STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 7, 2000
v	No. 212985 Oakland Circuit Court
RICHARD NORMAN GILLIM, Defendant-Appellant.	LC No. 97-156196-FC

Before: Murphy, P.J., and Collins and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). The court sentenced defendant fifteen to thirty years' imprisonment. Defendant appeals his conviction as of right. We affirm.

At trial, the then fourteen-year-old victim testified that years earlier, defendant regularly baby-sat the victim and her siblings while their parents went out for the evening. The children would generally play with defendant's children and then would fall asleep on defendant's living room floor or sofa until their parents came to pick them up. One night when the victim was seven or eight years old, she fell asleep on defendant's sofa when defendant was baby-sitting. During the night, the victim woke up to find that defendant had pulled down her jeans and had his mouth on her vagina. The victim did not immediately tell anyone about the incident.

In May 1991, approximately two weeks after the incident alleged by the victim, the victim's sister told her mother that the previous night, while she and her siblings were at defendant's house, defendant came into the room where she was trying to sleep and rubbed her vaginal area with his hand. When she pretended that she was starting to wake up, defendant left the room. Trial testimony differed regarding whether the victim reported her own encounter to her mother at that time, but the victim's sister was taken immediately to the police to report the incident from the previous day.

Years later, in May or June 1997, while the victim was staying at an intervention and counseling facility, Family Youth Intervention (FYI), the victim revealed to her therapist what defendant had done to her in 1991. The therapist encouraged the victim to tell her parents and, shortly thereafter, the victim

wrote a letter about the incident and gave it to her mother. The victim was taken to police and charges subsequently were brought against defendant.

Defendant first contends the trial court erred in admitting evidence of defendant's sexual contact with the victim's sister. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Riegle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). This Court will not find an abuse of discretion merely because it determines that it would have ruled differently on a close evidentiary question. *Smith, supra* at 550.

MRE 404(b) governs admission of "other acts" evidence. It provides, in pertinent part:

> (1) 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.

The standard regarding the admissibility of other acts evidence is set forth in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). The evidence must be offered for a proper purpose under MRE 404(b); it must be relevant under MRE 402, as enforced through MRE 104(b); and, under the balancing test of MRE 403, the probative value of the evidence must not be substantially outweighed by unfair prejudice. *Id.* at 74-75. In addition, the trial court may provide a limiting instruction if requested. *Id.* at 75.

Here, the prosecution offered the other acts evidence for a proper purpose under MRE 404(b): to show defendant's common scheme, plan, or system in committing the assaults. Specifically, the prosecutor argued that the similarity of defendant's assaults on the victim and her sister showed a common scheme: defendant assaulted the girls while he was baby-sitting and while the girls were, or appeared to be, asleep at his home, he stopped the sexual contact when the girls appeared to wake up, and he did not verbally threaten the girls.

Other acts evidence is generally proper to show a scheme or plan if the evidence demonstrates "a series of crimes in a unique, regular, or regimented manner." *People v Sabin*, 223 Mich App 530, 535; 566 NW2d 677 (1997). Here, the evidence showed a consistent pattern or scheme by defendant in approaching his victims and committing the sexual contact while they were asleep at his home. As the prosecutor pointed out, the only significant difference between defendant's pattern of behavior during the assaults was the extent of his contact: he touched the victim's sister's vaginal area through her clothes, while he pulled the victim's pants down and performed oral sex.

Once a proper purpose is shown, the next inquiry is whether the evidence is relevant. *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). Under MRE 401, evidence is relevant if it is material and has probative value. *Id.* at 388. To be material, the proffered evidence must be related, or logically relevant, to an issue or fact of consequence at trial. *Id.* at 388-389; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Evidence has probative value if it has any tendency to "make a material fact at issue more probable or less probable than it would be without the evidence." *Crawford, supra* at 387. However, as noted above, the evidence offered must be probative of something other than the defendant's propensity to commit the crime. *Id.* at 390.

Generally, all elements of a criminal offense are placed in issue when a defendant pleads "not guilty" to the charge. *Id.* at 389. Thus, in this case, at issue was whether defendant engaged in the sexual penetration of the victim when she was less than thirteen years old. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). In *Starr, supra*, our Supreme Court found that testimony of the defendant's younger half-sister that defendant had abused her before abusing the victim in that case, his minor adopted daughter, was admissible "to rebut [the] defendant's claim of fabrication of the charges." *Id.* at 501. Here, defense counsel repeatedly questioned whether the sexual penetration ever occurred by implying that the victim was untruthful, that her story was implausible, and that her memory was flawed. The thrust of defendant's position throughout trial was that the jury should not believe defendant had sexual contact with the victim based on the victim's dubious and belated account of the incident. Thus, evidence of a common scheme, plan or method was relevant to show that defendant committed the crime as the victim testified. The victim's sister's description helped establish that the victim's recollection was accurate, despite the number of years in the interim. The other acts evidence was relevant because it tended to prove an intermediate fact or issue, other than defendant's character, which is probative of the ultimate issue.

Finally, although the evidence was prejudicial to defendant, we do not believe that its probative value was substantially outweighed by the danger of unfair prejudice. *Starr, supra* at 499. While the victim's sister's testimony was likely disturbing to the jury, the other acts evidence involved sexual contact that was less severe than the contact charged in this case, i.e., penetration did not occur, and while a common method was shown through other acts evidence, the actual sexual behavior was not identical. We conclude, therefore, that any resulting prejudice from the admission of the evidence did not substantially outweigh its probative value. Further, the trial court gave the jury specific limiting instructions concerning the other acts evidence. On balance, we cannot conclude that there was no excuse or justification for the court's admission of the evidence. *Riegle, supra.*

Next, defendant contends the trial court deprived him of his right to a fair trial by not allowing him to discover records relevant to, or cross-examine witnesses regarding, the victim's stay at the FYI facility. We disagree. We review a trial court's rulings on evidentiary issues, including rulings on discovery requests, for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998).

First, defendant contends that he should have been allowed discovery of the victim's records of her discussions with her therapist while she was staying at the FYI facility. Defendant has not preserved this issue for appeal through an objection or motion before the trial court and, in fact, acknowledged at

trial that he made a motion in district court to allow him to subpoena the records, that the district denied the motion on the basis of the "medical privilege," and that he accepted the court's ruling and was not seeking a waiver of medical privilege. Because error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence, defendant has waived appellate review of this issue. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

Defendant further contends the trial court erred in sustaining the prosecutor's objection when defense counsel asked the victim why she left home and went to the FYI facility. Defense counsel argued that the victim's stay at the FYI facility was relevant because she reported defendant's sexual conduct at the facility. He further argued that the reason the victim went to the FYI facility was relevant to show context and to understand why she wrote the letter about defendant's abuse. In response, the prosecutor argued that the reason the victim went to the FYI facility was irrelevant, especially since she already testified that her reason was related to problems that did not involve defendant or his conduct. The trial court ruled that the victim's reason for entering the FYI facility was not relevant to prove whether the victim was molested by defendant.

Again, evidence is relevant if it tends "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." MRE 401. The only link between this case and the victim's stay at the FYI facility was that the victim told her therapist there about the alleged abuse and, consequently, gave the letter to her mother explaining what occurred. Defendant does not contend that the victim's reason for being at the facility might suggest she was inaccurate or untruthful about her claim. We agree with the trial court that the victim's reason for being at the facility is not relevant to the question whether defendant molested her. Further, defense counsel did ask the victim whether she wanted to write the letter to her mother while at the FYI facility or whether she felt she had to. The prosecutor did not object to the question or resulting testimony, but defense counsel did not further pursue the matter. Accordingly, we find that the court did not abuse its discretion in refusing to allow defendant to question the victim regarding her reasons for entering the FYI facility.

Next, defendant claims he is entitled to a new trial because of jury misconduct. Specifically, he alleges that five members of the jury were seen entering a car during the lunch recess and that some were carrying notes taken during opening statements.

A claim of jury misconduct is properly preserved by an objection or a motion for a new trial or evidentiary hearing before the trial court. *People v Benberry*, 24 Mich App 188, 191-192; 180 NW2d 391 (1970); see also *People v Hoag*, 113 Mich App 789, 800; 318 NW2d 579 (1982). Defendant did not raise this issue before the trial court during trial or in his motion for a new trial. Defendant claims he informed his lawyer about the alleged jury misconduct during trial, but that defense counsel did not take action below. However, defendant was represented by different counsel during his motion for a new trial and still failed to raise this issue or move for an evidentiary hearing on the matter. Therefore, this issue is not preserved for appellate review. *Benberry, supra*. In any event, defendant has failed to assert any facts, nor are there any in the record, that would raise an inference that any misconduct occurred or that defendant was prejudiced by any alleged jury misconduct. *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998).

Finally, defendant contends that his attorney's failure to raise the jury misconduct issue amounted to ineffective assistance of counsel. Because defendant did not object below or move for an evidentiary hearing regarding his claim of ineffective assistance of counsel, this Court's review is limited to errors apparent on the record. As discussed above, however, the record contains no reference to any jury impropriety or any discussion between defendant and defense counsel regarding that issue. Because there is no evidence of any error by defense counsel and no evidence of prejudice to defendant, his claim fails. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Affirmed.

/s/ William B. Murphy
/s/ Jeffrey G. Collins
/s/ Donald S. Owens