STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2010
v	No. 287475 Wayne Circuit Court
JOSEPH THOMAS PAUPORE, Defendant-Appellant.	LC No. 07-024598-FH

Before: Wilder, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of four counts of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(A). We affirm.

Defendant contends that there was insufficient evidence to support his convictions. We review a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether the prosecution has presented sufficient evidence to sustain a conviction, we construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding all of the elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

MCL 750.520e provides in relevant part:

> (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:
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> (b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances:
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> (iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

The trial record contains sufficient evidence to show that, on four separate instances, defendant made "sexual contact" with the victim. Pursuant to statute, "sexual contact" is defined in relevant part as

> the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose…. [MCL 750.520a(q).]

"Intimate parts" are defined as "the primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(e). "Sexual contact may be proven by establishing that the touching of an intimate part of the victim's body was intentional and can reasonably be construed as being for the purpose of sexual arousal or gratification." *People v Duenaz*, 148 Mich App 60, 65; 384 NW2d 79 (1985). The manner in which a defendant touched a victim can be indicative of touching for the purpose of sexual arousal or gratification. *Id*.

Here, substantial evidence showed that on four separate occasions defendant touched the victim's "intimate parts" during her medical appointments in July 2007 or August 2007. Dr. Craig Magnatta, D.O., testified as an expert at trial that a videotape of the August appointment showed that defendant removed the victim's clothing and touched her exposed buttocks and breasts in an inappropriate manner on several occasions for no medical purpose. The victim also testified that defendant touched her breasts, buttocks, and thighs while he was performing therapy on her neck and back. The victim testified that defendant touched her vaginal area and she pointed out on the videotape when defendant touched that part of her body. Additionally, the victim testified that defendant pulled her hands and elbow into the front of his pants and the victim testified that she felt defendant's testicles and she asserted that the area was "a little damp." Magnatta testified that the videotape depicts defendant pulling the victim's hands into his pants. Magnatta testified that defendant's treatment of the victim was medically unacceptable and unethical.

With respect to her July appointment, although this appointment was not videotaped, there was sufficient evidence to show that defendant touched the victim's intimate parts on four separate occasions. The victim testified that she was unclothed when defendant treated her back and neck. She indicated that defendant touched her vagina, buttocks, and breasts during that appointment. She also testified that, during the treatment, defendant pulled her elbow into his pants and pressed it into his penis. Near the end of the treatment when the victim opened her eyes and looked up, she saw defendant's exposed penis and it touched her nose and left a wet mark.

Additionally, there was sufficient evidence to allow a rational juror to conclude beyond a reasonable doubt that defendant's touching amounted to "sexual contact" because the touching could "reasonably be construed as being for the purpose of sexual arousal or gratification, [or] done for a sexual purpose…." MCL 750.520a(q). Here, before defendant performed the therapy, he would remove the victim's clothing, he did not have a female medical assistant remain in the exam room as is custom in the medical field according to Magnatta, and he did not offer the victim a gown or other covering. Magnatta testified that it is not medically acceptable to have a patient unclothed while performing osteopathic therapy, and he testified that defendant

acts were unethical and medically unacceptable when he removed the victim's clothing. Additionally, there was evidence that defendant caused the victim's hands and elbows to come into contact with his penis, he exposed his penis near the victim's face and caused it to hit her nose, and he touched her exposed body in a manner that was not medically necessary and was unethical. In addition, the victim testified that the videotaped appointment shows that defendant touched the victim with one hand while placing his other hand into his pants. This evidence would allow a reasonable trier of fact to conclude beyond a reasonable doubt that defendant touched the victim's intimate parts on four separate occasions for the purposes "of sexual arousal or gratification, [or] done for a sexual purpose," and, thus, amounted to "sexual contact" for purposes of CSC IV. MCL 750.520a(q).

Finally, there was sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant used force or coercion in order to accomplish the sexual contact with the victim. Here, defendant used force or coercion because he engaged in "medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable." MCL 750.520e(1)(b)(iv). Defendant, a doctor of osteopathic medicine, engaged in medical treatment and examination of the victim in a manner that Magnatta explained is not medically recognized, is unethical, and is medically unacceptable.

In sum, viewed in a light most favorable to the prosecution, we conclude there was sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant committed four separate acts of CSC IV. *Johnson*, 460 Mich at 722-723.

Next, defendant contends that the trial court erred in failing to instruct the jury regarding the defense of consent. Defendant waived this issue for appellate review when, through his defense counsel, he affirmatively approved the jury instructions provided by the trial court on two separate occasions. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000) (affirmatively approving a jury instruction extinguishes any error for review). Therefore, we decline to address the merits of defendant's argument.

Next, defendant contends that he was denied his due process right to a fair trial when the trial court admitted the testimonies of several of defendant's former patients and employees regarding instances where defendant would act in a sexually inappropriate manner. Defendant contends that this evidence was inadmissible propensity evidence and should have been excluded under MRE 404(b). We review a trial court's decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). A trial court commits an abuse of discretion when it admits evidence that is inadmissible as a matter of law. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (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.

In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), our Supreme Court set forth a four-part test to determine the admissibility of evidence under MRE 404(b):

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 . . . 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. [*Id*. at 55.]

In this case, the prosecutor properly submitted notice of her intent to offered the other-acts evidence. MRE 404(b)(2). She also offered the evidence for a proper purpose under MRE 404(b)(1) to show intent and that defendant acted according to a common plan or scheme, and the evidence was logically relevant to these proffered purposes.

"Evidence 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*, 463 Mich 43, 63; 614 NW2d 888 (2000). "Logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot." *Id*. at 64. "Distinctive and unusual features are not required to establish the existence of a common plan or scheme." *People v Kahley*, 277 Mich App 182, 185; 744 NW2d 194 (2007). However, "[g]eneral similarity between the charged and uncharged acts does not … by itself, establish a plan scheme, or system used to commit the acts." *Sabin*, 463 Mich at 64. Instead, the evidence must show "'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" *Id*., quoting Wigmore, Evidence (Chadbourn rev), § 304, p 249.

In this case, three of defendant's former patients and two of his employees testified concerning other-acts where defendant would touch them during medical examinations in a sexually inappropriate manner, attempt to remove their clothing, or exit the exam room aroused after treating female patients. This other-acts evidence shared more than general similarity with the charged offenses, and instead, shared "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." *Sabin*, 463 Mich at 64 (quotations omitted). The other-acts evidence showed that defendant sexually assaulted other patients and employees in a distinctively similar manner. Defendant would isolate the female patients in an examination room and have them disrobe before he entered and began his treatment. Similar to the former patients, the victim's appointments in July and August were unrelated to the intimate parts of her body, yet defendant would treat all of the women while they were unclothed. As he did at the victim's final two appointments, defendant touched or fondled two of the former patients' vaginas. He performed a breast exam or fondled the breasts of his former patients and the victim regardless of whether they needed a breast exam. Defendant had all the former female patients bend over in front of him while he stood behind the women and observed or fondled their intimate parts. At times, when he treated the former patients, as he did when he treated the victim, he would exit and enter the examination room without explaining his reason for doing so. A former employee's testimony showed that part of defendant's plan was to use therapy as a treatment mechanism to create an opportunity to remove a women's clothing and touch her in a sexual manner. Defendant used his position of authority as a physician to isolate female patients, and an

employee, and place them in a position of vulnerability where they were required to trust that he was providing medically necessary and ethical care. Once the women were in this position, defendant used the opportunity for sexual satisfaction or gratification by viewing and/or touching the intimate parts of the female body. In sum, the other-acts evidence was logically relevant to show defendant acted according to a common plan or scheme.

In addition, the other-acts evidence was logically relevant to show intent and absence of mistake. This Court has observed that "when a defendant pleads not guilty of the offense charged, all elements that comprise the offense are placed "at issue."" *People v Martzke*, 251 Mich App 282, 293; 651 NW2d 490 (2002). In order to prove that defendant was guilty of CSC IV, the prosecution was required to prove beyond a reasonable doubt, in part, that defendant touched the victim "for the purposes of sexual arousal, gratification [or] for a sexual purpose" in order to show that he made sexual contact with the victim. MCL 750.520(a)(q). Thus, whether defendant intended to touch the victim in a sexual manner was "at issue" in this case. *Id*. Evidence that defendant touched former patients in a sexual manner under the guise of medical necessity was probative of whether he had intent to touch the victim in the same manner as opposed to merely touching for medical purposes.

Finally, the probative value of the other-acts evidence was not outweighed by the danger of unfair prejudice. *VanderVliet*, 444 Mich at 55. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398. In this case, the evidence was more than "marginally probative." *Id*. The evidence showed that defendant's actions were not for medical purposes but were instead part of a common plan or scheme where defendant would use his position as a physician in order to gain sexual gratification or pleasure. Additionally, defendant's intent in this case was relevant and the other-acts evidence was probative of his intent. Moreover, it is unlikely the jury gave undue weight to the other-acts evidence. *Id*. Here, the jury had a significant amount of other evidence in this case upon which to base its verdict. Specifically, the prosecution introduced a videotape of defendant committing the sexual misconduct at the August appointment, and an expert testified that defendant's actions were not medically necessary and were unethical and inappropriate. The introduction of that evidence made it less likely that the jury would convict defendant on the basis of his propensity to commit bad acts. Finally, the trial court instructed the jury not to consider the other-acts evidence for purposes of propensity or to convict defendant because it thought he was of bad character. See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (jurors are presumed to follow their instructions).

In sum, defendant was not denied his due process right to a fair trial because the trial court did not abuse its discretion in admitting the other-acts evidence.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot