STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 11, 2011
v	No. 294921 Kent Circuit Court
HANS CHRISTIAN SMITH, Defendant-Appellant.	LC No. 09-003246-FC

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a), and was sentenced as an habitual offender, third offense, MCL 769.11, to 14 to 30 years' imprisonment for each count. Defendant appeals as of right and for the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

The victim in this case was thirteen years of age at the time of trial. She testified that when she was six or seven years of age her parents separated and she went to live with her father while her mother moved into a home which shared an apartment with defendant. The victim testified that on one occasion, the victim and defendant's daughter were playing dress-up in defendant's apartment, when defendant took the victim and sat her down on a couch. Defendant started rubbing the victim's leg over her clothing from the knee up, which made the victim feel uncomfortable. On other occasions, the victim took baths in defendant's apartment with his oldest daughter. Defendant would "say that he had to go to the bathroom so he would come in," and he would unzip his pants and use the toilet. Defendant would then come over and help the children in the bathtub and "play around with [them] for a few [sic]." Sometimes while defendant was playing with the girls in the bathtub, the girls would sit on the side of the tub and defendant would "end up feeling [them] . . . [l]ike he would rub on [them]." The girls were still in the middle of playing, and the water was not drained; on at least one occasion, they got back into the tub after defendant touched them. The victim testified that defendant was not drying her off because she always dried herself. The victim analogized defendant's rubbing as if he were sliding his hand down a staircase banister. According to the victim's testimony, defendant felt the girls on the sides of their legs and their stomachs, and generally "all over." The victim testified that defendant touched her "a couple" of times on her "private" by rubbing it in the

same manner. On the witness stand, the victim made a fist and showed with her other hand how defendant rubbed the hole in her fist, which represented her "private."

On another occasion, while the victim and defendant's daughter were playing in the bathtub and then sitting on the side of the tub, defendant rubbed and then inserted his finger into the victim's "private"; the victim testified, "I don't want to say he necessarily stuck it, his finger in, but he kind of did." The victim demonstrated that defendant stuck his finger in her vagina "past the first knuckle and just under the second knuckle." The victim testified that defendant inserted his finger into her privates on one other occasion. On cross-examination, the victim testified, "I can't be wrong about that. . . . You just remember something like that, it can't leave your brain, once it happens, it happens." There were also times when defendant chased and teased the victim, and set her on top of a floor freezer. Defendant would tickle the victim on the freezer, and she testified that "usually [her] shirt would end up off 'cause that's what he was trying to do." She also testified that defendant sometimes rubbed the victim's chest on these occasions, which made her uncomfortable.

After about the fourth incident in defendant's apartment, the victim told her mother that defendant was "making [her] feel really uncomfortable and that he was touching [her] in ways he shouldn't be." Her mother told the victim that she would "deal with it," and she did not send the victim down to defendant's apartment unless there were other people present, such as his daughter's grandmother or defendant's wife. The victim's mother reported the incidents to her landlord, and following a brief discussion, the victim's mother and the landlord decided not to report any of the alleged conduct to the police. However, several years later, the landlord told the victim's mother about new allegations concerning defendant and defendant's niece.

It was not until December 2008 that the police were notified. The victim testified that there were "shows on TV about it and then [they] were talking about it in school and stuff and it just started bringing back all the memories and everything and then [she] was like having trouble sleeping and stuff," so she reported the abuse to the school principal. The principal called Child Protective Services and the police and informed the victim's parents. Detective Kelly Braate of the Grand Rapids Police Department subsequently interviewed the victim. Although the victim initially had trouble talking about the incidents, she told Braate that she remembered running away from defendant, and that defendant chased her, placed her on a freezer, and "stuck his fingers inside of her private."

The defendant's niece was eighteen at the time of trial. She testified that when defendant was married to her aunt, they were occasionally together at her grandmother's house. When defendant's niece was 10 or 11 and in the fourth grade, she was downstairs in the basement computer room, playing a video game, when defendant came downstairs and started massaging her back and shoulders. She testified that defendant started moving his hands down to her chest area and was "playing with [her] . . . nipples and stuff," under her clothes. Defendant then put his hands down his niece's pants and started rubbing her vagina, and then, according to testimony of defendant's niece, defendant then put his fingers in her vagina. Defendant's niece did not tell anyone about the incident until she was in eighth grade. She decided to report defendant's abuse because she was in the computer room at her grandmother's house again, which was now upstairs, and defendant grabbed her arm "like he wanted to do it again."

