

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK EDWARD MCALLISTER,

Defendant-Appellant.

UNPUBLISHED
December 20, 2012

No. 302345
Muskegon Circuit Court
LC No. 10-059060-FC

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). Defendant was sentenced to concurrent terms of 15 to 50 years' imprisonment for each conviction. Because we conclude that the admission of other-acts evidence was proper and that defendant was not deprived of effective assistance of counsel, we affirm.

Defendant's convictions in this case are the result of criminal sexual conduct perpetrated on the victim, HR, in the 1990s. Defendant was a friend of HR's father, and began sexually assaulting HR when she was seven or eight years old. The sexual abuse stopped in 1998 when HR reported the abuse to law enforcement; however, defendant was not prosecuted at that time and the case was eventually closed. The case against defendant in regard to his sexual abuse of HR was reopened in 2010 after defendant was accused of sexually abusing another child, KBT. During defendant's trial regarding his sexual abuse of HR, evidence regarding criminal sexual conduct perpetrated by defendant on KBT in 2008 was introduced pursuant to MRE 404(b) and MCL 768.27a. Other-acts evidence regarding defendant's alleged sexual abuse of HR's siblings, RR and FR, on multiple occasions in the 1990s was also introduced during trial.

HR testified that defendant would play hide and seek with her and force her to perform oral sex on him when he found her; she further testified that occurrences of oral sex were not limited to hide and seek and that defendant frequent forced her to perform oral sex. HR also testified to multiple instances of "dry humping," and testified to one incident where defendant forced her to engage in penile-vaginal penetration.

KBT testified that she and defendant were in her basement watching television when defendant began rubbing her back. KBT testified that defendant eventually moved his hand down the side of her body, under the front part of her pants and underwear, and touched her

vaginal area. KBT testified that she was scared, so she did not say anything, and that defendant finally stopped when a woman she identified as his wife called for him and they left the house. KBT was crying and upset, and after defendant left and her mother returned home, she told her mother and grandmother about defendant's conduct.

RR testified that when he was five years old defendant asked him to have "sex" with him and pulled RR's pants down, laid RR on the floor, and started rubbing his penis between RR's legs. RR testified to another similar incident. RR also testified that defendant woke him up on several occasions when defendant spent the night at his house and told RR to go and get FR. RR testified that defendant would have sexual intercourse with FR in RR's bed while RR watched. RR also testified that defendant drove him and FR to a dead-end road and told him to take a walk and then while he was gone defendant had sexual intercourse with FR.

FR testified that when she played hide and seek with defendant she and defendant would have sexual intercourse, meaning penile-vaginal penetration, when he found her. She also testified to the instances when RR would come and get her and bring her to his room where defendant would have sexual intercourse with her and the incident when RR went for a walk and she had sexual intercourse with defendant at a dead-end road.

KBT was the first victim to testify regarding defendant's criminal sexual conduct. Defense counsel objected to KBT's testimony during trial, and argued that the testimony was irrelevant because there was a large gap in time between the alleged sexual conduct with KBT and the alleged sexual conduct with HR. Defense counsel did not raise objections to RR and FR's testimony. In response to defense counsel's objection to KBT's testimony, the prosecution argued that the objection was untimely because notice of intent to admit other-acts evidence pursuant to MRE 404(b) and MCL 768.27a was filed before the trial. The trial court agreed that the objection was untimely, but opted to hear the parties' arguments concerning the admissibility of the evidence. The prosecution argued that the evidence of defendant's conduct with KBT was being offered to prove motive, purpose, intent, and scheme because it demonstrated that defendant has sexually abused a child of a similar age in a similar manner, and that the gap of years between defendant's sexual abuse of the children did not render the evidence inadmissible. Defense counsel reiterated his argument that the large time gap rendered the evidence irrelevant.

The trial court ruled that the evidence was admissible pursuant to MRE 404(b). It held that the evidence was offered for a proper purpose because intent and scheme were at issue in the case, and that the evidence had "some relevance as to defendant's intent and possible scheme and/or motive." The trial court also held that "the probative value of the evidence is not substantially outweighed by unfair prejudice." Finally, the trial court noted that it would provide a limiting instruction to the jury.¹

¹ The limiting instruction given to the jury was as follows:

You have heard evidence that was introduced to show that the Defendant committed crimes for which he is not on trial. If you believe this evidence, you must be very careful only to consider it for certain purposes. You may only think

On appeal, defendant first argues that the trial court erred by admitting the testimony of KBT, RR, and FR under both MRE 404(b) and MCL 768.27a because the probative value of the evidence was outweighed by the danger of unfair prejudice. Because defendant only objected to the admission of KBT's testimony, defendant's argument in regard to the testimony of RR and FR is unpreserved. We review preserved claims of evidentiary error for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 285; 651 NW2d 490 (2002). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). However, "a preserved, non-constitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999), quoting MCL 769.26. Errors regarding the admission of evidence are nonconstitutional. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2007). Thus, the effect of any evidentiary error is evaluated by assessing the error in "the context of the other evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Lukity*, 460 Mich at 495. Defendant's unpreserved claims are reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763.

The other-acts evidence in this case was apparently admitted pursuant to MRE 404(b) and MCL 768.27a. However, this Court has explained that in cases where listed offenses² are at issue, analysis of whether the other-acts evidence is admissible "begins and ends with MCL 768.27a." *People v Smith*, 282 Mich App 191, 205; 772 NW2d 428 (2009) (citations omitted). Moreover, defendant argues that the evidence was inadmissible under both MRE 404(b) and MCL 768.27a because the evidence fails the balancing test of MRE 403. Thus, specific consideration of MRE 404(b) is not necessary. See also *People v Watkins*, 491 Mich 450, 496; 818 NW2d 296 (2012) (holding that MRE 404(b) and MCL 768.27a irreconcilably conflict and that the statute prevails over the court rule).

about whether this evidence tends to show that the Defendant had a reason to commit the crime and/or that the Defendant specifically meant to commit criminal sexual conduct and/or that the Defendant used a plan, system, or characteristic scheme that he has used before or since. 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 he is likely to commit crimes. You must not convict the Defendant here because you think he is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the Defendant committed the alleged crime you must find him not guilty.

² First-degree criminal sexual conduct is a listed offense. See MCL 768.27a(2)(a); MCL 750.520b.

MCL 768.27a provides 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.” The Michigan Supreme Court has made clear that MCL 768.27a permits admission of propensity evidence that would be precluded by MRE 404(b) because the statute permits admission of evidence “for its bearing on any matter to which it is relevant,” and a defendant’s propensity to commit a crime makes it more probable that he committed the charged offense. *Watkins*, 491 Mich at 470, quoting MCL 768.27a.³ However, evidence offered for admission pursuant to MCL 768.27a is still subject to MRE 403, which permits the exclusion of relevant evidence when the probative value of the evidence 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. MRE 403; *Watkins*, 491 Mich at 481. When applying MRE 403 to evidence in the context of MCL 768.27a, “courts must weigh the propensity inference in favor of the evidence’s probative value rather than its prejudicial effect.” *Id.* at 487. Thus, “other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference.” *Id.*

All relevant evidence is inherently prejudicial, and MRE 403 only precludes evidence that is unfairly prejudicial. *People v Wilson*, 252 Mich App 390, 398; 652 NW2d 488 (2002). “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010), citing *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Factors to consider when determining whether evidence is unfairly prejudicial include:

(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant’s and the defendant’s testimony. [*Watkins*, 491 Mich at 487-488.]

The *Watkins* Court further explained that these considerations should be balanced by courts, and should be separately applied to each piece of evidence offered under MCL 768.27a. *Id.* at 489. Further, the Court explained that “trial courts retain their discretion under MRE 403 to determine how many separate pieces of other-acts evidence may be admitted before the probative value of such evidence is outweighed by the danger of ‘confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.’” *Id.*, quoting MRE 403. The Court explained that these determinations must be made in context of the entire trial, considering all the other-acts evidence as well as the evidence as a

³ Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401.

whole. The Court noted that there is no bright-line rule in regard to how many other acts may be admitted “before the scale tips in favor of exclusion,” and that this determination is left to the trial court’s discretion. *Id.* at 489-490. When weighing probative value of other-acts evidence, courts should consider the extent to which the other-acts evidence supports the victim’s credibility and rebuts any defense attack on the victim’s credibility. *Id.* at 491-492. Further, limiting instructions to the jury are appropriate to ensure that the jury properly employs other-acts evidence. *Id.* at 490.

Regarding the first factor, the other-acts evidence admitted in this case concerning defendant’s alleged sexual abuse of KBT, FR, and RR are similar to the charged crime because all the alleged instances of sexual abuse involve defendant’s opportunistic predation of prepubescent children who knew and trusted defendant. Further, the sex acts following hide and seek as described by FR match the instances of oral sex that HR endured when playing hide and seek with defendant. The sexual abuse RR suffered corresponded to the “dry humping” that HR detailed. In regard to the second factor, the other-acts described by FR and RR were contemporaneous with defendant’s charged offenses against HR; however, there is a wide gap in time between the events defendant was charged with in this case and the incident involving KBT. Concerning the third factor, the abuse of KBT happened only once; but she almost immediately reported the abuse, thereby preventing any further acts. The other-acts involving FR and HR occurred frequently over an extended period of years. Further, the other-acts evidence presented by KBT, FR, and RR bolsters HR’s credibility and rebuts defendant’s attack on her credibility advanced during trial. The parties make no specific arguments in regard to the final factors.

Thus, we conclude that the other-acts testimony of KBT, FR, and RR provided evidence that defendant had a propensity to sexually abuse children when given the opportunity, and that the testimony was probative for that reason and because it tended to support HR’s credibility, which defense counsel attacked at trial. Therefore, we cannot find that the trial court abused its discretion by permitting KBT’s other-acts testimony, or that admission of the other-acts testimony given by FR and RR constituted plain error affecting defendant’s substantial rights.

Defendant also argues that defense counsel was ineffective because he failed to respond to the prosecution’s notice of intent to present other-acts evidence before trial, and then failed to adequately object to the admission of the evidence during trial.

No evidentiary hearing was held in regard to defendant’s claims of ineffective assistance of counsel; accordingly, our review of defendant’s claims is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel’s performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice occurs if there is a “reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *Id.* at 312 (quotation and citation omitted).

First, in regard to defendant’s argument that defense counsel was ineffective because he failed respond to the prosecution’s notice of intent to present other-acts evidence before trial, we

conclude that defendant has failed to demonstrate that defense counsel's failure was prejudicial. While the trial court acknowledged that defense counsel's challenge to the evidence during trial was untimely, the trial court allowed defense counsel to raise the challenge and considered defense counsel's arguments in favor of excluding the other-acts evidence. There is no indication on the record that the fact that the challenge was untimely had any impact on the trial court's ultimate decision to admit the evidence or that an earlier challenge to the admissibility of the evidence would have been successful. Accordingly, defendant has failed to demonstrate that but for counsel's error, the outcome of the proceedings would have been different.

Next, in regard to defendant's argument that defense counsel failed to adequately object to the admission of the evidence during trial, we note that defense counsel is afforded a strong presumption that his performance constituted sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). This Court will not substitute its judgment regarding trial strategy, nor does it assess counsel's competence with the benefit of hindsight. *Id.* Further, a "particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *Id.* at 61. Here, defense counsel raised an objection to the other-acts evidence during the testimony of the first other-acts witness. Defense counsel overcame the prosecution's argument that the objection was untimely and successfully convinced the trial court to consider his objections to the testimony. Defense counsel articulated a coherent argument in regard to why the evidence was inadmissible, specifically that the lapse in time between the alleged instances of sexual abuse rendered the other-acts evidence irrelevant. Defendant has failed to overcome the strong presumption that defense counsel's actions constituted sound trial strategy.

Moreover, even if a more elaborate argument against the other-acts evidence would have convinced the trial court to exclude it, there is no indication that the result of the proceedings would have been different if the other-acts evidence would have been excluded. The victim in this case provided specific testimony regarding defendant's sexual abuse, and the victim's testimony alone is sufficient to support a conviction of first-degree criminal sexual conduct. *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994), *aff'd* 450 Mich 349 (1995), *amended and reh den* 450 Mich 1212 (1995); MCL 750.520h (victim's testimony "need not be corroborated in prosecutions under sections 520b to 520g"). Thus, defendant has failed to demonstrate a reasonable probability that, absent the errors, the jury would have had a reasonable doubt respecting guilt. *Pickens*, 446 Mich at 312.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra