

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN EDWARD STUTZMAN,

Defendant-Appellant.

UNPUBLISHED

February 1, 2002

No. 222546

Lenawee Circuit Court

LC No. 99-008323-FH

Before: Zahra, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of third-degree criminal sexual conduct, MCL 750.520d (multiple variables). He was sentenced as an habitual offender, third offense, MCL 769.11, to fifteen to thirty years' imprisonment and appeals as of right. We affirm in part and remand for resentencing.

The minor victim, H.F., was visiting a friend's home on New Year's Eve. The victim was ill and took medication before going to sleep. An elderly relative of the home owner was asleep in the same bedroom, but in a different bed. The elderly woman suffered from Alzheimer's disease. The victim woke up to find that her underwear was pulled down, her nightshirt was pulled up toward her neck, and defendant was sexually penetrating her. She told him to stop and get off, but he did not comply. After a few minutes, defendant stopped, sat on the edge of the bed, then left the room. Evidence of other bad acts were also admitted at trial. Thirty days after the sexual assault of H.F., minor J.S. testified that she was asleep in her bed. Defendant was at J.S.' family home visiting her brother. Defendant woke up J.S. between 2:00 and 5:00 a.m. to smoke a cigarette with him. Defendant pulled J.S. into a bathroom, lifted her onto the sink, removed her clothing, removed his own clothing, and penetrated J.S. Defendant told J.S. that she would get in trouble if she told anyone about the incident. Finally, minor S.A. testified that she was asleep when she woke up to find defendant's hand on her breast. S.A. told defendant to get off of her bed and leave her alone. Defendant sat at the edge of the bed. S.A. told defendant again to get away from the bed and leave her alone. Defendant walked away.

Defendant first argues that the trial court abused its discretion by admitting the other acts evidence. We disagree. The decision to admit evidence rests within the trial court's discretion and will not be reversed absent an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A decision constitutes an abuse of discretion when it is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of

passion or bias. *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000). A trial court's decision on a close evidentiary decision cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

When evaluating MRE 404(b) evidence, the following test for admission applies:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 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) mod 445 Mich 1205 (1994).]

We cannot conclude that the trial court abused its discretion by admitting the other acts evidence. *Sabin, supra*. The sexual acts shared sufficient common features to infer a plan, scheme, or system in doing the acts. *Sabin, supra* at 65-66. The evidence was relevant, the probative value did not outweigh any prejudice, and the trial court provided two limiting instructions. *VanderVliet, supra*.

Defendant next argues that resentencing before a different judge is required because the sentence imposed was five times the recommendation of the statutory sentencing guidelines. The trial court cannot disregard the guidelines as an intrusion upon its judicial authority, see Const 1963, Art 4, § 45, and we remand for resentencing in light of the guidelines.

We note that the trial court determined that substantial and compelling reasons for deviation from the guidelines existed, and the sentence imposed was 15-30 years' imprisonment. The trial court reasoned that departure was warranted because: (1) the victim was physically small and helpless; (2) the evidence revealed that defendant committed first-degree criminal sexual conduct; (3) the evidence at trial revealed that defendant had committed another rape of a "physically small girl;" (4) the defendant's prior record indicated that he could not control his assaultive behavior; (5) the inability to control the behavior posed a threat to others; (6) the legislative guidelines were unconstitutional to the extent that it invaded judicial authority; and (6) the 12-36 month minimum sentence was "utterly unjust" and violated the principle of proportionality. We note that many of the factors cited by the trial court for deviating from the guidelines are incorporated within the calculations of the guidelines themselves.¹ However, the trial court may nonetheless deviate when it determines that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b). Accordingly, on remand, the trial court must base any deviation on the weight given to the characteristics in the guidelines.

¹ We also note that scoring of the guidelines may have played a role in the lower minimum guideline range calculation. The trial court when sentencing defendant cited to the size disparity between the victim and defendant. MCL 777.40(1)(b) was awarded ten points for exploitation of the victim's youth. However, because of the ten points awarded, the five points that would have been attributable to the size disparity between the victim and defendant or the fact that the victim was asleep, MCL 777.40(1)(c), could not be added into the scoring of offense variable ten. MCL 777.40(1). Accordingly, one could argue that, under the scoring, this factor was given inadequate weight.

Because there is no indication that the trial court will disregard our instructions on remand, there is no need to order resentencing before a different judge. *People v Chesebro*, 206 Mich App 468, 475-476; 522 NW2d 677 (1994).

Affirmed in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Harold Hood

/s/ William B. Murphy