STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 27, 2001
v	No. 220755 Macomb Circuit Court
TERRY MEFFORD, Defendant-Appellant.	LC No. 97-003319-FC

Before: Doctoroff, P.J., and Holbrook, Jr., and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Defendant was sentenced to concurrent terms of fifteen to forty years' imprisonment for each conviction. We affirm.

Defendant argues that his state and federal double jeopardy rights were violated when the prosecution commenced the instant case after defendant previously pleaded guilty and was sentenced for an incident involving the same victim and allegedly occurring within the same continuous time sequence. In essence, defendant claims that the incident for which he pleaded guilty to the lesser offense of assault with intent to commit sexual penetration arose during the same transaction or criminal episode as the offenses charge in the instant case, and therefore were required to be prosecuted at the same time. We disagree. Double jeopardy issues are reviewed de novo on appeal. *People v Mackle*, 241 Mich App 583, 592; 617 NW2d 339 (2000).

"The Michigan and federal constitutions provide that no person shall twice be put in jeopardy for the same offense." *People v Dawson*, 431 Mich 234, 250; 427 NW2d 886 (1988); *Mackle, supra*. The purpose of the double jeopardy prohibition is to protect persons from repeated prosecutions for the same offense. *Dawson, supra*; *People v Spicer*, 216 Mich App 270, 272; 548 NW2d 245 (1996). In Michigan, the "same transaction" test is used "for determining whether two offenses are materially indistinguishable so as to prevent successive prosecutions." *People v White*, 212 Mich App 298, 305-306; 536 NW2d 876 (1995). Under the "same transaction" test, where one or more of the offenses does not contain a specific criminal intent as an element, the inquiry is whether the offenses "arose out of the same criminal episode or transaction and violated laws that sought to prevent a similar type of harm." *Crampton v 54-A District Judge*, 397 Mich 489, 502; 245 NW2d 28 (1976); *Mackle, supra* at 593; *People v Jackson*, 153 Mich App 38, 45-46; 394 NW2d 480 (1986).

Because first-degree criminal sexual conduct is a general intent crime, *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000), this Court must look to whether the offenses in this case arose out of the same criminal episode or transaction and involved laws invented to prevent the same or similar harms. We need not reach the latter element because the former element is not met under the facts of the instant case. Contrary to defendant's arguments, the offenses involved in this case and the offense resulting in defendant's prior conviction did not arise out of the same criminal transaction. Rather, multiple separate counts of first-degree criminal sexual conduct occurred based upon multiple penetrations, including digital and oral, of one victim during the month of February 1997. We find no merit in defendant's argument that engaging in sexual penetration with the victim on different days during a one-month period constitutes "the same continuous sequence." Defendant's argument is tantamount to arguing that robbing a convenience store on one night and returning to rob the same store the next night constitutes only one robbery.

Next, defendant argues that he was denied a fair trial when the trial court admitted evidence of defendant's prior conviction. We disagree. The admissibility of evidence of prior bad acts under MRE 404(b) is within the trial court's discretion and will only be reversed on appeal where there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "An abuse of discretion will be found only when 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 Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Resolution of the issue turns on application of MRE 404(b), regarding the admissibility of other crimes, wrongs, or acts, to the facts of this case. MRE 404(b)(1) provides:

> (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.

MRE 404(b) is a rule of inclusion and the list of exceptions is nonexclusive. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). To be admissible under MRE 404(b), other acts evidence must satisfy a four-prong standard: (1) the evidence must be offered for a proper purpose under MRE 404(b), (2) it must be relevant under MRE 402, (3) its probative value must not be substantially outweighed by unfair prejudice, and (4) the trial court may upon request provide a limiting instruction to the jury. *Sabin, supra* at 55-56; *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Applying these requirements to the facts of this case, we conclude that the trial court did not abuse its discretion in admitting evidence of defendant's prior conviction. First, the prosecution offered the evidence for a myriad of proper purposes, including defendant's intent to be sexually gratified, to show defendant's scheme, plan, or system in committing the sexual abuse, and absence of mistake or accident in the victim's allegations or perception. Of the

purposes offered, "only one needs to be a proper, noncharacter reason that compels admission for the testimony to be admissible." *Starr, supra* at 501. We find the evidence of defendant's prior conviction admissible to show defendant's plan, scheme, or system in accomplishing the sexual abuse against the victim. "[E]vidence of other instances of sexual misconduct that establish a scheme, plan, or system may be material in the sense that the evidence proves that the charged act was committed." *Sabin, supra* at 61-62. Under that theory,"[t]he question is whether the circumstances surrounding the charged and other acts support an inference of a common system." *Sabin, supra* at 66, n 11.

Here, the charged acts and the other act support a common scheme, plan, or system where defendant entered into the then ten-year-old victim's bedroom at night while the victim slept, awakened him, told him to pull down his pants and, if the victim refused, threatened to hurt his family to gain the victim's cooperation and silence. Defendant then used his finger to penetrate the victim's anus. These incidents share sufficient common features to infer a plan, scheme, or system in committing the acts.

The evidence was also relevant pursuant to MRE 402, satisfying the second prong of the test. Evidence of similar misconduct is logically relevant to show that the charged acts occurred where the other bad act and the charged offenses are "sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Sabin, supra* at 63. Further, the probative value of the evidence is not substantially outweighed by unfair prejudice, satisfying the third prong. Although, the potential for unfair prejudice existed, the evidence was probative in showing that the sexual assaults occurred, the system defendant may have employed in committing the assaults, and to rebut defendant's general denial of the incidents. Moreover, the MRE 403 determination is better left to a "contemporaneous assessment of the presentation, credibility, and effect of testimony." *Sabin, supra* at 70-71, quoting *VanderVliet, supra* at 70. With regard to the fourth prong, defendant makes no claim that he requested, but the trial court denied, a limiting instruction. On this record, the other acts evidence was properly admitted.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra