

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EARL CHISLEY,

Defendant-Appellant.

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UNPUBLISHED  
November 9, 2010

No. 292837  
Shiawassee Circuit Court  
LC No. 09-008004-FC

Before: O'CONNELL, P.J., and BANDSTRA and MARKEY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree criminal sexual conduct, MCL 750.520b(1)(b), for which he was sentenced to 7 to 20 years' imprisonment. We affirm.

Defendant first asserts that he was denied a fair trial when he was unable to effectively use his last two peremptory challenges because two jurors failed to disclose prior acquaintances with the victim and the victim's family during voir dire. We disagree.

Defense counsel moved to strike the two jurors, asserting that she would have exercised peremptory challenges to have them removed from the jury had the information regarding their acquaintances been disclosed during voir dire. After questioning each of them about the circumstances of the acquaintances, the trial court determined that the jurors could remain impartial and denied the defense motions to strike. A trial court's factual findings in determining whether to excuse a juror are reviewed for clear error. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

A criminal defendant has a right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *Miller*, 482 Mich at 547. However, there is no constitutional right to exercise a peremptory challenge. *People v Daoust*, 228 Mich App 1, 7; 577 NW2d 179 (1998), overruled on other grds *Miller*, 482 Mich at 561. Michigan grants the right to peremptory challenges by statute and court rule, but the right expires when the jury is sworn. *Id.* When information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish that he was actually prejudiced by the presence of the juror. *Miller*, 482 Mich at 548-549, 561 (the primary inquiry is whether the defendant was denied his right to an impartial jury; if not, then there is no need for a new trial). Thus, "some showing must be made that the misconduct affirmatively prejudiced the

defendant's right to a trial before an impartial and fair jury." *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998).

At the beginning of the second day of trial, a juror we shall refer to as juror F alerted the trial court that she recognized the victim's mother. Apparently, juror F did not recognize the victim's mother's name on the witness list because she knew her only by her maiden name.<sup>1</sup> Juror F saw the victim's mother while she was leaving the courtroom after the first day of trial and thought she looked familiar. Juror F then looked through her daughter's yearbook and realized that the victim's mother had been at juror F's house to drop the victim's sister off for a birthday party once before. The trial court questioned juror F regarding her ability judge the credibility of the victim's mother's testimony, and then stated:

[W]e would not know any of this but for the fact that [juror F] seems to be very conscientious, and based on her testimony that, you know, the knowledge of [the victim's mother] is just fleeting or passing knowledge through a class party for their respective children a couple of years ago, and then possibly something at [juror F]'s house, and she's testified that again she has no social relationship with [the victim's mother], doesn't know anything about this case, and that the matter would not affect her being able to judge the testimony and would not affect or influence how she would decide this case, or for that matter decide a conflict in testimony between [the victim's mother] and any other witness. So I'm satisfied that she's been honest, she's been conscientious, brought the matter up, and if the relationship, if there was a relationship there, past or present, an actual relationship of [juror F] with [the victim's mother], or there was some knowledge on the part of [juror F] of the marriage relationship of Defendant and [the victim's mother] or anything else concerning the family or [the] victim here, the alleged victim, then I would look at it differently, but again I think [juror F] has been forthright and honest and based on what she said, and I don't have any reason to disbelieve her, she maintains an impartial and neutral state of mind in this matter. So I'll deny the motion to strike [juror F] at this time.

At the lunch break during the second day of trial, a juror that we shall refer to as juror S alerted the trial court that she recognized Elaine Love, who had been sitting in the courtroom during the trial that morning. Juror S and Love had been neighbors and their children had attended the same daycare. Juror S stated that she had not spoken to Love in years and did not know Love's connection to the trial. Defense counsel and the trial court questioned juror S regarding her ability to be fair and impartial, and then defense counsel informed the trial court that Love was the victim's biological father's fiancée. The trial court stated:

[W]hen [juror S] testified she said she didn't know any connection that Elaine Love would have to this case. I don't think she knows, she didn't seem to know who the other people were, if the, if [the victim]'s father was in the courtroom, she didn't seem to know who that person was, so I think that I'm satisfied that there is no issue at all and that ... we have a Juror who is being very, very

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<sup>1</sup> During her marriage to defendant, the victim's mother took defendant's last name.

conscientious in letting the Court know that they might recognize somebody in the courtroom is all.

Defendant was not denied a fair and impartial trial. Neither juror F nor juror S recognized any of the potential witnesses during voir dire, and, after the jury was sworn, defendant no longer had a right to use his two peremptory challenges. Once each juror came forward upon recognizing a person in the courtroom, the trial court properly questioned each juror about the nature of the relationship between the juror and the person they recognized and about any possible bias or partiality towards the prosecution or defense. Both jurors testified under oath that they did not personally know the person they recognized, and they were not biased or partial to one particular party. There is no evidence in the record, and defendant did not present any evidence, suggesting that these jurors were partial or that their presence on the jury actually prejudiced him. See *Miller*, Mich 482 Mich at 550, 553-554. Thus, given each juror's very limited acquaintance with, and knowledge of, the victim and the victim's family the trial court did not clearly err in finding that defendant failed to establish that he was actually prejudiced by the presence of juror F or juror S on the jury.

Defendant next asserts that the trial court erred in allowing the late endorsement of a witness by the prosecution. We disagree. "A trial court's decision to permit or deny the late endorsement of a witness is reviewed for an abuse of discretion." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes. *Id.*

MCL 767.40a(3) provides, "[n]ot less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial." MCL 767.40a(4) provides, "[t]he prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties."

Here, the prosecution realized that Sara Gallock would be a favorable witness only during the weekend before the trial. The prosecution explained to the trial court that, initially, Gallock was going to testify for the defense that according to the programming records, the movie *Monsters, Inc.* did not air on ABC Family Night during September 2004 or October 2004.<sup>2</sup> However, the weekend before the trial, the prosecution called Gallock to inquire whether *Monsters, Inc.* was instead televised during September/October 2003 or September/October 2005. Gallock rechecked the programming records and realized that *Monsters, Inc.* had been televised on October 30, 2004, consistent with the victim's testimony. Thereafter, on the first day of trial, the prosecution requested the late endorsement of Gallock as its witness, instead of defendant's witness. Although the prosecution was aware of Gallock for three months before trial because she was on defendant's witness list, the prosecution did not learn of Gallock's error regarding the programming records and her favorable testimony until the weekend before trial. Once the prosecution was aware of the favorable testimony, it did not delay in seeking the

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<sup>2</sup> The victim testified that the first time defendant engaged in sexual intercourse with her was on a night, in October 2004, that she and defendant were watching *Monsters, Inc.* on ABC Family night.

endorsement of Gallock. The trial court did not abuse its discretion in determining the prosecution had shown good cause.

Furthermore, regardless of whether the prosecution had shown good cause, a defendant must show that he was *unfairly* prejudiced to be entitled to any relief. *People v Callon*, 256 Mich App 312, 328; 662 NW2d 501 (2003). Typically, unfair prejudice results when defense counsel is unable to adequately prepare for the witness's cross-examination. *People v Burwick*, 450 Mich 281, 296; 537 NW2d 813 (1995). Defendant has failed to show unfair prejudice resulted from the late endorsement of Gallock. The trial court granted the prosecution's motion on the condition that the prosecution make Gallock available to defense counsel before allowing her to testify. Although Gallock's testimony substantially changed, defense counsel did not seek additional time to prepare, and was able to adequately cross-examine Gallock regarding the sudden change in her testimony. Defendant was not unfairly prejudiced by the late endorsement.

Defendant also asserts that the trial court erred in determining other acts evidence was admissible under MCL 768.27a and MRE 404(b). We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion, and reviews de novo the proper interpretation of a statute or rule of evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). In a criminal case, if error is found, reversal is not required unless the defendant meets his burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error, meaning the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

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.

To be admissible under MRE 404(b) other acts evidence 1) must be offered for a proper purpose, 2) must be relevant, and 3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *People v Dobek*, 274 Mich App 58, 86; 732 NW2d 546 (2007), quoting *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998).

MCL 768.27a(1) provides:

[n]otwithstanding section 27, 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. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled

date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

Under MCL 768.27a, if a defendant is accused of committing a listed offense against a minor, the prosecution may present evidence that the defendant committed another listed offense against a minor without justifying the admissibility of the evidence under MRE 404(b). *People v Watkins*, 277 Mich App 358, 364; 745 NW2d 149 (2007); *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007). Furthermore, the prior acts evidence may be admitted for any relevant purpose, including the defendant's propensity to commit the charged offense. *Pattison*, 276 Mich App at 619-620; MCL 768.27a. However, the trial court must still determine whether evidence that is admissible under MCL 768.27a should nevertheless be excluded because its probative value is substantially outweighed by unfair prejudice pursuant to MRE 403.<sup>3</sup> *Pattison*, 276 Mich App at 620-621.

Here, the trial court properly determined that the other acts evidence was admissible pursuant to MCL 768.27a and MRE 404(b). Pursuant to MRE 404(b), it was properly admissible to show a common plan, motive, or scheme when defendant began sexually fondling the victim when she was 11 years old and defendant's inappropriate behavior escalated to sexual intercourse from the time that the victim was 14 years old until she was 16 years old. The other acts evidence was relevant because it tended to make a material fact, whether defendant engaged in sexual intercourse with the victim, more probable. Finally, the probative value of the other acts evidence substantially outweighed any prejudicial effect because the alleged other acts tended to highlight the progressive nature of the sexual relationship between defendant and the victim. Additionally, pursuant to MCL 768.27a, the other acts evidence was admissible because it was relevant to show the nature of the relationship between the victim and defendant. Furthermore, its probative value outweighed any unfair prejudice. It was not an abuse of discretion for the trial court to admit the other acts evidence pursuant to MCL 768.27a and MRE 404(b).

Defendant next asserts that error occurred when Trooper Dwight Denning improperly gave lay opinion testimony regarding the victim's character. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion, and reviews de novo the proper interpretation of a statute or rule of evidence. *Katt*, 468 Mich at 278.

In general, it is not proper for one witness to comment on the credibility of another witness. *Dobek*, 274 Mich App at 71. A lay witness's opinion on the believability of the complainant's story is inadmissible. *People v Smith*, 425 Mich 98, 113; 387 NW2d 814 (1986). It is for the jury to determine whether a particular witness is credible. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *Dobek*, 274 Mich App at 71. However, not every instance of inappropriate subject matter being mentioned before the jury warrants a mistrial. *People v*

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<sup>3</sup> MRE 403 provides, "[a]lthough 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."

*Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), overruled on other grounds *People v Thompson*, 477 Mich 146, 148, 157-158; 730 NW2d 708 (2007). An unresponsive and volunteered answer from a witness to a proper question is not grounds for a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

During the prosecution's direct examination, Denning's testimony was as follows:

*Prosecution.* Likewise, given the nature of this case did you see any reason to have this young woman evaluated either by a sexual assault nurse examiner or a specialized physician regarding sexual assault to reinforce the evidence in this case?

*Denning.* No, I saw no reason to do anything like that.

*Prosecution.* Okay. And why was that, Trooper Denning?

*Denning.* I've been interviewing people for twenty-two years and I believe I'm a good judge of character of who I'm talkin' to and what they -

*Defense Counsel.* Objection, Your Honor. He's providing character testimony for the victim.

*Trial Court.* I'll sustain the objection.

This case did not involve the testimony of only defendant and the victim, rather, the victim's testimony was corroborated by the victim's mother and several friends, as well as by a letter the victim wrote, and the trial court properly instructed the jury that it was to determine the credibility of each witness. Thus, Denning's unsolicited statement, to which the defense objection was sustained, did not result in a miscarriage of justice because it was not outcome determinative.

Finally, defendant asserts that OV 4, OV 10, and OV 13 were improperly scored. We disagree. This Court reviews de novo the application of the sentencing guidelines, but reviews a trial court's scoring of a sentencing variable for an abuse of discretion. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A sentencing court has discretion in determining the number of points to be scored, provided the evidence adequately supports a particular score. *Hornsby*, 251 Mich App at 468. "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). This Court must affirm a sentence within the applicable guidelines range, absent an error in the scoring or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

Under MCL 777.34(1)(a) (OV 4), ten points are scored if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(2) states to "[s]core 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." Also, the victim's expression of fearfulness is enough to satisfy the statute. *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009). At trial, both the victim and the victim's

mother testified that the victim attended counseling to deal with her sexual abuse issues. Furthermore, the victim's mother stated at defendant's sentencing hearing that the victim once attempted suicide during the years of sexual abuse before she told anyone, and that her grades during that time period were very poor. After the victim reported the sexual abuse, the victim initially went to sexual abuse counseling for a few months and she expressed a desire to go back. Also, the victim's concentration levels and grades greatly improved after defendant's trial. This evidence was sufficient to uphold the trial court's scoring of OV 4 at ten points.

Under MCL 777.40(1)(b) (OV 10), ten points are scored if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." A difference in age alone, where the defendant is the older party, may be sufficient to uphold the scoring of OV 10. See *People v Johnson*, 474 Mich 96, 103; 712 NW2d 703 (2006) (the defendant was found to have exploited the victim's youth in committing the sexual assault where the defendant was 20 years old, and the complainant was 15 years old). Here, the evidence revealed that defendant, who was approximately 19 years older than the victim, took advantage of the victim's age and abused his authority status as her step-father, by beginning to inappropriately touch the victim at the age of 11, consistently offering her marijuana and alcohol, and ultimately engaging in sexual intercourse with the victim beginning at age 14. This evidence was sufficient to uphold the trial court's scoring of OV 10 at ten points.

Under MCL 777.43(1)(c) (OV 13), 25 points are scored if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person[.]" MCL 777.43(2)(a) provides that, "[f]or determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." The five-year period must include the sentencing offense and no other period may be properly considered. See *People v Francisc*, 474 Mich 82, 86-87; 711 NW2d 44 (2006) (only those crimes committed during a five-year period that encompass the sentencing offense can be considered in scoring OV 13). The victim testified at trial that she and defendant engaged in sexual intercourse at the family home over ten times and over 40 times in secluded, wooded areas from the time the victim was 14 years old until after she was 16 years old. This testimony was sufficient for the trial court to find defendant committed three felonies within a five-year period, including the sentencing offense, and thus, was sufficient to uphold the trial court's scoring of OV 13 at 25 points. Because no error occurred in the scoring of the OVs, defendant's sentencing guidelines range is correct, and he is not entitled to resentencing.

We affirm.

/s/ Peter D. O'Connell  
/s/ Richard A. Bandstra  
/s/ Jane E. Markey