STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ARTHUR DEAN,

Defendant-Appellant.

UNPUBLISHED
November 22, 1996

No. 179574
LC No. 94-036683-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ARTHUR DEAN,

Defendant-Appellant.

No. 186560
LC No. 94-036690-FC

Before: Doctoroff, C.J., and Hood and Bandstra, JJ.

PER CURIAM.

In Docket No. 179574, defendant was convicted by a jury of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), for which he was sentenced to concurrent terms of ten to fifteen years' imprisonment for each conviction. In Docket No. 186560, defendant pleaded guilty to one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and was sentenced to fifteen to thirty years' imprisonment for this conviction, to be served concurrently with the sentences received in Docket No. 179574. Defendant now appeals as of right. We affirm.

Defendant argues that the trial court abused its discretion in admitting other bad acts evidence pertaining to defendant's sexual abuse of other boys during the time period in question. We disagree.

Although other bad acts evidence is not admissible to prove the character of a person to show that the person acted in conformity therewith, the evidence may be admissible for other purposes. MRE 404(b)(1). In the present case, the evidence was relevant and highly probative of a scheme or plan by defendant to befriend the young boys or their families and then take advantage of that position to get the boys alone so that he could molest them. *People v VanderVliet*, 444 Mich 52, 84-85; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994); *People v Cadle*, 204 Mich App 646, 655; 516 NW2d 520 (1994), remanded on other grounds 447 Mich 1009; 526 NW2d 918 (1994). Furthermore, the prejudicial effect of the other bad acts evidence did not substantially outweigh the evidence's probative value. *Cadle, supra*. The trial court prevented the asserted prejudice by giving the jury a cautionary instruction not to use the other bad acts evidence to characterize defendant as a bad person who was likely to have committed the alleged crime. *People v McMillan*, 213 Mich App 134, 139; 539 NW2d 553 (1995); *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Thus, defendant's argument is without merit.

Although defendant asserts that the trial court erred in ruling before the trial began that the prosecution could introduce the other bad acts evidence, there is nothing in MRE 404(b) that requires that the prosecution must wait until the close of its proofs to introduce the evidence in question. Although the trial court may delay its ruling regarding the bad acts evidence if the record does not reliably establish the relevance and admissibility of the evidence, the court's review of the admissibility question should be flexible and the defendant should not be allowed to prohibit proofs that are probative of a contested issue. *VanderVliet, supra* at 89-91. We have reviewed the lower court record and conclude that the trial court did not err in making its ruling before the trial began. Defendant had pleaded not guilty, which put all of the elements of the offense at issue, *id.* at 78-79, and the evidence was relevant to establishing a scheme or plan. Thus, defendant's assertion is meritless.

Defendant next contends that the trial court used penetrations with another boy to score Offense Variable (OV) 12 against him in the present case. However, this assertion is untrue because there was testimony regarding two incidents of fellatio with the victim in the present case. At trial, the instant victim testified that defendant put his mouth on the victim's penis twice. Because fellatio is considered to be a penetration, MCL 750.520a(l); MSA 28.788(1)(l), and there was evidence to support the scoring decision, *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993), the trial court did not abuse its discretion in scoring OV 12 after determining that the incidents of fellatio with the victim constituted two penetrations.

Defendant next asserts that his fifteen-year minimum sentence for his CSC I conviction is disproportionate. We disagree. Defendant's sentence is within the minimum guidelines' range of ten to twenty-five years and is therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Mooney*, 216 Mich App 367, 379; 549 NW2d 65 (1996). Although defendant argues that the trial court improperly made an independent finding of guilt in another case in which the charges were dismissed, we conclude that this assertion is untrue. In this case, the trial court properly considered the nature of the plea agreement and the charges that were dismissed as a result of the plea agreement. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517

NW2d 827 (1994). Defendant has failed to present sufficient mitigating factors to overcome the presumption of proportionality. *Mooney*, *supra*.

Defendant also claims that his ten-year minimum sentence for CSC II is disproportionate. Even if we were to hold that the CSC II sentence was disproportionate, such a decision would afford defendant no relief in view of our affirmance of the longer sentence for CSC I. *People v Turner*, 213 Mich App 558, 584; 540 NW2d 728 (1995); *People v Sharp*, 192 Mich App 501, 506; 481 NW2d 773 (1992).

We affirm.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Richard A. Bandstra