STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2012
v	No. 305277 Ottawa Circuit Court
VIRGIL NAPIER, Defendant-Appellant.	LC No. 10-035174-FH

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by right his conviction by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a). We affirm.

On the night of September 26, 2010, defendant was taking care of the five-year-old victim. The victim testified defendant woke her up to go to the bathroom. Then "[h]e set me on the counter, and then, Umm [sic], he only licked in the back of my butt, but only in, in the front, too, a little." She stated her underwear was around her ankles. The victim testified that during the incident defendant was holding her legs in the air with one hand. She described that "it felt like he was wiggling his tongue" and that it was "in my butt and—yeah, it was right by my butt hole." She described that defendant wiped her with a towel. The victim went to sleep, but got up in the night, got in bed with her mom, and told her mom. The victim's mother recalled the victim getting in her bed and telling her something about a bathroom counter.

The next morning, defendant collapsed. He had taken several Xanax pills and attempted to commit suicide. After defendant was taken to the hospital, the victim provided more information to her mother. The mother testified the victim "said she went potty. And she said, she said he put her on the bathroom counter and started kissing and licking her body, and then he put her back to bed." Mother testified that the victim referred to her private parts as "her body."

The mother took the victim to the emergency room. An examination was completed and evidence for a lab kit was collected. The victim's physical examination was normal, which was consistent with the victim's disclosure of oral contact and no pain or bleeding. At the emergency room, the victim reported that defendant "licked my whole body, referring to the genital area and butt, and then he wiped the area off with a black towel that was wet."

Detective Robert Donker collected a damp brown towel from the bathroom at the house. The victim's underwear and the towel tested negative for the presence of biological materials. Vaginal, rectal, and oral swabs from the victim tested negative for seminal fluid or spermatozoa and the genital swab tested negative for saliva.

Breah Groen, a forensic interviewer, was informed the victim referred to her private parts as "body," "front butt," and "back butt." The victim told Groen that defendant

> kissed her front butt and he licked her back butt, that he picked up her legs and put his tongue inside in the back of her butt, that she felt that it was scratchy because of his beard, and when asked where she felt scratchy, she pointed to her genital area.

Evidence was introduced that the FBI was investigating defendant for involvement with child pornography starting in October of 2007. Five images were downloaded from his computer involving naked prepubescent girls. Defendant admitted to the agent that he masturbated to the images and that he was addicted to looking at the images in a way similar to an addiction to a good cup of coffee. Charges were never brought and the investigation was closed shortly after defendant's suicide attempt. Defendant moved before trial to exclude this evidence as inadmissible under MRE 404(b) or MCL 768.27a. The trial court denied the motion. A jury convicted defendant of first-degree criminal sexual conduct. Defendant now appeals.

Defendant argues there was insufficient evidence to support his conviction, a claim we review de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). We "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). MCL 750.520b(1)(a) prohibits a person from engaging in "sexual penetration" with another person who is under 13 years of age. "Sexual penetration" is "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). Thus, by definition, cunnilingus is an act of sexual penetration. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992).

The victim's testimony and what she told others viewed in a light most favorable to the prosecution supports a rational trier of fact's finding that the essential elements of the crime were proven beyond a reasonable doubt. *Wolfe*, 440 Mich at 515. Additionally, although a victim's testimony need not be corroborated, MCL 750.520h, other circumstantial evidence, including his attempted suicide and his involvement with child pornography, supports defendant's conviction.

Second, defendant argues that evidence of the child pornography investigation was incorrectly admitted pursuant to MRE 404(b), that MCL 768.29a is unconstitutional, that the rules of evidence should control and that MRE 403 precludes admission. Defendant preserved his argument that the evidence was inadmissible pursuant to MRE 404(b) by presenting it in the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). The trial court's decision in this regard is reviewed for an abuse of discretion. *People v Bauder*, 269 Mich App

174, 179; 712 NW2d 506 (2005). Defendant's arguments that the evidence was inadmissible because MCL 768.27a is unconstitutional, that the rules of evidence should control, and that MRE 403 precludes admission were not raised below and are therefore not preserved. *Id.* at 177-178. These arguments are reviewed for plain error affecting substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

Defendant challenges admission of evidence of an FBI investigation of defendant's involvement with child pornography stemming from materials found on defendant's computer. The testimony included that defendant admitted he downloaded the image; he masturbated to the images, and that he was addicted to the pornography. MCL 768.27a 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." MCL 768.27a. "Because a defendant's propensity to commit a crime makes it more probable that he committed the charged offense, MCL 768.27a permits the admission of evidence that MRE 404(b) precludes." *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012). Our Supreme Court has concluded that "MCL 768.27a is a valid enactment of substantive law to which MRE 404(b) must yield" and "in cases in which the statute applies, it supersedes MRE 404(b)." *Watkins*, 491 Mich at 475, 477. Consequently, defendant's arguments that MCL 768.27a is unconstitutional and that MRE 404(b) should control admissibility of the evidence are without merit.

Evidence admissible pursuant to MCL 768.27a, however, may be excluded under MRE 403. *Watkins*, 491 Mich at 481. In evaluating evidence under MRE 403 in this context, "courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Id*. at 487. The challenged evidence in this case was probative because the pornography involved prepubescent girls, and the victim was a prepubescent girl. The evidence showed defendant's propensity for sexual attraction to prepubescent girls.

Further factors for courts to consider when applying MRE 403 in this context 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. [*Watkins*, 491 Mich at 487-488.]

First, although viewing child pornography while masturbating is not the same as sexually abusing a child, the acts are similar because both involved prepubescent girls. Second, the FBI investigation was ongoing at the time of the instant offense. Third, defendant admitted he was addicted to both the pornography and masturbating while watching it; his behavior was not on an isolated occasion. Fourth, there is no evidence of intervening acts. Fifth, there is no indication that the evidence of the pornography investigation or defendant's admissions concerning it is unreliable. Sixth, although the 5 year old victim testified, there was no physical evidence of the assault. We conclude that none of these considerations weigh against admitting the evidence.

Although MCL 768.27a permits admission of evidence regarding acts that would constitute a listed offense that do not result in a conviction,[1] trial courts may consider lack of a conviction when weighing admissibility under MRE 403. *Watkins*, 491 Mich at 489. In this case, defendant was not charged or convicted of a listed offense; however, the challenged evidence was strongly corroborated by the images from defendant's computer and his admissions. The fact that defendant was not charged or convicted is but one factor (reliability of the evidence) in applying MRE 403, *Watkins*, 491 Mich at 487-488, and does not weigh significantly in favor of excluding the evidence in this case. We conclude that the evidence was properly admitted under MCL 768.27a and that MRE 403 did not require its exclusion.

We affirm.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Deborah A. Servitto

[1] Possession of child sexually abusive material, MCL 750.145c(4), was at the time of the crime and remains a "listed offense." MCL 28.722(k), (s)(i); *People v Althoff*, 280 Mich App 524, 537-540; 760 NW2d 764 *Watkins*, 491 Mich (2008).