caused AH to digitally penetrate and perform cunnilingus on AD. AD, who moved into defendant's home after her parent's barred her from their home because AD stole a ring from her mother, testified that she was forcibly raped by defendant. This testimony by AD was permitted notwithstanding that defendant was not charged with this alleged sexual assault. Defense counsel vigorously cross-examined both complainants and impeached their testimony, establishing inconsistencies with prior statements made by the complainants and motives that would support the conclusion that the complainants fabricated their claims. Defendant denied any wrongful conduct. Defendant presented testimony from his spouse and two teenage

daughters who lived in the residences where the alleged assaults occurred, all of whom claimed that such conduct could not have gone on in their home without them knowing of it. The jury heard somewhat competing testimony from a clinical social worker for the prosecution, who testified in regard to typical and relevant symptoms of child sexual abuse, and a doctor of psychology for the defendant, who opined that the interviewing techniques employed by the state in this case resulted in a high degree of risk that the interviews of the complainants produced inaccurate, biased and unreliable information.

The jury considered all the evidence and returned a verdict of guilty on counts one, two and three for first-degree CSC, counts eight, nine and 10 for second-degree CSC and counts five and seven for third-degree CSC. The jury acquitted defendant of counts four, six, 11, and 12. The trial court sentenced defendant to concurrent terms of 96 to 240 months' imprisonment for his first-degree CSC convictions and 48 to 180 months' imprisonment for his second-degree and third-degree CSC convictions. Defendant appeals as of right. We affirm.

I. Testimony of Defendant's Uncharged Sexual Assault of AD

Defendant first argues that the trial court abused its discretion by allowing testimony under MCL 768.27a that defendant forcibly raped AD. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Questions of law are considered de novo on appeal. *People v AD*, 468 Mich 77, 79; 658 NW2d 800 (2003).

MRE 404(b) generally governs admission of evidence of bad acts. It provides:

> (1) 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.

Because defendant's charges involve a sexual offense against a minor, MCL 768.27a(1) is applicable, which provides in relevant part, that:

> Notwithstanding [MCL 768.27,[1]] in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the

[1] MCL 768.27 states that:

> In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto;

(continued…)

> 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.

"In cases involving the sexual abuse of minors, MCL 768.27a now allows the admission of other-acts evidence to demonstrate the likelihood of a defendant's criminal sexual behavior toward other minors." *People v Pattison*, 276 Mich App 613, 621; 741 NW2d 558 (2007). However, in applying MCL 768.27a(1) courts must nonetheless "take seriously their responsibility to weigh the probative value of the evidence against its undue prejudicial effect in each case before admitting the evidence." *Id*. at 621.

Initially, we note that defendant cedes that much of AD's testimony in regard to sexual contact was relevant under MRE 404(b) to determine motive and intent. Defendant's contention is essentially limited to AD's testimony that defendant forced AD to perform fellatio and submit to sexual intercourse. The prosecution responds by arguing that AD's testimony that defendant forced himself on her was admissible under MRE 404b to prove that defendant had motive and intent to aid and abet AH in sexually molesting AD (counts 11 and 12).

We agree that evidence that defendant forced AD to perform fellatio and submit to sexual intercourse would be admissible to establish his motive to achieve sexual contact with AD on another occasion. The evidence tended to show more than defendant's propensity to sexually engage female minors that lived in his home; it showed that he had a specific sexual interest in AD, which provided the motive for the alleged sexual assaults involving AH. The evidence was properly admitted for that purpose. See *People v Watson*, 245 Mich App 572, 579-580; 629 NW2d 411 (2001).

The trial court's limiting instructions in regard to AD's testimony prevented the jury from considering AD's testimony for an improper purpose. Specifically, during the first day of testimony, AH began to testify that defendant had commented to her that he had raped AD. Defense counsel interjected, the trial court excused the jury, and the trial court and counsel discussed an instruction in regard to defendant's uncharged crimes. The trial court then instructed the jury that,

> you're about to hear some evidence from this point forward regarding AH AD, for which the defendant has not been charged with – having violated any laws of the state of Michigan or for the crimes that he's not on trial for today. If you believe this evidence, you must be very careful . . . only to consider it for certain purposes. You must not – you may -- may only think about whether the evidence tends to show that the defendant specifically meant to commit the crime of criminal sexual conduct, that the defendant acted purposefully, that is not by mistake or accident or because he misjudged the situation, that the defendant used a plan, scheme, or characteristic scheme that he has used before or since, or to explain the behavior of the victim.

(…continued)

> notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

> You must not consider the evidence that you're about to hear for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct. All the evidence must convince you, beyond a reasonable doubt, that the defendant committed the alleged crime or you must find him not guilty.

During closing argument, defense counsel commented on the trial court's previous cautionary instruction, stating that:

> . . . It wasn't until the last scheduled trial date that [AD] came up with the strikingly similar testimony in her statements regarding the incident when she was taken out of the truck and raped in a field.
>
> That testimony was not offered to prove that the rape did occur, by the way. And you're going to get an instruction on that. That –- that was not offered for the purposes of proving that rape occurred. It was to prove that something similar happened and that – and [defendant] was acting – in a way that was – was a similar motive or intent of plan or scheme or device. So I'm going to ask you, how do you unring a bell? We've taken the position that it does not happen and we had to try it as it if was [sic] allegation in this case. It's really not an allegation in this, but you've got to wonder why it came up at that time. Just on the even [sic] of the last trial date in February. Why did it come up then. It came up because AH wanted to bolster her friend's testimony and that, in and of itself, might be a reason for you now.

After closing arguments, the trial court reiterated to the jury that:

> You've heard evidence that was introduced to show that the defendant committed crimes for which he was not on trial. If you believe this evidence you must be very careful to consider it for certain purposes. You may only think about whether this evidence tends to show that the defendant specifically meant to commit the crime of criminal sexual conduct, that the defendant acted purposefully, that is not by mistake or accident or because he misjudged the situation. That the defendant used a plan, scheme, or characteristic scheme that he's used before or since, or to explain the behavior of the victim. You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct. All the evidence must convince you, beyond a reasonable doubt, that the defendant committed the alleged crime or you must find him not guilty.

Here, the evidence was admissible under MCL 768.27a to "demonstrate the likelihood of a defendant's criminal sexual behavior toward other minors." *Pattison, supra*. The trial court did not simply allow the jury to consider evidence of defendant's bad acts for any purpose, but specifically instructed the jury, on two occasions, on the proper use of the evidence. Thus, in applying MCL 768.27a(1) the trial court took seriously its responsibility "to weigh the probative

value of the evidence against its undue prejudicial effect in each case before admitting the evidence." *Id*. at 621. We therefore conclude that the trial court properly admitted the testimony relating to an uncharged sexual assault by defendant against AD.

II. Separation of Legislative and Judicial Powers

Defendant next argues that the MCL 768.27a violates the Michigan Constitution because it amounts to legislative intrusion on the province of our Supreme Court under Const. 1963, art 6, § 5, to establish rules of practice and procedure for the administration of our state's courts.

This Court expressly decided this exact legal issue in *Pattison supra*, at 619-620, stating:

> We agree that the Legislature may not enact a rule that is purely procedural, i.e., one that is not backed by any clearly identifiable policy consideration other than the administration of judicial functions. However, rules of evidence are not always purely procedural, and may have legislative policy considerations as their primary concern.
>
> In this case, MCL 768.27a is a substantive rule of evidence because it does not principally regulate the operation or administration of the courts. Instead, it reflects the Legislature's policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords. Naturally, a full and complete picture of a defendant's history will tend to shed light on the likelihood that a given crime was committed. However, the risk that a defendant would suffer undue prejudice from the exposition of his or her past misdeeds has led the judiciary, as a matter of policy, to exclude most of this information from a jury's consideration. The decision to enact a statute like MCL 768.27a and to allow this kind of evidence in certain cases reflects a contrary policy choice, and it is no less a policy choice because it is contrary to the choice originally made by our courts. Therefore, MCL 768.27a is substantive in nature, and it does not violate the principles of separation of powers. [Citations omitted.]

Following *Pattison*, defendant's claim must be rejected, MCR 7.215(J)(1).

III. The Ex Post Facto Clause, Const 1963, art 1, § 10

Defendant next argues that the application of MCL 768.27a violates the Ex Post Facto Clause, Const 1963, art 1, § 10, since the alleged abuse occurred before the statute took effect on January 1, 2006.

Pattison, supra at 618-619, also addressed this claim, and indicated:

> Defendant argues that the application of MCL 768.27a in this case violates the Ex Post Facto Clause, Const 1963, art 1, § 10, since most, if not all, of the alleged abuse occurred before the statute took effect on January 1, 2006. In *Calder v Bull*, 3 US (3 Dall) 386, 390, 1 L Ed 648 (1798), Justice Chase outlined the definition of an "ex post facto law." His definition included as a fourth

category "[e]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Id*.

> When a defendant is charged with a sexual offense against a minor, MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b). In many cases, it allows evidence that previously would have been inadmissible, because it allows what may have been categorized as propensity evidence to be admitted in this limited context. However, the altered standard does not lower the quantum of proof or value of the evidence needed to convict a defendant. In this case, for example, defendant could have been tried and convicted before this statute was enacted solely on the basis of his daughter's proposed testimony. That same testimony, if presented as it appears in the record, remains legally sufficient to support his conviction at his upcoming trial. Therefore, the standard for obtaining a conviction against defendant has not changed, and the application of MCL 768.27a to this case does not violate the Ex Post Facto Clause.

Here, as in *Pattison, supra*, "defendant could have been tried and convicted before this statute was enacted solely on the basis of his daughter's . . . testimony." *Id*. at 619. "That same testimony, if presented as it appears in the record, remains legally sufficient to support his conviction at his . . . trial." Following *Pattison, supra*, defendant's claim must be rejected, MCR 7.215(J)(1).

IV. The Admissibility of Expert Testimony from a Clinical Social Worker

Defendant next argues the trial court abused its discretion in allowing into evidence expert testimony from Leo Niffeler, a clinical social worker, in regard to child sexual abuse victims and/or perpetrators. Defendant first claims that "[t]he notion that this 'expert' could provide a jury with a detailed psychoanalysis of AH . . . based solely on a brief description of the case by the prosecutor – without interviewing her or any witness in this case, without reviewing a single report or statement and without even observing [AH] testify – is the epitome of junk science."

Although defendant claims on appeal that Niffeler's testimony was junk science, the following colloquy indicates that defense counsel did not challenge that one could be declared an expert in the field of sexual abuse:

> *The Prosecutor*. Your honor, I would ask that he be qualified as an expert in the discipline of child in – in sexual abuse relating to child – child sexual abuse and also perpetrators of sexual abuse.
>
> *The Court*. The Court: That you. That – yes, Mr. Thomas?
>
> *Defense Counsel*. I have no – no argument on that.

In any event, defendant fails to appreciate that Niffeler was not required to interview, review any report or observe AH. Our Supreme Court has enunciated general principles regarding the testimony of expert witnesses in child sexual abuse cases: "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). However,

> (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. [*Id*. at 352-353.]

Here, Niffeler testified in regard to typical and relevant symptoms of child sexual abuse. There is no requirement that the putative expert familiarize himself with the individual case. To do so makes it more likely that Niffeler would improperly testify that the sexual abuse occurred, vouch for the veracity of AH and testify whether the defendant is guilty. Defendant's argument is without merit.

Defendant also maintains that Niffeler's testimony that AH "suffered from and exhibited all the classic manifestations of sexual abuse accommodation syndrome is unacceptable under the general acceptance theory as well as [*Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 469 (1993)] and [*Kumbo Tire*], and certainly fails the test for admissibility set out in revised MRE 702 and FRE 702." In short, defendant argues that the prosecution failed to show that Niffeler's testimony was the product of reliable principles or methods.

Defendant did not make this argument below, and this issue is not preserved. *People v Grant*, 445 Mich. 535, 546; 520 NW2d 123 (1994). Thus, this court reviews this unpreserved for plain error that affected the defendant's substantial rights. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

Under MRE 702, the proponent of expert witness testimony must show that "the data underlying the expert's theories and the methodology by which the expert draws conclusions from the data [are] reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 789; 685 NW2d 391 (2004). Here, Niffeler testified that his testimony regarding typical and relevant symptoms of child sexual abuse was based in part on his education, training and as well as his extensive experience with child sexual abuse victims and/or perpetrators. Niffeler offered unchallenged testimony that he was very familiar with typical and relevant symptoms of child sexual abuse, and this supports the trial court's conclusion that his data is reliable. Defendant has failed to establish plain error affecting his substantial rights.

V. The Trial Court's Erroneous Statement that Defendant Pleaded Guilty to the Information

Defendant next argues in his Rule 11 brief that the trial court committed error requiring reversal in informing prospective jurors that defendant pleaded guilty to the crimes charged. In

its preliminary instructions to prospective jurors the trial court had just read the 12-count Information to the jury when it stated: "Now, as I indicated, the defendant pled guilty to the charges. You should clearly understand that the Information I have just read to you is not evidence. An Information is read in every criminal trial so the defendant and the jury can hear the charges." At that point, defense counsel interjected, stating, "[y]our honor, if we could just make a correction. He has not pled guilty to each of the charges." The trial court responded, "I'm sorry, did I say guilty." The trial court then told prospective jurors that, "Oh, I apologize, Not guilty, and properly re-read the above instruction.

The trial court simply misspoke. Further, the trial court informed the jury that it had misspoke, and properly re-read the instruction. Juries are presumed to follow their instructions. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001). There is no harm shown, defendant has failed to establish error requiring reversal.

VI. Extrinsic Evidence Presented to the Jury

Lastly, defendant argues in his rule 11 brief that the prosecutor improperly showed two photographs of defendant's penis to the jury. Armada police officer Orrin Paul Shoemaker testified that, based on AH's description of defendant's penis, a search warrant was executed on October 19, 2005, to photograph defendant's penis. Shoemaker testified that "[t]here was a ridge running form the base of [defendant's] penis . . . to the head of the penis." Apparently, at this time, the prosecutor attempted to admit pictures taken of defendant's penis, which the trial court had previously ruled inadmissible. Defense counsel objected to the manner in which the prosecutor handled the pictures and claimed the jury could saw the inadmissible photos. Defense counsel asked defendant whether to move for a mistrial but defendant indicated on the record that he wanted to go forward with the case. The trial court informed the jury to disregard any "flash" of the photograph.

> A defendant tried by jury has a right to a fair and impartial jury. During their deliberations, jurors may only consider the evidence that is presented to them in open court. Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment.
>
> In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. [*People v Budzyn,* 456 Mich 77, 88-89; 566 NW2d 229 (1997) (Citations omitted).

Here, defendant cannot meet the two-prong test set forth in *Budzyn, supra* at 89. The record does not indicate that any juror saw the photographs. Further, AH, Shoemaker and defendant's

former wife testified to the physical characteristics of defendant's penis. We therefore conclude that defendant has failed to show prejudice resulting from any exposure the jurors had to these photographs. Thus, defendant has failed to establish error requiring reversal.

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra