STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 20, 2009
v	No. 280430 Wayne Circuit Court
COREY JONES, Defendant-Appellant.	LC No. 07-006795-01

Before: Murphy, P.J., and K. F. Kelly and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of six counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b)(ii), and sentenced to concurrent prison terms of 9 to 20 years for each conviction. He appeals as of right. We affirm.

I. Basic Facts

Defendant was convicted of sexually abusing his daughter, age 16 at the time of trial.[1] The charged incidents occurred between 2005 and 2007, and all occurred in the family home. The victim testified that in the fall of 2005, she was seated between defendant's legs while they were playing an X-Box video game in defendant's bedroom, and defendant "placed his hand in [her] pants and was just playing with [her] vagina." She stated that defendant had his hand "just sitting there" for three minutes. Subsequently, in 2005, defendant called the victim into his bedroom and told her to get on the floor, and the victim got on her knees. Defendant got on his knees, put his finger in the victim's vagina, and moved it back and forth. The victim recalled another occasion in 2005 when defendant called her into his bedroom, told her to lie across the bed, inserted his finger into her vagina, and moved it back and forth. In 2006, defendant "put his mouth on [the victim's] vagina" several times, "[m]aybe two, three times a week." On one occasion, the victim was on defendant's bed, defendant was on the floor, and he "licked her vagina." The two other charged incidents involving oral sex also occurred in defendant's bedroom.

[1] Three counts alleged that defendant digitally penetrated the victim's vagina and three counts alleged that defendant performed oral sex on the victim.

Apart from the charged allegations, the victim testified that in 2006, while she was taking a shower, defendant got into the shower with her and his penis touched her. She explained that defendant put his hands around her stomach, "spinned [sic] [them] around in the shower and got out." On another occasion while they were in defendant's bed, defendant "put his penis, like, between [the victim's] legs, but not too close, that way . . . [she] can't get pregnant, - and he came on [her] back." Defendant's last attempt to sexually abuse the victim occurred on February 9, 2007, when he came into her bedroom, asked her to turn over, and she refused. On the following Sunday, the victim attended church with her maternal grandmother and the victim's boyfriend. The victim explained that although she was 16 years old, defendant did not allow her to date. While the victim was at church, defendant called after learning that her boyfriend was with her. Defendant was enraged and demanded that the victim's grandmother bring the victim home. The victim feared that defendant would beat her, and ultimately revealed the sexual abuse to her grandmother, who took her to the police station.

Defendant testified and denied the allegations. The defense theory was that the victim fabricated the allegations because she wanted "to stay with her mother" and wanted more freedom to date boys. Defendant maintained that the victim was not credible, explaining that the X-Box video game system was not in the home in the fall of 2005 when he allegedly abused the victim as they were playing it. He indicated that the victim was not allowed to date because of her poor performance in school. The defense presented other defense witnesses, including defendant's wife (the victim's stepmother), defendant's 12-year-old daughter (the victim's stepsister), and a neighbor.

II. Great Weight of the Evidence - Sufficiency of the Evidence

Defendant argues that his conviction on one of the counts of first-degree CSC was contrary to the great weight of the evidence because there was "absolutely no evidence to establish penetration." While defendant frames the argument presented as one regarding the great weight of the evidence, he blends in concepts concerning sufficiency of the evidence in the body of his analysis and discussion, e.g., "[t]he standard of review regarding sufficiency of evidence is de novo." Regardless, the evidence was sufficient to establish digital penetration on the count at issue and the jury's verdict on that count was not against the great weight of the evidence. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992); *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); *People v Horn*, 279 Mich App 31, 41 n 4; 755 NW2d 212 (2008). Given that we must view the evidence in a light most favorable to the prosecution, *Wolfe, supra* at 515-516, that reasonable inferences that arise from evidence can constitute satisfactory proof of the elements of a crime, *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), and that all conflicts in the evidence must be resolved in favor of the prosecution, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), the testimony by the victim that defendant was digitally "playing" with her vagina was sufficient to find penetration. Moreover, in light of the testimony, it cannot be said that the evidence "preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Lemmon, supra* at 627.

III. Ineffective Assistance of Counsel

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on

the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that it is "reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

A. Directed Verdict on One Count of First-Degree CSC.

Defendant argues that defense counsel should have moved for a directed verdict on the one count of first-degree CSC discussed above because there was no evidence of sexual penetration. Any such motion would have been futile for the reasons stated above; therefore, counsel was not ineffective. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003)(counsel is not ineffective for failing to make futile objections).

B. Failure to Challenge Other Uncharged Acts

Defendant also argues that he was denied a fair trial when defense counsel failed to object to testimony regarding other uncharged sexual incidents between the victim and himself. While defendant contends that the evidence was inadmissible under MRE 404(b)[2] and that any probative value was substantially outweighed by the danger of unfair prejudice, he does not address the admissibility of the evidence under MCL 768.27a. This statute provides, in relevant part, that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." All of the sexual assaults at issue are "listed offenses" under MCL 768.27a. A "[l]isted offense" is any offense defined in MCL 28.722(e). MCL 768.27a(2)(a). "When a defendant is charged with a sexual offense against a minor, MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b)." *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007); see also *People v Watkins*, 277 Mich App 358, 364-365; 745 NW2d 149 (2007), lv gtd 480 Mich 1167 (2008), lv den – vacating order granting lv __ Mich __, issued December 17, 2008 (Docket No. 135787). MCL 768.27a speaks of relevancy, and we find that the evidence was relevant. Moreover, we conclude that defendant has not demonstrated that he was unfairly prejudiced by the evidence, MRE 403. While the acts described were serious and incriminating, such characteristics are inherent in the underlying crimes for which defendant was accused. The danger that MRE 403 seeks to avoid is that of *unfair* prejudice, given that all evidence presented

[2] MRE 404(b)(1) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

by the prosecution is presumably prejudicial to the defendant to some degree. *Pickens*, *supra* at 336. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. We also take note of *People v Dobek*, 274 Mich App 58, 88-90; 732 NW2d 546 (2007), in which this Court, relying on *People v DerMartzex*, 390 Mich 410, 413-415; 213 NW2d 97 (1973), indicated that where a defendant is charged with unlawful sexual acts, it is proper to admit evidence of uncharged sexual activity between the defendant and the victim when such evidence shows familiarity, enhances credibility, explains and gives context to the relationship, forms a link in the chain of events, allows the jury to appreciate the full range and nature of the interactions between the defendant and the victim, and otherwise provides the jury with the full or entire story, instead of leaving the jurors to view events in a vacuum. For these reasons, we conclude that admission of the challenged evidence was proper.

Also, with respect to defendant's argument of lack of notice, reversal is unwarranted given that the evidence was substantively admissible and that there is no indication that defendant would have reacted or proceeded differently with proper notice. See *People v Hawkins*, 245 Mich App 439, 455-456; 628 NW2d 105 (2001).

Because defendant has failed to establish that an objection would have resulted in the exclusion of the other-acts evidence, his claim of ineffective assistance of counsel cannot succeed.

C. Failure to Timely Endorse a Witness

Defendant argues that defense counsel's failure to endorse his stepson as a witness prejudiced the defense. On the second day of trial, after the close of the prosecution's case, defense counsel moved to endorse defendant's stepson, who would have testified that he removed the X-Box video game system from defendant's house in mid-2005. The prosecutor objected, arguing that the request was untimely and that the evidence was not newly discovered. In denying the motion, the court noted that because defendant was testifying, he could testify regarding the removal of the video game system. Defense counsel added that defendant's wife would also testify about the matter.

Ineffective assistance of counsel can take the form of a failure to call a witness or present other evidence only if the failure deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod in part on other grounds 453 Mich 902 (1996). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.* Defendant's stepson's testimony was not critical to preserve the fairness of defendant's trial and, in light of all the circumstances, there is no reasonable probability that, but for counsel's failure to present his testimony, the verdict would have been different. Defendant asserts that the stepson's testimony would have called into question the victim's testimony that she and defendant were playing the X-Box video game system in the fall of 2005 when defendant allegedly sexually abused her. However, defendant, his wife, and his daughter all testified that there was no X-Box video game system in their home after it was removed in April 2005. Thus, although the proposed evidence may have supported defendant's claim that he did not have a video game system in the fall of 2005, it would have been cumulative to three other defense witnesses' trial testimony. Given these circumstances, there is no reasonable probability that the outcome would have been different had defendant's stepson testified.

IV. Trial Court

We reject defendant's claim that the trial court denied him a fair trial when it failed to "sua sponte, stop the trial and hold a hearing on the admissibility of evidence" of the uncharged acts between himself and the victim. As discussed in part III(B), the evidence was admissible. More significantly, defendant has not offered any support for his claim that the trial court was required to sua sponte conduct an evidentiary hearing. Indeed, defendant did not even object to the evidence. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

V. Opinion Testimony

Defendant argues that the trial court abused its discretion in admitting the opinion testimony of the victim's maternal grandmother that the victim would not make up a story about anyone abusing her. 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). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). 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* at 412.

It is improper for a witness to comment on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 432 (1985). However, opinion or reputation testimony concerning the credibility of a witness is permissible under MRE 608(a) "after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." MRE 608(a). "Where a defense counsel attacks a witness' character for truthfulness in an opening statement, the prosecution may present evidence that supports the witness' character for truthfulness on direct examination." *People v Lukity*, 460 Mich 484, 489; 596 NW2d 607 (1999).

Defendant's defense was that the incidents did not occur and that the victim was lying. During opening statement, defense counsel questioned the credibility of the victim, stating that the victim had "made up" the allegations because she was "caught" with her boyfriend, that she "has not been forthright," and that she was "merely creating a smoke screen." This theme continued throughout defense counsel's cross-examination of the victim, culminating in her asking the victim if she "felt bad because [she was] lying." These remarks were clear attacks on the victim's character for truthfulness. Consequently, the trial court did not abuse its discretion in allowing the maternal grandmother to "give her opinion" regarding the victim's character for truthfulness.

Within this issue, defendant argues that he is entitled to a new trial because the grandmother improperly testified that the victim's teacher had said that the victim "seems looser" since having reported the incidents. Immediately following this testimony, defense counsel objected and the trial court sustained the objection. Defendant did not request any further action by the trial court, and the prosecutor did not discuss the matter further. In its final instructions, the court instructed the jury to decide the case based only on the properly admitted evidence and to follow the court's instructions. Jurors are presumed to follow their instructions.

People v Graves, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant has failed to demonstrate that he was denied a fair trial.

VI. Denial of the Late Endorsement of a Witness

Defendant argues that the trial court abused its discretion in denying his motion to endorse his stepson as a witness. We again disagree. A trial court's decision to permit or deny the late endorsement of a witness is reviewed for an abuse of discretion. *Yost, supra* at 379. As discussed in Issue III(C), defendant sought to endorse his stepson as a witness after the close of the prosecution's case. Defendant's explanation to the trial court for his failure to timely endorse his stepson was that he had a receipt showing the date that he purchased a new X-Box after the original X-Box was removed from his home, but the date on the receipt was faded and illegible. However, the record shows that the issue whether an X-Box was in the home in the fall of 2005 was not new and that the witness was not newly discovered. Moreover, as indicated above, the testimony would have been cumulative to the testimony of three other witnesses on the subject. On this record, defendant has not demonstrated that the trial court abused its discretion.

VII. Cumulative Error Theory

We reject defendant's final argument that the cumulative effect of several errors deprived him of a fair trial. Because no cognizable errors warranting relief have been identified, reversal under a cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio