STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 28, 2010
v	No. 292280 St. Clair Circuit Court
ALAN GEORGE THOMPSON, Defendant-Appellant.	LC No. 08-002522-FH

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c (person under age 13), and the trial court sentenced defendant to a prison term of 15 to 180 months. Defendant appeals as of right. We affirm.

Defendant argues that the trial court abused its discretion when it allowed the prosecutor to introduce "other acts" evidence under MRE 404(b) and MCL 768.27a regarding defendant's alleged criminal sexual conduct involving another minor. Because we hold that the trial court properly admitted the "other acts" evidence under MCL 768.27a, we find it unnecessary to determine whether the evidence was properly admitted under MRE 404(b).

MCL 768.27a provides, in relevant part, that " 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." Under the statute, a "listed offense" is defined as those offenses found in MCL 28.722. MCL 768.27a(2). A "minor" is defined as any individual that is under 18 years of age. MCL 768.27a(2)(b).

Defendant argues that the trial court should not have admitted the evidence because the prosecutor failed to establish that the "other acts" evidence constituted a listed offense and was relevant to the instant case. We disagree.

The "other acts" evidence introduced at trial could constitute either second- or fourth-degree criminal sexual conduct if the jury believed the acts were done for a sexual purpose. Second- and fourth-degree criminal sexual are listed offenses within the meaning of MCL 768.27a(2). See MCL 28.722(e)(*x*). It is not necessary that a defendant be convicted of the

"other acts" evidence before they could be admitted under MCL 768.27a. *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008).

Contrary to defendant's argument, the "other acts" evidence was relevant to determining whether he committed the instant offense. In child sexual assault cases, whether the defendant has the propensity to sexually assault children is relevant to determining whether he or she committed another sexual assault against a child. *People v Pattison*, 276 Mich App 613, 620; 741 NW2d 558 (2007). Thus, we agree with the trial court's finding that the "other acts" evidence was relevant and admissible under the statute to determine whether defendant intentionally touched the complainant for a sexual purpose.

Defendant argues that, even if relevant, the trial court should have excluded the "other acts" evidence because its probative value was substantially outweighed by its prejudicial effect, and thus inadmissible under MRE 403.[1] We disagree.

Pursuant to MRE 403, evidence, even if relevant, is inadmissible if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." Clearly, the "other acts" evidence was prejudicial to defendant's case. However, evidence is not unfairly prejudicial merely because it is damaging to a party's case. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Evidence is unduly prejudicial if it has "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *Id*. The danger of introducing unfairly prejudicial evidence is the possibility the jury would find the evidence more probative of an issue than it deserves. *Id*. Because defendant denied any wrongdoing and alleged that the complainant fabricated her claim that he had inappropriately touched her, the "other acts" evidence was relevant to rebut his claim of fabrication and was highly probative of the complainant's credibility. For that reason, defendant cannot show that the evidence was so prejudicial as to warrant exclusion under MRE 403. See *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998) (stating that "[e]vidence is unfairly prejudicial where there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury").[2]

In the alternative, defendant argues that application of MCL 768.27a to his case violated his equal protection rights. Specifically, defendant argues that MCL 768.27a is unconstitutionally discriminatory because it unfairly classifies and punishes those defendants charged with criminal sexual assaults against children and there is no rational basis for the unequal treatment under the law. We disagree.

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[1] Although not explicitly stated in MCL 768.27a, a trial court considering whether "other acts" evidence is admissible under the statute must still take seriously its responsibility to determine whether MRE 403 might render the evidence inadmissible. *Pattison*, 276 Mich App at 621.

[2] Defendant argues that the trial court committed reversible error when it failed to analyze the admissibility of the "other acts" evidence under the five-factor test articulated in *United States v Gaurdia*, 135 F 3d 1326, 1331 (CA 10, 1998). Because Michigan courts have not adopted the factors discussed in that case, the trial court was not required to apply those factors.

The Equal Protection Clauses of both the United States and Michigan Constitutions protect every person against unequal treatment under the law. US Const, Am XIV; Const 1963, art 1, § 2; *People v Cooper (After Remand)*, 220 Mich App 368, 372; 559 NW2d 90 (1996). Not all discrimination violates the Equal Protection Clause. *El Souri v DSS*, 429 Mich 203, 207; 414 NW2d 679 (1987); *Champion v Secretary of State*, 281 Mich App 307, 324; 761 NW2d 747 (2008). Whether a challenged classification violates the Equal Protection Clause is measured by one of three tests. *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000). Which test is appropriate depends on the type of classification and the nature of the interest affected. *Dep't of Civil Rights v Waterford Twp*, 425 Mich 173, 190; 387 NW2d 821 (1986).

In this case, the challenged classification is between those persons charged with sexually assaulting a child and those persons who are not. Because persons charged with sexually assaulting children are not members of a suspect or middle-tier classification, defendant's challenge is subject to rational basis review. *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 147 (1994). Under the rational basis test, a challenged classification is presumed constitutional and will be upheld if it is rationally related to a legitimate governmental purpose. *Harvey v State*, 469 Mich 1, 7; 664 NW2d 767 (2003). "[A] statute will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rational for it seems tenuous." *Cooper (After Remand)*, 220 Mich App at 373. The burden of proof is on the person attacking the legislation to show that the classification is arbitrary. *Id*. Defendant has not met his burden of proof.

In *Cooper*, this Court addressed an equal protection challenge to MCL 28.243(9)(a), which requires law enforcement agencies to return the fingerprint cards and arrest records of a defendant acquitted of the charges against him unless he had been charged with a crime involving criminal sexual conduct. *Id*. In finding that MCL 28.243(9)(a) did not violate the defendant's equal protection rights, this Court stated:

> Criminal sexual conduct offenses—committed against children as well as adults—are particularly difficult to detect, investigate, and prosecute. Historically, such offenses have been underreported because of various lamentable factors, including, but not limited to, the victim being related to the offender, the victim's age, or the victim's feelings of fear, embarrassment, or shame. Once reported, criminal sexual conduct offenses are more difficult to prosecute than other serious crimes because they are generally committed under a shroud of secrecy, leaving the victim as the only significant witness to the offense. Moreover, empirical evidence indicates that sex offenders are generally recidivists. Because of these unique characteristics, the state has a legitimate interest in implementing a criminal identification and record system to facilitate law enforcement investigation and prosecution of criminal sexual conduct offenses. We also note that, under certain circumstances, evidence of prior sexual assaults that have resulted in acquittal may be admissible as prior bad acts evidence in subsequent sexual assault prosecutions under MRE 404(b). This is another fact that justifies the refusal to return arrest records to persons acquitted of sex crimes. [*Cooper (After Remand)*, 220 Mich App at 374-375 (internal citations omitted).]

Although not factually on point, we find the principles articulated in *Cooper* applicable to the instant case. Accordingly, we hold that the classification created by MCL 768.27a is rationally related to and advances a legitimate government interest.

Next, defendant argues that the trial court abused its discretion when it prevented him from impeaching the complainant's testimony with a three-second video clip from her preliminary examination testimony. Specifically, defendant argues that because the video clip was admissible under MRE 613, the trial court committed reversible error when it held otherwise. Defendant's argument has partial merit.

Pursuant to MRE 613(a), a party may impeach a witness's credibility with prior written or oral statements of the witness. *People v Donald*, 103 Mich App 613, 617; 303 NW2d 247 (1981). This includes a tape-recorded statement of the witness. *Id*. Because the complainant was available to testify and would have had an opportunity to explain or deny what was shown in the three-second video clip, the evidence was admissible under MRE 613 and the trial court abused its discretion when it held otherwise. *Id*. at 617.

Nevertheless, because defendant introduced a still photograph that captured the image that he wished to show the jury in the three-second video clip, the trial court's error was harmless. Through the photographic exhibit, defendant was able to show the jury that the complainant's testimony at trial differed from the testimony that she had given at the preliminary examination. Indeed, defendant thoroughly cross-examined the complainant about the photograph and how her testimony at trial differed from that depicted in the photograph. Also, defendant indicated below that his purpose in introducing the video clip was not because it was truly necessary to impeach the complainant's credibility, but rather to show that the admitted photographic exhibit was not taken out of context. Thus, the video clip was cumulative. A trial court is not required to admit cumulative evidence. MRE 403. For these reasons, defendant has failed to show how the failure to admit the video clip actually prejudiced his case. Accordingly, he is not entitled to relief on this issue.

We find unconvincing defendant's argument that the trial court's failure to allow him to introduce the video clip deprived him of his right to confront witnesses and to present a defense. Although the right of criminal defendants to confront witnesses brought against them is a primary interest secured by the constitution, that right is not without limits. *Chambers v Mississippi*, 410 US 284, 294, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). "[N]either the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Even a criminal defendant's right to present a defense must yield to established rules of procedure and evidence. *Chambers*, 410 US at 302.

Defendant next argues that the trial court abused its discretion when it allowed a Michigan State Police Trooper to testify as a rebuttal witness about her experiences investigating child sexual assault cases. More specifically, defendant argues that given the nature of the trooper's testimony, it was necessary that she be qualified as an expert witness, which could only

be done through a *Daubert*[3] hearing. Defendant argues that because the trial court did not hold a *Daubert* hearing prior to allowing the trooper to testify, he is entitled to a new trial. We disagree.

Contrary to defendant's argument, a trial court is not required to hold a *Daubert* hearing unless the proposed testimony is scientific in nature. See *Clerc v Chippewa Co War Memorial Hosp*, 267 Mich App 597, 603; 705 NW2d 703 (2005). Based on our review of the record, we agree with the trial court that the trooper was qualified to testify as an expert. The trooper testified that over the course of her 9½-year tenure as a police officer, she had investigated approximately 50 criminal sexual assault cases. She also testified that because she is the only female at her station, she is often requested by the Department of Human Services to handle the complaints from that agency, and that she tends to take complaints from younger children. The trooper had received training in investigating criminal sexual assault cases and in the forensic interviewing of children. Based on the trooper's experience and training, she was properly recognized by the trial court as an expert witness. MRE 702; *Petri*, 279 Mich App at 417 (stating that "[a] police witness can be qualified as an expert on the basis of experience or training in child sexual abuse cases").

Lastly, defendant argues that to the extent his trial counsel failed to properly preserve the arguments he raises on appeal below, he was deprived of the effective assistance of counsel. We disagree.

Defendant preserved for appellate review his ineffective of counsel claims that were based on the admissibility of the "other acts" evidence under MRE 404(b), the admissibility of the three-second video clip to impeach the complainant's testimony, and the trial court's decision to allow the state trooper to testify as an expert witness. Because defense counsel raised proper objections on those grounds at trial, counsel was not ineffective simply because the trial court ruled adversely to defendant's position. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant's remaining ineffective assistance of counsel arguments, which were not properly preserved for appellate review, are based on the admissibility of the "other acts" evidence pursuant to MCL 768.27a, the constitutionality of MCL 768.27a, and the trial court's limiting instruction regarding "other acts" evidence under MRE 404(b). Because we hold that the "other acts" evidence was admissible pursuant to MCL 768.27a, that MCL 768.27a is not unconstitutional, and that the trial court gave a proper limiting instruction on the use of the "other acts" evidence, defendant's trial counsel was not ineffective. "Trial counsel cannot be faulted for failing to raise an objection or motion that would have been futile." *Fike*, 228 Mich App at 182. Even assuming the limiting instruction given in this case was improper, given that the "other acts" evidence was admitted pursuant to MCL 768.27a and "other acts" evidence admitted under that statute can be considered for any purpose, defense counsel's failure to object

[3] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

to the limiting instruction would not have been outcome determinative. Defendant has not shown that he was denied the effective assistance of counsel.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering