

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 26, 2013

v

TONY DEVERN STREETS,

Defendant-Appellant.

No. 309672
Kent Circuit Court
LC No. 11-008035-FC;
11-008254-FC

Before: FITZGERALD, P.J., and METER and M. J. KELLY, JJ.

PER CURIAM.

In lower court no. 11-008035-FC, defendant appeals as of right his convictions of two counts of first-degree criminal sexual conduct (person under 13), MCL 750.520b(1)(a). In lower court no. 11-008254-FC, defendant appeals as of right his convictions of two additional counts of first-degree criminal sexual conduct involving a person under 13. The trial court sentenced him to life without the possibility of parole for each offense, in accordance with MCL 750.520b(2)(c) (involving habitual sex offenses). We affirm.

Defendant's convictions stemmed from sexual assaults perpetrated against his daughter. The victim was 12 years old at the time of the assaults. Defendant forced the victim to perform fellatio on him in a van in a grocery-store parking lot on two occasions. He also engaged the victim in penile-vaginal penetration and forced her to perform fellatio on him at a home belonging to his girlfriend.

Defendant was incarcerated for violating his parole at the time these proceedings began. He argues that his convictions should be vacated because the trial court erred in denying his motion to dismiss for a violation of the 180-day rule. MCL 780.131(1) sets forth the 180-day rule and "requir[es] that an inmate housed in a state correctional facility who has criminal charges pending against him 'shall be brought to trial within 180 days after' the DOC delivers written notice of information concerning the inmate's imprisonment to the prosecuting attorney." *People v Lown*, 488 Mich 242, 255; 794 NW2d 9 (2011), quoting MCL 780.131(1). MCL 780.133 governs the prosecution's compliance with the 180-day rule and provides:

In the event that, within the limitation set forth in [MCL 780.131], action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried

warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

“[MCL 780.133] specifies that if ‘action is not commenced on the matter’ within the 180-day period, the court loses jurisdiction and must dismiss the matter with prejudice.” *Lown*, 488 Mich at 256. Whether the 180-day rule divested the trial court of jurisdiction is a question of law that we review de novo. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

The 180-day period commences the day after the prosecution receives certified written notice of the defendant’s incarceration from the Michigan Department of Corrections. *Lown*, 488 Mich at 250, 255-256. The key inquiry in determining whether there has been a violation of the 180-day rule is not whether trial commenced during this period, but whether the prosecution commenced action on the matter within the 180-day period. *Id.* at 256-257, 267. Indeed, the Michigan Supreme Court “has long held that to commence action within the 180-day period, a prosecutor need not ensure that the *trial* actually begins, or is completed, within that period. Rather, the prosecutor must have undertaken action—or, put otherwise, begun proceedings—against the defendant on the charges (or the ‘matter’).” *Id.* at 256-257 (emphasis in original). Therefore, if trial is delayed beyond 180 days, but the prosecution commenced action within 180 days with a genuine intent to move the case toward trial, a defendant cannot establish a violation of the 180-day rule. *Id.* at 262-264.

In the case at bar, it is undisputed that trial did not begin within 180 days after the prosecution received notice of defendant’s incarceration. Trial was originally scheduled for January 9, 2012, which was within 180 days of the notice, but was subsequently adjourned twice. The record is unclear regarding who was responsible for one of the adjournments; the other was requested by defendant’s counsel because of a scheduling conflict. Contrary to defendant’s assertions, though, he would not be entitled to relief simply if he were to show that he was not responsible for the adjournment in question. Rather, “it is sufficient that the prosecutor ‘proceed promptly’ and ‘move [] the case to the point of readiness for trial’ within the 180-day period.” *Id.* at 246, quoting *People v Hendershot*, 357 Mich 300, 304; 98 NW2d 568 (1959). The record establishes that the prosecutor commenced action within 180 days after receiving notice of defendant’s incarceration. There is no indication that the prosecutor did not genuinely intend to proceed to trial within 180 days, and nor is there any indication that either the trial court or prosecutor unreasonably delayed trial. Thus, the trial court was not deprived of jurisdiction over defendant. *Lown*, 488 Mich at 247.

We also reject defendant’s claim that his trial counsel was ineffective because he admitted to requesting both adjournments, when, according to defendant, one of the adjournments occurred because of problems relating to defendant’s location within Department of Corrections facilities. Defendant appears to be contending that counsel admitted to something deleterious and untrue. However, even assuming, arguendo, that trial counsel did not request the adjournment in question, any objection he could have raised with regard to the adjournment would have been meritless. As discussed above, there is nothing in the record to demonstrate that the prosecutor did not take appropriate action within the 180-day period. “Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.” *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant next argues that the trial court abused its discretion¹ when it admitted the testimony of two witnesses, T.V. and K.V., who testified that when they were approximately nine years old and seven years old, respectively, defendant sexually assaulted them. The prosecution offered their testimony pursuant to MCL 768.27a. In pertinent part, MCL 768.27a(1) provides that “in a criminal case in which the defendant is accused of committing a listed offense² 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.” Ordinarily, MRE 404(b) precludes the admission of evidence for purposes of showing propensity. However, “MCL 768.27a permits the admission of evidence that MRE 404(b) precludes” because it permits the prosecution to demonstrate a defendant’s propensity for committing sexual offenses against minors. *People v Watkins*, 491 Mich 450, 470-471; 818 NW2d 296 (2012). Defendant contends that the trial court should have excluded the other-acts evidence in this case under MRE 403.

Although evidence admissible under MCL 768.27a may be used for propensity purposes, it “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.’” *Watkins*, 491 Mich at 481, quoting MRE 403. In *Watkins*, the Michigan Supreme Court provided the following non-exhaustive list of factors for determining whether evidence that was otherwise admissible under MCL 768.27a was unfairly prejudicial such that it should be excluded under MRE 403:

(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.]

“Trial courts should apply [the MRE 403] balancing [test] to each separate piece of evidence offered under MCL 768.27a.” *Watkins*, 491 Mich at 489.

We find that the trial court did not abuse its discretion in admitting the other-acts evidence. With regard to the first factor outlined in *Watkins*, the similarity of the offenses, both K.V. and T.V. were under the age of 13 at the time defendant sexually assaulted them. The victim in the instant case was under the age of 13. In addition, defendant’s sexual assaults against K.V. and T.V. were similar to some of his sexual assaults against the victim in the case at

¹ We review a trial court’s admission of evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

² “The listed offenses include the various forms of criminal sexual conduct.” *People v Dobek*, 274 Mich App 58, 88 n 16; 732 NW2d 546 (2007).

bar, because defendant forced the girls to perform the same sexual act—fellatio.³ With regard to the second factor, the temporal proximity of the acts, the record reveals that defendant's sexual assaults against K.V. and T.V. occurred approximately 23 and 16 years, respectively, before the sexual assaults against the victim in the case at bar. However, defendant was incarcerated for a considerable amount of time between the prior assaults and the current victim's assaults. Thus, although the sexual assaults against the victim occurred many years after the prior assaults, a considerable portion of the gap was attributable to defendant's incarceration, and nothing in the record shows that defendant sufficiently reformed his behavior in between the prior assaults and the present assaults. Regarding the third factor, the frequency of the acts, the record reveals that defendant repeatedly sexually assaulted K.V. over a period of two to three years and that he sexually assaulted T.V. on more than one occasion. Regarding the fourth factor, the presence of intervening acts, the only intervening act of note was defendant's incarceration; there is no evidence of an intervening act that favors defendant. With regard to the fifth factor, there is nothing in the record to indicate that either T.V.'s or K.V.'s testimony was unreliable. Finally, with regard to the last factor, the need for the other-acts evidence, the record reveals that defendant repeatedly attacked the victim's credibility. Evidence of defendant's sexual assaults against T.V. and K.V. lent credibility to the victim's testimony and, as such, was highly relevant. See *id.* at 491-492.

In light of the forgoing factors, the trial court did not abuse its discretion when it admitted the testimony of K.V. and T.V. Their testimony established that defendant had a history of sexually assaulting young girls in a manner similar to that employed in his assaults against the victim. Although this evidence was prejudicial to defendant, it was highly probative and was not *unfairly* prejudicial. *People v Buie (On Remand)*, __ Mich App; __ NW2d __ (Docket No. 278732, issued October 2, 2012), slip op at 11. Additionally, we note that the trial court properly instructed the jury on how to consider the other-acts evidence. Defendant is not entitled to relief on appeal.

Next, defendant argues that he was denied a fair trial when the prosecution elicited certain testimony from Thomas Cottrell. Cottrell, who testified as an expert witness in the area of sexual-abuse disclosure by children, testified that he had treated approximately 400 children who reported sexual abuse, and that of those 400 children, only two made false reports of sexual abuse. Defendant did not object to this testimony. Thus, our review of this issue is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Assuming, without deciding, that Cottrell's testimony was erroneously admitted, we decline to grant relief to defendant under the plain-error standard of review because he cannot demonstrate prejudice. *Id.* at 763. The evidence against defendant in this case was strong. The victim testified regarding several instances of sexual assault; her testimony alone was enough to establish defendant's guilt. MCL 750.520h. Additionally, the testimony of T.V. and K.V. was

³ In addition, K.V. testified that defendant tried to put his penis in her vagina on more than one occasion.

highly probative of defendant's guilt, as discussed earlier. Further, the prejudicial effect, if any, of Cottrell's testimony was alleviated by the trial court's instructions, because the trial court instructed the jury that Cottrell's testimony "cannot be used to show that the crime or crimes charged here were committed or that the defendant committed them. Nor can it be considered an opinion by Thomas W. Cottrell that [the victim] is telling the truth." This instruction helped to ensure that the jury did not use Cottrell's testimony for an improper purpose. See *People v Peterson*, 450 Mich 349, 378; 537 NW2d 857 (1995), amended in part on other grounds 450 Mich 1212 (1995). Jurors are presumed to follow their instructions and most errors are presumed to be cured by appropriate instructions. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). We find no basis for reversal.

Finally, because defendant cannot establish prejudice, we reject his claim that his trial counsel was ineffective for failing to object to Cottrell's testimony. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994) (a defendant must demonstrate prejudice in order to prevail on a claim of ineffective assistance of counsel).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Patrick M. Meter

/s/ Michael J. Kelly