STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 5, 2008
v	No. 271508 Lapeer Circuit Court
WILLIAM JAMES GATES, Defendant-Appellant.	LC No. 05-008663-FC

Before: Fort Hood, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13), two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13), and one count of assault with intent to commit CSC involving sexual penetration, MCL 750.520g(1). As a fourth-offense habitual offender, defendant was sentenced to concurrent prison terms of 22 years, 6 months to 40 years in prison for CSC I, 10 to 15 years for each count of CSC II, and 5 to 10 years for assault with intent to commit CSC. We affirm.

Defendant's convictions were based on multiple instances of abuse of two family members. At the time of these incidents, the two victims were about five or six years old. At trial, the jury heard testimony from these two victims, as well as other acts testimony from a nephew of defendant's who is now an adult, and a friend of that nephew. Both other acts witnesses testified that defendant sexually abused them when they were children, beginning when they were about five or six, and ending when they were about 13.

Defendant first argues that as applied to this case, MCL 768.27a violates the constitutional guarantee against ex post facto laws.[1] MCL 768.27a allows certain other acts evidence to be admitted for any relevant purpose in criminal cases involving certain offenses against minors. The statute became effective on January 1, 2006. Defendant was tried in 2006, but the acts were committed several years earlier.

[1] US Const, Art I, § 10; Const 1963, art 1, § 10.

This Court has rejected the ex post facto challenge to MCL 768.27a. In *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007), this Court examined whether the prohibition on ex post facto laws was implicated by the application of MCL 768.27a to a crime committed after the law's effective date. *Pattison* stated that the new rule "allows in evidence that previously would have been inadmissible, because it allows what may have been categorized as propensity evidence to be admitted." *Id.* at 619. The Court concluded, however, that "the altered standard does not lower the quantum of proof or value of the evidence needed to convict a defendant," and thus did not violate the ex post facto prohibition. *Id.* Accordingly, defendant's argument is without merit.

Defendant next argues that the trial court denied him due process when it admitted other acts evidence. Defendant's due process challenge is predicated on the general legal prohibition against character evidence being used to prove action in conformity on a given occasion, and argues at length that the evidence was not admissible under MRE 404(b) and interpreting case law. However, the challenged evidence was admitted under MCL 768.27a, which allows for the admission of other acts evidence for any purpose, including to show propensity. Courts have recognized that the admission of other acts evidence is restricted, not because it is irrelevant, but because it may be overly prejudicial. *Pattison, supra*, at 620 (observing that "our cases have never suggested that a defendant's . . . propensity for committing a particular type of crime is irrelevant to a similar charge. On the contrary, it is because of the human instinct to focus exclusively on the relevance of such evidence that the judiciary has traditionally limited its presentation.").

"There is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence." *Bugh v Mitchell*, 329 F3d 496, 512 (CA 6, 2003). Moreover, referring to FRE 414 (which similar to MCL 768.27a permits the admission of "evidence of the defendant's commission of another offense or offenses of child molestation" in a child molestation prosecution), *United States v LeMay*, 260 F3d 1018, 1026 (CA 9, 2001) made the following observation:

> We conclude that there is nothing fundamentally unfair about the allowance of propensity evidence under [FRE] 414. As long as the protections of [FRE] 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded. [See also *Pattison, supra* at 620-621.]

MRE 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403 does not serve to protect a defendant from the disturbing characteristics of evidence that are "inherent in the underlying crime." *People v Starr*, 457 Mich 490, 499-500; 577 NW2d 673 (1998). "The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself." *Id*. at 500. However, as noted above, the testimony of the other acts witnesses was relevant under MRE 401 precisely because of such a line of reasoning. Thus, contrary to defendant's argument, the evidence was substantially probative and the prejudice resulting was not unfair.

Defendant next alleges that the trial court erred when it refused a jury request to rehear testimony from the victim. Before the jury was sent to deliberate, the attorneys indicated that they would be "on call" from their offices. Later that afternoon, the jury reached a verdict. Before taking the verdict, the trial court placed two events on the record. First, the judge stated that the jury requested clarification regarding the charged counts. The trial judge stated that he met with counsel, and they agreed to an answer that was provided to the jury. Secondly, the jury sent the trial judge a note indicating that it would like to take a break and then rehear the testimony of a victim. The trial court instructed the bailiff to give the jury a break. With regard to the testimony, the jury was informed "that they're going to have to rely on their collective memory and there would be no read back of the testimony." It is unclear from the record if counsel was consulted regarding this instruction before it was given to the jury.[2] After the trial judge made a record regarding the handling of the notes from the jury, neither counsel objected to the trial court's disposition of the jury's notes.

MCR 6.414(J) provides that when a jury makes a request to review testimony or evidence, "the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request." This court rule simply expresses an established "case-law rule" that the decision on whether to read back testimony is "confided to the sound discretion of the trial judge." *People v Howe*, 392 Mich 670, 675-676; 221 NW2d 350 (1974) (internal quotation marks removed). A blanket refusal to read back testimony is an abuse of discretion, but a court may, within its discretion, ask jurors to try to rely on their memories, so long as the jury is informed that its request may be renewed. *People v Crowell*, 186 Mich App 505, 508; 465 NW2d 10 (1990), remanded on other grounds 437 Mich 1004 (1990).

"A defendant does not have a right to have a jury rehear testimony. Rather, the decision whether to allow the jury to rehear testimony is discretionary and rests with the trial court." *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000), citing MCR 6.414 and *Howe, supra*. Although a trial judge violates MCR 6.414(J) by foreclosing the jury from the possibility of later reviewing the requested testimony, this error is subject to waiver when defense counsel specifically approves of the trial court's refusal of the request and its subsequent instruction to the jury. *Carter, supra* at 219-220. To preserve an issue for appeal, an objection must be placed on the record because counsel may not harbor error as an appellate parachute. *Id*. at 214. Because defendant failed to object in the record below, the trial court's decision is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

[2] This lack of clarity in the record is compounded by the fact that the prosecutor did not file a brief on appeal. Although the general rule is that the parties may not enlarge the record on appeal, *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000), neither party moved to expand the record on appeal or to file affidavits indicating whether the trial court consulted with them at the time of the jury request.

Assuming without deciding that the trial court refused to provide the jury with the testimony and foreclosed any renewal of the request,[3] defendant has failed to demonstrate plain error affecting defendant's substantial rights. *Carines*, *supra* at 763. Specifically, there is no basis for reversal because defendant failed to show that he was actually innocent or that the assumed error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id*. at 774.

Finally, defendant argues that the trial court erred at sentencing, when it scored offense variable (OV) 11 at 25 points and OV 13 at 50 points. After defendant filed this appeal, however, this Court ordered a remand to the trial court for resentencing. This issue was addressed in a resentencing, where the trial court agreed with defendant, reducing the scoring of OV 11 to zero points and OV 13 to 25 points. The trial court then resentenced defendant to the same sentences originally imposed. Though defendant received no reduction in sentence, defendant's argument was reviewed and decided in his favor in the trial court, and is now moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Stephen L. Borrello

[3] Despite the presumption that the trial judge possesses an understanding of the applicable law, *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992), and in light of the unclear record, we nonetheless will assume that review was foreclosed. However, in the future, we presume that the trial judge's response to a note from the jury will be adequately delineated in the record. (Although the trial judge handwrote the answers to the jury on the first note, there is no handwritten notation on the second note requesting the transcript.) We make this foreclosure assumption despite the fact that defendant does not assert that MCR 6.414(B) was violated. (MCR 6.414(B) provides in relevant part, "The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present.").