STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS GERARD BARTLOMIEJ,

Defendant-Appellant.

UNPUBLISHED
December 18, 1998

No. 195837
Macomb Circuit Court
LC No. 95-000915 FC

Before: Kelly, P.J., and Holbrook, Jr. and Murphy, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(b); MSA 28.788(3)(1)(b). Defendant was sentenced to concurrent terms of 20 to 30 years and 8 to 20 years for his convictions, respectively. He now appeals as of right. We affirm defendant's convictions, and remand for entry of a corrected judgment of sentence.

Defendant argues that the testimony of a Child Protective Services worker included hearsay statements regarding the nature of allegations contained in departmental reports. He further alleges that the testimony suggested that he had engaged in uncharged misconduct and he was not provided with sufficient notice, pursuant to MRE 404(b)(2), in advance of trial of the nature and purpose of this other acts evidence. A trial court's decision to admit or exclude evidence is reviewed for a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "There is an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the ruling." *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

The challenged testimony involves the contents of reports generated by Child Protective Services personnel in conjunction with the over twenty incidents in which Child Protective Services was called to defendant's home. The contents include statements of past uncharged abuse inflicted by defendant on the victim, defendant's step-daughter. The reports were properly admitted to establish why the victim had waited to contact the police in relation to the instant charges of criminal sexual

conduct. It was clearly established at trial that the victim was, as a result of these past incidents, very afraid of her step-father.

Defendant claims that the statements contained in these reports, as read into the record by a Child Protective Services worker, constitute inadmissible hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). When defendant objected at trial, the prosecution countered by invoking what is commonly known as the business records exception to the hearsay rule and the trial court overruled the objection.[1]

We find that the statements referred to by the Child Protective Services worker did not amount to hearsay in which an exception would need be applied. The statements at issue attempt to show the state of mind of the victim. The prosecution, by using these reports, intended to show the fear present in the victim so as to legitimize the time lapse between the presently charged incidents and the subsequent reporting of the abuse to the authorities. For purposes of depicting the victim's state of mind at the time she reported these crimes, it is irrelevant whether the facts in these reports are accurate. The reports were used not to establish whether these acts did, in fact, occur, but rather that the victim had a fearful mistrust of defendant. Therefore, the statements contained in the reports, while seemingly admitted under MRE 803(6), were not used to show their truthfulness and, as a result, are not hearsay.

Moreover, we are not persuaded by defendant's assertion that the reports contained statements of prior acts which were used to establish the defendant's propensity to commit the crimes in question. Evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts. *People v Crawford, supra* 458 Mich at 383. In order for evidence of prior acts to be admissible, the following safeguards must be met:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under rue 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).]

Where the evidence tends to prove a fact other than the defendant's character, admissibility depends upon whether its probative value outweighs its prejudicial effect, taking into account the efficiency of a limiting instruction. *Crawford, supra* at 385. We find that the facts contained in the reports were used to show fear in the victim and explain the delay in her reporting the allegations of sexual abuse. We note defendant did not request that a limiting instruction be given to the jury to cushion any prejudicial effect that such testimony might have on his right to a fair trial. However, the trial judge did instruct the jury to disregard the allegations of other bad acts in deciding if defendant committed the instant crimes alleged beyond a reasonable doubt.[2] Further, defense counsel did not object to the instructions given by the trial judge to the jury. As such, the trial court did not abuse its discretion in admitting the prior acts evidence.

Next, defendant claims that the testimony involving other acts was subject to MRE 404(b)(2), and thus, requires that notice be given to defendant by the prosecution.[3] Defense counsel objected to the lack of notice at the start of the trial and to the relevancy of the testimony when introduced by the prosecution at trial. The record indicates that the prosecution first brought these reports to light it its opening statement. The record is devoid of any pretrial notice being given to defendant, nor is there a showing that the trial court waived the notice requirement on the basis of good cause. However, we find that this error at the trial court level was harmless. It is only in cases of constitutional error that a criminal defendant enjoys the protection of a harmless-beyond-a-reasonable-doubt standard. *People v Tommie Mitchell, Jr. (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 210653, rel'd 8/21/98), slip op at 2. For non-constitutional errors, the court is to apply the "highly probable" standard. As such, the error is harmless where it is "highly probable that the [error] did not contribute to the [verdict.]" *Id.*, citing *People v Gearns*, 457 Mich 170, 205 (Brickley, J.), 207 (Cavanagh, J.); 577 NW2d 422 (1998). We find that while it was error for the prosecution not to give adequate notice to defendant as to the use of these reports, it is not highly probable that the use of these reports without warning to defendant contributed to the verdict. The record is replete with the testimony of the victim, the police officer in charge of the investigation, the Child Protective Services worker, and others as to the factual accuracy of the incidents relating to the instant charges pending at the time of trial.

Further, we believe that defendant was not substantially prejudiced by the erroneous admission of this evidence. While the lack of notice did deny defendant the opportunity to prepare an effective rebuttal and to marshal arguments opposing admission or countering its effect, in light of the weight of the evidence establishing the elements of these crimes, we find that defendant was not substantially prejudiced by this error.

Finally, defendant claims that the trial court improperly sentenced him to a maximum term of twenty years' imprisonment for the second-degree criminal sexual conduct conviction. The prosecution failed to give adequate notice of its intent to seek sentence enhancement based on defendant's habitual offender status. Absent application of the habitual offender statute, the maximum sentence for second-degree criminal sexual conduct is fifteen years' imprisonment. MCL 750.520c(2); MSA 28.788(3)(2). The prosecution has conceded that the trial court erred in sentencing defendant to a maximum term of twenty years' imprisonment. As such, we remand this case to the trial court for the entry of a corrected Judgment of Sentence in accordance with this opinion.

Defendant's convictions are affirmed and the case is remanded for the entry of a corrected Judgment of Sentence. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy

[1] MRE 803(6) states,

> **Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The terms "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

[2] In reading the instructions to the jury, the trial judge stated,

> Some of the testimony in this case might show that the defendant committed other bad acts. Remember that the defendant is not on trial for any of those acts. You must find that the defendant committed the alleged act or you must find the defendant not guilty.

[3] MRE 404(b)(2) states in relevant part,

> The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence.