

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 27, 2012

v

LOUIS WAYNE RANSOM,

Defendant-Appellant.

No. 306788
Kent Circuit Court
LC No. 11-002803-FH

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

Defendant Louis Wayne Ransom was convicted after a jury trial of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a), and assault with intent to commit CSC II, MCL 750.520g(2). The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to concurrent terms of 6 1/2 to 25 years' imprisonment for each conviction. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm the convictions and sentence of defendant.

I. FACTS

Defendant's convictions arise out of events that took place in the early morning hours of December 24, 2010. The victim heard a noise and awoke to find defendant, her grandfather, attempting to climb into the bed with her. Defendant held the victim down by grasping her arms with one hand and placing his foot over her legs. He then tried several times to touch the victim between her legs and on her chest. The victim testified to the following at trial:

Q. I know—just so we're specific, when you say private areas, what do you consider your private areas?

A. Like around my chest and between my legs.

* * *

Q. When you say tried to touch you there, what exactly happened, where did it go?

A. Well, it touched right on one of—on my chest right near my shoulder.

Q. When you say it touched there, I know it's hard, but can you give the jury an idea, what did it do, that hand?

A. Well, it just kind of brushed against my chest.

The victim tried to squirm away from defendant and told defendant to “leave [her] alone.” The victim’s step-grandmother, who was sleeping in the same room, testified that she woke up and saw defendant “straddling” the victim’s feet, holding her down, and moving his hand under the blanket near the victim’s “private.”

The prosecution also offered evidence at trial that defendant had inappropriate contact with the victim’s mother when she was a child. Specifically, the victim’s mother testified that defendant touched her vaginal area and asked her to touch his penis when she was five or six years old. Defendant testified that he pleaded guilty to CSC IV with regard to the incident.

II. ANALYSIS

Defendant first argues that his CSC II conviction should be overturned because insufficient evidence was offered at trial to prove that he touched the victim’s intimate parts. “We review de novo a challenge on appeal to the sufficiency of the evidence.” *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). When evaluating the claim, “this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt.” *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). “The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

MCL 750.520c(1)(a), 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” is defined as “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, [or] done for a sexual purpose” MCL 750.520a(q). “[I]ntimate parts” includes “the primary genital area, groin, inner thigh, buttock, or breast of a human being.” MCL 750.520a(e).

There was sufficient evidence of sexual contact that was presented at trial. First, after the victim testified that she considered her private areas to be “around [her] chest and between [her] legs,” the victim testified that defendant “brushed against [her] chest” and “touched right on one of—on [her] chest right near [her] shoulder.” The victim gave the aforementioned testimony in the midst of describing several attempts by defendant to touch her “private areas.” Second, the victim’s step-grandmother testified that she awoke to see defendant moving his hand under the blanket near the victim’s “private.” From this evidence, the jury could infer that defendant intentionally touched the victim’s breast for the purpose of sexual arousal or gratification. *Nowack*, 462 Mich at 400. Defendant does not dispute that the victim was under 13 years of age.

Therefore, viewed in a light most favorable to the prosecution, there was sufficient evidence to prove each element of CSC II beyond a reasonable doubt.

Next, defendant claims that evidence of his prior CSC IV conviction was erroneously admitted and that his trial counsel was ineffective for failing to object.

Generally, this Court reviews the admission of evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010) (citation omitted). An abuse of discretion occurs where the decision falls outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). In this case, however, the issue is unpreserved, and unpreserved issues are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 579 NW2d 130 (1999).

The evidence at issue was admitted under MCL 768.27a, which 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. A “listed offense” is “a tier I, tier II, or tier III offense,” such as CSC II. MCL 28.722; MCL 768.27a; MCL 750.520c. Furthermore, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401.

Recently, our Supreme Court held that “MCL 768.27a irreconcilably conflicts with MRE 404(b) and that the statute prevails over the court rule.” *People v Watkins*, 491 Mich 450, 496; 818 NW2d 296 (2012). Evidence admitted under MCL 768.27a remains subject to MRE 403 analysis, and the trial court may exclude this evidence if “its probative value is substantially outweighed by the danger of unfair prejudice . . .” *Id.*; MRE 403. “[W]hen applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence’s probative value rather than its prejudicial effect.” *Watkins*, 491 Mich at 487. Therefore, “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.*

This does not mean, however, that other-acts evidence admissible under MCL 768.27a may never be excluded under MRE 403 as overly prejudicial. There are several considerations that may lead a court to exclude such evidence. 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 487-88.]

Here, evidence that defendant sexually assaulted his daughter when she was a child is highly relevant because “a defendant’s propensity to commit a crime makes it more probable that he committed the charged offense.” MRE 401; *Watkins*, 491 Mich at 470. Thus, the question

remains whether its “probative value is substantially outweighed by the danger of unfair prejudice” MRE 403.

On these facts, the probative value is not substantially outweighed by the danger of unfair prejudice for the following reasons. First, the crimes are similar because (1) they both involved a child between the ages of six and ten, (2) defendant is related to both victims, and (3) they involve similar conduct by defendant. Second, the testimony concerning the prior bad act was corroborated by the victim’s mother. Finally, as stated above, we weigh defendant’s propensity to commit the offense “in favor of the evidence’s probative value rather than its prejudicial effect.” *Watkins*, 491 Mich at 487. It is true that there is a large lapse in time between defendant’s criminal sexual contact with the victim’s mother and the present case. However, this fact alone is insufficient to show that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Watkins*, 491 Mich at 487. Therefore, the evidence was properly admitted under MCL 768.27a and defendant has shown no plain error affecting his substantial rights. *Carines*, 460 Mich at 763.

We also find that defendant’s ineffective assistance of counsel claim is without merit. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). “[A] trial court’s findings of fact are reviewed for clear error” and constitutional questions are reviewed de novo. *Id.*; *People v Dunbar*, 463 Mich 606, 615; 625 NW2d 1 (2001). Where, as here, no *Ginther*¹ hearing was held, our “review is limited to the existing record.” *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To prevail on a claim of ineffective assistance of counsel, “defendant must show that counsel’s performance fell below an objective standard of reasonableness, and 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); *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Here, defendant cannot demonstrate that his counsel’s performance in failing to object, fell below an objective standard of reasonableness. We cannot conclude that defense counsel’s failure to object fell below a standard of reasonableness as any objection to the evidence admitted under MCL 768.27a would have been frivolous for the reasons previously set forth in this opinion. See, *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001). “Obviously, defense counsel is not required to make frivolous or meritless motions or objections.” *Id.*

Even if we were to find that defense counsel’s performance fell below an objective standard of reasonableness, defendant’s argument still fails because defendant cannot demonstrate prejudice. “To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant has the burden

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

In the present case, we cannot find from our review of the record as a whole that the result would have been different had the challenged testimony not been admitted. First, the victim testified that defendant held her down by grasping her arms with one hand and placing his foot over her legs. The victim further testified that defendant tried several times to touch her between her legs and on her chest. Specifically, the victim said defendant “brushed against [her] chest” and “touched right on one of—on [her] chest right near [her] shoulder.” The victim gave this description in the midst of describing several attempts by defendant to touch her “private areas.” Also, there was testimony that defendant asked the victim to touch him as well. Further, the victim’s step-grandmother testified that she awoke to see defendant kissing the victim in an “adult way.” She went on to testify that defendant was moving his hand under the blanket near the victim’s “private.” The jury could reasonably infer that defendant intentionally touched the victim’s “private” for the purpose of sexual arousal or gratification. Also, the victim is under the age of 13 years old. Thus, even if we presume defense counsel fell below an objective standard of reasonableness, defendant fails to prove that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *Strickland*, 466 US at 688.

Affirmed.

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens