STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD LEE BRYANT,

Defendant-Appellant.

UNPUBLISHED
June 9, 1998

No. 196741
Muskegon Circuit Court
LC No. 95-138478 FC

Before: Markey, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) for licking the vagina of the four-year-old victim. The trial court sentenced defendant to eight to thirty years' imprisonment. Defendant now appeals his conviction and sentence as of right. We affirm.

I. Insufficient Evidence

Defendant claims that there was insufficient evidence upon which the jury could find him guilty of CSC I. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The victim testified that while she was lying down for a nap, defendant pulled her underwear to the side and "licked her ba-pee." The victim indicated that her "ba-pee" was her vaginal area, and stated that she went to the bathroom from her "ba-pee." The victim's mother testified that "ba-pee" was a term used in her family for vagina. A defendant's touching with his mouth of the urethral opening, vaginal opening, or labia establish "sexual penetration" for purposes of proving CSC I. *People v Legg*, 197 Mich App 131, 132-133; 494 NW2d 797 (1992). Defendant admitted at trial that he was alone with the victim long enough for the alleged act to take place. Moreover, a police officer testified that defendant admitted to the crime during an interview that took place at defendant's home before his arrest. According to the police officer, defendant stated that that the victim was lying on the couch and that he pulled down her pants and licked her vagina for fifteen to twenty seconds. At trial, defendant

denied that he committed the crime or that he admitted to the police officer that he committed the crime. However, for purposes of a sufficiency of the evidence analysis, we must resolve all conflicts in the evidence in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The testimony of defendant's former step daughter that defendant sexually molested her on at least three occasions when she was six or seven years old provided evidence of lack of mistake. Although defendant claims that the testimony was not credible because the witness waited several years before revealing the alleged abuse to her mother and because he was never charged or convicted as a result of her allegations, we will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Wolfe*, *supra* at 514. Defendant further claims that the evidence was insufficient because there was no physical or medical evidence. However, a doctor testified at trial that the act of licking a female in the genital area for fifteen or twenty seconds would not cause any temporary or permanent injury. Therefore, there was sufficient evidence to support defendant's conviction for CSC I.

II. Other "Bad Acts" Evidence

Defendant claims that the trial court abused its discretion by admitting the other "bad acts" testimony of his former step daughter. The decision whether to admit evidence is within the sound discretion of the trial court and this Court will not disturb that decision on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). See also *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). There is an abuse of discretion only if an unprejudiced person considering the facts on which the trial court acted would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). Stated differently, this Court will find an abuse of discretion in an evidentiary matter where the trial court's ruling has no basis in law or fact. *Green v Jerome-Duncan Ford, Inc*, 195 Mich App 493, 498; 491 NW2d 243 (1992).

MRE 404(b)(1) governs the admission of other bad acts evidence. It 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 the case.

To be properly admissible, other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose under MRE 404(b); (2) it must be relevant under MRE 402 as enforced through MRE 104(b); and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In addition, the trial court may, upon request, provide a limiting instruction to the jury. *Id.* at 75.

In *VanderVliet*, the Michigan Supreme Court quoted Imwinkelreid, Uncharged Misconduct Evidence, § 2:17, p 45, to the effect that:

> This is the normal test for materiality: Does the item of evidence even slightly increase or decrease the probability of the existence of any material fact in issue? Standing alone, the item of evidence need not have sufficient probative value to support a finding that the fact exists. So long as the item of evidence affects the balance of probabilities to any degree, the item is logically relevant. [*VanderVliet, supra* at 60 n 8.]

The Court went on to note, again quoting Imwinkelreid, *supra* at pp 45-46, "Simply stated, '[l]ogical relevance is the "touchstone" of the admissibility of uncharged misconduct evidence.'" *VanderVliet, supra* at 61.

MRE 404(b) is an inclusionary, rather than an exclusionary rule; relevant other acts evidence does not violate MRE 404(b) unless it is offered solely to show the criminal propensity of an individual to establish he acted in conformity therewith. *Id.* at 65. The trial court applied the test set forth in *VanderVliet* to the facts of this case and held that the evidence was admissible to show defendant's intent and common scheme or plan.

Defendant claims that given the paucity of other corroborating evidence in this case, the danger of unfair prejudice substantially outweighed the probative value of the evidence. We disagree. The trial court properly admitted the testimony as evidence of defendant's common plan or scheme to sexually molest young girls who trusted him by virtue of his relationships with their mothers. The victim in this case and the witness were both pre-pubescent girls who were close in age at the time of the alleged incidents. In addition, both of the girls were daughters of women in defendant's life and, consequently, had relationships of trust and confidence with him. With regard to the specific sexual acts alleged, the victim claimed that defendant licked her vagina, while the witness' allegations included a variety of touching and kissing, including the kissing of her vaginal area. Given the similarities between the two cases, the danger of unfair prejudice did not outweigh the probative value of the evidence. See *People v Lee*, 212 Mich App 228, 245-246; 537 NW2d 233 (1995); *People v Miller (On Remand)*, 186 Mich App 660; 465 NW2d 47 (1991).

In this regard, this case is distinguishable from *People v Sabin*, 223 Mich App 530; 566 NW2d 677 (1997). *Sabin* involved a prosecution for CSC I for vaginal penetration by the defendant of his then thirteen-year-old daughter and other bad acts evidence of uncharged misconduct: testimony by the defendant's stepdaughter that the defendant performed acts of oral sex on her from the time she was six years old until the time she turned fourteen. *Id.* at 534. This Court noted:

> In the present case, the only similarity in the conduct involved in the alleged incidents was that defendant told each alleged victim that telling anyone about the incident(s) would break up the family. There is little physical similarity between the repeated acts of oral molestation described by the victim's stepsister [the defendant's stepdaughter] and the violent, forcible vaginal rape alleged by the victim. Nor does the testimony indicate that defendant committed the acts in the same room or had some unique,

> consistent pattern or scheme in approaching, overcoming, or treating his victims. Compare *id* [referring to *Miller, supra* at 664]. Defendant's alleged threat to each alleged victim not to tell or risk breaking up the family is relatively common in incestuous relationships. [*Sabin, supra* at 536].

Here, by contrast, there was considerable similarity in defendant's conduct as described by the victim and the daughter of defendant's former wife, as well as in the circumstances surrounding that conduct. We agree with the trial court that the testimony by the daughter of defendant's former wife was admissible under the *VanderVliet* tests to show defendant's intent and common scheme or plan, particularly in light of the clear pattern in defendant's behavior.

Defendant argues that the bad acts evidence was overwhelmingly prejudicial because he was never charged or convicted of any misconduct despite a full investigation of the allegations and because the witness waited at least six years before telling her mother about the alleged incidents. This Court has permitted the use of similar bad acts evidence even when it was not proved at trial or resulted in an acquittal. See, e.g., *People v Gibson,* 219 Mich App 530, 533; 557 NW2d 141 (1996). Furthermore, the trial court informed the jury in this case that defendant had not been charged or convicted in connection with those allegations and that the witness did not report the alleged molestation by defendant until she was twelve or thirteen years old. Therefore, the jury could consider those facts in determining the weight to be given to the testimony. Finally, in its closing instructions, the trial court cautioned the jury that the other bad acts evidence could only be used to show that defendant used a plan, system or characteristic scheme and that the evidence could not be used for purposes of showing that defendant was a bad person or that he was likely to commit crimes. Therefore the trial court did not abuse its discretion by admitting the other bad acts evidence for purposes of showing a common plan or scheme under MRE 404(b).

We recognize that this Court dealt with a somewhat similar situation in *People v Starr,* 217 Mich App 646; 553 NW2d 25 (1996), lv granted 454 Mich 877 (1997). *Starr* also involved a prosecution for CSC I and other bad acts evidence of uncharged misconduct: testimony by defendant's half sister about innumerable sexual acts including "rape" having been inflicted upon her by the defendant over a period when she was aged four to thirteen (according to the defendant's brief) or when she was aged three to adult (according to the prosecutor's brief). *Id.* at 647. A majority of the *Starr* panel, over Judge Markey's dissent, stated:

> We conclude that these allegations of similar acts were so horrendously prejudicial as to require their suppression as being more prejudicial than probative. This was not a skunk in the jury box. It was a pig farm. No trier of fact could have been unswayed by the depiction of this depravity in assessing discrete claims of the "bad man's" guilt. [*Starr, supra,* at 647-648.]

The Court's emphasis in *Starr* was upon the "horrendously prejudicial" nature of the other bad acts evidence; the Court's conclusion was that this evidence was "so inflammatory and so prejudicial that the probative value was clearly outweighed." *Id.* Here, applying the weighing process mandated by the third of the *VanderVliet* tests, we do not find the other bad acts evidence to have been so

prejudicial as to substantially outweigh its probative value. Clearly, the evidence was logically relevant, and we do not find it to have been "horrendously prejudicial."

III. Custodial Interrogation

Defendant claims that the trial court erred by permitting a police officer to testify regarding defendant's alleged confession because the police officer did not give defendant a *Miranda* warning. *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Mayes (After Remand)*, 202 Mich App 181, 190; 508 NW2d 161 (1993). All of the surrounding facts and circumstances must be examined to determine whether the defendant was in custody at the time of the interrogation. *Id*. The central question is whether the accused reasonably could have believed that he or she was not free to leave. *Id*. The ultimate question of whether a person is in custody, and thus entitled to *Miranda* warnings before being interrogated by law enforcement officers, is a mixed question of law and fact that must be answered independently by the reviewing court after de novo review. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). A reviewing court will defer to the trial court's finding of historical fact absent clear error. *Id.*

The trial court properly concluded that defendant was not "in custody" at the time that he made the inculpatory statements to the police officer. Courts are reluctant to find custodial circumstances where interrogation occurs in familiar, neutral surroundings, such as the suspect's home. See *Mayes*, *supra* at 196 (Corrigan, J., concurring). In this case, the police officer interviewed defendant in a familiar environment, defendant's own home. There is no indication that the police officer, who was in plain clothes and driving an unmarked car, physically or verbally coerced or pressured defendant during their conversation. Moreover, the interview was fairly short. When defendant was asked at trial whether he felt that he had a choice of whether to follow the police officer to his car, defendant responded, "I don't really know how to answer that. I really don't. I suppose I could have just walked away, but, you know, I didn't have nothing to hide. So I walked with him." Defendant's own statements indicate his belief that he was free to leave or end the interview if he wished. Viewing the circumstances as a whole, defendant was not "in custody" at the time that he made the alleged inculpatory statements and, thus, the officer was not required to give defendant *Miranda* warnings. Therefore, the trial court did not err by admitting evidence of defendant's confession.

IV. Preliminary Examination

Defendant also claims that the trial court abused its discretion by remanding this matter for a preliminary examination resulting in a charge of CSC I, after defendant had waived his right to a preliminary examination on the lesser charge of CSC II. At a pretrial hearing, the prosecutor moved to remand this case for a preliminary examination pursuant to a stipulation with defendant's previous counsel. Apparently, the prosecutor's office had agreed with defendant's previous counsel, that it would charge defendant with the lesser offense of CSC II on the ground that defendant would plead guilty to that offense. However, according to the prosecutor, there was an understanding that if defendant did not plead guilty, the case would be remanded for a preliminary examination and the prosecutor would ask for the greater charge of CSC I. The prosecutor's motive was to spare the victim from having to testify at the preliminary examination and at trial. Defendant objected on the basis that remand would

be highly prejudicial to him because the preliminary examination would likely result in higher charge. The trial court held that the prosecution has an absolute right to a preliminary examination and, thus, granted the motion. We review the trial court's decision to remand this matter for a preliminary examination for an abuse of discretion. See *People v Johnson*, 57 Mich App 117, 121-122; 225 NW2d 704 (1974).

Both the prosecutor and the defendant are entitled to a prompt preliminary examination. MCL 766.1; MSA 28.919; MCR 6.110(A). In *People v Wilcox*, 303 Mich 287, 295; 6 NW2d 518 (1942), the defendant claimed that his constitutional rights had been violated when the examining magistrate compelled a preliminary examination despite his waiver of the examination. The Court held that the criminal code in existence at that time, like MCL 766.1; MSA 28.919, distinctly provided that that the state and the accused are entitled to a preliminary examination. *Id*. The Court noted that the state has an interest in determining whether there is sufficient probable cause to hold a subject for trial or that it may wish to perpetuate testimony in the event that a witness is later unavailable for trial. *Id*. The defendant's waiver did not affect the prosecution's right to request a preliminary examination. *Id*. at 295-296. Therefore, regardless of defendant's waiver in this case, the prosecutor was entitled to a preliminary examination. The prosecution moved to remand in a timely manner and, although it resulted in a higher charge, the remand did not prejudice defendant's ability to defend himself. There is no question that the trial court had the authority to remand. *People v Dunham*, 220 Mich App 268, 276; 559 NW2d 360 (1996). See also *People v Stattney*, 187 Mich App 660, 662; 468 NW2d 238 (1991).

V. Sentencing

Defendant claims that his sentence of eight to thirty years' imprisonment is disproportionate. We limit our review to whether the sentencing court abused its discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A sentencing court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). Defendant's minimum sentence was within the guidelines range of two to eight years. A sentence imposed within an applicable sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. See e.g., *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Nevertheless, a sentence within a guidelines range can conceivably violate proportionality in unusual circumstances. *Milbourn, supra* at 661. Defendant claims that his sentence was disproportionate in light of his lack of a criminal record as an adult or juvenile. A defendant's lack of criminal history does not constitute an "unusual circumstance" which overcomes the presumption. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Moreover, defendant's crime was very serious, particularly considering the age of his victim and his pattern of similar conduct. Therefore, defendant's sentence was proportionate.

Affirmed.

/s/ Jane E. Markey
/s/ Richard Allen Griffin
/s/ William C. Whitbeck