

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER DIBBLE,

Defendant-Appellant.

UNPUBLISHED

November 16, 2010

No. 292492

Ionia Circuit Court

LC No. 08-013837-FH

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b (victim between age 13 and 16; members of same household), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c (person between the ages of 13 and 16; members of same household). The trial court sentenced defendant to 126 months to 30 years' imprisonment for his CSC I conviction and to 10 to 15 years' imprisonment for each CSC II conviction. We affirm.

I. BASIC FACTS

The charges in this case stem from defendant's sexual abuse of his then-girlfriend's daughter in 2005 when she was approximately 13 years old. In April 2008, the prosecution filed a notice of intent to introduce other acts evidence. Specifically, the prosecution sought to introduce under MRE 404(b) the testimony of defendant's ex-wife, who would testify that between 1991 and 1998 defendant would regularly become intoxicated and physically force her to engage in oral and anal sex, and sexual intercourse. In addition, the prosecutor sought to introduce the testimony of the ex-wife's son, who would testify that defendant forced him to perform oral sex on defendant when he was 11 years old. At the time of the abuse, this victim was living in the same residence as defendant and was defendant's stepson (hereinafter, prior victim). The prosecution sought admission of the prior victim's testimony under both MRE 404(b) and MCL 768.27a. In October 2008, the prosecution filed another notice of intent to introduce evidence under MCL 768.27a of other acts of uncharged sexual assaults perpetuated by defendant against the present victim between 2005 and 2006. All of this testimony was admitted at trial.

II. OTHER ACTS EVIDENCE

Defendant first argues that the trial court erred by admitting the testimonies concerning defendant's other acts related to his ex-wife, the prior victim, and the victim. This Court reviews for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). "A court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *Id.*

A. VICTIM'S AND PRIOR VICTIM'S TESTIMONIES

Defendant contends that the victim's and the prior victim's testimonies regarding other acts should not have been admitted under MRE 404(b) because the prosecutor's notices of intent were facially deficient. Defendant cites no law for the proposition that a facial deficiency will result in suppression of other acts evidence. In any case, the notices in the present matter sufficed to put defendant on notice of the specific testimony the prosecution sought to introduce and the legal grounds upon which the prosecution sought its introduction. Thus, this argument lacks merit.

The remainder of defendant's argument suggests that both the victim's and the prior victim's testimonies did not meet the substantive requirements of MRE 404(b) and should have been excluded. However, this argument is moot because the trial court properly admitted the testimonies under MCL 768.27a. See *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007). MCL 768.27a(1) provides in part as follows:

Notwithstanding [MCL 768.27, the statutory equivalent of MRE 404(b)(1)], 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.* . . . [Emphasis added.]

Accordingly, evidence admitted under MCL 768.27a(1) may be considered for its bearing on any matter to which the evidence is relevant, including a defendant's propensity to commit a crime, and does not have to satisfy the more stringent requirements of MRE 404(b). *Pattison*, 276 Mich App at 618-619. "Relevant evidence" means 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." MRE 401. However, pursuant to MRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Unfair prejudice occurs "when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App. 519, 521-522; 652 NW2d 526 (2002).

Here, defendant's charged offenses, CSC I and CSC II, are listed offenses against a minor under the statute. MCL 768.27a(2)(a); MCL 28.722(e)(x). Thus, evidence that defendant had committed another listed offense against a minor was admissible under the statute, so long as it

was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. In our view, the testimonies of both the victim and the prior victim were relevant and admissible. Testimony of uncharged sexual acts committed against the victim was relevant to establish a continuing course of conduct with the victim and to support the victim's credibility. In light of the testimony's relevance, and because evidence at trial created a credibility contest between the victim and defendant and the defense theory was that the victim and her mother had fabricated the story to get rid of defendant, it cannot be said that the testimony had a minimal probative value that was outweighed by the danger of unfair prejudice. Certainly the testimony was prejudicial, but we fail to see how it was unfair in light of the defendant's theory of the case. Accordingly, the victim's testimony regarding uncharged sexual acts was properly admitted under MCL 768.27a.

Similarly, the prior victim's testimony was also relevant to establish that defendant engaged in a common plan or scheme, where he would perpetuate sexual abuse against child members of his family. It also served to bolster the complaining victim's testimony, and thus, for the same reason, its probative value was not substantially outweighed by the danger of unfair prejudice. Accordingly, the prior victim's testimony regarding molestation perpetuated on him by defendant was properly admitted under MCL 768.27a. The trial court did not err by admitting either of these witnesses' accounts.

B. EX-WIFE'S TESTIMONY

Defendant also challenges the trial court's decision to admit under MRE 404(b) his ex-wife's testimony that he habitually forced her to engage in sexual acts between 1991 and 1998. We need not address the propriety of the admission of this testimony under MRE 404(b) because it was properly admitted under MCL 768.27b. That provision provides, in relevant part:

(1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence *is admissible for any purpose for which it is relevant, if it is not otherwise excluded under [MRE 403]*.

* * *

(4) Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice.

(5) As used in this section:

(a) "Domestic violence" or "offense involving domestic violence" means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

* * *

(iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(b) “Family or household member” means any of the following:

* * *

(ii) An individual with whom the person resides or has resided.

In the instant matter, defendant was accused of engaging in “an offense involving domestic violence” as defined in MCL 768.27b(5)(a)(iii) and (iv). Although plaintiff did not indicate it was seeking admission of the ex-wife’s testimony under MCL 768.27b, it did “disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial.” MCL 768.27b(2). Further, the testimony was relevant because it demonstrated that defendant exercised dominion and control over the members of his household in order to subject them to unwanted sexual assaults. Furthermore, even if we were to conclude that the ex-wife’s testimony was improperly admitted under the statute, we conclude that any error would have been harmless. The admissible evidence against defendant was overwhelming. Nothing in the record shows that his convictions somehow hinged on the testimony of his ex-wife. Moreover, the trial court provided the jury with a limiting instruction that directed it to consider the information only for certain limited purposes. Juries are presumed to follow their instructions and instructions are presumed to cure most errors. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Accordingly, defendant’s argument as it relates to his ex-wife’s testimony is unavailing.

III. EX POST FACTO CLAUSE

Finally, defendant argues that MCL 768.27a is an unconstitutional ex post facto law because it allowed for him to be convicted based on less, or different, evidence than the law required at the time he committed the offences. We disagree. This Court has already explicitly rejected this same argument. In *People v Pattison*, 276 Mich App at 618-619, this Court stated:

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. *However, the altered standard does not lower the quantum of proof or value of the evidence needed to convict a defendant.* In this case, for example, defendant could have been tried and convicted before this statute was enacted solely on the basis of his daughter’s proposed testimony. That same testimony, if presented as it appears in the record, remains legally sufficient to support his conviction at his upcoming trial.

Therefore, the standard for obtaining a conviction against defendant has not changed, and the application of MCL 768.27a to this case does not violate the Ex Post Facto Clause. [Emphasis added.]

Accordingly, we reject defendant's claim based on the same reasoning announced in *Pattison*.

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello