

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RONALD ERNEST MOODY,

Defendant-Appellant.

UNPUBLISHED

September 13, 2012

No. 304039

Wayne Circuit Court

LC No. 10-006405-FH

Before: CAVANAGH, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(i) (victim at least 13 but less than 16 years of age and defendant is a member of the same household). Because defendant waived appellate review of his challenge to the admission of “DC’s” testimony, and because that testimony was properly admissible in any event, we affirm.

Defendant’s conviction stems from the sexual assault of his stepdaughter, “BB.” The prosecution also charged defendant with three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(i), involving his adopted daughter, “JH,” but the jury acquitted defendant of those charges. The charges involving both BB and JH were tried together before a single jury. During trial, the trial court admitted other-acts evidence involving defendant’s sexual assaults of another adopted daughter, “DC.” Although the prosecution charged defendant with several counts of criminal sexual conduct involving DC, the district court dismissed those charges following DC’s preliminary examination testimony on the basis that she lacked credibility. Ultimately, the jury acquitted defendant of two counts of second-degree criminal sexual conduct involving BB and convicted him of one count.

Defendant argues that he was denied his due process right to a fair trial because the trial court admitted DC’s testimony notwithstanding that the district court judge who presided over defendant’s preliminary examination determined that DC was not credible. Defendant waived appellate review of this issue by stipulating to the admission of DC’s testimony. The prosecution filed a notice of intent to introduce the other-acts evidence during trial, relying on MRE 404(b)

and MCL 768.27.¹ In response, defendant filed a motion to preclude the admission of the evidence, arguing that DC's testimony had no probative value and that the charges against him involving DC had been dismissed because of her lack of credibility. At the hearing on the motion, however, defense counsel stipulated to the admission of the evidence as follows:

MS. WEINGARDEN [the prosecutor]: Counsel has indicated that they're stipulating to allowing the 404 b testimony of [DC] at the trial.

THE COURT: Okay. Good.

MS. WEINGARDEN: Is that right, counsel?

MS. WOODSON [defense counsel]: That's correct, Your Honor.

THE COURT: That solves that issue. The motion for 404 b is withdrawn. And there is a stipulation that the 404 b evidence will be allowed with respect to [DC.]

Counsel's stipulation to the admission of the evidence waived appellate review of this issue. "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citations omitted). Accordingly, defendant's waiver of his challenge to the admission of the evidence precludes appellate review of this issue.

In any event, even if defendant had not waived appellate review of this issue, he would not be entitled to relief. During trial, DC testified that she performed oral sex on defendant at least three times, that defendant touched her buttocks, and that she engaged in vaginal intercourse with defendant on two occasions. The incidents involving oral sex and inappropriate touching occurred before DC turned 16 years old. The incidents involving vaginal sex occurred when DC was 16 years old. MCL 768.27a provides, in relevant part:

(1) Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the

¹ MCL 768.27, the statutory counterpart to MRE 404(b), provides:

In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

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. . . .

(2) As used in this section:

(a) “Listed offense” means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.

Both first-degree criminal sexual conduct, MCL 750.520b, and second-degree criminal sexual conduct, MCL 750.520c, are “listed offenses” as set forth in MCL 28.722. A defendant commits first-degree criminal sexual conduct in violation of MCL 750.520b(1)(b)(i) if he engages in sexual penetration with a person who is at least 13 years old but less than 16 years old and both people are members of the same household. A defendant commits second-degree criminal sexual conduct in violation of MCL 750.520c(1)(b)(i) if he engages in sexual contact with a person who is at least 13 years old but less than 16 years old and both people are members of the same household. Thus, the incidents involving DC performing oral sex on defendant and defendant touching DC’s buttocks were admissible under MCL 768.27a. Because the incidents involving vaginal intercourse occurred when DC was 16 years old, they did not constitute first-degree criminal sexual conduct under MCL 750.520b(1)(b)(i) and, therefore, were not admissible under MCL 768.27a. Nevertheless, they were admissible under MRE 404(b), as discussed later in this opinion.

In *People v Watkins*, 491 Mich 450, 496; 818 NW2d 296 (2012), our Supreme Court held that “MCL 768.27a irreconcilably conflicts with MRE 404(b) and that the statute prevails over the court rule.” Thus, in cases in which a defendant is charged with 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,” including to demonstrate that the defendant had a propensity to commit such offenses. *Id.* at 469, 471-472; see also MCL 768.27a. Evidence admitted under MCL 768.27a remains subject to MRE 403, however, and 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.’” *Watkins*, 491 Mich at 481, quoting MRE 403.

[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*, 491 Mich at 487.]

In this case, the evidence involving oral sex and defendant touching DC’s buttocks were admissible under MCL 768.27a. Relevant evidence is “‘evidence having 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.’” *People v Sabin (After Remand)*, 463 Mich 43, 56-57; 614 NW2d 888 (2000), quoting MRE 401. Thus, relevant evidence is evidence that is material and has probative force. *Id.* at 57. Defendant had a father-daughter relationship

with BB, DC, and JH. All three victims testified that the sexual abuse began with defendant making inappropriate comments to them, and all three testified that they were approximately 13 to 16 years old when most of the abuse occurred. Both DC and BB testified that defendant touched their buttocks, and DC and JH testified that they performed oral sex on defendant and that defendant penetrated them vaginally with either his penis or his finger. Thus, the evidence was material and probative of whether defendant committed the acts with which he was charged.

Moreover, contrary to defendant's argument, the probative value of DC's testimony was not substantially outweighed by the danger of unfair prejudice. "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 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.]

Further, "when 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." *Id.* at 487.

As described above, the other acts regarding which DC testified were similar to the charged crimes. All three victims were approximately the same age when most of the abuse occurred, defendant's abuse of all three victims began in the same manner, and defendant's conduct escalated over time. Although defendant contends that DC's testimony was not credible, it was for the jury to determine whether to believe DC's allegations. DC admitted that the district court dismissed the charges against defendant that pertained to her and that she "had an attitude" when she testified at the preliminary examination. Thus, weighing the propensity inference in favor of the probative value of the evidence rather than its prejudicial effect, the probative value of DC's testimony was not substantially outweighed by the danger of unfair prejudice. Thus, DC's testimony regarding oral sex and defendant touching her buttocks was properly admissible under MCL 768.27a.

Similarly, DC's testimony regarding the two incidents of vaginal intercourse was properly admissible under MRE 404(b), which 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 this case.

Under MRE 404(b), evidence must be offered for a proper purpose, it must be relevant, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, and, upon request, the trial court should instruct the jury that the other-acts evidence must be considered only for the proper purpose for which it was admitted. *Crawford*, 458 Mich at 385; *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Here, the evidence was offered for a proper purpose. The prosecution sought to admit the evidence under MRE 404(b) to show that defendant engaged in a common plan, scheme or system with respect to all three victims. DC's testimony was relevant for this purpose because it tended to show that the abuse of all three victims began in the same manner, occurred when the victims were approximately the same age, and that defendant's conduct escalated over time. In addition, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. DC's testimony regarding the two incidents of vaginal intercourse was similar to the incidents involving anal intercourse that JH described and, to a lesser extent, the "animal wrestling" that BB described. Further, the trial court provided a limiting instruction and directed the jury to consider the evidence only to determine whether defendant had a common plan, scheme, or system. Thus, the trial court's instruction helped reduce the prejudicial effect of the evidence. Accordingly, because the evidence was properly admissible under MRE 404(b), even if defendant had not waived appellate review of this issue, he would be entitled to no relief.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Pat M. Donofrio