

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHET ALLEN KEMP,

Defendant-Appellant.

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UNPUBLISHED

February 2, 1999

No. 201240

Allegan Circuit Court

LC No. 96-010076 FC

Before: Kelly, P.J., and Gribbs and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), involving the then eight-year-old daughter of his former girlfriend. He was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to a prison term of eight to thirty years. Defendant appeals as of right. We reverse.

At the time of trial, the complainant was thirteen years of age. The trial was essentially a credibility contest between her testimony and defendant's testimony. This testimony was diametrically opposed on all crucial points, and neither the victim nor defendant was corroborated on such crucial points by any other witness. To bolster its case, the prosecution, over defense objection, introduced the testimony of the daughter of another of defendant's former girlfriends. This witness testified that while on a motorcycle ride with defendant when she was sixteen years of age, defendant stopped the bike and dismounted. While defendant was purporting to point something out to her, she felt his erect penis beneath his clothing rub against her thigh.

This alleged incident was unlike anything the complainant in the present case described. Aside from the fact that the witness in question was over the age of consent when the incident occurred, most of the incidents described by the complainant occurred in defendant's bedroom. Although one incident allegedly occurred on a trail behind defendant's house, it occurred while she and defendant were riding on his ORV, rather than while the vehicle was stopped and defendant dismounted. The prosecutor's closing argument emphasized that the testimony of the witness showed defendant's propensity for pursuing sexual gratification with young females. Thus, even in its own argument, the prosecution does not rely on this evidence 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, which are the permitted purposes for such evidence under MRE 404(b)(1).

Rather, the evidence was used for the improper purpose of demonstrating defendant's propensity to sexually abuse young women, a purpose for which the evidence had no logical relevance, given the age disparity and the fact that the witness was over the age of consent, but for which the evidence was highly and unfairly prejudicial. Cf. *People v Starr*, 457 Mich 490; 577 NW2d 673 (1998). Such evidence, when it does not involve previous acts of misconduct between the same parties, but rather defendant's allegedly similar acts with others, is inadmissible for this purpose. *People v Sabin*, 223 Mich App 530, 534-535; 566 NW2d 677 (1997). In light of the prosecutor's reliance on this evidence in closing argument and the closely drawn nature of the testimony as presented to the jury, this error was not harmless and a new trial is required. *Id.* at 539-540.

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Michael J. Kelly

/s/ Roman S. Gibbs

/s/ E. Thomas Fitzgerald