STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 24, 2009
v	No. 282098 Oakland Circuit Court
JOHN ALLEN MIHELCICH, Defendant-Appellant.	LC No. 2007-213588-FC

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of five counts of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a), and sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 7 to 22-1/2 years for each conviction. He appeals as of right. Because we conclude that there was no error in the admission of evidence regarding defendant's uncharged acts of sexual misconduct, that the trial court did not abuse its discretion in amending the information, that the trial court did not engage in improper judicial fact-finding, and that the trial court's scoring of offense variables 4 and 10 is supported by record evidence, we affirm.

Defendant was convicted of sexually assaulting two underage girls. At trial, evidence was presented that defendant committed other uncharged acts of sexual misconduct against another underage girl, TB.

I. Other Uncharged Acts

Defendant argues that his convictions should be reversed because the evidence of his uncharged sexual conduct involving then 13-year-old TB was improperly admitted, contrary to MCL 768.27a and MRE 404(b). 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). 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).

A. MRE 768.27a

MCL 768.27a(1) provides 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." MCL 768.27a(2)(a) provides that a "listed offense" is an offense defined in section two of the Sex Offenders Registration Act, MCL 28.722. The offense at issue involved defendant digitally penetrating then 13-year-old TB's vagina, which qualifies as a listed offense under MCL 28.722(e)(x). Further, the prior offense meets the minimum threshold for relevancy, MRE 401, and defendant has not demonstrated that he was unfairly prejudiced by the evidence. See MRE 403. The evidence assisted the jury in weighing the victims' credibility, particularly where defendant argued that the victims were not credible and the evidence showed a pattern of defendant engaging in sexual contact with juveniles to whom he had access while in his home. Furthermore, although 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 its prejudicial effect.

In addition, because the evidence was offered and admitted under MCL 768.27a, it is immaterial whether the evidence would have been admissible under MRE 404(b). "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).

B. Hearsay

Defendant further argues that the trial court erred in admitting the evidence because the testimony regarding his sexual misconduct with TB was inadmissible hearsay and violated his right of confrontation because he was not given the opportunity to cross-examine TB. Hearsay, which is a 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. MRE 801(c); MRE 802; *McDaniel, supra* at 412. Pursuant to MRE 801(d)(2), however, a statement that is offered against a party and is the party's own statement is not hearsay. In this case, the evidence of defendant's sexual misconduct with TB was established by defendant's own statements. Defendant admitted during a police interview that he digitally penetrated TB, that she was "underage" at the time, and that the incident occurred in 1996 or 1997.[1] Defendant also admitted to his sister that he had sexual contact with TB. Defendant's statements were admissible as admissions by a party-opponent under MRE 801(d)(2), and, thus, were not hearsay.[2]

[1] Although defendant later claimed that TB was 16 years old at the time of the incident, her birth date contradicted that claim.

[2] Within this issue, defendant notes that the police detective improperly testified that TB told him
(continued…)

C. Prosecutorial Misconduct

Defendant also argues that the prosecutor improperly referenced the other acts evidence in closing argument. Because defendant has not demonstrated that the evidence was improperly admitted, it follows that the prosecutor did not engage in misconduct by referring to that evidence during closing argument. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

D. Ineffective Assistance of Counsel

We also reject defendant's alternative argument that defense counsel was ineffective for permitting the introduction of the other acts evidence involving TB. Because defendant has failed to establish a basis for excluding the evidence, he has failed to establish that counsel's performance fell below an objective standard of reasonableness. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Defendant's claim of ineffective assistance of counsel cannot succeed.

II. Amendment of Information

Defendant next argues that the trial court erred in granting the prosecutor's motion to amend the information to add a count of second-degree CSC after it granted a directed verdict on a count of first-degree CSC. Defendant contends that, as a result of the amendment, the trial court erroneously instructed the jury on an uncharged count of second-degree CSC as a cognate lesser included offense of first-degree CSC, contrary to *People v Cornell*, 466 Mich 335, 353-355; 646 NW2d 127 (2002). We disagree.

We review a trial court's decision to grant a motion to amend an information for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). An information may be amended before, during, or after trial to cure a defect, imperfection, or omission as long as the defendant is not prejudiced. MCL 767.67; MCR 6.112(H). Unacceptable prejudice includes unfair surprise, inadequate notice, or inadequate opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). Here, the amendment did not involve a new or different act, but rather related to the degree of culpability associated with a charged act, and defendant did not assert below, nor does he argue on appeal, that he was unfairly prejudiced by the amendment. Thus, the trial court did not abuse its discretion in granting the amendment.

Instead, relying on *Cornell*, *supra*, defendant argues that amendment was impermissible because second-degree CSC is a cognate lesser offense of first-degree CSC. In *Cornell*, our Supreme Court held that lesser-offense instructions are permitted only with respect to necessarily

---

(…continued)

that defendant "molested" her. Immediately following this testimony, however, defense counsel objected on hearsay grounds. The trial court sustained the objection and instructed the jury to disregard the testimony. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

included lesser offenses. Instruction on cognate lesser offenses are impermissible. *Cornell*, *supra* at 353-355. Defendant correctly argues that second-degree CSC is a cognate lesser offense of first-degree CSC, because it is possible to commit first-degree CSC without committing second-degree CSC. *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997). However, *Cornell* is inapplicable here. Because the trial court amended the information, the second-degree CSC charge became a principal charge, not a cognate lesser offense for instructional purposes. Accordingly, *Cornell* is not implicated.

III. Judicial Fact-finding at Sentencing

Defendant argues that he must be resentenced because the facts supporting the trial court's scoring of the sentencing guidelines were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and similar cases. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing court was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. *People v McCuller*, 479 Mich 672, 676; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 162-164; 715 NW2d 778 (2006). Although defendant argues that *McCuller* and *Drohan* were wrongly decided, this Court is bound to follow decisions of our Supreme Court. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002).

Further, because a *Blakely* challenge would have been futile, defense counsel was not ineffective for failing to challenge the scoring of the guidelines on this basis. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

IV. Scoring of Offense Variables 4 and 10

Defendant lastly argues that resentencing is required because the trial court erroneously scored ten points for offense variable (OV) 4 (psychological injury to a victim), MCL 777.34, and 15 points for OV 10 (predatory conduct), MCL 777.40, of the sentencing guidelines. When scoring the guidelines, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.*

A. OV 4

MCL 777.34(1)(a) provides that ten points are to be scored if "[s]erious psychological injury requiring professional treatment occurred to a victim." "There is no requirement that the victim actually receive psychological treatment." *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). Here, the score was based on serious psychological injury to KJ. Defendant sexually assaulted KJ when KJ was seven or eight years old. The presentence investigation report indicates that, in January 2007, more than ten years after the abuse occurred, KJ "immediately began crying" when interviewed by the police detective. In addition, KJ again became upset and started to cry at trial while testifying against defendant. KJ's reactions when

required to recall defendant's conduct considered in light of the nature of the offenses indicates that she suffered serious psychological injury. The trial court's score of OV 4 is supported by record evidence.

B. OV 10

MCL 777.40(1)(a) provides that 15 points should be scored if "predatory conduct was involved." Predatory conduct means "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). In *People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008), our Supreme Court explained the parameters of OV 10:

> To aid lower courts in determining whether 15 points are properly assessed under OV 10, we set forth the following analytical questions:
>
> (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 trial court correctly scored OV 10 at 15 points. KJ was seven or eight years old when defendant first approached her. Defendant is her uncle. A few months before the charged incidents occurred, defendant called KJ into a bathroom (where no one else was around), and asked her to perform oral sex on him. The episode stopped when defendant heard KJ's grandmother arriving home. Defendant subsequently approached KJ when she was in a room alone. He sat next to her, unzipped her pants, placed his hand in her pants, rubbed her vagina, and placed her hand on his penis. Defendant stopped and left the room when he heard someone coming down the stairs. In light of KJ's age, defendant's position as her uncle, and the timing and location of the assaults, there was sufficient evidence for the trial court to assess 15 points for OV 10. See *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003).

Affirmed.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra