STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 28, 2006
v	No. 263277 Oakland Circuit Court
JOHN ARTHUR POWELL, Defendant-Appellant.	LC No. 2004-195957-FC

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of nine counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a), two counts of attempted first-degree criminal sexual conduct, MCL 750.92 and MCL 750.520b(1)(a), and one count of third-degree criminal sexual conduct, MCL 750.520d(1)(a). He was sentenced to concurrent prison terms of 85 months to 15 years for each second-degree CSC conviction and the third-degree CSC conviction, and 3 to 5 years for each attempted first-degree CSC conviction. He appeals as of right. We affirm.

I. Basic Facts

Defendant, aged 56 at the time of his trial, was convicted of sexually assaulting two of his son's friends, SM, aged 16 at the time of trial, and RP, aged 13 at the time of trial.[1] Neighborhood children were often at defendant's house, and defendant socialized with the children regularly. Defendant's house had a clubhouse, trampoline, basketball court, hot tub, and video games. The children watched movies at defendant's house often, during which defendant would sit in the middle of a couch with children on either side of him and cover the group with a blanket.

SM testified that the sexual assaults started when he was about 10 years old and ended when he was 12 years old. The first incident occurred as defendant, his son, and SM watched a movie with a blanket draped over them. Defendant touched SM's penis over his clothes. Defendant allegedly repeated this act 40 or 50 times, as they watched movies. On occasion,

[1] Defendant was convicted of five counts of second-degree CSC involving SM, and four counts of second-degree CSC involving RP.

defendant also put his hand inside SM's pants and fondled his penis. On two or three occasions, defendant put his hand inside SM's pants and attempted to digitally penetrate SM's anus, but SM stopped him. SM indicated that defendant also attempted to make him touch defendant's penis. SM testified that, on one occasion when he and defendant were alone in the house, defendant undressed him, directed him to lie down, and performed oral sex on him. Defendant then masturbated SM until he ejaculated. Defendant thereafter removed his own clothes, directed SM to sit on his lap, and masturbated himself. Defendant always directed SM not to tell anyone. SM ultimately disclosed the incidents to his mother in response to her questioning. SM's mother testified that SM had seemed depressed and had unexplained stomach problems.

RP testified that her first incident occurred when she was seven years old, with the last occurring when she was ten years old. During the first incident, defendant put his left hand on her upper, inner thigh and rubbed it. When defendant attempted to move his hand toward her vagina, she stopped him. RP explained that defendant repeated this act five to ten times, sometimes putting his hand on top of her clothes and other times inside her underwear.

EM, aged 17 at the time of trial, testified that she lived next door to defendant and was a friend of defendant's son. EM indicated that, when she was 12 or 13 years old, she was sitting next to defendant in his hot tub, and he tried to put her right hand on his penis over his swimsuit. Defendant also put EM's body on his lap while they were in the hot tub. On a different occasion, while defendant was driving her, SM, and his son to the complex swimming pool, defendant reached over and touched EM's thigh. After swimming, defendant and EM were in the sauna, and defendant put his arm around her, and rubbed her upper thigh with his left hand.

Defendant testified on his own behalf and denied ever inappropriately touching any child. The defense also presented several defense witnesses, including defendant's wife, son, pastor, employer, and neighbors. The defense witnesses testified that defendant had a good reputation for honesty and denied seeing defendant engage in any inappropriate behavior with children.

II. Other Acts Evidence

Defendant argues that his convictions should be reversed because the two uncharged sexual incidents involving EM were inadmissible under MRE 404(b).[2] We disagree.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). If there is an underlying question of law, such as whether admissibility is precluded by a rule of evidence, we review that question of law de novo. *McDaniel*, *supra*.

[2] The trial court precluded the admission of a third incident in which defendant allegedly was found on top of EM after throwing her to the ground.

MRE 404(b) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). But other acts evidence is admissible under MRE 404(b) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (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, 496-497; 577 NW2d 673 (1998), reh den 459 Mich 1203 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In application, the admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *VanderVliet*, *supra* at 75.

In this case, the prosecution offered the other acts evidence for a proper purpose under MRE 404(b), i.e., as proof of a "scheme, plan, or system in doing an act." In *Sabin, supra* at 63, our Supreme Court held that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." See also *People v Hine,* 467 Mich 242, 251; 650 NW2d 659 (2002). The *Sabin* Court noted that "[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Sabin, supra* at 64. "For other acts evidence to be admissible there must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan." *Hine, supra*; see also *Sabin, supra* at 64-65. But "distinctive 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 the common plan in committing the charged offense." *Hine, supra* at 252-253, citing *Sabin, supra* at 65-66.

Defendant has not demonstrated that the trial court's evidentiary ruling was an abuse of discretion. The evidence was not offered to show that defendant had a bad character. Rather, it was probative of defendant's common scheme, plan, or system of taking advantage of similarly situated children. We agree with the trial court that the commonality of the circumstances of the other acts evidence and the charged crimes are sufficiently similar to establish a scheme, plan, or system in doing an act. The prosecutor theorized that defendant befriended and socialized with neighborhood children, created an enticing and comfortable environment that gave him access to them, and gently and surreptitiously touched them in an inappropriate manner. Both victims and EM were defendant's son's friends and were similar in age. With regard to the two specific acts, EM testified that defendant grabbed her right hand and put it on his penis. SM testified that defendant took his hand and attempted to make him touch his penis. EM testified that defendant rubbed her upper thigh with his left hand. RP testified defendant would put his left hand on her upper, inner thigh and rub it. It could be inferred from these common features that defendant had a system that involved taking advantage of his relationship with the young children to perpetrate the sexual abuse.

Furthermore, contrary to defendant's claim, the evidence was not inadmissible simply because the very nature of the evidence is prejudicial, and defendant has not demonstrated that he was unfairly prejudiced by the evidence. See MRE 403. While the acts described are serious and incriminating, such characteristics are inherent in the underlying crimes for which defendant

was accused. The danger that MRE 404(b)(1) seeks to avoid is that of *unfair* prejudice, not prejudice that stems only from the offensive nature of the crime itself. See *Starr, supra* at 499. Moreover, before EM testified and again in its final instructions, the trial court gave a cautionary instruction to the jury concerning the proper use of the other acts evidence, thereby limiting the potential for unfair prejudice.[3] Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

III. Prosecutorial Misconduct

Defendant also argues that he is entitled to a new trial because, on numerous occasions, the prosecutor referred to Playboy magazines as "pornography" or "pornographic" magazines. We disagree.

Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002), lv den 468 Mich 880 (2003). Here, however, defendant failed to object to some of the prosecutor's conduct below. We review those unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597

[3] Before EM testified, the trial court instructed the jury as follows:

> Ladies and Gentlemen, I'm going to give you instruction about testimony you're about to hear. You will hear evidence that is to show that the Defendant committed improper acts for which he is not on trial. If you believe this evidence you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show: A, that the Defendant acted purposefully, that is, not by accident or mistake; B, that the Defendant used a plan system for [sic] characteristic scheme that he had used before or since.
>
> You must not consider this evidence for any other purpose. For example, you must not decide that it shows the Defendant is a bad person or that the defendant is likely to commit crimes. You must not convict the Defendant here because you think he is guilty of other bad conduct.

In its final instructions, the trial court stated:

> You have heard evidence from [EM] that was introduced to show that the defendant committed improper acts for which he is not on trial. If you believe this evidence, you must be careful to consider it for certain purposes. You may only think about whether this evidence tends to show; A, that the defendant acted purposefully, that is not by accident or mistake. B, that the defendant used a plan, system or characteristic scheme that he has used before or since. You must not consider this evidence for any other purpose; for example, you must not decide that it shows the defendant is a bad person or that the defendant is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct.

NW2d 130 (1999), reh den 461 Mich 1205 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370, lv den 463 Mich 928 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant argues that because Playboy magazines are not considered pornography under Michigan or federal law, the prosecutor's mischaracterization amounted to the injection of a misleading " 'pornography' theme" throughout trial.[4] A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999), lv den 461 Mich 941 (1999). But examining the prosecutor's use of the term pornography in context, defendant has not demonstrated any basis for relief.

Regardless of whether Playboy magazine could legally be characterized as pornography, it is apparent that the prosecutor's reference to pornographic magazines referred only to the Playboy magazines (which defendant did not deny possessing), and that she used the term pornography in a commonly used manner.[5] During the direct examination of SM, the following exchange occurred:

> *Q.* How about other kinds of pornography? Did you ever see any pornography on a picture or a magazine?
>
> *A.* Yes.
>
> * * *
>
> *Q.* What kind of magazines were they? Do you remember the title?
>
> *A.* Playboy.

On direct examination, RP indicated that she saw "pornographic magazines" at defendant's house. On cross-examination, defense counsel asked RP "what does pornography mean to [her]?" In response, RP stated, "sex or naked people."

---

[4] Testimony revealed that, "once or twice," defendant showed SM a video depicting people having sex. In explaining the first instance of an inappropriate touching, SM explained that it occurred when defendant showed him and defendant's son a pornographic video. Thus, regarding defendant's claim that the prosecutor injected "pornography" into this case, there was evidence that Playboy magazines were not the only materials shown to SM. Nonetheless, defendant focuses his argument on the characterization of Playboy magazine.

[5] In common usage, pornography is defined as "writings, photographs, movies, etc., intended to arouse sexual excitement, esp. such materials having little or no artistic merit." See *Random House Webster's College Dictionary* (2d ed), p 1014.

During the prosecutor's cross-examination of a teenaged defense witness, LK, the following exchange occurred:

Q. You've seen pornography there, right?

A. Yes.

Q. Magazines?

A. Yes.

Q. Playboy?

A. Yeah.

During defense counsel's redirect examination of LK, the following exchange occurred:

Q. Now, you used the word pornography. What does that mean to you when somebody says pornography?

A. Inappropriate stuff.

Q. Is a Playboy magazine something that you would consider pornography?

A. Yes.

Q. A naked lady to you is pornography?

A. Yes.

Q. So when you talk about a magazine that was in [defendant's] house, was that a Playboy magazine?

A. Yes.

Subsequently, during the prosecutor's cross-examination of defendant's son, the following exchange occurred:

Q. You said there was pornography in the house. Isn't it true that your father kept -

[*Defense counsel*]: Objection. That's not what he said. He didn't say there was pornography at the house.

[*The prosecutor*]: There were pornographic magazines.

[*Defense counsel*]: That's her conclusion it's pornography.

[*The trial court*]: Why don't you rephrase the question.

* * *

Q. Were there Playboy magazines at your house?

A. Yes.

Later, during the prosecutor's cross-examination of defendant, the following exchange occurred:

> *Q*. And you're not disputing are you, sir, that you have pornography in your house?
>
> [*Defense counsel*]: Objection. What is the definition of pornography? We've been through this already.
>
> [*The prosecutor*]: Judge, I'm sorry.
>
> *Q*. You're not disputing the fact that you have Playboy magazines at your house, right?
>
> *A*. Right.

Additionally, during closing argument, defense counsel addressed this issue, and even acknowledged that "to some" Playboy might be considered pornography:

> Is a Playboy magazine pornography? Maybe to some of you it is. I'll tell you what, when I was 12 or 13, man I couldn't wait to get my hands on a Playboy magazine . . . They're looking through Playboy magazines, so these kids are hunting as [defendant's son] said for Playboy magazines. Okay, he's got a Playboy in the house. Playboy is not triple X rated sex pornography that they [sic] referring to [sic] pornography, pornography, pornography.

Viewed in context, the jury was not misled about the type of magazines that defendant had in his home and car. Moreover, defendant failed to object to most of the challenged exchanges and, in the two instances when he did object, failed to request any further action by the trial court. Any prejudice that may have resulted could have been cured by a timely instruction upon request. *Schutte, supra* at 721. Consequently, reversal is not warranted.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kathleen Jansen