

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
April 26, 2012

v

RODNEY BLAKE ROBINSON,

Defendant-Appellee.

No. 306707
Oakland Circuit Court
LC No. 2011-235127-FH

Before: WILDER, P.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

The prosecution appeals by leave granted the trial court's order denying its motion to admit prior acts evidence against defendant, Rodney Robinson, under MCL 768.27a. We reverse.

I. FACTS

This case arises out of alleged criminal sexual conduct between Robinson and CS, a 12-year-old female. CS was the only person to testify at the preliminary examination. CS testified that she and her sister, PS, lived in Arizona and came to Southfield, Michigan in July 2010 to visit their aunt, LE. CS was staying in LE's apartment and sleeping on the living room floor. Robinson was LE's fiancé and also lived in the apartment.

CS testified that on the night of the incident, she was playing a video game with Robinson while sitting on the living room floor. LE and PS were also in the room, but they had fallen asleep. Robinson then allegedly engaged in several inappropriate contacts with CS, including touching and squeezing CS's buttocks, digitally penetrating her vagina, touching her breasts, and trying to remove her pants. The next morning, Robinson apologized to CS, saying that he was sorry if he had made her feel uncomfortable. CS returned to Arizona, and in late August 2010, she told her father about the incident.

The trial court held that probable cause existed regarding all three charges against Robinson, and bound Robinson over for trial. The prosecution then amended the felony information. The initial felony information was comprised of three counts of second-degree criminal sexual conduct. In amending the information, the prosecution removed one count of second-degree criminal sexual conduct and added one count of first-degree criminal sexual conduct. That same day, the prosecution filed a notice of its intent to introduce evidence

pursuant to MCL 768.27a. Specifically, the prosecutor sought to introduce evidence regarding Robinson's 1999 second-degree criminal sexual conduct conviction for his conduct with a six-year-old, AM. Robinson was dating AM's aunt and babysitting AM when he vaginally penetrated her with his penis. The prosecution argued that the evidence was subject to MRE 403 and that Robinson's past conduct was relevant for "purposes of proving [Robinson]'s propensity, intent, and to rebut a claim that [CS] fabricated [Robinson]'s action against her."

Further, at a hearing, the prosecutor argued that Robinson's prior criminal sexual conduct was admissible under MRE 403 since the evidence was relevant, it had great probative value, and it would support CS's credibility and illustrate Robinson's propensity to commit acts of criminal sexual conduct. The prosecutor also claimed that Robinson's past and present criminal sexual conduct was similar, since in both cases, the victim was a niece of the woman who Robinson was living with, and Robinson played video games with both victims before the criminal sexual conduct occurred.

Robinson stated that although his previous conviction was second-degree criminal sexual conduct, he had actually been charged with first-degree criminal sexual conduct. Thus, Robinson argued that if AM's testimony was admitted, it would improperly introduce evidence of first-degree criminal sexual conduct even though the jury only convicted him of second-degree criminal sexual conduct. Robinson also claimed that evidence of his prior criminal sexual conduct conviction was overly prejudicial because no jury could overlook AM's testimony. Robinson also disagreed with the prosecutor's contention that evidence of his prior criminal sexual conduct could be considered as propensity evidence. He argued that all potential MCL 768.27a evidence is propensity evidence, and if that was always a basis for admission, MRE 403 would be pointless. Lastly, Robinson argued that his prior criminal sexual conduct was not similar to the current offense, since AM was not sleeping and there was no one else home.

The trial court stated that it was denying the prosecution's motion to introduce MCL 768.27a evidence because it would result in unfair prejudice to Robinson. The trial court explained that the jury would conclude that Robinson's behavior was escalating, since he was previously convicted of second-degree criminal sexual conduct but was now charged with first-degree criminal sexual conduct. The prosecutor stated that she would seek a stay pending appeal, and the trial court responded that it probably would not grant such a stay because a secondary reason for denying the prosecutor's motion was that the Legislature had crossed the separation of powers line.

The prosecution moved to stay proceedings in the lower court. The prosecution argued that the trial court's decision was contrary to this Court's published caselaw and that the prosecution intended to file an interlocutory appeal in this Court. As it had previously indicated, the trial court denied the prosecutor's motion.

The prosecution then filed an application for leave to appeal in this Court and moved for immediate consideration and for a stay in the proceedings in the lower court. This Court granted leave to appeal, immediate consideration, and a stay pending appeal.

II. CONSTITUTIONALITY OF MCL 768.27A

A. STANDARD OF REVIEW

The prosecution argues that the trial court erred by concluding that MCL 768.27a violated the separation of powers between the judicial and legislative branch. This Court reviews constitutional issues de novo.¹

B. ANALYSIS

Robinson contends that the trial court did not actually base its decision on constitutional grounds. He points out that the reason the trial court gave for denying the prosecutor's MCL 768.27a motion was that the evidence of Robinson's prior criminal sexual conduct was unfairly prejudicial. Robinson argues that the trial court's reference to a "secondary reason"—that is, a separation of powers problem—was actually in response to the prosecutor's motion to stay proceedings. We disagree.

Although it is true that the prosecutor and trial court had briefly transitioned into a discussion regarding a potential motion to stay, the trial court's "secondary reason" was clearly in reference to its "evidentiary ruling" regarding MCL 768.27a. It can only be reasonably understood that unfair prejudice was the first reason for the trial court's denial of the prosecutor's motion regarding the admissibility of the evidence under MCL 768.27a and that the reference to separation of powers was the "secondary reason."

Turning to the merits of the prosecution's argument, this Court has specifically rejected a separation of powers argument regarding MCL 768.27a.² Thus, the trial court erred to the extent that it denied the prosecution's motion to admit evidence under that statute on the basis that MCL 768.27a violated the separation of powers between the judicial branch and the legislative branch.

Additionally, we acknowledge that in *People v Watkins*,³ the Michigan Supreme Court granted leave to appeal regarding the issue of whether "MCL 768.27a interferes with the judicial power to ensure that a criminal defendant receives a fair trial, a power exclusively vested in the courts of this state under Const 1963, art 6, § 1." The Michigan Supreme Court has heard oral arguments on the case, but it has yet to rule on the issue. However, as MCR 7.215(C)(2) states:

[a] published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.

¹ *People v Pennington*, 240 Mich App 188, 191; 610 NW2d 608 (2000).

² *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007).

³ *People v Watkins*, 489 Mich 863; 795 NW2d 147 (2011).

Thus, the *Pattison* holding that MCL 768.27a does not violate principles of separation of powers is binding precedent, unaffected by the pending *Watkins* appeal.

III. INTERPLAY OF MCL 768.27A AND MRE 403

A. STANDARD OF REVIEW

The prosecution argues that the trial court erred in excluding the MCL 768.27a evidence based on MRE 403. Generally, this Court reviews for an abuse of discretion a trial court's decision to admit or exclude evidence.⁴ However, “[w]hen the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence,” this Court reviews the issue de novo.⁵

B. APPLICABLE LAW

MCL 768.27a is an evidentiary statute relevant for criminal sexual conduct cases, which states:

(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 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.

(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.

(b) “Minor” means an individual less than 18 years of age.

MCL 768.27a “allows prosecutors to introduce evidence of a defendant’s [sexual offenses] against minors without having to justify their admissibility under MRE 404(b).”⁶ In other words,

⁴ *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002); *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001).

⁵ *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

⁶ *Pattison*, 276 Mich App at 618-619.

evidence that would have been excluded under MRE 404(b), such as propensity evidence, is nevertheless potentially admissible under MCL 768.27a.⁷

C. ANALYSIS

According to MCL 768.27a(1), evidence that the defendant committed another offense against a minor is admissible where the defendant is “accused of committing a listed offense against a minor” and the evidence of the prior criminal sexual conduct must also qualify as “another listed offense.” In this case, Robinson was charged with one count of first-degree criminal sexual conduct⁸ and two counts of second-degree criminal sexual conduct.⁹ The evidence of Robinson’s prior criminal sexual conduct was in relation to Robinson’s conviction for second-degree criminal sexual conduct. First-degree criminal sexual conduct and second-degree criminal sexual conduct are clearly listed offenses that satisfy the first part of the test under MCL 768.27a.¹⁰ Also, MCL 768.27a(2)(b) defines “minor” as a person under the age of 18, and the minor in this case was 12 years old, and the minor involved in Robinson’s prior second-degree criminal sexual conduct conviction was six years old. Thus, Robinson’s prior conviction and the current charges qualify as listed offenses against minors, as MCL 768.27a requires.

MCL 768.27a(1) also states that evidence of a defendant’s prior criminal sexual conduct “is admissible and may be considered for its bearing on any matter to which it is relevant.” Thus, evidence of a defendant’s prior criminal sexual conduct must be relevant to an issue in the case in order to be 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.”¹¹

Evidence of Robinson’s prior criminal sexual conduct is relevant because it illustrates Robinson’s propensity to commit such acts, which makes it more likely that Robinson committed the charged acts against the minor in this case. This Court has specifically stated that evidence of “[a] defendant’s propensity to commit criminal sexual behavior can be relevant and admissible” pursuant to MCL 768.27a since it “demonstrate[s] the likelihood of the defendant committing criminal sexual behavior toward another minor.”¹² While it is true that the rules of

⁷ *Id.* at 619.

⁸ MCL 750.520b(1)(a).

⁹ MCL 750.520c(1)(a).

¹⁰ See *People v Smith*, 282 Mich App 191, 200; 772 NW2d 428, 435 (2009).

¹¹ MRE 401.

¹² *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008). See also *People v Mann*, 288 Mich App 114, 118; 792 NW2d 53, 56 (2010) (stating that evidence of the defendant’s prior criminal sexual conduct was admissible under MCL 768.27a because it “made the likelihood of [the defendant’s] behavior toward the minors at issue in this case more probable”).

evidence have, at times, mandated the exclusion of evidence relating to a defendant's prior bad acts, "our cases have never suggested that a defendant's criminal history and propensity for committing a particular type of crime is irrelevant to a similar charge."¹³

Moreover, the prosecutor correctly asserts that Robinson's prior criminal sexual conduct is also relevant because it illuminates whether the minor was providing truthful testimony. As this Court stated in *People v Mann*,¹⁴ evidence of the defendant's prior criminal sexual conduct "was relevant because it tended to show that it was more probable than not that the two minors in this case were telling the truth when they indicated that [the defendant] had committed CSC offenses against them."

Furthermore, Robinson's argument that his prior criminal sexual conduct was not similar enough to the charged crime is a red herring. MCL 768.27a does not contain a similarity requirement. Indeed, this Court has specifically held "similarity is simply an inapposite consideration under MCL 768.27a."¹⁵

Nevertheless, the trial court found that evidence of Robinson's prior criminal sexual conduct was unfairly prejudicial, which justified its exclusion. A trial court may exclude the admissible evidence of other acts under MRE 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."¹⁶

The prosecution argues that MRE 403 is not applicable to MCL 768.27a. However, the prosecution waived this issue by explicitly agreeing during the lower court proceedings that the trial court had to consider MRE 403 in its analysis of MCL 768.27a.¹⁷ Moreover, the prosecutor's argument that MRE 403 does not apply to MCL 768.27a is directly contrary to *People v Brown*,¹⁸ where this Court recognized that when analyzing MCL 768.27a, "the court must still employ the balancing test of MRE 403." (We acknowledge that the issue of whether "evidence of other offenses described in MCL 768.27a is admissible only if it is not otherwise

¹³ *Pattison*, 276 Mich App at 620; See also *People v Watkins*, 277 Mich App 358, 364; 745 NW2d 149 (2007) (stating that "there is no real question that [the prior victim's] testimony, if believed, tends to increase the probability that [the] defendant committed the charged offenses" and, "[t]herefore, the evidence is plainly relevant for purposes of MCL 768.27a . . .").

¹⁴ *Mann*, 288 Mich App at 118.

¹⁵ *Watkins*, 277 Mich App at 364-365.

¹⁶ MRE 403; *People v Sabin*, 463 Mich 43, 58; 614 NW2d 888 (2000).

¹⁷ See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

¹⁸ *People v Brown*, __Mich App__; __NW2d__ (Docket No. 297728, issued October 20, 2011) (slip op at 5).

excluded under MRE 403” is pending before the Michigan Supreme Court in *People v Pullen*.¹⁹ However, we reiterate that a published decision of this Court remains binding precedent despite a pending appeal to the Supreme Court.)²⁰

Thus, the issue becomes whether MRE 403 justified the trial court’s exclusion of the evidence. We first note that, although concluding that the evidence was unfairly prejudicial, the trial court did not analyze the *probative value* of the evidence. A court errs when it fails to “identify the probative nature of [the evidence], which is the necessary prerequisite to evaluation of the evidence’s probative value against the danger of unfair prejudice.”²¹

Evidence of Robinson’s prior criminal sexual conduct was highly probative to whether he committed the crimes against CS because Robinson’s prior acts illuminate whether he had a propensity to commit criminal sexual conduct crimes against minors, which would make it more likely that he committed the crimes against CS and more likely that she was providing credible testimony.

It is true that evidence of Robinson’s prior criminal sexual conduct is prejudicial and that a jury would probably hold this evidence against him. Yet, all relevant evidence is inherently prejudicial, and it is only *unfairly* prejudicial evidence that should be excluded under MRE 403.²² “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.”²³ As discussed above, evidence of Robinson’s prior criminal sexual conduct had significant—rather than marginally—probative value. Indeed, the trial court reasoned that the evidence was unfairly prejudicial because the jury would conclude that Robinson’s behavior was escalating based on the nature of the charges levied against him. However, Robinson’s prior criminal sexual conduct involved Robinson vaginally penetrating a six-year-old girl with his penis, where this case involved Robinson digitally penetrating a 12-year-old girl. Thus, the evidence belies the trial court’s escalation rationale. And while Robinson argues that this evidence should have been excluded as unfairly prejudicial because it was only offered to prove propensity, this Court has specifically held that evidence of a defendant’s propensity is admissible under MCL 768.27a.²⁴ Thus, Robinson was

¹⁹ *People v Pullen*, 489 Mich 864; 795 NW2d 147 (2011).

²⁰ MCR 7.215(C)(2).

²¹ *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998).

²² *People v Wilson*, 252 Mich App 390, 398; 652 NW2d 488 (2002), quoting *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995).

²³ *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010), citing *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785, 792 (1998).

²⁴ *Petri*, 279 Mich App at 411.

unable to demonstrate that “the probative value” of the evidence was “*substantially* outweighed by the risk of unfair prejudice.”²⁵

We need not address the prosecution’s alternative argument related to MRE 404(b) because our decision under MCL 768.27a is dispositive on the issue of admissibility of the subject evidence.

We reverse.

/s/ Kurtis T. Wilder
/s/ Peter D. O’Connell
/s/ William C. Whitbeck

²⁵ *Starr*, 457 Mich at 499 (emphasis in original).