STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 13, 2009
v	No. 281207 St. Clair Circuit Court
WILLIAM ROGER DEKEYZER, Defendant-Appellant.	LC No. 06-003248-FC

Before: Servitto, P.J., and O'Connell, and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age). Defendant was sentenced to serve concurrent terms of 81 months to 30 years' imprisonment for CSC I, and 19 months to 15 years' imprisonment for each conviction of CSC II. He appeals as of right. We affirm.

First, defendant argues the trial court abused its discretion when it allowed the prosecution to admit prior bad acts evidence pursuant to MRE 404(b)(1). We disagree. 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).

MRE 404(b)(1) provides:

> 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.

This Court in *People v Magyar*, 250 Mich App 408, 413; 648 NW2d 215 (2002), citing *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982) stated that to be admissible, bad acts evidence must satisfy the following three requirements: "(1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially

outweighed by its potential for unfair prejudice." *Magyar*, *supra*, at 414. "A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense." *Id.*, citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994).

The trial court did not abuse its discretion by admitting the 404(b) evidence. The proper purpose of admitting the 404(b) evidence was to show defendant's plan or scheme to exploit young girls who were closely related to him by using his position of trust in the family to take advantage of them. The victim's aunt testified that defendant, her father, touched her breasts and genitals, engaged in oral sex with her, and attempted to engage in penile penetration. Similarly, the victim testified that her grandfather would give her "hugs and he would rub [her] back" and that he "would touch" her "private areas." The victim also circled the genital area of a drawing during direct examination to indicate where defendant had touched her. She also explained that her grandfather put his finger in between the folds of skin on her vagina and that he "moved [his finger] around." The manner in which defendant would hug and put his arm around the two victims and then proceed to touch their genitals demonstrates a common plan or scheme. The testimony by the victim's aunt that her father molested her was relevant as it tended to illustrate that defendant's actions were a part of a common plan or scheme. See *People v Kahley*, 277 Mich App 182, 185; 744 NW2d 194 (2007) ("Evidence of uncharged acts may be admissible to show that the charged act occurred if the uncharged acts and the charged act are sufficiently similar to support an inference that they are manifestations of a common plan or scheme.").[1]

Next, defendant argues MRE 403 precludes the use of the subsequent bad act because the probative value of the evidence is substantially outweighed by the prejudice created. We disagree. MRE 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998), our Supreme Court stated, "The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized." *Id*. at 388. Further, "to ensure the defendant's right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else." *Id*. "Mechanical recitation of 'knowledge, intent, absence of mistake, etc.,' without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE

[1] We note that defendant relies on the recently decided case of *People v Steele*, ___ Mich App ___; NW2d (2009). We conclude Steele does not support defendant's claim of error. While an argument can be made that in *Steele* the other acts were more congruent to the charged acts than exists in the present case, *Steele* does not purport to set a bar or standard to determine sufficient congruency in other acts molestation cases. Rather, *Steele* held that "[w]hile there were some dissimilarities between the charged acts and the other bad acts, a high degree of similarity is not required, nor are distinctive or unusual features required to be present in both the charged and the uncharged acts." (Emphasis in original.)

404(b)." *Id*. at 387. The *Crawford* Court also cited *VanderVliet*, *supra*, at 52. In *VanderVliet*, our Supreme Court established a standard for using similar bad acts evidence, stating:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*VanderVliet*, *supra*, at 55.]

In this regard, as stated above, the prosecutor offered the bad acts evidence for a proper purpose, it was relevant, and under MRE 403 the relevant evidence, even though prejudicial, ultimately tended to help prove the ultimate fact at issue – that defendant molested the victim. Obviously, the 404(b) evidence was prejudicial, but any prejudice created did not substantially outweigh the probative value of the evidence, as the evidence was used properly and was not a hidden attempt by the prosecutor to simply smear defendant's character.

Next, defendant argues his trial counsel was ineffective by failing to request a cautionary instruction for the 404(b) evidence presented by Johnson. We conclude that defendant waived this issue by effectively approving the instructions as read. After reading the instructions to the jury, the trial court asked if there were any objections to the instruction or errors in the instruction and defendant's trial counsel stated, "Other than my objection that was noted before on 5.8, I don't see any problems.''[2] Accordingly, any argument against the instructions has been waived for appeal. See *People v Dobek*, 274 Mich App 58, 65; 732 NW2d 546 (2007), citing *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (holding that waiver is the "intentional relinquishment or abandonment of a known right" and that once waived, appellate review is precluded).

In any event, the trial court's instruction in this regard sufficiently conveyed to the jury not to improperly use Johnson's testimony. The jury was instructed:

> You've heard evidence that was introduced to show that the Defendant has engaged in improper sexual conduct for which the Defendant is not on trial.
>
> If you believe this evidence, you must be very careful to consider it for only one limited purpose, that is, to help you judge the believability of testimony regarding the acts for which the Defendant is now on trial.
>
> You must not consider this, this evidence for any other purpose. For example, you must decide that – you must not decide that it shows that Defendant is a bad person or that the, the Defendant is likely to commit these crimes. You must not con- I read that wrong. I got to start over.

[2] The objection to CJ12d 5.8 dealt with witnesses who testified about the truthfulness of other witnesses in the trial. The objection did not concern the 404(b) evidence presented by Johnson or how the jury should consider Johnson's allegations against defendant.

> 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 the Defendant is likely to commit crimes. You must not convict the Defendant here because you think he's guilty of other bad conduct.

We also agree with the prosecution that an additional instruction may have only unduly highlighted Johnson's testimony, and we presume defense counsel's decision to approve the above jury instruction was sound trial strategy. *People v Riley* (After Remand), 468 Mich 135, 140, 659 NW2d 611 (2003).

Next, defendant argues his trial counsel was ineffective by failing to object when the trial court told the jury that if they believed defendant was a "bad man" they could convict him of the CSC charges. We find no instance of this ever occurring. Rather, as noted, the trial court instructed the jury to the opposite by stating, "you must not decide that it [the 404(b) evidence] shows that Defendant is a bad person." This argument is without merit.

Next, defendant argues his trial counsel was ineffective by failing to request defendant's daughter's medical records for an in camera review. However, trial counsel did request that Johnson's medical records be reviewed in his motion to compel waiver of physician-patient privilege. The trial court took the motion to consider the medical records under advisement, but evidentially concluded it was not necessary. Trial counsel could do nothing more than what he did, the decision by the court was not in trial counsel's control.

Lastly, defendant argues trial counsel was ineffective by failing to move to strike the testimony by the victim's mother, or by not trying to locate the doctor to have him testify that the victim's mother lied under oath. According to defendant, the victim's mother lied when she testified that a physician advised her that a physical examination of the victim would not reveal whether the victim had been penetrated. Defendant believes his trial counsel was ineffective by failing to further investigate this testimony because it would have revealed that the physician never made such a statement. During cross-examination the following exchange took place between defense counsel and the victim's mother:

> *Q.* Did you ever have your daughter examined for any injury?
>
> *A.* Yes.
>
> *Q.* Okay. At what time?
>
> *A.* I took her to Doctor Faremouth (phonetic), our family doctor, um, and he advised me that even if there was any sort of penetration, that it wouldn't show up.
>
> *Q.* Okay. Did he do an examination?
>
> *A.* Not a physical, no.
>
> *Q.* Okay. Did you ever determine if you daughter's private area had a tear of any kind in it?

A. No.

Q. Okay. Why not?

A. Because she wasn't complaining of pain. So I didn't believe that there would be – and again I was told by the doctor that it wouldn't have shown up.

Reading this exchange does not provide any insight into why defense counsel would have or should have had any reason to believe that the victim's mother was committing perjury. Further, there is no indication that counsel's performance was below an objective standard of reasonableness under professional norms. Accordingly, defendant did not receive ineffective assistance of counsel.

Finally, defendant argues the evidence illustrating that the victim's mother committed perjury by testifying that a physician stated that a physical examination would not show whether the victim was penetrated was newly discovered evidence that warranted a new trial. We disagree.

"For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003), quoting *People v Johnson,* 451 Mich 115, 118 n 6; 545 NW2d 637 (1996).

Here, defendant's argument does not satisfy *Cress.* Even when operating under the assumption that the purported newly discovered evidence could not have been timely discovered, it is implausible that the final standard under *Cress* could be satisfied because the newly discovered evidence that the victim's mother committed perjury would not make a different result probable on retrial. Essentially, if a new trial occurred, the allegedly perjured testimony would not be heard and the jury would be operating under the impression that no physical examination was performed. This is exactly what the jury believed in the present matter, as it was told no exam was performed and that there was no physical evidence. The jury still found defendant guilty, and there is no reason to believe that informing the jury about the perjury would make a different result more probable.

Affirmed.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra