S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA DAVID SPRATLING,

Defendant-Appellant.

UNPUBLISHED
March 14, 2013

No. 308662
Kent Circuit Court
LC No. 11-006317-FH

Before: WILDER, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(a); two counts of accosting a child for immoral purposes, MCL 750.145a; and two counts of possession of child sexually abusive material, MCL 750.145c(4). The trial court sentenced him to concurrent terms of 75 months' to 15 years' imprisonment for the third-degree criminal sexual conduct conviction and 32 months' to four years' imprisonment for each of the remaining convictions. We affirm.

The victim testified that, in the summer of 2010 when she was 14 years old, she frequently spent weekends at her uncle's house where defendant[1] also lived. Defendant's mother was engaged to the victim's uncle, and defendant and the victim had a relationship like that of cousins. However, that changed because defendant told the victim she was pretty and started kissing her on the lips. Defendant asked the victim to send photographs of herself to him, which she did. Many of the photographs were introduced at trial. Some were "graphic" and some were only of her face. The victim sent photographs to about 17 other people. The photographs included images of the victim in her underwear, showing her breasts, holding her genital area open, and putting her fingers in her genital area. Telephone records verified that photographs were sent from the victim's telephone to defendant's telephone and that they were opened, although the photographs had all been deleted from defendant's telephone. When a detective asked defendant to appear for an interview, defendant stated that he knew it was about photographs the victim had sent him.

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[1] A document in the record identifies defendant's birthday as August 25, 1988. Therefore, he would have been 21 and 22 years old in the summer of 2010.

The victim described other incidents with defendant. One night defendant removed her pants and put his penis against her vagina; it touched the inside of her vagina. When she sat up defendant left. The interaction lasted two to four seconds. There was another incident when the victim was sitting on a couch and defendant stood in front of her with his penis exposed and told her to "lick it." The victim first said "no," and then, when defendant did not move away, she did what he asked. A third incident occurred when the victim was standing in the kitchen and defendant pulled her pants down and "started licking" her. The victim reported all these incidents, eventually, to detectives.

At trial, the testimony of a certain witness, A.J., was introduced. In the spring of 2008, when A.J. was 14 years old and defendant was 19 years old, he invited her and her 14-year-old friend to his apartment in Florida. He gave the girls alcoholic drinks, then kissed, fondled, and had sexual intercourse with each of them. A.J. testified that she told defendant that she was 14 years old. Officer Fred Eckert, from Florida, investigated the allegations and testified that defendant admitted that A.J. told him she was 14 years old before he and A.J. had sexual relations. Defendant later pleaded guilty to a misdemeanor involving contributing to the delinquency of a minor, and the case was then transferred to the Navy because defendant was on active military duty. Officer Eckert stated that defendant, in the military proceedings, pleaded guilty to a charge involving sex with a child.

Defendant objected to the admission of the evidence of the Florida incident. The trial court determined that the evidence was admissible under both MCL 768.27a and MRE 404(b).

Defendant first argues that the challenged other-acts evidence was improperly admitted. This issue is preserved, *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001), and is reviewed for a clear abuse of discretion, *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). MCL 768.27a 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.[2] "Because a defendant's propensity to commit a crime makes it more probable that he committed the charged offense, MCL 768.27a permits the admission of evidence that MRE 404(b) precludes." *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012).

However, evidence admissible pursuant to MCL 768.27a may be excluded under MRE 403, which deals, in relevant part, with probative value versus prejudicial effect. *Watkins*, 491 Mich at 481. In *Watkins*, the Michigan Supreme Court stated:

> [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

[2] It is not in dispute that the actions at issue here were "listed offenses."

> because it allows a jury to draw a propensity inference. [*Watkins*, 491 Mich at 487.]

Considerations that may result in a court excluding evidence under MRE 403 even though the evidence is admissible under MCL 768.27a 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.][3]

In this case, the challenged evidence had probative value to show that defendant had a propensity to have sexual relations with 14-year-old girls. It was also probative because it supported the victim's testimony. *Id*. at 491. Moreover, we conclude that the *Watkins* considerations do not weigh in favor of excluding the evidence. The incidents are similar because the girls in each case were the same age and defendant engaged in penile-vaginal penetration with the girls. The Florida incident occurred only two or two and one-half years before the instant offense. In Florida, defendant engaged in penile-vaginal penetration with each girl one time, and in the instant case defendant engaged in penile-vaginal penetration with the victim one time. Thus, we find that the infrequency of the other acts does not weigh in favor of excluding the evidence, given that the frequency of the one particular common act was the same for all victims. There is no indication that the testimony from the other-acts witnesses was unreliable. Further, there was a lack of physical evidence in this case and defense counsel argued that the victim's version of events was unreliable; thus, there was a need for evidence beyond testimony from the victim and defendant, even though defendant did not testify. Finally, there were no intervening acts. Viewing all the factors as a whole, we find that MRE 403 did not bar the evidence.

Defendant argues that the evidence should not have been admitted because the relevant charges related to his conduct in Florida were dismissed for lack of evidence.[4] However, the record does not support this argument. Officer Eckert testified that defendant "pled guilty to a misdemeanor [concerning] contributing to the delinquency of a minor, and the case actually transferred over to the naval folks, because he was active duty military, for an Article 92 court martial." Eckert stated that the case was "pled down to a misdemeanor" in the state court because "the Navy was going to handle" the situation further. Eckert then stated that defendant pleaded guilty to "several charges, one of them involving sex with a child," in connection with the court martial. Contrary to defendant's suggestion on appeal, there is no indication that there

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[3] This list is merely illustrative and not exhaustive. *Watkins*, 491 Mich at 488.

[4] We note that in making this argument, defendant cites to a page of the trial transcript in which *his attorney* makes this statement regarding the alleged lack of evidence and dismissal of the charges.

was insufficient evidence to proceed on the charges in state court. Moreover, we note that evidence may be admitted under MCL 768.27a even when the other act did not result in a conviction, although the trial court may consider whether charges were filed and whether there was a conviction when conducting the MRE 403 analysis. *Watkins*, 491 Mich at 489. The lack of a state-court criminal-sexual-conduct conviction in this case did not weigh in favor of excluding the evidence.

Defendant also examines the admissibility of the other-acts evidence under MRE 404(b), but this argument is irrelevant because when evidence is admissible under MCL 768.27a, the statute "supersede[s] MRE 404(b)" and "MRE 404(b) must yield" to MCL 768.27a. *Watkins*, 491 Mich at 470, 475, 477. The evidence was properly admitted.

Next, defendant argues that there was insufficient evidence to convict him of two counts of possession of child sexually abusive material. Claims of insufficient evidence are reviewed de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). In reviewing such a claim, "a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Additionally, "[t]he 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. The scope of review is the same whether the evidence is direct or circumstantial." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Id.* (internal citation and quotation marks omitted).

Pursuant to MCL 750.145c(4), "[a] person who knowingly possesses any child sexually abusive material is guilty of a felony[.]"[5] The Michigan Supreme Court has determined that "possesses" in MCL 750.145c(4) "includes both actual and constructive possession." *People v Flick*, 487 Mich 1, 4; 790 NW2d 295 (2010). "[A] defendant constructively possesses 'any child sexually abusive material' when he knowingly has the power and the intention at a given time to exercise dominion or control over the contraband either directly or through another person or persons." *Id.* at 15. When a person accidentally views child sexually abusive material, that person does not "knowingly possess" the material, but when a person takes affirmative steps to gain access to the material and views it, even if the images are later deleted, that person "knowingly possessed" the images. *Flick*, 487 Mich at 16-17, 19.

In this case, there is no dispute that the photographs were child sexually abusive material. Instead, defendant argues there was insufficient evidence that he knowingly possessed the images. We disagree. Viewed in the light most favorable to the prosecution, the evidence supported that defendant took affirmative steps to obtain the photographs. The victim testified

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[5] This language was in effect at the time of the crimes. The statute now indicates that "[a] person who knowingly possesses or knowingly seeks and accesses any child sexually abusive material is guilty of a felony[.]"

that defendant asked her to send him photographs more than once and that she complied. Telephone records verified that the photographs were sent from the victim's telephone to defendant's telephone and that the messages containing the photographs were opened. Additionally, a police officer testified that when she contacted defendant to ask him to come in for an interview, he stated that he knew the situation involved pictures sent to him by the victim "when she was a kid." Based on this evidence, reasonable inferences support that defendant knowingly possessed the child sexually abusive material. *Nowack*, 462 Mich at 400; *Flick*, 487 Mich at 4, 16-17, 19. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational jury could have found beyond a reasonable doubt that defendant knowingly possessed child sexually abusive material. *Wolfe*, 440 Mich at 515.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Michael J. Riordan