

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BILLY MATTHEW LONG,

Defendant-Appellee.

---

UNPUBLISHED

September 14, 2010

No. 293586

Oakland Circuit Court

LC No. 2008-222164-fc

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(2)(b) (sexual penetration with a person under 13 years of age). Because the trial court properly admitted the challenged prior acts evidence at trial, and, because MCL 768.27a does not violate the separation of powers, we affirm.

Defendant's convictions arise out of an incident involving reciprocal fellatio between defendant and his five-year-old son, "BL," date of birth, March 24, 2002. BL testified that some time during Summer 2007, defendant walked into BL's bedroom and told him to show his private parts to defendant. Defendant threatened to break BL's PlayStation if he did not show his private parts. Defendant hit the PlayStation with his hand and injured his hand. BL took his own clothes off and defendant took his clothes off. Defendant sat down and told BL to suck defendant's penis. BL testified that he got on his knees and used his mouth to comply with defendant's order. BL stated that defendant also used his mouth to suck BL's penis. BL testified that it lasted for a "long time" and that it ended when defendant walked out of BL's room. BL said that neither he nor defendant used their hands during the incident. BL testified that he told his mother, Brandy Long, on the day it happened and later also told his Aunt Lynn.

In September 2007, the Department of Human Services (DHS) removed BL and his half-sister AM from their home with defendant and their mother, Brandy Long. AM was placed with her father, Fred Murphy. Murphy volunteered to take BL as well, and DHS placed BL with Murphy. Murphy never spoke to either BL about the abuse.

Shayla Tiller, BL's kindergarten teacher testified that on June 4, 2008, an incident occurred in her classroom with BL and a fellow male student, Edward, while her class was watching a movie. Tiller noticed something going on between the two students and asked what was going on. The boys explained that they had showed each other their "privates." Tiller

warned the boys not to engage in that conduct, sent a note home to each set of parents, and also notified the school principal. Tiller testified that Edward's mother called her that evening and said that Edward admitted that BL had "suck[ed] his private" during the incident. The following morning Tiller had a meeting with the principal and the two boys. Both boys admitted to the occurrence, specifically that BL had sucked Edwards's penis and that Edward had touched BL's penis. Tiller asked BL what gave him the idea to do something like that. BL responded, "[b]ecause my father does it to me." Tiller notified Children's Protective Services (CPS) as well as the police. The boys were suspended from school and neither returned for the remainder of the year.

CPS referred the matter to Care House in Oakland County. On June 12, 2008, Amy Allen interviewed BL at Care House in her role as lead forensic interviewer and case manager. Allen testified as an expert in characteristics of children who report sexual abuse at trial. BL testified at trial that during the interview at Care House he told Allen that he put his mouth on defendant's penis and that defendant did not touch him using his hands. Allen stated that delayed disclosure is very common when children are sexually assaulted due to the fear of getting into trouble or being disbelieved. Allen also stated that it is common for children who are sexually assaulted to display sexually aggressive behavior or act out sexually in front of other people or with other children. According to Allen, often times, a child will act out an actual sexual assault that happened to him.

Defendant was convicted, after a jury trial, of two counts of CSC I for engaging in mutual fellatio with BL. The trial court sentenced defendant to 25 to 50 years' imprisonment on both counts, as a second habitual offender. Defendant now appeals as of right.

Defendant first argues that the trial court abused its discretion when it admitted improper other acts evidence concerning alleged prior sexual conduct against minors. "This Court reviews a trial court's evidentiary decisions for an abuse of discretion. However, this Court reviews de novo whether a rule or statute precludes admission of evidence as a matter of law." *People v Roper*, 286 Mich App 77, 90-91; 777 NW2d 483 (2009) (internal citation omitted). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

Before trial, the prosecutor filed a motion seeking to introduce evidence under MCL 768.27a that defendant committed criminal sexual conduct against minors on prior occasions. Defendant objected. After oral argument on the matter, the trial court issued a written opinion and order granting the prosecutor's motion to admit the evidence regarding prior criminal sexual conduct that defendant committed against his step-niece, NC, (d/o/b 11/25/1984) in Spring 1997, his daughter, LLH, (d/o/b 10/5/1996) in July 1998, and finally, his step-daughter, AM, (d/o/b 3/24/2002) throughout 2007. The trial court also granted defendant's motion with regard to an allegation that occurred in 1992, holding that the evidence was excluded under MRE 403 because it was too remote in time and substantially more prejudicial than probative.

At trial, the prosecution introduced evidence of defendant's past sexual assaults of his step-niece, biological daughter, and step-daughter. Defendant's step-niece, NC, testified at trial that when she was 12 years old in 1997, she attended a family gathering at her step-mother's home where defendant was present. NC spent the night and slept on the couch. According to NC, defendant slept on the floor next to her. NC stated that while she was sleeping defendant

took her hand and placed it on his bare erect penis. As NC realized what was happening she acted like she was turning over in her sleep and faced the back of the couch. NC eventually told her mother, who contacted the police, and defendant was charged with one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (person under 13). NC states that she testified with regard to the incident in court. Defendant was not convicted of any charges.<sup>1</sup>

Defendant's biological daughter, LLH, testified that she had no current recollection of the underlying incident that occurred to her in July 1998 and thus the trial court dismissed her as unavailable as a result of her lack of memory. As such, LLH's testimony from the preliminary examination that occurred in September 2002 was read to the jury. LLH testified that on a visit to defendant's house, he pulled her pants and underwear down and inserted the silver part of a red and silver screwdriver into her anus. LLH testified that it made her sad and it hurt. She told her mother, Amy Gatton, what happened when she returned home. LLH testified that she never saw defendant again. Gatton testified at trial that after LLH returned home, Gatton found a small toy rubber lizard that had blood on it. Gatton testified that her older son told her that LLH had wanted him to put the lizard "up [her] butt." Gatton stated that she immediately talked to LLH about the lizard and LLH told her what had happened with defendant. Gatton filed a police report. Defendant was charged with CSC II and the matter proceeded to court in September 2002. The CSC II charge was later dismissed after defendant pleaded no contest to fourth-degree child abuse, MCL 750.136b(7), a misdemeanor.

Defendant's step-daughter, AM, testified that on more than one occasion, defendant touched her "privates" including her anus and her vagina with his hands and penis on the inside and the outside throughout 2007. AM stated that defendant hurt her when he put his penis in both her vagina and anus. AM testified that defendant also told her to put her mouth on his penis and suck. AM stated that defendant told her that if she did not comply, she would not be able to eat anything. AM said that "stuff came out" of defendant's penis and defendant made her swallow it. AM testified that defendant put his mouth on her vagina. AM also said that defendant made her watch pornographic movies and inserted a gel-covered "fake private" into her vagina and anus. Defendant told AM to keep the abuse their "little secret." Eventually, AM revealed the abuse to her teacher, the school contacted the police, and AM was removed from her home. The police execution of a search warrant at their home resulted in the discovery of a box of sex toys under defendant's bed that contained items AM described in a Care House interview. Defendant was charged with seven counts of CSC I and one count of CSC II for his sexual abuse of AM. The matter went to trial where a jury found defendant not guilty of all counts.

Defendant's conduct against these witnesses was specifically proscribed by MCL 750.520b(1)(a) (sexual penetration of an individual who was less than 13 years of age) and MCL 750.520c(1)(a) (sexual contact with an individual less than 13 years of age), which are listed offenses. MCL 28.722(e)(x); MCL 768.27a(2)(a). The trial court did not err in admitting the challenged testimonial evidence, because in cases involving the sexual abuse of minors, MCL

---

<sup>1</sup> In its brief on appeal, the prosecution states that defendant was found not guilty in a jury trial. Defendant has represented throughout the course of these proceedings that the charge was dismissed at the preliminary examination.

768.27a permits the admission of evidence that the defendant committed other listed offenses against a minor for consideration with regard to any relevant matter, including demonstrating the likelihood that defendant would engage in criminal sexual behavior toward the victim. See *Pattison*, 276 Mich App at 620.

Despite defendant's assertions that he was never convicted of CSC I or II with regard to any of the alleged sexual abuse of these witnesses, such evidence was admissible pursuant to MCL 768.27a. MCL 768.27a states, in pertinent part, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the 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." This Court has not construed MCL 768.27a as requiring a conviction. In a case where the defendant was charged with CSC II against a minor, this Court stated that "evidence that the defendant committed another crime of [CSC II] against a minor may be admitted under MCL 768.27a, independent of MRE 404(b), even if there was no conviction for the other crime." *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008). Further, MCL 768.27a allows prosecutors to introduce evidence of even uncharged sexual offenses involving minors against a defendant when said defendant is charged with a sexual offense against a minor. *Pattison*, 276 Mich App at 618-619.

Defendant also argues that the admission of the other acts evidence violated MRE 403. In *Pattison*, this Court explained:

[O]ur cases have never suggested that a defendant's criminal history and propensity for committing a particular type of crime is irrelevant to a similar charge. On the contrary, it is because of the human instinct to focus exclusively on the relevance of such evidence that the judiciary has traditionally limited its presentation to juries. 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. [*Pattison*, 276 Mich App at 620.]

However, this Court further stated, "Although we find this information extraordinarily pertinent to a given defendant's behavior in a similar case, we caution trial courts to take seriously their responsibility to weigh the probative value of the evidence against its undue prejudicial effect in each case before admitting the evidence. See MRE 403." *Pattison*, 276 Mich App at 620-621. MRE 403 states, in pertinent part, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

The challenged evidence is obviously relevant, MRE 401, because defendant's past activity of sexually assaulting prepubescent children makes it more probable that he sexually assaulted the victim in this case. Defendant's propensity to commit these types of acts is highly probative to the charged offenses. See *People v Mann*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2010). Further, the evidence that defendant had assaulted other minor family members—NC, LLH, and AM—was relevant because it tended to show that it was more probable than not that BL, defendant's son, was telling the truth. The evidence goes directly to the reliability of the BL's testimony, especially considering the fact that BL was just five years old at the time of the assault and just seven years old at the time of trial. The number of previous victims also made

the likelihood of defendant's sexually abusive behavior toward BL more probable because all of the abuse involved minor family members.

Defendant's assertion that the victims in the previous cases were all girls, thus their testimony was not relevant to this case where he was charged with sexually abusing his young son is also of no consequence. Under MCL 768.27a, all prior sexual abuse of minors is admissible, regardless of the gender of the victims. Furthermore, this Court has already held that "similarity is simply an inapposite consideration under MCL 768.27a." *People v Watkins*, 277 Mich App 358, 365; 745 NW2d 149 (2007).

Almost all evidence of previous behavior has some prejudicial effect. *People v Albers*, 258 Mich App 578, 591; 672 NW2d 336 (2003). But considering the shocking nature of BL's testimony describing the instant sexual assault—mutual fellatio with defendant, his father—there was little or no danger that the jury would convict defendant on the other acts testimony alone or even give that evidence undue weight. The evidence did not cause undue delay, nor was it a waste of time. In sum, MRE 403 did not require the denial of the admission of evidence.

Moreover, after reviewing the record, we are satisfied that the trial court took seriously its responsibility to weigh the probative value of the evidence against its undue prejudicial effect, MRE 403, before admitting the evidence. *Pattison*, 276 Mich App at 620. We point out that the prosecutor attempted to present the testimony of one more alleged victim in its pretrial motion, however, the trial court granted defendant's motion with regard to that allegation, holding that the 1992 evidence was excluded under MRE 403 because it was too remote in time and was substantially more prejudicial than probative.

To the extent defendant argues that the admission of the other acts evidence violated MRE 404(b), his argument is misplaced. Although defendant argues that the testimony was inadmissible under MRE 404(b), the record reflects that this testimony was properly admitted pursuant to MCL 768.27a, not MRE 404(b). The prosecutor specifically provided notice that it intended to admit the testimony of NC, LLH, and AM under MCL 768.27a, and we conclude that the trial court did not abuse its discretion in admitting the testimony under that rule.

Defendant also argues that MCL 768.27a conflicts with MRE 404(b) and violates the doctrine of separation of powers. Defendant did not raise this issue in the trial court and therefore is unpreserved. Unpreserved constitutional claims are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). This Court has explained that, because the Michigan Supreme Court has the exclusive authority to promulgate rules governing practice and procedure in Michigan courts, "when resolving a conflict between a statute and a court rule, the court rule prevails if it governs purely procedural matters. This tenet applies equally to a conflict between a statute and a rule of evidence." *Donkers v Kovach*, 277 Mich App 366, 373; 745 NW2d 154 (2007) (internal citations omitted).

This Court decided this issue in *Pattison*, 276 Mich App at 613, and *Watkins*, 277 Mich App at 365. We are bound by prior published Court of Appeals decisions "issued on or after November 1, 1990 that have not been reversed or modified by the Supreme Court." MCR 7.215(J)(1). In *Pattison*, 276 Mich App at 619, this Court explicitly held that MCL 768.27a was "a substantive rule of evidence because it does not principally regulate the operation or administration of the courts" and therefore, "it does not violate the principles of separation of

powers.” Additionally, in *Watkins*, 277 Mich App at 363-364, this Court held MCL 768.27a controls over MRE 404(b) to the extent that the two conflict because the statute addresses an area of substantive law. And finally, with regard to policy considerations, the *Pattison* Court explained that MCL 768.27a,

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. [*Pattison*, 276 Mich App at 620.]

For all these reasons, we therefore conclude that defendant’s argument is wholly without merit.

Affirmed.

/s/ Michael J. Talbot  
/s/ Patrick M. Meter  
/s/ Pat M. Donofrio