

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

January 24, 2013

Plaintiff-Appellee

v

No. 306086

Wayne Circuit Court

RYAN ERNEST ANDREE,

LC No. 11-003171-FH

Defendant-Appellant.

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age). Defendant was sentenced to two years' probation. Because we conclude that the trial court did not abuse its discretion by admitting other acts evidence under MRE 404(b) and because there was sufficient evidence to support defendant's convictions, we affirm.

This case arises from defendant's sexual contact with the victim, his minor cousin, during a family gathering on January 23, 2011, at defendant's home. Defendant twice pulled the victim onto his lap and fondled her breast.

On appeal, defendant first argues that the trial court unfairly prejudiced his right to a fair trial by admitting other acts evidence under MRE 404(b). We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Smith*, 282 Mich App 191, 194; 772 NW2d 428 (2009). A trial court abuses its discretion "when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009). However, when the decision involves a preliminary question of law, such as whether a rule of evidence precludes admission, an appellate court reviews the question de novo. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

MRE 404(b)(1) governs the admissibility of other acts evidence, and provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence may, however, be admissible 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 when the same is material. "Relevant other acts evidence does not violate MRE 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *People v Vandervliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Evidence regarding other acts is admissible if it is offered for a proper purpose, is relevant to an issue at trial, and the probative value of the evidence is not substantially outweighed by the potential for unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

In this case, a motion hearing was held before defendant's trial regarding the admissibility of the other acts evidence. Specifically, the prosecution sought to admit testimony from the victim regarding a previous incident when defendant pulled the victim on top of him and touched her breast and buttocks during a family camping trip in 2010. The prosecution argued that the evidence was admissible under MRE 404(b) to demonstrate absence of mistake or accident, and that the evidence was relevant for this purpose in light of defendant's anticipated accident defense.¹ Defendant argued that the evidence should not be admitted because it would "inflame" the jury. The trial court found that the evidence was admissible under MRE 404(b) because it was relevant to rebut any claim of accident, and that the evidence was more probative than prejudicial. The jury was instructed in regard to the proper use and consideration of the other acts evidence during trial. On appeal, defendant argues that the trial court abused its discretion by admitting the evidence because it failed to adequately consider the unfair prejudice

¹ We note that the prosecution specifically requested admission of the other acts evidence under MRE 404(b) instead of under MCL 768.27a.

to defendant that arose due to the admission of the other acts evidence. However, defendant does not specifically dispute that the other acts evidence was admitted for the proper purpose of showing the absence of mistake or accident, and that the evidence was relevant. Thus, the only issue on appeal is whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

To determine whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, courts use the balancing test under MRE 403. MRE 403 provides that although 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. MRE 403 “does not prohibit prejudicial evidence; only evidence that is unfairly so. Evidence is unfairly prejudicial when a danger exists that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

Here, there is nothing in the record to suggest that the other acts evidence was given undue or preemptive weight by the jury. Rather, the record supports the conclusion that defendant did not suffer from any undue prejudice because the trial court twice gave the jury instructions regarding the proper use and consideration of the other acts evidence. *Id.* Jurors are presumed to follow the trial court’s instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, the evidence was highly probative due to the similarity of the other acts and the alleged conduct in this case. Therefore, we conclude that the trial court did not abuse its discretion by admitting evidence of the other acts of sexual contact between defendant and the victim because its ruling was not outside the range of reasonable and principled outcomes. *Waclawski*, 286 Mich App at 669-670.

Defendant also argues that the prosecution presented insufficient evidence to prove his convictions beyond a reasonable doubt. We disagree.

We review de novo claims regarding the sufficiency of the evidence. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). The evidence is viewed in a light most favorable to the prosecution to determine whether a rational jury could find that each element of the crime was proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). All conflicts in the evidence must be resolved in favor of the prosecution, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), and it is up to the finder of fact to make decisions about the credibility of witnesses and the probative value of evidence, *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant was convicted of violating MCL 750.520c(1)(a), which provides that “[a] person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and . . . [t]hat other person is under 13 years of age.” “‘Sexual contact’ includes the intentional touching of the victim’s or actor’s intimate parts, or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose

of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner” MCL 750.520a(q).

Defendant does not deny that the victim was 11 years old at the time of the incident or that he touched the victim’s breast. However, defendant maintains that he touched the victim’s breast on accident. Accordingly, the principle issue is whether there was sufficient evidence to prove defendant touched the victim for the purpose of sexual arousal or gratification, or for a sexual purpose or in a sexual manner. We conclude that there was sufficient evidence to demonstrate sexual contact.

In this case, the victim specifically testified to defendant’s conduct. The victim testified that she was sitting next to defendant in the basement, and he pulled her onto his lap, pushed his hand through the neck of her shirt and touched her bra, which covered her breast, and moved his hand around a bit. She estimated that defendant had his hand on her bra for about ten minutes. There were no other kids nearby; all of her cousins were in the next room. The victim recalled the first incident ending when they were called out of the basement for cake and ice cream. When the victim returned to the basement to see defendant, another touching occurred. Defendant pulled the victim onto his lap and put his hand down through the neck of her shirt a second time. Although he initially placed his hand over her bra, he then moved his hand under her bra and touched her breast. Again, no one was in the room. She estimated that the second incident lasted about 15 minutes. This incident ended when the victim’s mom called her and defendant upstairs to say goodbye to everyone.

Viewing this evidence in the light most favorable to the prosecution, the evidence demonstrates that defendant engaged in the intentional touching of the victim’s intimate parts and the clothing covering the immediate area of the victim’s intimate parts. MCL 750.520c(1)(a). The fact that defendant put his hand down the victim’s shirt twice at the party and, at one point, placed his hand on her bra and moved it around indicates that his touching was not merely accidental, as defendant claimed. The other acts evidence that was introduced by the prosecution, which revealed how defendant fondled the victim’s breast and buttocks while they were alone on a sand dune near the beach, provided further proof of defendant’s intent. Therefore, we conclude that there was sufficient evidence for a rational jury to find beyond a reasonable doubt that defendant intentionally touched the victim’s breast, or the clothing covering her breast, and that the touching was done for a sexual purpose or gratification.

Defendant points out numerous discrepancies between the victim’s testimony and his own; however, it is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Moreover, a victim’s testimony alone is sufficient to support a CSC II conviction. MCL 750.520h (victim’s testimony “need not be corroborated in prosecutions under sections 520b to 520g”).

Affirmed.

/s/ Joel P. Hoekstra

/s/ Kirsten Frank Kelly

/s/ Jane M. Beckering