

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 2, 2013

v

WILLIAM JOSEPH MOODY,

Defendant-Appellant.

No. 307645
Genesee Circuit Court
LC No. 11-028599-FH

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2). Defendant was sentenced, as a second habitual offender, MCL 769.10, to 28 to 90 months' imprisonment. We affirm.

On appeal, defendant argues that the trial court improperly admitted evidence, pursuant to MCL 768.27a, of similar, prior acts of child sexual abuse, given that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, MRE 403. We disagree.

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object and state the same ground for objection that it asserts on appeal. *People v Douglas*, 296 Mich App 186, 191; 817 NW2d 640 (2012). Defendant objected to the other-acts evidence at a pretrial hearing, arguing that such acts were not relevant.¹ Defendant did not, however, object to the evidence as impermissibly prejudicial pursuant to MRE 403. Therefore, defendant's MRE 403 argument was not properly preserved for appeal. An unpreserved claim of error is subject to the plain-error test. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Plain-error review

¹ The hearing was on the prosecution's motion to adjourn the trial date. The prosecution did not file a specific motion regarding the use of other-acts evidence at trial, though it gave appropriate notice that it planned to do so.

requires the defendant who has forfeited his claim of error to prove (1) that the error occurred, (2) that the error was “plain,” (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*People v Vaughn*, 491 Mich 642, 663-664; 821 NW2d 288 (2012).]

In order for a plain error to affect substantial rights, there must be a “showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Carines*, 460 Mich at 763.

MCL 768.27a provides, in relevant part, 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.”² Evidence which is admissible under MCL 768.27a “may nonetheless be excluded under MRE 403 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.’” *People v Watkins*, 491 Mich 450, 481; 818 NW2d 296 (2012), quoting MRE 403. In *Watkins*, 491 Mich at 487, the Michigan Supreme Court explained:

[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. That is, 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.

A court should consider the following factors when deciding whether to exclude other-acts evidence under MRE 403 as being overly prejudicial:

(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.]

The victim, NT, a ten year old female, testified that on January 10, 2011, her mother, 28 year old CT, dropped NT off at the apartment of NT’s aunt in Flint. NT was sitting on a couch

² “‘Listed offense’ means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.” MCL 768.27a(2)(a). MCL 28.722(k) defines a “listed offense” as “a tier I, tier II, or tier III offense.” Assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2), is a tier III offense when the victim is under the age of 13, as was the case here, and thus it is a listed offense for purposes of MCL 768.27a. See MCL 28.722(w)(v). There is no dispute that the other-acts evidence also concerned listed offenses.

watching television in the living room with defendant, the aunt's father,³ while the aunt slept in a bedroom. NT was wearing a t-shirt and blue jeans. Defendant was sitting on a separate couch in the living room, but at one point got up, walked over to the couch that NT was on, and sat down on her right side. While NT was sitting up, defendant "grabbed" her around her ankle and pulled her towards himself. NT testified that "he almost got my pants so I had pulled 'em up and I was trying to pull away still." Defendant pulled NT's pants, as well as her underwear, down to about her thighs. Defendant never removed his clothes, and NT testified that he had never done anything like this before. The aunt testified that she had been sleeping while NT and defendant were in the living room; but, when she woke up, she went into the kitchen to get some water. The aunt saw NT lying down on the couch on her stomach, while defendant was sitting on the couch with his hand "up under her." Defendant's hand was on the upper half of NT's body. Afterward, when alone with the aunt, NT "started fidgeting to her pants" and told the aunt, "he touched me."

NT's mother, CT, testified concerning the other-acts evidence at issue. On one occasion, when CT was nine or ten years old, she was with her 12 year old cousin, KB, when defendant touched their bare chests under their shirts. On a later occasion, defendant took CT and KB to an abandoned house, and defendant had sexual intercourse with KB. CT testified that "he pulled his pants down and pulled [KB's] down as she was hollering and got on top of her." On a third occasion, when CT was approximately 11 or 12 years old, CT was asleep in bed when defendant "came in and tried to put his hands up under my nightgown." Defendant then performed oral sex on CT.

With respect to the probative value of the other-acts evidence, it showed defendant's propensity to engage in illicit sexual acts with minor female relatives. At trial during closing arguments, defendant maintained that there was no evidence that he actually touched NT in a private area, no evidence that he exposed any sexual areas of his body, and "[a]bsolutely no testimony that anything of a sexual nature ever occurred." Consistent with the court's instructions to the jury, the prosecutor was required to prove that defendant's intention was to touch NT's intimate parts for the purpose of sexual arousal or gratification. MCL 750.520g(2); MCL 750.520c; MCL 750.520a(q); *People v Evans*, 173 Mich App 631, 634; 434 NW2d 452 (1988). The defense here was essentially that defendant had no intent to touch NT's intimate parts and that any contact was not for sexual arousal or gratification. Evidence showing that defendant had previously sexually assaulted CT and KB was extremely probative on the issues of defendant's intent, purpose in acting, and motive, standard grounds for admissibility under the stricter, but inapplicable, MRE 404(b). This is especially true considering the particular defense raised by defendant. And again, the evidence was probative of defendant's character or propensity to commit the sexual assault. *Watkins*, 491 Mich at 492 (trial court failed to weigh propensity inference in favor of the evidence's probative value in showing the defendant's "character or propensity to commit the charged offense"). The other-acts evidence was also highly probative in relationship to supporting NT's credibility and rebutting challenges to her

³ CT and NT's aunt are half-sisters, sharing the same mother, but they did not share defendant as a father.

testimony. *Id.* (“trial court failed to weigh in favor of the evidence's probative value the extent to which the other-acts evidence supported the victim's credibility and rebutted the defense's attack thereof”).

Turning to the prejudice component of MRE 403, defendant argues on appeal that various factors in the *Watkins* calculus render CT's testimony inadmissible under MRE 403. The first factor from *Watkins*—similarity between the prior acts and the charged crime—actually weighs in favor of admissibility. There were similarities between the circumstances involving the prior acts and the sexual assault against NT. First, NT, CT, and KB were all roughly the same age—between 9 and 11—when the alleged sexual conduct occurred. Second, all three victims were female. Third, familial relationships existed between defendant and the young female victims. Although the acts were not precisely the same, each constituted at least a sexually charged advance against a young female who was not a stranger to defendant.

With respect to defendant's arguments claiming a lack of temporal proximity, an absence of intervening acts, infrequency of the other acts, and a lack of reliability of the evidence supporting the occurrence of the other acts, while some of these factors may arguably weigh in favor of finding unfair prejudice, in whole, given the highly probative value of the other-acts evidence, we cannot conclude that the probative value of the other-acts evidence was substantially outweighed by the danger of unfair prejudice, MRE 403. Minimally, there is no basis to find a *plain* error. We note the nature of the other-acts evidence in one of the consolidated cases in *Watkins*, 491 Mich at 460, which was admitted by the lower court, and which ruling was affirmed by our Supreme Court:

The trial court allowed EW to testify regarding other-acts evidence under MCL 768.27a. According to EW, about 10 years earlier, when she was 15 years old, she had often baby-sat Watkins's oldest child. She testified that, during one visit, Watkins led her upstairs by the hand. He allegedly began kissing her, and their interactions culminated in sexual penetration. According to EW, their sexual relationship lasted a couple of years.

This evidence was ostensibly uncorroborated, there was no indication of intervening acts, and there was no close temporal proximity, yet the Court affirmed the ruling admitting the other-acts evidence. We likewise affirm under the facts presented here.

Affirmed.

/s/ William B. Murphy

/s/ Peter D. O'Connell

/s/ Jane M. Beckering