

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM BRYAN POLSTON,

Defendant-Appellant.

UNPUBLISHED

July 26, 2012

No. 303302

Eaton Circuit Court

LC No. 10-020227-FC

Before: STEPHENS, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

Defendant appeals convictions following a jury trial of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b) (victim over 13 but less than 16 years of age and actor is a teacher of the school in which victim is enrolled), and three counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(e) (victim at least 16 but less than 18 years of age and actor is a teacher of the school in which victim is enrolled). Defendant was sentenced to serve concurrent terms of 15 to 30 years for the CSC I convictions, and 57 to 180 months for the CSC III convictions. We affirm.

Defendant's convictions stem from his relationship with E.P., who had been a student in his high school world history class. In the fall of 2002, E.P., a high school freshman, was struggling academically, and defendant began tutoring her in world history. E.P. and defendant became friendly. On January 20, 2003, defendant picked E.P. up from her parents' house and took her to his home in Eaton County. There, E.P. and defendant engaged in fellatio, cunnilingus, and vaginal intercourse. At the time, E.P. was 14 years old.

After the incident, E.P. continued to talk to defendant regularly, and the two often engaged in kissing and touching in defendant's classroom. E.P. again went to defendant's house on June 11, 2004, where they engaged in fellatio and vaginal intercourse. E.P. went to defendant's house for the last time on September 17, 2004, after a high school football game. There, defendant gave E.P. alcohol and the two engaged in fellatio and vaginal intercourse. E.P. was 16 years old at the time of both the last two sexual encounters.

E.P. did not tell anyone of her involvement with defendant until several years later, when she told both a former teacher and a coworker. The coworker eventually accompanied E.P. to visit an attorney, and E.P. chose to pursue an out-of-court settlement rather than going to the police. Eventually, E.P. reached a \$70,000 settlement agreement with defendant, and received

an initial payment of \$10,000. Eventually, the teacher E.P. had confided in informed school administrators about the relationship, and E.P. was interviewed about it in the ensuing criminal investigation.

On appeal, defendant first argues that the trial court improperly dismissed a juror on the third day of trial, and that as a result, he was denied a fair trial and impartial jury. We disagree. A trial court's decision to remove a juror is reviewed for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). The abuse of discretion standard acknowledges that there will be situations in which there is no single correct outcome; rather, there will be more than one reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside this principled range of outcomes." *Id.*

Under both the Michigan and United States Constitutions, a criminal defendant is entitled to trial by a fair and impartial jury. US Const, Am VI; Const 1963, Art 1 §20. This Court has previously noted that "while a defendant has a fundamental interest in retaining the composition of the jury as originally chosen, he has an equally fundamental right to have a fair and impartial jury made up of persons able and willing to cooperate, a right that is protected by removing a juror unable or unwilling to cooperate." *Tate*, 244 Mich App at 562.

MCL 768.18 provides, in pertinent part as follows:

Any judge of a court of record in this state about to try a felony case which is likely to be protracted, may order a jury impaneled of not to exceed 14 members, who shall have the same qualifications and shall be impaneled in the same manner as is, or may be, provided by law for impaneling juries in such courts. All of those jurors shall sit and hear the cause. *Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12. . . .* [Emphasis added.]

MCL 768.18 "is intended to avoid mistrials in cases where one or more of the original jurors is necessarily discharged during the trial due to personal disability or legal disqualification." *People v Harvey*, 167 Mich App 734, 744; 423 NW2d 335 (1988). In *People v Beasley*, 55 Mich App 583, 587-588; 223 NW2d 77 (1974), the Court held that under MCL 768.18, "the decision to excuse the juror . . . is left to the discretion of the trial judge," and found that where a juror disclosed during trial that he was acquainted with a witness, the trial court did not err in excusing that juror.

In this case, the trial court did not abuse its discretion in removing the juror from the panel. During the second day of trial, the trial judge noticed the juror making eye contact with someone in the audience and speaking with jurors seated next to her. The juror admitted to the court that during the afternoon of the second day of trial, she exclaimed "Oh, my God" in response to seeing an individual with whom she used to work walk into the courtroom and sit with defendant's relatives. The juror admitted that she spoke briefly with the individual, who she had not seen for 10 or 15 years, while waiting for her husband to pick her up after the second day of trial. She stated that she asked him if she, the juror, knew defendant, and the individual

responded that she did not. In spite of her interaction with the individual, the juror told the court that she was not biased and could be fair and impartial in deciding the case. In dismissing the juror, the trial judge indicated that his “concern is what impact or what the impression of the people alongside of her might have been left with. They heard her comment and her reaction.”

Under these circumstances, the trial court’s decision to remove the juror was within the range of principled outcomes. Her familiarity and admitted contact with someone who sat with defendant’s family, as well as the trial judge’s own observations of what was transpiring in the courtroom, support the court’s concerns over the impact the juror’s actions might have on the other jurors.

Defendant next argues that based on newly discovered evidence, he is entitled to a new trial. We again disagree. The evidence includes a letter from defendant’s uncle stating that that he was with defendant all night on September 17, 2004, a ticket stub to a University of Michigan football game the following day, and a graduation announcement dated June 11, 2004 and family photograph purportedly taken on June 11, 2004 in California. “This Court reviews a trial court’s postconviction ruling granting or denying a new trial based on newly discovered evidence for an abuse of discretion.” *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

The trial court denied defendant’s motion for a new trial on the basis of newly discovered evidence, explaining:

Clearly that evidence could have been produced or discovered with reasonable diligence. There’s some cases right on point that I read in that regard. And additionally—and I’ll comment on the evidence and the jury’s verdict at the time of sentencing. It’s a real stretch, frankly, that a different result would have been probable given the testimony I heard and the jury’s verdict, et cetera, which I’ll comment on later.

So I’m going to deny that argument. I don’t think it’s a close call.

In order to show that defendant is entitled to a new trial based on newly discovered evidence, defendant must demonstrate that “(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.” *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (internal quotation marks and citation omitted).

Plaintiff does not contest on appeal that defendant has satisfied the first prong of the test, and there is nothing in the record that suggests that the evidence itself was not newly discovered. Nor does plaintiff contest the second prong of the test. Defendant argued that the proffered evidence provided alibis for offenses that allegedly occurred on June 11, 2004 and September 17, 2004. At trial, defendant presented no evidence in support of an alibi defense. Thus, the proffered evidence is not merely cumulative.

As for the third prong, defendant argues that the evidence could not have been discovered and produced at trial using reasonable diligence because he did not have adequate time to investigate the allegations prior to trial. Defendant notes that his trial counsel was substituted

onto the case only three months prior to trial, and that the charges were brought only three months prior. Defendant also asserts that important witnesses had moved out of state by the time the charges were filed.

None of these reasons explains why defendant was unable to discover the evidence prior to trial. Although only three counts of CSC were initially brought against defendant, he should have been aware of the dates of the alleged offenses when he was arraigned on June 7, 2010, a full six months prior to trial. If he had used reasonable diligence, defendant could have begun exploring the dates of the alleged sexual encounters in order to determine what he was doing and where he was doing it on those dates. Presumably, once he had some thought or information that he was elsewhere at a time he was alleged to be engaged in sexual activity with E.P., he could have searched for and produced the documents he now offers as newly discovered. At the very least, he could have informed plaintiff and the court that he was potentially going to raise an alibi defense, and even asked for more time to locate supporting documentation. Defendant does not argue that the documents were unavailable or undiscoverable prior to trial.

Finally, defendant argues that the evidence makes a different result probable on retrial. Defendant argues that the evidence provides him a clear alibi for two of the three dates of the alleged incidents, and further argues that the evidence would damage E.P.'s credibility. Nothing in the family photograph proves that defendant was in California, or that the photograph was taken on June 11, 2004. And although defendant alleges that he received the graduation announcement while attending the graduation of a family member, nothing in the announcement tends to prove that defendant was actually at the graduation. As for the letter from defendant's uncle and the ticket stub, the letter is not a sworn affidavit and the ticket stub again does not prove either that he attended the game or that he was not capable of committing the offenses that allegedly occurred on September 17, 2004. The proffered documents may have some tendency to provide an alibi for defendant, but without more, it cannot be concluded that they would likely change the outcome on retrial, particularly in light of the evidence introduced at trial, including E.P.'s extensive and detailed testimony. Accordingly, the trial court did not abuse its discretion in holding that defendant did not demonstrate that the evidence was newly discovered.

Defendant further argues that evidence of alleged conduct that occurred in another county should have been held inadmissible pursuant to both MCL 768.27a and MRE 403. We disagree. A trial court's determination as to the admissibility of evidence is reviewed for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). MCL 768.27a(1) provides, in pertinent 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." This Court has previously held that such evidence can be considered relevant under the statute if it tends to demonstrate defendant's propensity toward criminal sexual conduct directed at minors. *People v Pattison*, 276 Mich App 613, 620; 741 NW2d 558 (2007). This Court further noted 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." *Id.*

Defendant argues that MCL 768.27a is unconstitutional because it violates both the prohibition on ex post facto laws and the separation of powers doctrine. Defendant acknowledges that this Court previously addressed those specific issues, holding that the statute does not violate either constitutional provision. *People v Pattison*, 276 Mich App 613; 741 NW2d 558 (2007). Moreover, *People v Watkins*, ___ Mich ___; ___ NW2d ___ (Docket No. 142031, decided June 8, 2012), slip op p 2, held that MCL 768.27a “does not impermissibly infringe on this Court’s authority regarding rules of practice and procedure under Const 1963, art 6, § 5.” The Supreme Court did not address the ex post facto clause, so *Pattison* controls the issue. In *Pattison*, 276 Mich App at 618-620, this Court specifically held that MCL 768.27a does not violate the ex post facto clause because it does not lower the quantum of proof or value of evidence needed to convict a defendant, and does not violate the separation of powers because it is substantive in nature.

The Supreme Court in *Watkins* also affirmed that MRE 403 must be considered when deciding if evidence can be admitted under MCL 768.27a:

[W]hen applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence’s probative value rather than its prejudicial effect. That is, 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. [*Watkins*, slip op p 34.]

Under the MRE 403 standard, there exists no total prohibition on the introduction of prejudicial evidence. Rather, evidence will only be excluded where it is unfairly prejudicial. In other words, “there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

In this case, the prosecution introduced evidence of defendant’s other acts of criminal sexual conduct involving the same victim in a different county. The victim testified that although she and defendant never had sex at school, they frequently kissed and touched each other in defendant’s classroom. This was clearly relevant under MCL 768.27a because it went directly toward showing defendant’s propensity to commit the charged acts, and further, allowed the jury to “view the case’s facts in the larger context that the defendant’s background affords.” *Pattison*, 276 Mich App at 620.

Further, the evidence’s probative value was not substantially outweighed by its risk of unfair prejudice to defendant. The evidence was highly probative, in that it showed defendant’s propensity to commit acts of criminal sexual conduct. It was also presented in the context of a broader narrative describing defendant’s conduct surrounding the charged acts. Its prejudicial impact beyond its relevance was limited in that it was introduced in brief testimony by the victim, which was not extensive or detailed. Clearly, any evidence of other criminal sexual conduct will be, by its very nature, prejudicial to defendant. However, the evidence was not “marginally probative” (indeed, its tendency to make a fact of consequence more probable was high), nor was there a danger it would “be given undue or preemptive weight by the jury.” *Crawford*, 458 Mich at 398. The evidence would not forestall the jury’s responsibility to decide the facts based on the evidence; it would supplement it. Thus, the trial court did not abuse its discretion in finding evidence of defendant’s other acts admissible pursuant to MCL 768.27a.

Finally, defendant argues that he is entitled to a new trial, because the trial court improperly refused to admit into evidence a letter written by the victim to her civil attorney. We disagree. “The decision whether to admit evidence is within a trial court’s discretion. This Court reverses it only where there has been an abuse of discretion.” *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Pursuant to MRE 613(b),

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Further, a trial court may exclude extrinsic evidence used to impeach a witness’s credibility if it relates to a collateral matter. *People v Wofford*, 196 Mich App 275, 281; 492 NW2d 747 (1992). “This Court expressly permits employing a balancing analysis under MRE 403 when considering the admissibility of other forms of impeachment evidence.” *People v Blackston*, 481 Mich 451, 461; 751 NW2d 408 (2008).

Here, defense counsel sought to introduce for purposes of impeachment a letter allegedly written by the victim to her civil attorney that instructed the attorney not to have any contact with police. Defense counsel argued that E.P. “testified that she told [her civil attorney] that she wanted to go to the police.” The prosecutor disagreed, stating, “I think that miss-characterizes[sic], miss-characterizes [sic] [the victim’s] testimony. She indicated she went there not knowing what to do And what she said she wanted was for the defendant not to teach anymore.” After further discussion, the court excluded the letter from evidence, stating, “I think we’d better strike this whole scenario here from you [sic] minds and I’m going to give you an instruction on when I order something stricken it means exactly that. And we’re going to go into another area here.

The trial court did not abuse its discretion in excluding the evidence, because what the letter purported to state was not inconsistent with the victim’s testimony. The victim’s civil attorney testified regarding the contents of the letter that defendant sought to admit:

Defense counsel: You testified that you were instructed by [the victim] to . . . advise Officer Tobias that she wanted no contact with him?

Witness: That is correct.

Defense counsel: Okay. And she did that to you in writing.

Witness: She did. She always told me she wanted no contact with the police. But in December of ‘09 she told me that and I asked for it in writing and she gave it to me in writing.

In support of his argument that the victim’s testimony was inconsistent with the letter, defendant cites the following exchange:

Prosecutor: Okay. And did she advise you one way or the other what she thought was the best option?

E.P.: At that time she had strongly suggested that doing something out of court would be better for so many reasons and that she had expressed to me that as I'm trying to move on with my life and just grow that this would only stunt me if I tried to go anywhere with the police. And I decided then that it would probably be better, because of how it had been presented to me, that it would be better to go with a out of court or civil avenue.

Defendant argues that the import of E.P.'s response was that her civil attorney had convinced her not to go to the police. This mischaracterizes E.P.'s statement. E.P. simply testified that her civil attorney suggested that she pursue the matter "out of court." It says nothing about what E.P. wanted to do at the time, let alone that her attorney's advice was contrary to her own intentions. Indeed, when asked by defense counsel if she had "wanted to go to the police from the beginning?", she responded, "I did not. No." Accordingly, the letter was not inconsistent with her prior testimony, and consequently, the trial court did not abuse its discretion in excluding the letter from evidence.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Donald S. Owens