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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 7, 2013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.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age). He was sentenced as a fourth offense habitual offender, MCL 769.12, to a mandatory term of life imprisonment without the possibility of parole for each count of CSC I, and 25 to 50 years imprisonment for CSC II. Defendant appeals as of right. This panel differs as to the number of errors that took place at trial and as to the egregiousness of those errors, but we unanimously agree that defendant's trial did not suffer from errors that, under the current state of the law, compel us to reverse. Consequently, we affirm.

The victim in this case was a member of defendant's family. The victim testified that defendant assaulted her when she was 11 years old, while she was spending the night at his house. At trial, the prosecutor called two additional witnesses who testified regarding other acts evidence, specifically that defendant had engaged in improper sexual behavior with them approximately 20 years earlier. Both witnesses were also family members. Some of the other acts resulted in defendant being convicted of CSC II, by plea, in 1995.

First, defendant argues that MCL 768.27a infringed on his due process right to a fair trial. Specifically, he argues that MCL 768.27a is unconstitutional because it prevents the trial court from balancing the probative value and prejudicial effect of proffered other-acts evidence. Because defendant failed to raise this argument below, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

In *People v Watkins*, 491 Mich 450, 481; 818 NW2d 296 (2012), our Supreme Court held that MCL 768.27a is subject to MRE 403 balancing. Here, the trial court failed to engage in the MRE 403 balancing test and seemingly believed that it could not engage in this test.

Consequently, the trial court committed clear error. However, to merit reversal, this error must have prejudiced defendant's substantial rights, which it did not.

Watkins instructs that "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.* at 487. The Court instructed that "when applying MRE 403 . . . , courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Id.* at 487.[1] Here, the propensity inference is enhanced by the similarity between the charged acts and the prior behavior placed in evidence. One of the two other-acts witnesses testified to defendant engaging in sexual behavior with her, including penetration, beginning when she was 5 years old and ending when she was 11 or 12, and the other testified to witnessing such behavior. The second witness also testified that defendant had tried to touch her inappropriately when she was a young child. Given that the victim was the only witness who could testify to what happened between her and defendant, the other-acts evidence was highly probative. It is axiomatic that highly probative evidence favoring the prosecution will be highly prejudicial to the defense, but it is not thereby axiomatically *unfairly* prejudicial, especially because, as noted, propensity inferences are permitted under MCL 768.27a.

The other acts had occurred approximately 20 years prior to the charged offense. However, "[t]he remoteness of the other act affects the weight of the evidence rather than its admissibility." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011). It is conceivable that other acts that are sufficiently remote could eventually become so attenuated that a court could determine, with reasonable certainty, that they no longer carry enough weight to have enough probative value to outweigh the danger of unfair prejudice, confusing the jury, or similar concerns. However, that conclusion would be highly dependent on facts such as the individual circumstances of the case, the defendant, and the circumstances of the other acts; it would be impossible to craft a bright-line guide for the precise point at which judges should invade what is ordinarily the purview of the jury. The defense, of course, may always argue to the jury that they should not, in fact, give evidence from so far in the past any credence. In the absence of a blatantly obvious reason why the other-acts evidence at issue is so remote that it could not possibly have had any probative value, the courts should not second-guess its admissibility.

In addition, the trial court instructed the jury according to CJI2d 20.28a, which is the standard instruction of other-acts evidence of child molestation. "In cases in which a trial court

---

[1] The Court also provided some considerations that a trial court could use to determine whether the other-acts evidence is overly prejudicial:

> 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. . . . [*Watkins*, 491 Mich at 487-488.]

determines that MRE 403 does not prevent the admission of other-acts evidence under MCL 768.27a, this instruction is available to ensure that the jury properly employs that evidence." *Watkins*, 491 Mich at 490. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant was not denied his due process right to a fair trial particularly in light of the fact that he was convicted by plea in 1995 for some of the other-acts evidence, which certainly makes the evidence more reliable and the acts were very similar in nature. *Watkins*, 491 Mich at 487-488.

Next, defendant argues that the prosecutor improper elicited "human lie detector" testimony from a police officer. Defendant failed to raise the issue below, so we again review for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

The record does not indicate that the prosecutor elicited the cited testimony in bad faith. "It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *Id.* at 71. However, under MRE 701, police officers can testify about their opinions or inferences formed by their observations and rational perceptions as police officers. *People v Oliver*, 170 Mich App 38, 49-50; 427 NW2d 898 (1988).

Contrary to defendant's assertion, the officer in question did not comment on defendant's credibility. Without prompting by the prosecutor, the officer gave a description of interrogation and interview techniques and explained to the jury the process that occurs. From there, the prosecutor followed up with a question regarding the importance of observing a suspect's demeanor. The officer responded by explaining what a suspect's particular demeanor indicates. The officer then described defendant's demeanor during his interrogation, and what those actions *can* indicate. However, the officer did not purport to explain what defendant's actions *actually did* indicate. Indeed, the officer's explanation was phrased in terms of what is common, not in terms of certainties. The officer never stated whether she believed defendant to be lying and why. Consequently, unlike the "human lie detector" doctor in *People v Izzo*, 90 Mich App 727; 282 NW2d 10 (1979), who purported to state with certainty that he *would* know if a witness had been truthful to him, the officer here did not express a conclusion about defendant's credibility. It was proper for her to testify about her observations of defendant based on her interrogation training.

Next, defendant claims that he received ineffective assistance of trial counsel. We disagree. "[O]ur review is limited to mistakes apparent from the record" because defendant did not raise the issue of ineffective assistance of counsel in a motion for a new trial or request a *Ginther* hearing.[2] *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).

To prove defendant received ineffective assistance of counsel, a defendant must show: (1) "that counsel's performance was deficient in that it fell below an objective standard of

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

professional reasonableness," and (2) that there is a reasonable probability the outcome of the trial would have been different but for counsel's performance. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). There is a presumption of effective assistance of counsel and the burden is on defendant to prove otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

First, defendant argues that defense counsel was ineffective for informing the jury of the incestuous relationships in defendant's family. However, the record indicates that it was defense counsel's trial strategy to introduce the subject. Before trial, defense counsel was aware that the other-acts evidence would be admitted. In his opening statement to the jury, counsel preemptively cautioned the jurors to listen carefully to the trial court's instructions on how to treat such evidence. He also wove that evidence into a theory of defense, which he carried through his closing statement. It is objectively reasonable for an attorney faced with the introduction of damaging other-acts evidence to assimilate that evidence into the attorney's own presentation of the case, and to do so before the opposing party has an opportunity to do so. Defense counsel here could have decided that mentioning the general outlines of the family sexual dynamic before the prosecution did would, even minimally, lessen the impact it would have. In addition, counsel used this family history to help portray the victim as "damaged," and thereby contest the validity of her testimony without calling it perjurious. The fact that the trial strategy was unsuccessful does not constitute ineffective assistance. *People v Stewart* (*On Remand*), 219 Mich App 38, 42; 555 NW2d 715 (1996).

Second, defendant argues that defense counsel was ineffective for failing to object to a police officer testifying that he interviewed defendant at the sheriff's department, "where he was incarcerated at that time." The record indicates that the comment was unanticipated. The prosecutor asked when and where the officer interviewed defendant, and not why the interview occurred at that particular location. Further, the comment was brief, and it is possible defense counsel did not want to draw attention to it by objecting. "Declining to raise objections can often be consistent with sound trial strategy." *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008). Defendant has not overcome the strong presumption that defense counsel's failure to object was sound trial strategy.

Finally, defendant claims that his mandatory sentence of life imprisonment without the possibility of parole, pursuant to MCL 750.520b(2)(c), is cruel and unusual punishment. We rejected this same argument in *People v Brown*, 294 Mich App 377, 390-392; 811 NW2d 531 (2011). However, we note that even if we entertained defendant's argument that his sentence should be proportionate to an individual analysis of the circumstances under which the crime occurred and his probability of rehabilitation, we do not find that his sentence here is disproportionate. Not only has the Legislature appropriately recognized that such a violation generally has devastating lifelong consequences, the victim here discussed her own ongoing physical and emotional problems and fear of retaliation from defendant. Indeed, she indicated that he had "destroyed her life," The evidence showed that defendant has an ongoing pattern of taking advantage of and destroying the lives of others in a similar manner. It may be that, defendant is, as one prior police report put it, "a product of his environment" and a dysfunctional family filled with "rampant sexual abuse," but no explanation changes the facts. Simply put, life imprisonment without the possibility of parole does not in any way appear disproportionate to

defendant's conduct and potential for rehabilitation. Consequently, defendant's sentence did not constitute cruel or unusual punishment.

Affirmed.

/s/ Amy Ronayne Krause