

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUCAS JAMES PETERSON,

Defendant-Appellant.

UNPUBLISHED

June 24, 2021

No. 355617

Grand Traverse Circuit Court

LC No. 20-013518-FC

Before: GADOLA, P.J., and SAWYER and RIORDAN, JJ.

PER CURIAM.

Defendant is charged with first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) (victim under 13 years of age), and second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (victim under 13 years of age). In this interlocutory appeal, he challenges the order of the trial court denying in part his motion to exclude certain other-acts evidence under MRE 403. We affirm.

I. FACTS

Defendant is charged with sexually assaulting the victim, NL, in August 2017, when he was 16 years old and the victim was 11 years old. The prosecution alleges that while attending a birthday party, defendant and the victim took a walk together into an isolated area in the woods. Defendant allegedly then anally penetrated the victim. The prosecution further alleges that in 2018, when NL was 12 years old and defendant was 17 years old, NL visited friends at defendant's home. Defendant followed NL upstairs, then put his hand inside her shirt and touched her breasts.

The prosecution notified defendant of its intent to introduce at trial the testimony of three other individuals, TS, RC, and MC, each asserting that defendant sexually assaulted them. It is anticipated that TS would testify that in 2015, when she and defendant were both 14 years old, she agreed to go into the woods with defendant (the same woods where defendant allegedly later assaulted NL) to engage in oral sex. TS asserts that over her objections, defendant vaginally and anally penetrated her. It is anticipated that RC would testify that in 2015, when she was 12 years old and defendant was 14 years old, defendant pinned her down and touched her breasts while in a camper, and on a separate occasion, pinned her down and attempted to digitally penetrate her

vagina through her clothing. It is anticipated that MC would testify that in 2016, when she was 17 and defendant was 15, he grabbed her and also swatted her buttocks while the two were volunteering at a thrift store; defendant was adjudicated in juvenile court for the assault and sentenced to probation.

Defendant moved to exclude the testimony of the three witnesses on the basis that the anticipated testimony was not relevant and was more prejudicial than probative. The trial court granted in part and denied in part the motion, holding that the testimony of TS and RC was admissible, but excluding the testimony of MC. This Court granted defendant's request for interlocutory review of the trial court's order.¹

II. DISCUSSION

Defendant contends that the testimony of TS and RC is inadmissible because the testimony is not relevant, and that the probative value of the testimony is substantially outweighed by the risk of unfair prejudice, warranting exclusion of the evidence under MRE 403. We disagree.

We review de novo whether the trial court properly applied the rules of evidence. *People v McFarlane*, 325 Mich App 507, 517; 926 NW2d 339 (2018). A trial court's decision to admit other-acts evidence is reviewed for an abuse of discretion and will not be disturbed absent an abuse of the trial court's discretion. *People v Uribe*, 499 Mich 921 (2016); *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Thorpe*, 504 Mich 230, 251-252; 934 NW2d 693 (2019). A decision on a close evidentiary question typically is not an abuse of the trial court's discretion. *Id.*

Generally, relevant evidence is admissible and evidence that is not relevant is not admissible. MRE 402; *People v Zitka*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 349494); slip op at 3. Evidence is relevant if it has "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.

The admissibility of evidence of other crimes generally is governed by MRE 404(b), which provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). Such evidence may be admitted "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 . . ." MRE 404(b)(1). However, when a defendant is charged with criminal sexual conduct involving a minor, MCL 768.27a permits the admission of evidence of the defendant's other acts that may demonstrate a propensity to commit a "listed offense," notwithstanding MRE 404(b). MCL 768.27a provides:

¹ *People v Peterson*, unpublished order of the Court of Appeals, entered January 19, 2021 (Docket No. 355617).

(1) Notwithstanding section 27, 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) 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.]

The purpose of the statute is “to address a substantive concern about the protection of children and the prosecution of persons who perpetrate certain enumerated crimes against children and are more likely than others to reoffend.” *Watkins*, 491 Mich at 476. In cases in which MCL 768.27a applies, it supersedes the directives of MRE 404(b). *Id.* at 476-477.

But although MCL 768.27a prevails over MRE 404(b) regarding evidence that falls within the scope of the statute, it does not mandate the admission of all evidence that falls within the statute’s scope. *Uribe*, 499 Mich at 922. Rather, “ ‘the Legislature necessarily contemplated that evidence admissible under the statute need not be considered in all cases and that whether and which evidence would be considered would be a matter of judicial discretion, as guided by the [non-MRE 404(b)] rules of evidence,’ including MRE 403 and the ‘other ordinary rules of evidence, . . .’ ” *Uribe*, 499 Mich at 922, quoting *Watkins*, 491 Mich at 484-485. Thus, relevant evidence that is admissible under MCL 768.27a nonetheless may be excluded under MRE 403. *People v Solloway*, 316 Mich App 174, 193; 891 NW2d 255 (2016).

Stated another way, before evidence may be admitted under MCL 768.27a it must survive scrutiny under MRE 403. *Watkins*, 491 Mich at 486. MRE 403 provides that 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.” In *Watkins*, our Supreme Court provided guidance for determining whether evidence admissible under MCL 768.27a warrants exclusion under MRE 403:

There are several considerations that may lead a court to exclude such evidence. These considerations include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant’s and the defendant’s testimony. This list of considerations is meant to be illustrative rather than exhaustive. [*Watkins*, 491 Mich at 487-488 (citation omitted).]

This list does not supplant the proper analysis under MRE 403, but instead provides a tool to facilitate the analysis. *Uribe*, 499 Mich at 922. In addition, “when applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence’s probative value rather than its prejudicial effect.” *Watkins*, 491 Mich at 487. Stated

differently, “other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference.” *Id.* In so concluding, our Supreme Court explained:

As with any balancing test, MRE 403 involves two sides of a scale – a probative side and a prejudicial side. Propensity evidence is prejudicial by nature, and it is precisely the danger of prejudice that underlies the ban on propensity evidence under MRE 404(b). Yet, were a court to apply MRE 403 in such a way that other-acts evidence in cases involving sexual misconduct against a minor was considered on the prejudicial side of the scale, this would gut the intended effect of MCL 768.27a, which is to allow juries to consider evidence of other acts the defendant committed to show the defendant’s character and propensity to commit the charged crime. To weigh the propensity inference derived from other-acts evidence in cases involving sexual misconduct against a minor on the prejudicial side of the balancing test would be to resurrect MRE 404(b), which the Legislature rejected in MCL 768.27a. [*Watkins*, 491 Mich at 486.]

In this case, it is undisputed that the anticipated testimony of TS and RC² would be evidence of acts that are listed offenses under MCL 768.27a. Defendant contends that the testimony of TS and RC is not relevant, however, because the circumstances of those asserted acts differ from the circumstances of the charged offense. But although there are certain differences in the other acts and the charged offense, all of the victims were under the legal age for consent to sexual activity, and the details of each asserted act tend to demonstrate defendant’s intent, motive, and plan to sexually assault a minor. The other-acts evidence therefore is relevant.

With regard to TS’s testimony, it is anticipated that TS would describe an encounter with defendant that is similar to the accusation against him in the present case, specifically, that defendant walked with her to an isolated area in the same woods where defendant allegedly later assaulted NL, then forced her to participate in sexual penetration, including anal penetration, over her objections. The trial court observed that although the evidence has substantial prejudicial effect, it also is probative given the similarity of the incident asserted by TS with the charged offense, suggesting a similar method of assaulting each victim.

The additional *Watkins* factors do not suggest that the testimony should be excluded. Regarding temporal proximity and the frequency of the alleged other acts, defendant is accused of assaulting NL in August of 2017 and 2018; TS asserts that defendant assaulted her once in the summer of 2015, while RC asserts that defendant assaulted her twice in 2015. The two witnesses thus will assert three assaults within two to three years of the charged conduct. This evidence does not suggest a lack of temporal proximity or lack of frequency that would warrant suppression of the testimony. Regarding reliability, there is nothing in the record that suggests that TS’s account

² Defendant asserts that the anticipated testimony of RC regarding an alleged assault does not relate to a listed offense because defendant has not been charged with the conduct. We observe, however, that MCL 768.27a applies to “evidence that the defendant committed another listed offense against a minor,” and is not limited to charges or convictions.

of the assault is not reliable, and charges have been brought against defendant in a separate case regarding the alleged assault on TS. In addition, the anticipated testimony of TS is necessary support for the prosecution's case in light of the dearth of evidence beyond the testimony of NL in the charged case. Given that the factors identified in *Watkins* that might warrant exclusion of the evidence are not applicable here, the record supports the trial court's conclusion that the probative value of TS's testimony outweighs the prejudicial effect. We therefore conclude that the trial court did not abuse its discretion by determining that the testimony of TS was admissible.

With regard to the testimony of RC, it is anticipated that RC would testify that in 2015, when she was 12 years old and defendant was 14 years old, defendant pinned her down and fondled her breasts while in a camper, and on a separate occasion, defendant again pinned her down and attempted to digitally penetrate her vagina through her clothing. The trial court observed that RC would testify that she was 12 at the time of the alleged assaults by defendant, and thus was of similar age to the victim in this case, thereby supporting the conclusion that defendant had a propensity to assault girls of the same age as NL. We also observe that the nature of the asserted assault against RC is similar to that of the alleged 2018 assault against NL.

With regard to temporal proximity and frequency, as noted, TS and RC together would assert that there were three assaults within two to three years of the charged conduct, which does not suggest a lack of temporal proximity or lack of frequency that would warrant suppression of the testimony. Regarding need, the evidence in the charged case is not overwhelming, and the testimony of RC could significantly bolster NL's credibility.

Regarding reliability, there is some suggestion in the record that the prosecution did not bring charges against defendant regarding RC's allegations because there were credibility concerns. Both RC and her sister, who allegedly was present during the assaults on RC, were interviewed by police who reported that the girls were reluctant to provide information and that their accounts differed regarding the location of the incidents and the extent of the contact. The suggestion of unreliability, however, is not so great that failure to exclude the evidence on that basis alone could be deemed an abuse of discretion.

We therefore conclude that the trial court properly analyzed the evidence under MRE 403, and properly weighed the proposed other-acts evidence admissible under MCL 768.27a in favor of the propensity inference of the evidence's probative value rather than its prejudicial effect. See *Watkins*, 491 Mich at 487. The trial court therefore did not abuse its discretion by determining that the evidence of the alleged assaults on TS and RC does not warrant exclusion under MRE 403.

Affirmed.

/s/ Michael F. Gadola
/s/ David H. Sawyer