STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 20, 2009
v	No. 280647 Oakland Circuit Court
STEVEN PAUL CASBAR, Defendant-Appellant.	LC No. 2007-213597-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a) (person under 13 years of age), and sentenced as a recidivist CSC offender, MCL 750.520f, to 5 to 22-1/2 years' imprisonment. He appeals as of right. We affirm.

I. Basic Facts

The 45-year-old defendant was convicted of sexually assaulting his live-in girlfriend's 12-year-old daughter over a one-month period in the summer of 2005. The charged incidents occurred in the family home when the victim's mother was at work and her siblings were asleep. The victim, age 13 at the time of trial, testified that defendant inappropriately touched her breast and buttocks more than once but less than ten times. According to the victim, defendant told her "to keep this [their] little secret." The victim stated that the first incident occurred when she went in defendant's bedroom to say goodnight and, as she hugged him, he moved his hand over her breasts and buttocks over her clothing. The victim stated that, on another occasion, defendant tried to pull down her pajama pants, indicating that he "just want[ed] to take a little peek." The victim recalled another incident when defendant picked her up, placed her on his bed, and asked in a "sexual manner" "if [she] wanted to have a little fun." She declined, indicating that she was tired. In the fall or winter of 2005, the victim told a classmate what defendant had done. The classmate testified that she told her own mother, but nothing was done. The victim indicated that "at one point," defendant moved out and the victim's mother briefly dated another man. The victim subsequently learned that defendant would be moving back in and that defendant and her mother had wed. In early 2006, the victim told a different classmate about the incidents. The classmate testified that she encouraged the victim to disclose the incidents to an adult. The victim testified that, at the urging of her friend, she told her counselor about the incidents in February 2006.

The defense theory was that the victim fabricated the allegations because she did not like defendant, was jealous of how much time her mother spent with him, and did not support her mother's marriage to him. On cross-examination, the victim admitted that she argued with defendant and her mother about her poor performance in school, yelled and threw things at her mother on one occasion, and that defendant had confronted her about her behavior. On redirect examination, the victim indicated that although she disliked some of her mother's other partners,[1] she had not accused any of them of sexual assault.

II. Other Uncharged Acts

Defendant argues that his conviction should be reversed because evidence of other uncharged sexual incidents involving his daughter and his former girlfriend's son were improperly admitted, contrary to MCL 768.27a and MRE 404(b). We disagree.

A. The Other Acts

A police lieutenant, formerly a detective in a sex crimes and child abuse unit, testified that in March 1990, she investigated a CSC matter involving defendant. The two sexual assault complainants were defendant's three-year-old stepdaughter, over whom he had legal guardianship, and defendant's then live-in girlfriend's seven-year-old son. As part of the investigation, the lieutenant interviewed defendant and the two children. In the first interview with defendant, he denied touching the children. In a second interview, defendant admitted touching his stepdaughter's vagina "two different times." He stated that while he was bathing his stepdaughter, she touched her vagina and then he touched her vagina for about 30 seconds. The lieutenant indicated that defendant's description of the second incident was nearly identical to the first. Defendant stated that while he was bathing his stepdaughter, she began rubbing her vagina and, in turn, he touched her vagina between the lips for about 30 seconds. He stopped because he knew it was wrong, and he did not do it again. Defendant restated these admissions in a written statement. Charges were brought against defendant, but were subsequently dismissed after a district court ruled that the three-year-old child was too young to testify. With regard to the seven-year-old boy, defendant admitted that he slept in a bed with the boy during an out-of-town trip and that the boy was not wearing any underwear, only a T-shirt. Defendant stated that he was lying next to the boy, woke up during the night because the bed was shaking, and observed the boy masturbating himself. The lieutenant testified that defendant was charged with and pleaded guilty to second-degree CSC. A certified copy of the judgment of sentence was admitted as an exhibit at trial.

B. Unfairly Prejudicial

Defendant contends that the evidence was inadmissible under both MCL 768.27a and MRE 404(b) because any probative value was substantially outweighed by the danger of unfair prejudice. 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

[1] The victim's mother had been married about five other times and had boyfriends in between her husbands.

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.

MCL 768.27a 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." As defendant acknowledges, 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). The evidence meets the minimum threshold for relevancy, MRE 401,[2] and defendant has not demonstrated that he was unfairly prejudiced by the evidence, MRE 403. The evidence assisted the jury in weighing the victim's credibility, particularly where defendant argued that the victim was not credible, and it showed a pattern of defendant engaging in sexual contact with juveniles to whom he had ready access. Furthermore, 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, because, presumably, all evidence presented by the prosecution is prejudicial to the defendant to some degree. *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994). The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Because the evidence was offered and properly admitted under MCL 768.27a, defendant's argument that the evidence was not admissible under MRE 404(b)[3] is inapposite in this case. "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 [other] 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).

B. Inadmissible Hearsay

Defendant further argues that the trial court erred in admitting the evidence because the testimony constituted inadmissible hearsay and violated his right of confrontation, where he was not given the opportunity to cross-examine the two minor complainants. Hearsay, which is a

[2] MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The relevancy "threshold is minimal: 'any' tendency is sufficient probative force." *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998).

[3] MRE 404(b)(1) prohibits "[e]vidence 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).

statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801, MRE 802, and *People v Ivers*, 459 Mich 320, 331; 587 NW2d 10 (1998)(BOYLE, J, concurring). Pursuant to MRE 801(d)(2), a statement that is offered against a party and is the party's own statement is not hearsay. Defendant's statements made to the police lieutenant were admissible under MRE 801(d)(2) as admissions by a party-opponent. The Confrontation Clause argument lacks merit because testimonial statements by the previous victims were not used; rather, it was defendant's own statements to police that were admitted into evidence. See *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004)(out-of-court statement by a witness that is testimonial in nature is inadmissible under the Confrontation Clause unless the witness is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the witness).

C. Judgment of Sentence

Defendant also argues that pursuant to MRE 410, the trial court erred in admitting the judgment of sentence for his prior second-degree CSC conviction because the conviction was pursuant to a no-contest plea. Because defendant did not raise this issue below, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). Defendant bears the burden of showing actual prejudice, *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006), and reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence, *Carines*, *supra* at 763.

In relevant part, MRE 410(2) generally provides that, "in any civil or criminal proceeding," a plea of no contest is inadmissible against the defendant who entered the plea. Therefore, evidence of the prior conviction based on defendant's plea of no contest should not have been admitted. However, this unpreserved issue does not warrant appellate relief. *Carines, supra.*

First, the trial court was not informed that defendant had pleaded no contest. At the hearing on the prosecution's motion to admit other uncharged acts, the prosecutor indicated that defendant had a prior conviction. Defense counsel indicated that defendant had "pleaded guilty." At trial, the police lieutenant testified that defendant pleaded guilty. In rebuttal argument, the prosecutor stated that defendant "pleaded guilty to molesting" the boy. Indeed, throughout the proceedings, defendant did nothing to advise the trial court that he pleaded no contest. Given defendant's failure to take any action in this regard, he cannot now complain of an error. To hold otherwise would allow defendant to harbor error as an appellate parachute. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Furthermore, the substance of the admissible evidence rendered the admission of the evidence of the actual conviction harmless. The victim provided detailed testimony regarding the charged acts. Two witnesses testified that the victim told them about defendant's actions on different occasions. Moreover, the prior conviction related only to the seven-year-old boy; it had no bearing on defendant's admissions that he touched his three-year-old daughter's vagina on two different occasions. In short, the erroneous admission of the judgment of conviction did not affect the outcome and, therefore, did not affect defendant's substantial rights. *Carines, supra*.

D. Ineffective Assistance of Counsel

We also reject defendant's alternative argument that he was denied the effective assistance of counsel because defense counsel failed to object to the evidence of the prior conviction on MRE 410 grounds. Given the admissible evidence against defendant, there is no basis for concluding that there is a reasonable probability that, but for counsel's failure to object, the jury's verdict would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

III. Presentence Report

We disagree with defendant's final claim that a remand is warranted to correct an error in his presentence investigation report (PSIR). Defendant now claims that the Criminal Justice section of the PSIR inaccurately states on page six that he was previously convicted of *first-degree* CSC, even though it is undisputed that he was only convicted of *second-degree* CSC. Defendant did not raise this issue at sentencing. Regarding the prior offense, the Criminal Justice section states that the "C*harge(s)*" at the time of arrest was first-degree CSC, that the "Final *Charge[]*" was first-degree CSC, that there was a no contest plea in July 1991, and, after a delayed sentence, defendant was sentenced to one year probation in March 1992. The section does not identify the actual conviction. However, the Evaluation and Plan section and the Agent's Description of the Offense section both state that defendant had a prior conviction for *second-degree* CSC. Consequently, the PSIR accurately reports defendant's prior conviction as second-degree CSC, and no correction is warranted.

Affirmed.

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