STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 5, 2010
v	No. 291841 Wayne Circuit Court
LINCOLN ANDERSON WATKINS, Defendant-Appellant.	LC No. 06-008116-FC

Before: WILDER, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for four counts[1] of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under 13), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under 13). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 25 to 40 years in prison for the first-degree criminal sexual conduct convictions, and 10 to 15 years in prison for the second-degree criminal sexual conduct conviction. We affirm.

Defendant first argues that his right against double jeopardy was violated because the prosecutor's conduct precipitated a mistrial. We disagree.

Defendant did not preserve this issue below. "Unpreserved, constitutional errors are reviewed for plain error affecting substantial rights." *People v Pipes*, 475 Mich 267, 270; 715 NW2d 290 (2006). Under the plain error rule, "defendants must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant. Generally, the third factor requires a showing of prejudice—that the error affected the outcome of the trial proceedings. Defendants bear the burden of persuasion." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In this case, the trial prosecutor's supervisor discussed the entire history of defendant's case with an intern in an elevator at the courthouse where the trial was underway. The discussion included the fact that defendant had been tried once before, resulting in a hung jury

[1] Defendant was acquitted of one count of first-degree criminal sexual conduct.

(11 to 1 in favor of guilt), and further, the importance that the jury placed on the other acts evidence. At the end of the conversation, the trial prosecutor expressed her hope that no jurors were on the elevator, only to find that, in fact, juror number four had been present during the conversation. After the prosecutor informed the court and defense counsel what happened, defendant moved for a mistrial and the court granted it, refusing to even consider the prosecutor's suggestion that the court interview the juror to determine what, exactly, she heard and what she might have shared with other jurors. The court also remarked, "doesn't every lawyer know not to talk about the case in the elevator?" The court then scheduled the next trial.

A subsequent retrial after a mistrial raises double jeopardy concerns, and "[u]nder the Double Jeopardy Clause of the Michigan Constitution and United States Constitution, an accused may not be put in jeopardy twice for the same offense. Const 1963, art 1, § 15; US Const, Am V." *People v Grace*, 258 Mich App 274, 278; 671 NW2d 554 (2003). The double jeopardy clause "protects against two general governmental abuses: (1) multiple prosecutions for the same offense after an acquittal or conviction; and (2) multiple punishments for the same offense." *Id.* at 279 (internal citations omitted). In addition:

> Jeopardy attaches when a jury is selected and sworn and the Double Jeopardy Clause therefore protects a defendant's interest in avoiding multiple prosecutions even when no prior determination of guilt or innocence has been made. However, the general rule permitting the prosecution only one opportunity to obtain a conviction must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments. [*Id.* (internal citations omitted).]

Thus, "[w]here the motion for mistrial is made by the prosecutor, or by the judge sua sponte, retrial will be allowed if declaration of the mistrial was 'manifest[ly] necess[ary]' . . . . " *People v Tracey*, 221 Mich App 321, 325; 561 NW2d 133 (1997), quoting *People v Dawson*, 431 Mich 234, 252-253; 427 NW2d 886 (1988). Moreover, although, "retrial is barred where the prosecutor intended to goad the defendant into moving for a mistrial," *Dawson*, 431 Mich at 236, if "a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond his control, the public interest in allowing a retrial outweighs the double jeopardy bar," *Tracey*, 221 Mich App at 326. "Ordinarily a trial judge will determine whether the prosecutor intended to goad the defendant into moving for a mistrial. The judge's findings are subject to appellate review under the 'clearly erroneous' standard." *Dawson*, 431 Mich at 258. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008).

Defendant argues that the prosecutor's error was not innocent because there is no reason for an experienced prosecutor to talk about an ongoing case in a crowded elevator on the way to the courtroom where the case is being heard. Defendant urges this Court to find that Michigan's standard for a mistrial encompasses situations such as this, where the prosecutor's intentions are unknown, but the error so egregious that it constitutes a gross departure from accepted prosecutorial conduct and evidences reckless disregard for the due process rights of the accused. We disagree.

There is no doubt that the supervising prosecutor in this case acted in a grossly negligent, if not reckless, manner by discussing the details of an ongoing case in a courthouse elevator.

Nevertheless, although our Supreme Court observed that "[o]ther courts have held that . . . grossly negligent misconduct of other court officials and of the state's witnesses may be attributed to the prosecutor," *Dawson*, 431 Mich at 253 n 49, the Court did not indicate that it was adopting this standard for such individuals, let alone the prosecutor. Furthermore, the Court has also noted that "[p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Id*. at 257 n 56, quoting *Oregon v Kennedy*, 456 US 667, 675-676; 102 S Ct 2083; 72 L Ed 2d 416 (1982). Rather, as stated above, the rule is that:

> Where a mistrial results from apparently innocent or even *negligent* prosecutorial error, or from factors beyond his control, the public interest in allowing a retrial outweighs the double jeopardy bar. The balance tilts, however, where the judge finds, on the basis of the objective facts and circumstances of the particular case, that the prosecutor intended to goad the defendant into moving for a mistrial. [*Dawson*, 431 Mich at 257 (internal citations and quotations omitted; emphasis added).]

The only evidence here is that the prosecutor acted with gross negligence; there is nothing to suggest that the prosecutor intended to provoke a mistrial. Indeed, the prosecution had just received a favorable ruling from this Court, allowing it to introduce other acts evidence crucial to its case and it had nothing to gain by starting over with a new trial. Further, the prosecutor even suggested that the court determine exactly what the juror heard the prosecutor say and inquire whether the juror had shared the information with the other jurors before declaring a mistrial. Therefore, defendant's right against double jeopardy was not violated.

Defendant next argues that MCL 768.27a violates the fundamental right to the presumption of innocence and unconstitutionally infringes on the Supreme Court's authority. We disagree.

Constitutional issues are subject to de novo review. *People v Idziak*, 484 Mich 549, 554; 773 NW2d 616 (2009). MCL 768.27a provides:

> (1) Notwithstanding section 27,[2] 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. . . .

[2] MCL 768.27 provides: "In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant."

(2) As used in this section:

(a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.

(b) "Minor" means an individual less than 18 years of age. [MCL 768.27a (footnote added).]

Defendant was accused of committing first-degree and second-degree criminal sexual conduct, which are listed offenses under MCL 28.722(e)(x). By contrast, MRE 404(b)(1) provides that:

> Evidence 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, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Defendant argues that MCL 768.27a is in conflict with MRE 404(b) and the rule of evidence takes priority over the statute. Defendant suggests that when a court rule or rule of evidence is promulgated to protect a fundamental right and procedural due process of the accused, a conflicting statute should be viewed with a higher standard of scrutiny. We disagree.

"Const 1963, art 6, § 5 provides that our Supreme Court 'shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.' Generally, where a court rule established by our Supreme Court conflicts with a statute, the court rule governs if the matter pertains to practice and procedure. However, if the statute does not address purely procedural matters, but substantive law, the statute prevails." *People v McGuffey*, 251 Mich App 155; 649 NW2d 801 (2002). This doctrine also applies to a conflict between a statute and a rule of evidence. See *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007). In *Pattison*, the court explained that MRE 404(b) and MCL 768.27a conflict:

> 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). In many cases, it allows evidence that previously would have been inadmissible, because *it allows what may have been categorized as propensity evidence to be admitted in this limited context*. [*Id*. at 618-619 (emphasis added).]

The court concluded that the statute prevails, observing that "MCL 768.27a is a substantive rule of evidence because it does not principally regulate the operation or administration of the courts," and therefore, "it does not violate the principles of separation of powers." *Id*. at 619-620. Thus, as defendant concedes, this Court has already decided this issue. Furthermore, "[u]nder the law of the case doctrine, an appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). This Court already

decided this issue in a prior appeal in this case. *People v Watkins*, 277 Mich App 358, 364; 745 NW2d 149 (2007). Therefore, defendant's argument is without merit.

Defendant next contends that the trial court failed to consider the relevancy of the other acts evidence as well as its prejudicial effect when weighed against its probative value and concludes that the evidence of other acts in this case cannot meet the requirements of MRE 403. We disagree.

It is true that, even though other acts evidence is admissible pursuant to MCL 768.27a, trial courts must "take seriously their responsibility to weigh the probative value of the evidence against its undue prejudicial effect in each case before admitting the evidence," pursuant to MRE 403. *Pattison*, 276 Mich App at 620-621. MRE 403 states, in pertinent part, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." In this case, the trial court ruled that E.W.'s testimony was inadmissible before the start of the second trial, however, it was on the basis of the acts not being similar under MRE 404(b), not because the evidence was prejudicial under MRE 403. This Court, on the other hand, subsequently ruled that E.W. could testify because her testimony was relevant: "[c]ontrary to defendant's argument in the trial court, there is no real question that [E.W.'s] testimony, if believed, tends to increase the probability that defendant committed the charged offenses. MRE 401. Therefore, the evidence is plainly relevant for purposes of MCL 768.27a . . . ." *Watkins*, 277 Mich App at 364-365. Thus, while not addressing the issue of prejudice pursuant to MRE 403, this Court simply directed (as will be discussed below), that the trial court had to determine "which aspects of [E.W.'s] testimony related to the commission of listed offenses under MCL 768.27a. Those aspects of [E.W.'s] testimony are admissible." Thus, the issue of the admissibility of E.W.'s testimony has already been decided by this Court and will not be decided differently on this appeal. *Kozyra*, 219 Mich App at 433.

Even had the trial court performed a balancing test pursuant to MRE 403, however, E.W.'s testimony was admissible. The evidence that defendant had assaulted another minor – E.W. – was relevant because it tended to show that it was more probable than not that the victim was telling the truth. The similarity of the relationships (E.W. was defendant's wife's cousin while the victim thought of his wife as a godmother) and defendant's modus operandi (taking advantage of minors who had a close relationship with his wife and were present in his home to baby sit) also made the likelihood of defendant's behavior toward the victim more probable. Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Whether the victim was telling the truth had significant probative value in deciding whether defendant should be convicted of the crimes for which he was charged. Further, defense counsel was able to effectively cross-examine E.W. regarding the fact that she thought of defendant as her boyfriend and maintained contact with him after their relationship ended, even expressing a desire to have his child. Finally, the court instructed the jury on how to properly use the other acts evidence:

> The prosecution has introduced evidence of claimed acts of sexual misconduct by the defendant with a minor for which he is not on trial. Before you may consider such alleged acts as evidence against the defendant, you must first find that the defendant actually committed those acts. If you found that the defendant did commit those acts, you may consider them in deciding if the defendant committed the offenses for which he is now on trial.

Thus, E.W.'s testimony was relevant and not more prejudicial than probative. See *People v Mann*, __ Mich App __; __ NW2d __ (Docket No. 288329, issued April 8, 2010), slip op at 3.

Finally, defendant argues that his due process rights were violated when the trial court failed to hold an evidentiary hearing to determine the proper scope of E.W.'s testimony. We agree that the trial court abused its discretion in admitting certain portions of E.W.'s testimony, but we find the error harmless.

"Questions whether a defendant was denied a fair trial, or deprived of his liberty without due process of law, are reviewed de novo." *People v Steele*, 283 Mich App 472, 478; 769 NW2d 256 (2009). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo. Otherwise, we review for abuse of discretion a trial court's decision to admit evidence." *Pattison*, 276 Mich App at 615.

In a prior appeal by the prosecutor, this Court ruled:

> [E.W.'s] testimony is admissible to the extent it is evidence that defendant committed a "listed offense," as defined in MCL 28.722, against her while she was a minor. MCL 768.27a. The trial court shall determine *which aspects of [E.W.'s] proposed testimony pertain to the commission of listed offenses while she was a minor*, and allow the prosecutor to present that testimony. [*People v Watkins*, unpublished order of the Court of Appeals, entered May 14, 2007 (Docket No. 277905) (emphasis added).]

Although our Supreme Court subsequently remanded the case, this Court, after having determined that MCL 768.27a prevails over MRE 404(b), again stated, "we remand for a determination of which aspects of [E.W.'s] testimony related to the commission of listed offenses under MCL 768.27a. Those aspects of [E.W.'s] testimony are admissible." *Watkins*, 277 Mich App at 365.

Nevertheless, we have found no record evidence that the trial court conducted any sort of inquiry into which portion of E.W.'s testimony was admissible pursuant to this Court's order. Furthermore, although defense counsel raised several evidentiary issues prior to choosing a jury in the third trial, she did not ask that E.W.'s testimony be restricted in any way. In fact, while arguing that evidence of defendant's prior convictions should be kept out should he choose to testify, defense counsel stated, "we are already unduly hamstrung by the introduction of the 404(b)/statutory testimony." Defense counsel referred to the other acts evidence on two other occasions in a similar manner, but never in the context of asking the trial court to make a determination as directed by this Court. Defense counsel only stated that she wished to "preserve all of the challenges which were made in the Supreme Court and the Court of Appeals concerning the legality of [MCL 768.27a]," to which the trial court responded, "why are you saying that? I don't have anything to do with that."

Clearly then, the trial court ignored this Court's order to determine which part of E.W.'s testimony related to "the commission of listed offenses when she was a minor." As noted above, 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." E.W.'s testimony indicated that she had sexual intercourse with defendant when she was 15 years old. Thus, defendant's conduct would at least violate MCL 750.520d(1)(a)[3], which is a listed offense under MCL 28.722(e)(x). However, E.W. also testified that her relationship with defendant continued on until she reached age 17. Pursuant to MCL 750.520d, then, after E.W. turned 16 years old, the sexual acts described would no longer constitute a crime, and thus, would not constitute a listed offense admissible as other acts evidence under MCL 768.27a. Therefore, the trial court abused its discretion in allowing this testimony.

Defendant argues that this error was so egregious that it resulted in fundamental unfairness because, given the lack of witnesses or physical evidence, as well as the victim's inability to testify to exact dates and times[4], the jury could convict defendant only by concluding that the victim was a credible witness and defendant was not. Defendant further contends that presenting testimony that defendant and E.W. engaged in a sexual relationship when E.W. was only 16 and 17 years of age telegraphs to the jury that defendant is both a bad person and the person responsible for the charged offenses, and thus, was fundamentally unfair. We disagree.

When a trial court abuses its discretion in admitting evidence, "[a]n error in the admission or exclusion of evidence will not warrant reversal unless refusal to do so appears inconsistent with substantial justice or affects a substantial right of the opposing party." *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). In this case, E.W. described the first time she had sexual intercourse with defendant, which occurred when she was 15, and then simply stated that they had sex "a lot times," over the next two years. She explained that, in addition to defendant's duplex:

> there were times where he would be working on houses and we would go to these houses he was working on. He would usually pick me up from school and take me to these houses or hotel rooms. We would usually stay all day and he would drop me off around the corner from my mom's house and I would just go home like I had been to school that day.

Thus, E.W. did not provide any specific testimony differentiating events that occurred when she was 15 from events that occurred when she was 16 and 17. To find that defendant committed a listed offense with E.W., however, the jury only had to believe that the first incident E.W. described actually occurred and this was the only incident about which E.W. provided specific details. Moreover, since defense counsel was able to examine E.W. on events that occurred when she was older than 16, counsel was able to obscure the issue by bringing out the fact, that, in January 2004, E.W. still had a friendly relationship with defendant and professed her

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[3] MCL 750.520d(1)(a) provides that, "a person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and . . . [t]hat other person is at least 13 years of age and under 16 years of age."

[4] We disagree with defendant's characterization of the testimony, as the victim clearly indicated that these events occurred on Memorial Day 2006 and the days following.

love and care for him through e-mails. E.W. also expressed a sexual interest in him, suggested that they have a child together, and asked him why he was not keeping in contact with her. It was not until E.W. went to the police later in 2004 that she characterized defendant's actions as rape, although she denied this during her cross-examination. Thus, although admitting certain portions of E.W.'s testimony violated this Court's order, it was not inconsistent with substantial justice.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly