STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2004
v	No. 248957 Oakland Circuit Court
JIMMIE ALLEN RANDOLPH, Defendant-Appellant.	LC No. 2002-184556-FH

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Defendant appeals as of right a jury conviction of three counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a). He was sentenced as a third habitual offender to three concurrent terms of twelve to fifteen years' imprisonment. We affirm.

Defendant was charged with five counts of CSC III arising from an alleged sexual relationship he had with a fourteen-year-old girl, F. W., who was attending the college preparatory program for which he worked. According to F. W., she and defendant had agreed that defendant would buy her things and give her money in exchange for sexual favors, which took place in various motel rooms. Defendant had previously pleaded nolo contendre to a charge of misdemeanor assault and battery related to an incident in which he unexpectedly grabbed a fourteen-year-old student, A. B., by the face and kissed her in the school. A. B. was also enrolled in the same college preparatory program at the time of the assault. The prosecutor sought to admit the incident with A. B. in the instant case.

Defendant first argues that the trial court erred in admitting other-acts evidence under MRE 404(b). We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

MRE 404(b) prohibits the use of other-acts evidence to prove the character of a person but permits the admission of such evidence when it is (1) offered for a proper purpose, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-498; 577 NW2d 673 (1998), quoting *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The trial court admitted the other-acts evidence to show defendant's common plan, scheme, or system to initiate sexual relationships with young girls. The prosecutor noted that defendant's theory of the case was that the charged acts did not occur

but then argued that the other-acts evidence showed defendant's amorous attitude toward young girls rather than that the other-acts evidence showed a common plan, scheme, or system. Although Michigan courts have rejected the "lustful disposition" rule, *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000), the prosecutor properly argues on appeal that the other-acts evidence demonstrated a common plan, scheme, or system. As noted by our Supreme Court in *People v Sabin (After Remand)*, *supra*:

> [*People v*] *Crawford*, [458 Mich 376; 582 NW2d 785 (1998)], however, should not be read as imposing a heightened requirement for establishing the theory of admissibility or suggesting that the prosecution's failure to identify at trial the purpose that supports admissibility requires reversal. The requirement under MRE 404(b)(2) that the prosecution provide notice of the general nature of the other acts evidence and rationale for admitting the evidence is designed to ensure that the defendant is aware of the evidence and to provide an enlightened basis for the trial court's determination of relevance and decision whether the exclude the evidence under MRE 403. See *VanderVliet*, *supra* at 89, n 51. The prosecution's recitation of purposes at trial does not restrict appellate courts in reviewing a trial court's decision to admit the evidence. [*Sabin (After Remand)*, *supra* at 59 n 6.]

Thus, the prosecutor's failure to precisely articulate a proper purpose for admissibility does not preclude this Court from considering the trial court's decision to admit the evidence. We do not find that the trial court abused its discretion by admitting the other-acts evidence to show a common plan, scheme, or system. "[D]istinctive and unusual features are not required to establish the existence of a common design or plan. The evidence of uncharged acts needs only to support the inference that the defendant employed a common plan in committing the charged offense." *People v. Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002), citing *Sabin (After Remand)*, *supra* at 65-66.

First, both victims were fourteen years old when the assaults occurred. Second, they both attended the school at which defendant was the principal. Third, both girls participated in the Upward Bound program – a program designed to help "at risk" children – at which defendant was a counselor and assistant director. Moreover, the assault on A. B. occurred at Oakland University, where the Upward Bound program operated, and defendant convinced F. W. to join the Upward Bound program. From these similarities, it could be inferred that defendant was a sexual predator who used his position as a teacher and mentor to gain access to young, at-risk girls, and his method of contact was through the Upward Bound program. This is very similar to the system found in *Sabin (After Remand)*, *supra* at 66.

It is true that the incidents between defendant and the two girls contained several dissimilarities. With A. B., only one incident occurred in which defendant grabbed her and kissed her, while with F. W., several sexual encounters occurred. The incident with A. B. involved force, while the incidents with F. W. involved coercion in the form of gifts and money. However, these dissimilarities can be explained; when defendant's tactics with A. B. did not

work, he tried different tactics on the next girl.[1] Moreover, if A. B. had not rejected defendant's advances, it would be reasonable to assume that several sexual encounters would have occurred. Although this involved a close question whether the other-acts evidence was sufficiently similar to infer a common system, a trial court's decision on an evidentiary question where reasonable persons could disagree generally cannot be an abuse of discretion. *Sabin (After Remand), supra* at 67.

This case largely involved a credibility contest between defendant and F. W. Therefore, corroborative evidence was probative. *People v Mills*, 450 Mich 61, 72-73; 537 NW2d 909, mod 450 Mich 1212 (1995). Whether the evidence was more prejudicial than probative was best determined by the trial court. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). And an abuse of discretion must involve more than a difference of opinion. *Hine, supra* at 250, citing *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

Defendant also raises three issues related to witness Yolanda Sowell's invocation of her Fifth Amendment privilege not to testify. Specifically, defendant contends that in the handling of the matter, the prosecutor engaged in misconduct, the trial court failed to conduct a proper evidentiary hearing, and he received ineffective assistance of counsel. We disagree with all three contentions.

Defendant bases his claim of prosecutorial misconduct on the prosecutor's failure to introduce into evidence Sowell's testimony after the prosecutor referred to Sowell during his opening statement. However, it is well-settled that a prosecutor's reference during opening statements to evidence that is not subsequently admitted at trial does not warrant reversal if the reference was made in good faith, and no prejudice resulted. *People v Wolverton*, 227 Mich App 72, 76-77; 574 NW2d 703 (1997). We conclude the prosecutor's remarks here were made in good faith because when his opening statement was made, he did not yet know whether Sowell would succeed in invoking her Fifth Amendment privilege. Moreover, facts were adduced at trial that supported all the statements the prosecutor made, notwithstanding that Sowell did not testify. Therefore, we find no plain error affecting substantial rights. See *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

We are also satisfied that the trial court properly handled the matter. Defendant argues that the trial court erred by failing to hold a more comprehensive evidentiary hearing regarding the validity of Sowell's invocation of her Fifth Amendment privilege. In support of this assertion of error, defendant relies on *People v Poma*, 96 Mich App 726; 294 NW2d 221 (1980). However, *Poma* does not provide that an evidentiary hearing should be held to determine the validity of a witness's proposed assertion of the Fifth Amendment privilege. Rather, such a hearing is to be held to determine if the witness "will either *properly or improperly* claim the protection against self-incrimination . . . ." *Id.* at 733 (emphasis added). Recognizing the prejudice that inheres when a witness asserts the privilege from the witness stand, the judge

[1] The fact that defendant may have changed his tactics does not destroy his system of using his position as a teacher and mentor to gain access to young, at-risk victims through the Upward Bound program for sexual purposes.

"must not allow [the] . . . witness to be called to the stand." *Id.* In the case at bar, there appears to be no question that Sowell would have asserted her Fifth Amendment privilege in front of the jury if she were called to the stand. Thus, the requirements of *Poma* were satisfied.

Moreover, as he acknowledged at trial, defendant could not compel the prosecutor to grant Sowell immunity in exchange for her testimony. See *People v Catanzarite*, 211 Mich App 573, 580; 536 NW2d 570 (1995). For the same reasons, we disagree with defendant's argument that he was deprived of effective assistance of counsel when his attorney withdrew a motion for a mistrial based on the unavailability of Sowell's testimony. See *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003) (stating that attorneys are not required to advance meritless positions).

Finally, defendant argues that the trial court erred in scoring offense variable (OV) 11 at fifty points. We agree, but find that the error was harmless. A sentence within the statutory guidelines must be affirmed on appeal unless the trial court relied on inaccurate information or otherwise erred in calculating the defendant's score according to the guidelines. MCL 769.34(10); See *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

MCL 777.41 describes the appropriate scoring procedure for OV 11. It provides that fifty points must be scored if two or more sexual penetrations arising out of the sentencing offense occurred, MCL 777.41(1)(a), (2)(a), and twenty-five points must be scored if one criminal sexual penetration arising out of the sentencing offense occurred, MCL 777.41(1)(b), (2)(a), but instructs that points may not be scored for the penetration that forms the basis of the CSC III offense, MCL 777.41(2)(c). According to F. W., only one incident of oral sex occurred on the first motel visit. F. W. testified that during the second motel visit, defendant performed oral sex on her; when he attempted to have intercourse with her, she slid away and he resumed oral sex. On the third visit, F. W. testified, defendant performed oral sex and had intercourse with her.

Although F. W. testified about several penetrations, the penetrations did not all occur "at the same place, under the same set of circumstances, and during the same course of conduct." *People v Mutchie*, 251 Mich App 273, 276-277; 650 NW2d 733 (2002), aff'd on other grounds 468 Mich 50 (2003); *People v McLaughlin*, 258 Mich App 635, 674 n 16; 672 NW2d 860 (2003). Instead, F. W. described three sentencing offenses, two of which involved two sexual penetrations each. However, because one penetration in each sentencing offense formed the basis for the offense, only the second penetration could be scored. MCL 777.41(2)(c). Therefore, the court should only have scored OV 11 at twenty-five points.

Nevertheless, we find that this error was harmless. The corrected guidelines indicate that defendant's minimum sentence range, before habitual enhancement, was 72 to 120 months. Because defendant pleaded no contest to third habitual offender status, his minimum sentence was subject to enhancement pursuant to MCL 777.21(3)(c).[2] Thus, after habitual enhancement,

[2] By pleading guilty to habitual offender status, defendant waived his right to challenge the timeliness of the prosecutor's notice of intent to seek habitual offender enhancement. *People v Lannom*, 441 Mich 490, 491; 490 NW2d 396 (1992).

defendant's minimum sentence range was 72 to 240 months. Defendant's minimum sentence – 144 months – fell within the enhanced range and must be affirmed on appeal. *Babcock, supra* at 261.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald S. Owens