S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2011
v	No. 298748 Berrien Circuit Court
JOSEPH WALTER MELLOTT, Defendant-Appellant.	LC No. 2009-016446-FC

Before: MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); and three counts of second-degree criminal sexual conduct, MCL 750.520c. We affirm.

Defendant argues the trial court plainly erred by admitting other-acts testimony. The prosecution presented evidence of a statement defendant made about an uncharged sexual offense with a minor. On appeal, defendant argues that his own statement alone was insufficient evidence of the other act for admission under MCL 768.27a, and that the testimony should have been excluded under MRE 403. At trial, defendant did not object for either of these reasons. These issues are unpreserved. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). This Court reviews unpreserved issues for plain error. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). Defendant must show that plain error, which affected his substantial rights, occurred. *Id*.

Defendant's first-degree criminal sexual conduct, MCL 750.520b, convictions were based on allegations that he engaged in fellatio with his stepdaughter, who was less than 13 years old at the time. Defendant's second-degree criminal sexual conduct convictions, MCL 750.520c, were based on allegations that defendant repeatedly engaged in sexual contact with his stepdaughter, again while she was less than 13 years old. Before trial, the prosecutor gave defendant notice, under MCL 768.27a, that it planned to introduce evidence of uncharged sexual offenses with a minor. MCL 768.27a allows for the admission of defendant's uncharged sexual offenses against minors. *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007). The statute does not specify the measure of evidence necessary before the other act may be admitted. Even when testimony is admissible under MCL 768.27a, the trial court must still determine that the probative value of the evidence is not substantially outweighed by the danger

of unfair prejudice, MRE 403. *Id.* at 618-619. MRE 403 allows a trial court to exclude relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403 only prohibits the admission of unfairly prejudicial evidence. *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id.*

Relevant to MCL 768.27a, Trooper Erik Darling, of the Michigan State Police, testified that during an investigation in 1999 for another alleged assault, defendant stated that he had previously been charged with child molestation in 1994 for having sexual intercourse with a 15-year-old girl who had been living with him at the time. Defendant told Trooper Darling that he had been acquitted of the 1994 charge because the girl had actually been 16-years-old at the time, and she had fellated him instead of having sexual intercourse.[1] On appeal, defendant argues that the trial court plainly erred by admitting this testimony because defendant's statement alone was insufficient evidence of the existence of the other act to allow for its admissibility under MCL 768.27a. We disagree. MCL 768.27a does not require any particular amount of evidence of the other act. More importantly, a defendant's own statement can be substantive evidence. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002), citing MRE 801(d)(2).

Defendant also argues that the trial court plainly erred in admitting Trooper Darling's testimony because the danger of unfair prejudice substantially outweighed the evidence's probative value. MRE 403. A court must not take lightly its duty to weigh the probative value of the evidence against its highly prejudicial effect before admitting evidence under MCL 768.27a. *Pattison*, 276 Mich App at 620-621. Trooper Darling's testimony had substantial probative value because even if defendant was acquitted of committing the crime with which he had been charged, defendant's admitted other act involved fellatio with a young girl who, as with the victim in this case, lived in defendant's home because of her mother's relationship with defendant. It therefore corroborated the current victim's testimony. The evidence was relevant and admissible to demonstrate the likelihood of defendant committing the same criminal sexual conduct with the similarly-situated victim. *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008). It was particularly relevant because defendant challenged the victim's credibility.

Most evidence introduced against a defendant is prejudicial to some extent. *People v Railer*, 288 Mich App 213, 220-221; 792 NW2d 776 (2010). However, the record does not demonstrate that this case involves marginally probative evidence that would be given undue or preemptive weight. *Crawford*, 458 Mich at 398. Additionally, the trial court instructed the jury on how to properly use evidence of defendant's uncharged acts with a minor. "[J]urors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229

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[1] We note that the 1994 incident occurred in Indiana. There is no law in Michigan prohibiting sexual contact or penetration *per se* with persons aged sixteen or older, in the absence of additional situational factors, such as relationship by blood or affinity or the use of force or authority. In Michigan, fellatio and sexual intercourse are both "sexual penetration," MCL 750.520a(r), and they were so defined in 1994.

(1998). The trial court did not plainly err in admitting Trooper Darling's testimony. *Carines*, 460 Mich at 763.

More importantly, the victim in this case gave detailed testimony regarding the criminal sexual conduct, and another witness testified regarding an attack by defendant, which corroborated the victim's credibility as to the second-degree criminal sexual conduct charges. We note that defendant was able to present to the jury his own testimony that although he was tried for, and acquitted of, allegedly having sexual intercourse with the girl from the 1994 incident, he never engaged in fellatio with her or admitted to Trooper Darling engaging in fellatio with her. Furthermore, the mother of the girl from the 1994 incident testified that defendant never harmed her in any way and that the girl in fact dated defendant's brother from approximately the age of sixteen and that she was now 34 and married to the brother. Therefore, the jury was able to make its own assessment of the credibility of Trooper Darling's testimony about the 1994 incident, and we cannot second-guess that assessment. In any event, Trooper Darling's testimony regarding the 1994 incident was a minor portion of the evidence, and there was significant other evidence in support of defendant's conviction.

Next, defendant argues that defense counsel was ineffective for failing to sufficiently preserve his issue on appeal. Specifically, he argues that defense counsel provided ineffective assistance of counsel by insufficiently objecting to Trooper Darling's testimony, by failing to preserve the issue, or by failing to preserve a record of the trial court's ruling on the objection. The Sixth Amendment of the United States Constitution and the Michigan Constitution guarantee the right to assistance of counsel. US Const, Am VI; Const 1963, art 1, § 13. Before a defendant's conviction may be reversed because he was denied effective assistance of counsel, he must show two things: (1) "counsel's performance fell below an objective standard of reasonableness," and (2) "that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Trooper Darling's testimony was admissible under MCL 768.27a. The probative value of Trooper Darling's testimony was not substantially outweighed by the danger of unfair prejudice. Therefore, had defense counsel objected on the same grounds defendant now asserts on appeal, his objection would have been overruled. Failure to advance a "futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Affirmed.

/s/ Jane E. Markey
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause