

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD LESLIE FISHER,

Defendant-Appellant.

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UNPUBLISHED

July 30, 2009

No. 283160

Wayne Circuit Court

LC No. 07-004744-01

Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

A jury convicted defendant of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(c) and (d)(i), and the trial court sentenced him to concurrent prison terms of 10 to 15 years for each conviction. Defendant appeals as of right. We affirm.

In his sole issue on appeal, defendant argues that reversal of his convictions is required because of the introduction of evidence of prior acts of sexual misconduct. Defendant argues that the prior acts were too remote to be probative and, therefore, the prejudicial effect of the evidence substantially outweighed any probative value the evidence might have.

Defendant has abandoned this issue because he failed to file a transcript of the hearing at which this issue was addressed and decided, or to provide a settled statement of facts to serve as a substitute for the transcript, despite the opportunity to do so. The appellant is responsible for securing the filing of the transcript of lower court proceedings. MCR 7.210(B)(1)(a); *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). If a transcript is unavailable, the burden remains with the appellant to file a settled statement of facts as a substitute for the transcript. MCR 7.210(B)(2). If the appellant fails to do so, this issue may be considered abandoned. *PT Today, Inc v Comm'r of the Office of Financial & Ins Services*, 270 Mich App 110, 151-152; 715 NW2d 398 (2006); *People v Johnson*, 173 Mich App 706, 707; 434 NW2d 218 (1988). Without the appropriate transcript, “an appellate court is unable to review the party’s objection and the trial court’s reason for the decision.” *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995).

The record discloses that the admissibility of the other acts evidence was addressed and decided at a hearing on July 23, 2007. Defendant requested a transcript of that hearing, but a transcript was not available. Consequently, while this appeal was pending, this Court remanded this matter to the trial court “so that defendant-appellant may file a motion to settle the record

with respect to the pre-trial motions that the trial court register of actions indicates were heard and denied on July 23, 2007.” *People v Fisher*, unpublished order of the Court of Appeals, entered October 16, 2008 (Docket No. 283160). At the hearing on remand, defendant settled the record with respect to a matter that is not at issue on appeal, but did not raise, or otherwise attempt to settle the record with respect to, the evidentiary matter now presented on appeal. Accordingly, defendant has abandoned this issue.

Nonetheless, to the extent that the record permits review of this issue, we conclude that the trial court did not clearly err or abuse its discretion in allowing the introduction of prior acts evidence.<sup>1</sup>

To be admissible under MRE 404(b)(1), prior acts evidence (1) must be offered for a proper purpose, (2) must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). On appeal, defendant only challenges the third prong. He argues that any probative value is substantially outweighed by the prejudicial effect based on the remoteness of the prior acts. Evidence is unfairly prejudicial if it presents a danger of being only marginally probative and is likely to be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

Defendant cites *People v Teague*, 411 Mich 562, 565; 309 NW2d 530 (1981), in which the Court found that “evidence of an assault on the decedent under dissimilar circumstances more than ten years earlier was too remote to be relevant.” However, this case does not stand for the proposition that the probative value of a prior act that occurred more than ten years before the charged offense is always outweighed by the danger of unfair prejudice. The relevancy of the evidence in that case was also diminished because the prior act occurred under “dissimilar circumstances.”

Defendant also cites MCL 768.27b, which provides that if a person is accused of domestic violence, prior acts of domestic violence are admissible for any relevant purpose as long as they did not occur more than ten years before the charged offense and are not excluded under MRE 403. This statute does not support defendant’s remoteness argument. The Legislature chose to provide a cut-off date in domestic violence situations. However, it did not do so in MCL 768.27,<sup>2</sup> which is the statutory equivalent of MRE 404(b) and pursuant to which the prior acts in this case were offered and presumably admitted.

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<sup>1</sup> We are unable to definitively determine whether defendant preserved the specific issue presented on appeal. Assuming that this issue is unpreserved, this Court’s review is for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). If the issue is preserved, the trial court’s decision to allow the evidence is reviewed for an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 253 (2008).

<sup>2</sup> This statute provides:

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

(continued...)

The question is whether, under the facts of this case, the prejudicial effect of the prior acts evidence substantially outweighed its probative value. See *People v Knapp*, 244 Mich App 361, 380; 624 NW2d 227 (2001) (despite 20-year gap, probative value of prior acts evidence outweighed its prejudicial effect). Had defendant been in the community during the gap period, defendant's argument would have more merit. However, the trial court had the benefit of defendant's criminal record, which showed that defendant pleaded guilty to CSC in 1982, 1985, and 1987. In each case, charges were dismissed that related to the witnesses who testified to the prior acts in this case. Defendant's 1985 and 1987 convictions were parole violations. Defendant was not released from prison after his 1987 convictions until at least 2004.<sup>3</sup> The instant offenses occurred in December 2006. Thus, defendant simply did not have an opportunity to offend between 1987 and 2004. Considering this context, the mere remoteness of the prior acts was not a basis on which to exclude the evidence.

Defendant's criminal history shows that each time he was paroled from prison he engaged in CSC with vulnerable victims within a relatively short period of time after being released. The similarities between the prior acts evidence and the instant offenses are striking. Defendant targeted persons who by age or developmental disability had the mental functioning of a child, and he often assaulted multiple victims at the same time. Each victim was entrusted in his care during an outing when the sexual acts occurred. Also, the extent of the sexual acts was determined by what acts the victim allowed defendant to perpetrate. These facts were extremely probative. Given the explanation for the significant gap between assaults, the prior acts evidence was not unfairly prejudicial. Accordingly, we conclude that the trial court did not plainly err or abuse its discretion in admitting the evidence.

Affirmed.

/s/ Michael J. Talbot  
/s/ E. Thomas Fitzgerald  
/s/ Joel P. Hoekstra

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(...continued)

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

<sup>3</sup> A note on the felony warrant in the lower court file states that defendant was paroled in 2004. However, the Department of Corrections's Offender Tracking Information System website indicates that defendant was paroled in March 2005 (OTIS, DOC website, [www.state.mi.us/MDOC](http://www.state.mi.us/MDOC)).