

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILIP EDWARD CHAMPLAIN,

Defendant-Appellant.

UNPUBLISHED

January 20, 2009

No. 276447

Washtenaw Circuit Court

LC No. 04-001946-FC

Before: Murray, P.J., and O’Connell and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a) (sexual penetration with a person aged 13 to 15). We affirm.

The victim in this case was, at the time of the assault, a fifteen-year-old girl. She testified that she met and befriended an individual she knew as “Phil” on the internet, and they communicated in “chat rooms” and through messaging software.¹ She gave “Phil” her cellular telephone number, which they used to engage in approximately five telephone conversations, and she also used a “web cam” (a camera that transmits video over the internet) and microphone to communicate with “Phil.” There was apparently no sexual content in any of their conversations. After approximately three months, she and “Phil” arranged a general time in which to meet at the victim’s house at a time when the victim’s mother would not be home. The victim testified that “Phil” appeared at her house on a Monday morning sometime in late June 2004. The two engaged in “small talk” before “Phil” entered the house, without the victim’s invitation. The victim testified that “Phil” eventually picked her up and carried her to her bedroom where he touched her vagina, undressed her, and penetrated her vagina with his penis despite her oral protests.

“Phil” left the residence after the intercourse. The victim testified that she telephoned a friend and then walked to the friend’s house, where she told him about the incident. Although

¹ She never represented herself to “Phil” as being younger than sixteen years old, but she maintained an online profile presenting herself as variably being different ages between fifteen and eighteen years old. Defendant was approximately 38 years old.

there were some inconsistencies between the victim's testimony and the friend's testimony, the friend confirmed that the victim came to his house and informed him that her "online hubby or Philip" had just raped her. The friend testified that the victim rejected his advice that she inform the friend's mother or her own mother about the incident. The victim apparently did not inform anyone else about the incident until several months later, when the victim's mother brought the victim to the police to file a complaint concerning computer evidence regarding a sexual relationship that the victim admitted to engaging in with an individual named John Topp.² The victim informed the police about the incident with "Phil" in order to, by her own admission, deflect attention away from her relationship with Topp and because she "did not want to get Topp into trouble."

Defendant was arrested. His wallet was found to contain the victim's address, the victim's cellular telephone number, an alternate spelling of her name, and a notation "daddy's girl." The victim identified defendant as "Phil" during the preliminary examination, but she testified at trial that "Phil" was not present in court.³ A search of defendant's residence and computer revealed evidence of the online conversations between defendant and the victim. Police officers also testified that "several thousand" suspected child pornographic images were found on defendant's computer and on data-storage media in defendant's residence and automobile. After a pretrial hearing and over defendant's objection, the trial court allowed a limited number of those suspected child pornography images into evidence under MRE 404(b) to show motive. The trial court instructed the jury to consider those images only to determine whether defendant had "motive or reason" to commit sexual conduct against the victim. Defendant was convicted.

Defendant's primary argument on appeal is that the trial court erred in admitting the suspected child pornography images. We agree.

Questions of whether evidence is admissible as a matter of law under the rules of evidence are reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court's decision to admit evidence under MRE 404(b) is reviewed for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). A trial court commits an abuse of discretion when it admits evidence that is inadmissible as a matter of law. *Id.* An erroneous admission of evidence, however, is a nonconstitutional error. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001). "In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative. An error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000) (citations omitted).

Admission of evidence of a person's other "crimes, wrongs, or acts" is governed by MRE 404(b), which states:

² The victim had also met Topp online, and she believed Topp to be 37 years old.

³ A police officer who participated in the search of defendant's residence testified that defendant had changed his appearance in the interim between the time of the search and the time of trial.

[e]vidence 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. [MRE 404(b)(1) (emphasis added).]

To be admissible under MRE 404(b): (1) the evidence must be offered for a proper purpose, (2) it must be relevant, (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice, and (4) upon request, the trial court may provide a limiting instruction. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The prosecution has the burden of articulating a proper noncharacter purpose for the evidence and this burden requires more than “mechanical recitation” of the proper purposes enumerated in the statute. *Crawford, supra* at 387. The prosecution must also show that the evidence is logically relevant to something other than defendant’s character. *Id.* at 390. In terms of other-acts evidence MRE “404(b) stands as a sentinel at the gate: the proffered evidence truly must be probative of something *other* than the defendant’s propensity to commit the crime.” *Id.* (emphasis in original).

In this case, the prosecutor maintains that the challenged evidence was proper to show the jury defendant’s sexual interest in young girls, which demonstrated defendant’s motive in going to visit the victim, i.e., to sexually assault her. We disagree. The pornographic imagery here was even less relevant than evidence of the defendant’s prior sexual assault that our Supreme Court found improper as only relevant to show “lustful disposition” in *People v Sabin (After Remand)*, 463 Mich 43, 47, 66, 68; 614 NW2d 888 (2000). The instant case is similar to *People v Engelman*, 434 Mich 204; 453 NW2d 656 (1990). In *Engelman, supra*, the defendant was convicted of third-degree CSC for sexually penetrating a 15-year-old boy. *Id.* at 207. The trial court admitted a photograph of the defendant standing next to a young girl who was exposing herself to show common plan or scheme under MRE 404(b). *Id.* at 210-211, 218. Our Supreme Court held that the photograph showed no *particular* motive on the part of the defendant and was therefore inadmissible under MRE 404(b) to show a common plan or motive. *Id.* at 221, 223-224.

Equally significantly, this case is dissimilar to *People v Watson*, 245 Mich App 572; 629 NW2d 411 (2001). In *Watson*, the defendant was convicted of first-degree criminal sexual conduct arising from the abuse of his young stepdaughter. *Id.* at 574. The trial court admitted into evidence a photograph of the victim’s naked buttocks that the defendant had in his possession. *Id.* at 577-578. Admission of this evidence was proper under MRE 404(b) because evidence “that defendant had a sexual interest *specifically in his stepdaughter* would show more than simply his sexually deviant character – it would show his motive for sexually assaulting his stepdaughter.” *Id.* at 579 (emphasis added). We distinguished the photograph from the evidence in *Sabin, supra*, stating, “in the instant case *the other acts evidence involved the specific victim herself*, not someone else, as in *Sabin*.” *Id.* at 580 (emphasis added).

In the instant case, the photographs of child pornography do not demonstrate a particular motive on the part of defendant to sexually assault the victim. Instead, the photographs only show defendant’s deviant sexual interest in minors. Thus, the evidence had no logical relevance

to the case other than as related to defendant's bad character. Admission of the evidence under MRE 404(b) was therefore an abuse of discretion. *Katt, supra* at 278.

However, we do not reverse. Although the evidence was improper and prejudicial to defendant, we are not persuaded that the error was outcome determinative. *Elston, supra* at 766. The evidence was dissimilar to the charged offense and the prosecutor's case was not dependent on the evidence. See *Whitaker, supra* at 427-428, where the Court considered dissimilarity of evidence as a factor in deciding whether evidentiary error was outcome determinative, and *People v Snyder*, 462 Mich 38, 44-45; 609 NW2d 831 (2000) (erroneous exclusion of evidence was outcome determinative in part because the excluded evidence would have cast doubt on the prosecutor's entire theory of the case).

Although there were inconsistencies in the victim's testimony, the information that she was sexually assaulted by "Phil" was unwavering. The credibility issues with the victim's testimony – including her desire to cover up a relationship she had with another older man who she met online – were all brought to the jury's attention. Although there was no physical evidence of the sexual assault *itself*, there was ample objective evidence linking defendant to the victim, and there was consistent evidence corroborating the assault. This case was not strictly a credibility contest between defendant and the victim. Finally, while the victim failed to identify defendant at trial as the person who assaulted her, a police officer testified that defendant's appearance changed since he participated in a search of defendant's residence. The officer also testified that he was present at the preliminary examination and witnessed the victim identify defendant at that time. In addition, the judge instructed the jury not to consider the child pornography as reflective of defendant's propensity to commit the charged crime.

In summary, although the pornographic images should not have been admitted, we are unable to conclude that the error more probably than not affected the outcome of the proceedings.

Defendant also contends that the trial court erred in scoring offense variable (OV) 10, MCL 777.40, at 15 points during sentencing. The proper application and interpretation of legislative sentencing guidelines are questions of law we review de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). A trial court's factual findings are reviewed for clear error, *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008), and the ultimate scoring decision is reviewed for an abuse of discretion, which exists where adequate evidence does not support a particular score. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

MCL 777.40 provides:

(1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
[(a) predatory conduct was involved [15 points].] [MCL 777.40(1)(a).]

In *Cannon, supra* at 162, the Michigan Supreme Court set forth the following analytical analysis to aid lower courts in deciding whether or not 15 points are properly assessed under OV 10:

(1) Did the offender engage in conduct before the commission of the offense?

(2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?

(3) Was victimization the offender's primary purpose for engaging in the preoffense conduct?

If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40.

The evidence clearly shows that defendant engaged in conduct before the commission of the offense, as reflected by computer evidence and the victim's testimony of online communications between defendant and the victim, as well as arranging a time to meet. Even if defendant did not specifically know that the victim was fifteen years old, he did know that she was at least twenty years his junior – possibly more – and he participated in arranging to meet when the victim's mother would be absent. We find the victim was “vulnerable” within the meaning of MCL 777.40(3)(c).

Finally, the record supports that defendant's preoffense conduct was “predatory” in nature. The relevant inquiry is whether “victimization...[was defendant's]...primary purpose for engaging in the preoffense conduct.” *Id.* at 161-162. In other words, was the main purpose of defendant's actions to make the victim “an actual victim” of the criminal sexual conduct? *Id.* at 161. In *Apgar, supra* at 330, we stated that “[b]oth the timing and the location of an assault are factors of predatory conduct before the offense, which conduct includes watching a victim and waiting for any chance to be alone with her at a separate location.” Here, defendant prearranged a meeting with the victim, who he had to have known was twenty or more years younger, at a specific time when he knew she would be isolated because her mother would not be present in the house. This conduct supports that defendant engaged in conduct with the primary purpose of making it easier to sexually assault the victim. We therefore find that defendant's pre-offense conduct was “predatory” within the meaning of MCL 777.40. *Cannon, supra*. The trial court did not abuse its discretion in scoring 15 points.

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Alton T. Davis