Detective Bruce Veltman of the Hudsonville Police Department interviewed defendant in November 2004 about the allegations concerning the niece, and defendant told Veltman that his niece, who was a dancer, had finished doing some exercises in the computer room at her grandmother's house. Defendant stated that his niece was complaining about being sore, so he started to massage her shoulders, hips, thighs, and calves. When asked whether defendant put his hands inside her clothing, he stated at first that he did not remember, but that it was possible when he was massaging her, his hands could have gone inside her clothing onto her bare skin. Although defendant denied touching her vagina, Detective Ben Escalante interviewed defendant on a later date; in response to the question whether defendant touched his niece's breast and "briefly" touched her vulva, defendant responded yes, but claimed that it was a mistake, was not sexual, and "happened only the one time." Veltman also questioned defendant about abuse that had occurred in his family, and defendant responded that Veltman probably already knew that defendant abused his four-year-old sister when he was around sixteen years old. Defendant stated that the abuse was "experimental," was not sexual, and that he would not do it again.

Defendant testified that the victim played with his daughters while he was the primary caretaker for the daughters. Defendant recalled that the victim and his daughter took baths together, and there was no strict supervision of the girls while they were taking baths, other than an adult "stepping in to make sure that they were all right or . . . keeping an ear out for them." Defendant denied that he ever placed his finger in the victim's vagina. With regard to the incident involving his sister, defendant believed he told the police that it was nonsexual and that he was just experimenting. Defendant denied doing anything to his niece.

After closing arguments, Judge Bowler deliberated and returned a verdict of guilty as charged, of two counts of first-degree CSC. This appeal ensued.

On appeal, defendant first argues that the verdict was against the great weight of the evidence. A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). This Court reviews for an abuse of discretion a trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). "Findings of fact by the trial court may not be set aside unless clearly erroneous." MCR 2.613(C).

"The evidence presented at trial did not clearly weigh in defendant's favor." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). As previously stated, the victim, who was thirteen at the time of trial, testified regarding two incidents of digital penetration by defendant when she was six or seven years old and staying with her mother in the apartment above defendant. Contrary to defendant's assertions, she testified that while playing and taking baths with defendant's daughter, she and the daughter would sit on the edge of the tub, and defendant would rub the girls on their legs, stomachs, and "all over." The victim testified that defendant touched her "private" by rubbing his finger over it. The victim also testified that defendant then inserted his finger in her "private," past his first knuckle, and she demonstrated this with her hand.

Defendant argues that this case presents a credibility contest because he denied the misconduct, and the victim's initial testimony that "I don't want to say he necessarily stuck it, his finger in, but he kind of did," was equivocal. Witness credibility questions may support the granting of a new trial only in narrow circumstances, such as where testimony contradicts indisputable physical facts or laws, defies physical realities, or has been seriously impeached. *People v Lemmon*, 456 Mich 625, 642-644, 646-647; 576 NW2d 129 (1998). No such circumstances exist in this case relative to the testimony presented at trial. Our review of the record reveals that the victim was adamant about the penetration and she recalled specific details that clearly supported the allegations of penetration beyond a reasonable doubt. The trial court found her testimony to be credible and found her reluctance to reveal the incidents, except to her mother, to be normal for her age. Even assuming the trial court erred in discounting defendant's testimony, such credibility determinations are insufficient grounds for granting a new trial, and the verdict was not against the great weight of the evidence.

Defendant next argues that the trial court erred in admitting the similar-acts evidence that he digitally penetrated his niece, and in admitting evidence that many years previous defendant allegedly sexually abused his sister, who was four to six years old, when he was sixteen. The trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006). The trial court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant argues that the prosecution, in seeking to admit the evidence, relied on MCL 768.27a, which 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." Defendant asserts that this statute conflicts with MRE 404(b),[1] and consequently, the statute is an unconstitutional violation of the separation of powers doctrine. Citing *McDougall v Schanz*, 461 Mich 15, 30; 597 NW2d 148 (1999),[2] defendant

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[1] MRE 404(b)(1) provides:

> 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.

[2] In *People v Watkins*, 277 Mich App 358, 365; 745 NW2 149 (2007), this Court relied in part on *McDougall*'s holding that the Legislature has preeminence over substantive issues, to determine that MCL 768.27a is a "substantive rule of evidence deeply rooted in weighty policy considerations."

argues that MCL 768.28a is superseded by MRE 404(b) because the statute is solely concerned with "judicial dispatch of litigation" and invades the courts' authority. This issue has already been decided by this Court in *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007):

> MCL 768.27a is a substantive rule of evidence because it does not principally regulate the operation or administration of the courts. Instead, it reflects the Legislature's policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords. . . . However, the risk that a defendant would suffer undue prejudice from the exposition of his or her past misdeeds has led the judiciary, as a matter of policy, to exclude most of this information from a jury's consideration. The decision to enact a statute like MCL 768.27a and to allow this kind of evidence in certain cases reflects a contrary policy choice, and it is no less a policy choice because it is contrary to the choice originally made by our courts. Therefore, MCL 768.27a is substantive in nature, and it does not violate the principles of separation of powers. [Citations omitted.]

This Court is required to follow *Pattison* and *Watkins*, which are binding precedent pursuant to the rule of stare decisis. See MCR 7.215(C)(2), (J)(1); *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 362; 764 NW2d 304 (2009), lv den *Roberts ex rel Irwin v Titan Ins Co*, 485 Mich 935 (2009). Accordingly, defendant's constitutional challenge fails.

Defendant next argues that the evidence should have been evaluated pursuant to MRE 404(b). Defendant asserts that had the evidence been evaluated pursuant to 404(b), the trial court would have found the evidence inadmissible because the prior acts do not possess a sufficiently high "grade of similarity" to permit an inference that the alleged conduct at issue was part of a common plan, scheme, or system, as required by *People v Sabin (After Remand)*, 463 Mich 43, 65; 614 NW2d 888 (2000). Defendant did not object to the admissibility of the evidence pursuant to MRE 404(b), thus this issue is unpreserved. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). It is therefore reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In *Pattison*, 276 Mich App at 618-619, this Court specifically ruled that "MCL 768.27a allows prosecutors to introduce evidence of uncharged sexual offenses against minors without having to justify admissibility under MRE 404(b). The evidence was thus admissible pursuant to MCL 768.27a, and it is therefore irrelevant whether its admission was justified pursuant to MRE 404(b).

Defendant argues that the other-acts evidence should have been excluded pursuant to MRE 403, which provides that "(a)lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Defendant failed to object to the evidence on MRE 403 grounds, thus this issue is reviewed for plain error. *Carines*, 460 Mich at 763-764. Whether admitted pursuant to MCL 768.27a or MRE 404(b), evidence of other acts is subject to MRE 403. *Pattison*, 276 Mich App at 621 (trial courts should take seriously their responsibility to weigh the evidence under MRE 403 when it is admitted pursuant to MCL 768.27a); *People v Knox*, 469 Mich 502,

509; 674 NW2d 366 (2004) (citations omitted) (under MRE 404(b), one of the elements necessary to the admission of other-acts evidence is that the probative value must not be substantially outweighed by the danger of unfair prejudice). MRE 403 prohibits evidence that could cause unfair prejudice. Such unfair prejudice exists when there is a danger that the evidence will be given undue or preemptive weight by the trier of fact or where it would be inequitable to permit the use of the evidence. *People v Gipson*, 287 Mich App 261, 263; 787 NW2d 126 (2010) (citation omitted).

The only other-acts evidence considered by the trial court was that of defendant's niece which showed that defendant digitally penetrated his niece who was close in age to the victim, and committed a sexual assault in a similar manner. Although the evidence was prejudicial, "[f]rom every statement or piece of evidence admitted there is likely to be some prejudicial effect." *People v Albers*, 258 Mich App 578, 591; 672 NW2d 336 (2003), lv den 469 Mich 1026 (2004). A "determination of the prejudicial effect of evidence is 'best left to a contemporaneous assessment of the effect, presentation, and credibility of testimony' by the trial court.'" *People v Gonzalez*, 256 Mich App 212, 218; 663 NW2d 499 (2003). Accordingly, a defendant must meet a high burden to show that a trial court abused its discretion by declining to exclude relevant evidence under MRE 403. In this case, the evidence demonstrated the nature of defendant's interest and predilection toward adult-child sexual contact, and thus supported the accuracy and truthfulness of the victim's testimony. Thus, the challenged evidence was highly probative to proving that defendant committed the instant acts against the victim, and it bolstered the victim's credibility. Even though the trial court did not subject the evidence to an MRE 403 balancing analysis, the trial court did not abuse its discretion in admitting the evidence because defendant has not shown that the potential for undue prejudice substantially outweighed the probative value of the evidence. Consequently, there was no error and reversal is not warranted.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello