STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 16, 2009
v	No. 282429 Macomb Circuit Court
DONALD E. FITZPATRICK, Defendant-Appellant.	LC No. 2006-005414-FC

Before: Zahra, P.J., and O'Connell, and K.F. Kelly, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13). Defendant was sentenced to 25 to 40 years' imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises from the sexual assault of "KP," when she was seven years old. Defendant had a long-term romantic relationship with KP's grandmother, and family members considered him to be KP's grandfather. KP testified that defendant engaged in digital penetration with her on two occasions at his home in Sterling Heights. The jury acquitted defendant of one count of first-degree criminal sexual conduct and convicted him of the other count.

I. Other Acts Evidence

Defendant first argues that the trial court erroneously admitted other acts evidence under MRE 404(b) involving sexual assaults perpetrated on four other young girls. This Court reviews the admission of other acts evidence for an abuse of discretion. *People v Johnigan*, 265 Mich App 463, 466-467; 696 NW2d 724 (2005). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Whether other acts evidence is admissible under MRE 404(b)(1) depends on four factors: (1) The evidence must be offered for a permissible purpose, i.e., one other than showing character or a propensity to commit the charged crime. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); (2) the evidence must be relevant under MRE 402. *Id.*; (3) the probative value of the evidence cannot be substantially outweighed by any unfair prejudice to defendant,

id.; and (4) whether the trial court, if requested, is willing and able to provide a limiting instruction to the jury under MRE 105. *Id*.

Here, defendant focuses on the first of the four factors described above to argue that other act evidence was not properly admitted in the trial court. Defendant maintains that there was no proper purpose to admit the other acts evidence. Defendant claims this evidence was admitted merely to disparage his character. We disagree.

The evidence was properly admitted to show defendant's common plan, scheme, or motive involving young girls. "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). "'To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . [I]t need only exist to support the inference that the defendant employed that plan in committing the charged offense.'" *Id*. at 65-66, quoting *People v Ewoldt*, 7 Cal 4th 380, 403; 867 P2d 757 (1994). Further, to be admissible, there need not be a great deal of similarity between proffered other acts evidence and the charged. However, the other act evidence must be probative of something other than the defendant's character or propensity to commit the charged offense. *Knox, supra* at 511.

Here, the evidence showed that defendant engaged young girls in activities they enjoyed and enticed them with candy and treats before sexually assaulting them. "BP" testified that she was watching cartoons and eating popsicles with her friend at defendant's home when defendant engaged in digital penetration with her and rubbed her chest. She was nine years old at the time. Defendant had also offered to take BP to an indoor water park for her upcoming birthday. "TB" testified that defendant allowed her to drive his car in an alley when she was ten years old. She sat on defendant's lap in the driver's seat because she was unable to reach the pedals. While she steered the car, defendant rubbed her vaginal area with his hand. TB's sister testified that defendant gave them "little trinkets" and always played with them. "HP," KP's cousin, testified that on one occasion defendant massaged her chest and engaged in digital penetration. During that incident, defendant told her that she was his favorite granddaughter. Further, "EG" testified that when they were children, she and her sister often visited defendant's home to play with his dogs or ride his riding lawnmower. On one occasion, she walked into his garage to get some candy that he kept there for the neighborhood children. Defendant approached her from behind, rubbed her chest, and told her that she was becoming a beautiful girl.

This testimony established defendant's pattern of befriending young girls and engaging in fun activities with them in an effort to spend more time with them. When the opportunity arose, he then sexually assaulted them. While not identical in all aspects, we conclude the other acts evidence was sufficiently similar to the charged acts to show defendant's common plan, scheme,

or motive. *Knox, supra* at 511. The trial court did not abuse its dissection by admitting the other acts evidence.[1]

II. Sentencing

Defendant next argues that he is entitled to resentencing because prior record variable (PRV) 5 and offense variables (OV) 4, 10, and 12 were misscored. If the scoring of these variables is changed in accordance with defendant's argument, defendant would fall under the A-IV category, which provides a minimum sentence range of 51 to 85 months.[2] MCL 777.62. Because MCL 750.520b(2)(b)[3] required the trial court to sentence defendant to a minimum term of at least 25 years, however, defendant's challenge to the scoring of these variables is moot. An issue is moot if this Court is unable to provide a remedy. *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004). The trial court was statutorily required to impose a minimum sentence of at least 25 years' imprisonment. Because a 25-year sentence is longer than the minimum sentencing guidelines range pursuant to defendant's alleged "corrected" guidelines scoring, his scoring challenges are moot and he is not entitled to resentencing. *Cathey, supra* at 510.

Defendant next argues that the trial court erred by sentencing him to a minimum 25-year sentence pursuant to MCL 750.520b(2)(b), because the prosecutor failed to prove beyond a reasonable doubt that he was 17 years of age or older when the offense was committed. Defendant relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), in support of his argument. Our Supreme Court has held, however, that *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 163-164; 715 NW2d 778 (2006). Thus, a trial court may constitutionally utilize judicially ascertained facts to determine a sentence that is within the statutory maximum. *Id.* at 164. Accordingly, defendant's argument lacks merit. In any event, evidence presented during trial indicated that defendant was well over age 17 when he committed the offense.

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[1] Because the trial court properly admitted the other acts evidence under MRE 404(b), we need not address the prosecutor's argument that the evidence was also admissible under MCL 768.27a.

[2] Contrary to defendant's argument, his proposed guidelines scoring would not place him in the A-I category, providing a minimum sentence range of 21 to 35 months. See MCL 777.62.

[3] MCL 750.520b(2)(b) provides:

> (2) Criminal sexual conduct in the first degree is a felony punishable as follows:
>
> * * *
>
> (b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.

Defendant next contends that his 25-year minimum sentence under MCL 750.520b(2)(b) violates Michigan's indeterminate sentencing act and his federal and state protections against cruel and unusual punishment. We disagree. Whether a sentence violates Michigan's indeterminate sentencing act is a question of law that this Court reviews de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). This Court likewise reviews constitutional questions de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant argues that his 25-year minimum sentence violates Michigan's indeterminate sentencing act because he likely will not be eligible for parole until after his death. Defendant relies on *People v Moore*, 432 Mich 311; 320-321; 439 NW2d 684 (1989), in which the Supreme Court held that an indeterminate sentence is invalid if it effectively precludes the possibility that the defendant will be eligible for parole during his lifetime. However, in *People v Kelly*, 213 Mich App 8, 15-16; 539 NW2d 538 (1995), this Court recognized that our Supreme Court overruled *Moore* in *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994). This Court held that resentencing is not necessarily required when a defendant is sentenced to an indeterminate sentence that is effectively a life term. *Kelly*, *supra* at 15-16. Rather, the principle of proportionality determines the legality of the sentence. *Id.* at 16. The principle of proportionality involves examining both the circumstances of the crime and the offender's criminal history. *People v Milbourn*, 435 Mich 630, 650; 461 NW2d 1 (1990).

Here, defendant's 25 to 40-year sentence is proportionate. Defendant engaged in digital penetration with KP, who was only seven years old at the time of the offense. KP considered defendant to be her grandfather, and KP's parents trusted him with their daughter. Moreover, the evidence showed that defendant engaged in similar conduct with other young girls after befriending them and gaining their trust. Defendant exhibited a common scheme or plan with respect to young girls in his family and neighborhood. Accordingly, we cannot conclude that his sentence is disproportionate. Because the sentence is not disproportionate, it is likewise not cruel or unusual. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).

III. Competency of Witness

Defendant next argues that the trial court erred by determining that ten-year-old "HP" was competent to testify.[4] We review for an abuse of discretion a trial court's determination regarding a witness's competency to testify. *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001).

MRE 601 provides:

> Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

[4] Defendant erroneously asserts that HP was the complainant in this case. Rather, the complainant was HP's cousin, KP.

In accordance with MRE 601, the test for competency is whether a person has the capacity or sense of obligation to testify understandably and truthfully. *Watson*, *supra* at 583.

Before HP testified, the trial court questioned her as follows:

THE COURT: How old are you?

THE WITNESS: Ten.

THE COURT: What grade are you going into?

THE WITNESS: Fifth.

THE COURT: What school?

THE WITNESS: [. . .] Elementary School.

THE COURT: All right. Do you know the difference between the truth and a lie?

THE WITNESS: Yes.

THE COURT: Tell me something that's true.

THE WITNESS: Don [defendant] is going to jail soon probably.

MS. MAHONEY [defense counsel]: Your Honor, approach.

(Discussion held at the bench.)

THE COURT: Okay. What color is this?

THE WITNESS: Black.

THE COURT: If I told you it was red, would that be true or untrue?

THE WITNESS: A lie.

THE COURT: Okay. When you answer questions from the attorneys, can you remember to always tell the truth?

THE WITNESS: Yes.

THE COURT: All right. And if you don't know something, that's fine. Just say I don't know, okay?

THE WITNESS: Okay.

HP's answers to the trial court's questions evidenced that she had the capacity and sense of obligation to testify truthfully. Her response that defendant "is going to jail soon probably" was a statement that she apparently believed to be true. It did not indicate that HP had been

coached as defendant contends. Rather, it more likely revealed HP's limited understanding of the purpose of the proceeding and why she was required to testify. Moreover, the trial court instructed the jury that any possible sentence imposed if the jurors should convict defendant was not their concern. Therefore, we cannot conclude that the trial court abused its discretion by determining that HP was competent to testify.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly