STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 27, 2012
v	No. 306030 Wayne Circuit Court
SANDY MELVIN QUICK, Defendant-Appellant.	LC No. 11-003376-FC

Before: SAWYER, P.J., and SAAD and METER, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of criminal sexual conduct, first degree, MCL 750.520b, and criminal sexual conduct, second degree, MCL 750.520c. He was sentenced to consecutive prison terms of 25 to 35 years and 5 to 15 years. We affirm.

Defendant's convictions stemmed from sexual acts against his nine-year-old grandson who lived in the same household. Pursuant to MCL 768.127a,[1] defendant's 40-year-old stepdaughter was allowed to testify at trial regarding uncharged sexual acts defendant committed against her from the age of 7 until she was 10 or 11, when the witness's mother ended her relationship with defendant.

I. OTHER ACTS EVIDENCE

Defendant contends that he was denied a fair trial by the erroneous admission of "other acts" evidence pursuant to MCL 768.27a. Defendant argues that MCL 768.27a requires that the defendant must actually have been charged with and convicted of another "listed offense against a minor" in order for the evidence to be admissible. However, in *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007), this Court held: "When a defendant is charged with a

[1] MCL 768.27a provides in pertinent part: "[I]n 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."

sexual offense against a minor, MCL 768.27a allows prosecutors to introduce evidence of a defendant's *uncharged* sexual offenses against minors without having to justify their admissibility under MRE 404(b)" (emphasis added). In *People v Watkins*, 491 Mich 450, 472; 818 NW2d 296 (2012), the Supreme Court specifically agreed with this holding. Therefore, this argument has no merit.

Defendant next argues that the trial court was required to do an MRE 403[2] balancing test before admitting evidence under MCL 768.27a. He contends that the proffered evidence would not survive the scrutiny of an MRE 403 evaluation because it was offered to show propensity, which is not a proper purpose, and was too remote in time and dissimilar in nature. We agree that the court was required to consider MRE 403 but find that the evidence would survive this scrutiny.

In *Watkins*, 491 Mich at 481-482, the Supreme Court held that "evidence admissible pursuant to MCL 768.27a may nonetheless be excluded under MRE 403" and therefore a court should perform the balancing test required by the court rule. However, MCL 768.27a "allows evidence that previously would have been inadmissible, because it allows what may have been categorized as propensity evidence to be admitted in this limited context." *Pattison*, 276 Mich App at 618-619. 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." *Watkins*, 491 Mich at 487. "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." *Id.*

Under this standard, and considering the intent of the statute, we find that the temporal proximity factor was not sufficiently remote to preclude admission. Weighing the similarity/dissimilarity evidence in favor of its probative value rather than its prejudicial effect, and given the intent of the statute, we further find that the dissimilarity between the charged offense and the other acts evidence, i.e., the gender of the victims, was outweighed by the facts that both victims were similar in age when the acts occurred and both were defendant's family members who were under his care and control. We hold that the trial court did not abuse its discretion when it permitted the other acts evidence under MCL 768.27a.

In reliance on Const 1963, art 6, § 5, defendant further contends that MCL 768.27a conflicts with MRE 404(b) and therefore the statute is an unconstitutional exercise of legislative power over the procedure of the courts. Defendant did not preserve this issue for appeal. Therefore, he must demonstrate plain error which affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 762-764; 597 NW2d 130 (1999).

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[2] MRE 403 provides: "Although 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."

This argument is without merit because the constitutionality of MCL 768.27a has already been decided. As the Supreme Court held in *Watkins*, 491 Mich at 476-477:

> [T]he reasons for enacting MCL 768.27a were not to further the orderly dispatch of judicial business, but to address a substantive concern about the protection of children and the prosecution of persons who perpetrate certain enumerated crimes against children and are more likely than others to reoffend. Accordingly, we hold that MCL 768.27a does not run afoul of Const 1963, art 6, § 5, and cases in which the statute applies, it supersedes MRE 404(b).

II. EFFECTIVE ASSISTANCE OF COUNSEL

In briefs filed by appointed appellate counsel and by defendant in propria persona, pursuant to Supreme Court Administrative Order 2004-6, Standard 4, defendant contends that he was denied the effective assistance of counsel. To establish these claims defendant must show that (1) counsel's performance fell below professional norms, and (2) but for counsel's ineffectiveness, the ultimate result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant first contends that defense counsel elicited inadmissible and unfairly prejudicial evidence that defendant had been physically abusive toward his stepdaughter's mother and then failed to object or move for a mistrial. During defense counsel's cross-examination of defendant's stepdaughter, the witness inadvertently and unresponsively volunteered that after her mother's relationship with defendant ended, the family went to a battered women's shelter. "It is proper to provide background information to the jury to allow them to examine the full transaction." *People v Malone*, 287 Mich App 648, 662; 792 NW2d 7 (2010). The challenged testimony provided the jury with background information and addressed the witness's credibility and the reasons she did not come forward earlier. Further, the question was logical in the context of the testimony and would have been expected as part of the res gestae of the offense against the witness. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Thus, a defense counsel objection would have been futile. A trial attorney need not register a meritless objection to act effectively. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). In addition, an objection could have drawn more attention to defendant's proclivity for violence. "Declining to raise objections can often be consistent with sound trial strategy." *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008). "[T]here are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995).

Defendant argues that defense counsel should have moved for a mistrial. We disagree. "[A]n unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial," *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995), unless "the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). We find that the question asked by defense counsel was proper, and that the unresponsive, volunteered answer was not so egregious that the prejudicial effect impaired defendant's right to a fair trial. The prosecutor and defense counsel never referred to this inadvertent testimony in closing arguments and did not

emphasize it in any way. There was sufficient evidence on the record to convict defendant of the charged crimes absent this unsolicited and unresponsive statement. *Frazier*, 478 Mich at 243.

Next, defendant contends that he was denied the effective assistance of counsel because defense counsel failed to investigate and call witnesses, as defendant had instructed. Defendant contends that if his defense counsel had interviewed members of his family, counsel would have learned that there was discord in the family that had existed for over 30 years and that the family had a motive for fabrication. There is no evidence presented by defendant or on the record to show that his relatives would have testified as he claims. In fact, the victim testified that he liked defendant before the abuse happened, and the other-acts witness testified that she still loved defendant as her father. Defendant failed to provide names and information about what testimony could have been provided that would have resulted in a different outcome. *Frazier*, 478 Mich at 243.

Defendant also argues that defense counsel should have called an expert witness in child sexual abuse who could testify about the traits and characteristics of sexually abused children so that the jury could have better understood the evidence. "The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). The victim's mother testified regarding the sexually acting-out behaviors that the victim engaged in that caused her to suspect he had been sexually abused. Defendant has failed to indicate what the expert could have entered into evidence that would have changed the outcome of this trial and therefore had not demonstrated that he was deprived of a substantial defense. *Frazier*, 478 Mich at 243; *Chapo*, 283 Mich at 371.

Defendant also argues that defense counsel should have requested an additional medical examination of the victim. The record shows that the victim had been subjected to a medical examination after he revealed the sexual abuse. However, the examination revealed no evidence of the abuse because the victim had not revealed the abuse until three or four months after it had occurred and his young body had healed quickly. During closing arguments, the prosecutor admitted that, other than the testimony of the witnesses, there was no evidence to prove or show the acts, because they were done in private, and there was no evidence to show any injury because after four months there was "very good healing." Defendant has failed to demonstrate how an additional medical examination would have changed the outcome of this trial. *Frazier*, 478 Mich at 243. Clearly, an additional medical examination would also have revealed no evidence. For that reason, the trial court would have denied defendant's request for a medical examination. Counsel is not required to advocate a meritless position. *Snider*, 239 Mich App at 425.

Defendant further contends that he was denied the effective assistance of counsel because his counsel failed to communicate with him. Defendant has failed to explain what information was withheld from him because of the "failure to communicate," or how he was prejudiced, or how the outcome of the case would have been different if his attorney had communicated more frequently for longer periods of time. *Frazier*, 478 Mich at 243. Thus, defendant has failed to demonstrate a reasonable probability that, but for counsel's failure to communicate, the result of

the proceedings would have been different, or that the proceedings were fundamentally unfair. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Because defendant has failed to show any alleged error that would have changed the outcome of the proceeding, his argument that the cumulative effect of counsel's errors warrants reversal has no merit. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). Defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Patrick M. Meter