STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 7, 2013
v	No. 305890 Eaton Circuit Court
WILLIAM THOMAS BEEBE, Defendant-Appellant.	LC No. 11-020108-FC

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

GLEICHER, J., (*concurring*).

I concur with the lead opinion's decision to affirm defendant's convictions and sentence, but am unable to adopt its analyses concerning the admission of other-acts evidence and the "human lie detector" testimony of an investigating police officer.

I.

The prosecutor charged defendant with having sexually assaulted his niece in 2008. Before trial, the prosecutor notified defendant that she planned to introduce evidence of "other acts of criminal sexual conduct by defendant" committed in 1991 and 1992. The prosecutor's evidence consisted of a police report detailing the assaults and a retired state trooper's testimony that defendant pleaded guilty to second-degree criminal sexual conduct in 1993. Defendant preserved his objection to the introduction of the other-acts evidence by raising the evidence's remoteness in his written objection to the prosecutor's notice filed pursuant to MCL 768.27a. Defendant then objected at trial that this evidence was too old to demonstrate propensity, and thus was more prejudicial than probative. The following colloquy ensued:

> [*Defense Counsel*]: Your Honor, my objection is based primarily on the fact that this entire intention to introduce evidence is evidence that's some twenty years old. And, I think when we look at 403 in conjunction with the MCLA . . . 768.72 [sic], that there is a clear division of responsibility. And, I think it's incumbent upon the Court to look at both of those things in conjunction. And, I would say I think that the report that's going to be introduced, which is a police report going back nineteen years, is going to talk about some acts of an entire family along with Mr. Beebe, none of which led to a CSC first conviction, it was a conviction by plea of no contest I think in 1992 to second degree, for which he served a year in the county jail. I just don't think that that evidence is anything

> other than prejudicial to my client. I don't think it's probative, I don't think it shows a propensity, I don't think it does anything that would enable a juror to come to a fair decision.
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> * * *
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> *The Court:* All right. Well, I've reviewed—I've had a chance to now review the law on this. I'm—I think there has to be a clear distinction made between MCL 768.27a, which by case law trumps the similar acts provision where there is a weighing of prejudicial versus probative, where the Court is given discretion.
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> In this case—and the statute says not that the Court may permit it but evidence 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.
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> Certainly there is some relevance. I would agree with the defense that it is fairly remote. However, courts have also ruled that the remoteness goes to the weight, not the admissibility, which seems to this Court to be a strange interpretation, but there it is. I think by the mandatory nature of MCL 768.27a and the court's ruling that the remoteness goes not to the admissibility but to the weight I think the defense is entitled to an instruction on that. But, I believe that it is admissible even though I certainly have some strong reservations about the fairness to the defendant. But, I believe I'm required by the present state of the law to admit it.

The lead opinion concedes that "the trial court failed to engage in the MRE 403 balancing test and seemingly believed that it could not engage in this test," but holds that this error did not merit reversal. While I agree that the trial court's error qualifies as harmless, I believe that this call is far closer than the lead opinion suggests.

According to the lead opinion, the admission of evidence concerning events that occurred 20 years earlier did not "prejudice[] defendant's substantive rights." Contrary to the lead opinion's conclusions, the other-acts evidence, including the state trooper's description of remote events as "one of the worst examples of family incest" he had ever encountered, was highly prejudicial, and potentially *unfairly* prejudicial. Whether the remoteness of the challenged evidence created a danger of unfair prejudice that substantially outweighed its probity was never considered by the trial court. In my view, the answer to this question flows from meticulous application of the balancing process contemplated in MRE 403, which safeguards the right to a fair trial in cases also governed by MCL 768.27a. To the extent the lead opinion brushes aside the importance of rigorous analysis under MRE 403, I must respectfully disagree.

By failing to weigh whether the prejudicial nature of the evidence concerning the 1991-1993 events overcame its probative value, the trial court abused its discretion. See *People v Cherry*, 393 Mich 261; 224 NW2d 286 (1974) (the court's failure to recognize its discretionary power is itself an abuse of discretion). While the other-acts evidence was indisputably probative

of defendant's propensity to commit sexual crimes against minors, it remained subject to analysis under MRE 403. The record simply does not reflect that the trial court understood that it could have exercised its discretion and disallowed evidence regarding the 1991 and 1992 assaults based on their remoteness in time.

In *People v Watkins*, 491 Mich 450, 487; 818 NW2d 296 (2012), the Supreme Court specifically identified "the temporal proximity of the other acts to the charged crime" as one of the analytical considerations "that may lead a court to exclude such evidence." The *Watkins* Court emphasized, "[T]here is simply no legal basis for concluding that the lack of a temporal limitation in MCL 768.27a somehow means that the length of time since the other act of sexual misconduct against a minor occurred cannot be considered when weighing prejudice under MRE 403." *Id.* at 488. In fact, "[t]rial courts should apply this balancing to each separate piece of evidence offered under MCL 768.27a." *Id.* at 489. Thus, I believe the admissibility question presented in this case requires deeper analysis than a stark conclusion that because the evidence was "highly probative," it should have been admitted.

Evidence of a defendant's previous sex crimes against children is also highly prejudicial, particularly when those crimes occurred 20 years earlier. Indisputably, Michigan's Rules of Evidence recognize that convictions over 10 years old present a danger of unfair prejudice when used to impeach a witness's credibility. MRE 609(c). Indeed, MRE 609(c) creates a presumption that when introduced as impeachment evidence, such convictions are more prejudicial than probative. Thus, whether the more than 20-year-old evidence employed as *substantive evidence of guilt* qualified as substantially more unfairly prejudicial than probative requires careful consideration.[1]

"[T]emporal remoteness depreciates the probity of the extrinsic offense." *United States v Beechum*, 582 F2d 898, 915 (CA 5, 1978). Remote evidence of past misconduct may be excluded under MRE 403 for a variety of reasons, including a defendant's subsequent rehabilitation and the natural erosion of memories. Here, the two-decade temporal gap between the prior acts and the current ones may signify a lessened likelihood of a propensity to commit sex crimes against children. That defendant was only 12 years old when he sexually abused his sister, supports the notion that time may have brought a change in his behaviors. On the other hand, courts have acknowledged that the similarity between prior acts and the charged offense may outweigh any remoteness concerns. See *United States v Larson*, 112 F3d 600, 604-605 (CA 2, 1997) (discussing the history of FRE 414, the federal counterpart of MCL 768.27a).

The remote acts introduced in this case involved an 11-year-old family-member victim. The charged misconduct also involved a young (11-year-old) family-member victim. In both

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[1] I respectfully disagree with lead opinion that "[t]he remoteness of the other act affects the weight of the evidence rather than its admissibility." This conclusion puts the cart before the horse. The remoteness of the evidence must be considered in determining whether the evidence should be admitted at all—in other words whether its relevance outweighs any countervailing unfair prejudice arising from its staleness.

cases, defendant had easy access to the victims during family get-togethers. Evidence that defendant had a propensity to commit sexual offenses against young, female family members bore substantial probity. The trial court's failure to weigh the similarity of the other acts evidence against its remoteness requires this Court to either strike the balance, or to conclude that admission of the evidence was harmless error.

In *Watkins*, the trial court similarly failed to apply MRE 403. The Supreme Court held this omission harmless as "[i]n addition to being probative because of the propensity inference, the other-acts evidence also supported the victim's credibility, presented circumstances similar to those underlying the charged offense, and established Watkins's modus operandi." *Watkins*, 491 Mich at 491. While I believe the question in this case to be far closer than it was in *Watkins*, given the other evidence presented, any error in admitting the other-acts evidence did not constitute a miscarriage of justice.

II.

I also respectfully disagree with the lead opinion's conclusion that a testifying police officer "did not express a conclusion about defendant's credibility." The parties stipulated that the jury would view defendant's recorded interview with state trooper Nicole Hiserote. At the conclusion of Hiserote's testimony, the following colloquy ensued:

> *Q*. Now, part of – when you do this interrogation part is it important to be looking at the interviewee's demeanor?
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> *A*. Yes, it is.
>
> *Q*. And, why is that important? What do you look for?
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> *A*. Especially once you have made that accusation it's very common for them to kind of close themselves in, possibly cross their legs. It's an instinct to protect sensitive spots, possibly crossing arms, lack of eye contact, looking down, so forth.
>
> *Q*. And, in watching the video *what are some of the demeanor, the actions that you saw of the defendant*?
>
> *A*. I definitely saw some crossed arms and some legs crossed, failing to turn towards me or open himself up to me. We're taught that when you're doing the interview and the interrogation that you make yourself very open, because if someone's being honest with you they will also often feel very open and face you and have a conversation. *If you are being very open to them and they're not being truthful with you, a lot of times they will turn, maybe try to extend back from you again, cover up or cross*. [Emphasis added].

With this testimony, Hiserote informed the jurors that when they saw defendant crossing his arms or legs or turning away from the interviewer, they could reliably assume that defendant was lying.

Hiserote began her testimony by explaining that she had received "further training other than just what's provided in the academy as far as interviewing and interrogation techniques." This Court has held that an expert cannot be used as "a human lie detector" to give "a stamp of scientific legitimacy to the truth" of the witness' statement. *People v Izzo*, 90 Mich App 727, 730; 282 NW2d 10 (1979). Hiserote's "further training" in suspect interviewing lent her the air of an expert witness. It is readily apparent that when eliciting Hiserote's testimony concerning a suspect's body language, the prosecutor anticipated that the jury would compare Hiserote's description of deceptive behaviors with those demonstrated by defendant in the recording. Although Hiserote did not *expressly* state a conclusion about defendant's credibility, she implicitly did exactly that. I would hold that the prosecutor's deliberate orchestration of Hiserote's inadmissible opinion testimony amounted to prosecutorial misconduct. Nevertheless, I conclude that the introduction of this improper evidence does not mandate reversal of defendant's convictions, as this testimony likely did not undermine the reliability of the jury's verdict.

/s/ Elizabeth L. Gleicher