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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 27, 2005
v RICKY HAWTHORNE, Defendant-Appellant.	No. 255722 Wayne Circuit Court LC No. 04-002083-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v RICKY HAWTHORNE, Defendant-Appellant.	No. 255764 Wayne Circuit Court LC No. 04-000546-01

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (person under thirteen), one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (person under thirteen), and two counts of accosting, enticing, or soliciting a child for an immoral purpose (accosting a child), MCL 750.145a. Defendant was sentenced as a third habitual offender, MCL 769.11, to fifty to one hundred years in prison for each of the three CSC I convictions, fifteen to thirty years in prison for the CSC II conviction, and four to eight years in prison for each of the two convictions for accosting a child. We affirm.

Defendant was charged in two separate cases which were consolidated for trial and sentencing. He was convicted for offenses against three child complainants: two seven-year-old girls and an eight-year-old boy. On appeal, defendant argues that the trial court improperly admitted evidence of his past acts pursuant to MRE 404(b). We disagree. Defendant further claims that the trial court improperly departed from the statutory sentencing guidelines when it imposed minimum sentences of four years in prison for his convictions for accosting a child. We

agree that the trial court erred when it imposed the four-year minimum sentences; however, remand for resentencing is not required.

Defendant argues, first, that the trial court erred when it admitted the testimony of Christina Rios. Defendant pleaded guilty to a sexual offense against Rios in 1985, when she was ten years old. Defendant claims that Rios' testimony was impermissibly offered as proof of defendant's character or of a propensity to assault children. He adds that the prejudicial nature of the evidence outweighed its probative value. We disagree.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Katt,* 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court may be said to have abused its discretion only when its apparent reasoning is palpably violative of fact and logic, or when "an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *People v Jackson,* 467 Mich 272, 277; 650 NW2d 665 (2002), citing *Spalding v Spalding,* 355 Mich 382, 384; 94 NW2d 810 (1959); *People v Tate,* 244 Mich App 553, 559; 624 NW2d 524 (2001). Regardless, a conviction should not be reversed if the trial court's error was harmless. MCL 769.26; MCR 2.613(A). An error is harmless unless the proceedings were prejudicial or the reliability of the verdict was undermined. *People v Mateo,* 453 Mich 203, 211, 215; 551 NW2d 891 (1996). Accordingly, reversal is warranted if it is more probable than not that the error affected the outcome. *People v Young,* 472 Mich 130, 141-142; 293 NW2d 801 (2005).

MRE 404(b)(1) reads:

> 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system of doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b)(1) allows for the admission of evidence of other crimes, wrongs, or acts when the evidence: (1) is not being offered to prove character or propensity; (2) is relevant to an issue of fact at trial; and (3) its prejudice does not substantially outweigh its probative value as evaluated under MRE 403. *People v Sabin (After Remand),* 463 Mich 43, 55-56; 614 NW2d 888 (2000); *People v VanderVliet,* 444 Mich 52, 74-75; 508 NW2d 114 (1993). Thus, MRE 404(b)(1) incorporates both the requirement of MRE 402 that admissible evidence be relevant and the balancing required by MRE 403 to determine if relevant evidence should, nonetheless, be excluded because of the danger of unfair prejudice. *VanderVliet, supra* at 74-75.

Acts admissible under MRE 404(b)(1) may include instances that establish a scheme, plan, or system, which are material because they prove that the charged act was committed. *Sabin, supra* at 62. General similarity among acts is not enough, but their "relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot." *Id.* at 64. In *Sabin,* the alleged sexual abuse of the defendant's stepdaughter was admissible in the defendant's trial for sexual abuse of his daughter. *Id.* at 66. The Court found similarities, including that the defendant had a father-daughter relationship with each girl,

the girls were of similar age at the time of the abuse, and defendant used their fears of breaking up the family to keep them silent. *Id.* "One could infer from these common features that defendant had a system that involved taking advantage of the parent-child relationship, particularly his control over his daughters, to perpetrate abuse." *Id.* Thus, the Court opined that, despite some differences in the acts of abuse against each girl, the question of admissibility was properly left to the trial court's discretion. *Id.* at 67.

Here, defendant was charged with sexual offenses against three children, ages seven and eight years old. There was evidence in the instant case that defendant called the children's parents to invite the children to his home. The children then visited his home with groups of similarly aged children, many of whom did not have male figures in their lives. Defendant took the children out to eat and participated in activities with them before bringing them to his sparsely furnished apartment. Defendant encouraged some of the children to sleep next to him in his bed; one complainant was asked to sleep with her head on defendant's underarm despite her not wanting to do so. Other children slept on the floor. Further, each of the three complainants testified that defendant would periodically send the rest of the group on errands or outings while one child was required to stay behind. Each of the three children reported that, once he or she was isolated in defendant's apartment, defendant then engaged in touching or other sexual conduct.

Rios testified to similar events surrounding defendant's 1985 assault on her. She had visited defendant's home with a group of girls, ages five to eleven, most of whom had no male figures in their lives. Defendant called Rios' mother for permission before taking Rios and the others out to eat and to a roller skating rink. They then returned to defendant's sparsely furnished home where he requested that several children sleep next to him with their heads rested on him. He also invited individual girls into a room with him one at a time. Defendant assaulted Rios when he followed her after she had wandered off by herself to look at some dolls in defendant's basement.

These facts, when taken together, present evidence of similar plans to entice groups of children to defendant's home where he would both require them to sleep next to him and isolate individuals for abuse. Thus, it was within the trial court's discretion to find that Rios' testimony was relevant to show a common plan or scheme. Furthermore, the evidence was highly probative, particularly in the face of defendant's assertions at trial that the children were fabricating their allegations at the urging of their parents or grandparents. The evidence corroborated the children's testimony both in the face of defendant's general denial of the offenses, as in *Sabin*, *supra* at 71, and in response to defense counsel's spate of leading questions about fabrication during cross-examination of the children. Further, the evidence provided proof of defendant's intent to molest children by inviting them to stay overnight despite his lack of places for them to sleep. For instance, defendant claimed at trial that his most recent apartment was sparsely furnished because it was a temporary living arrangement. However, Rios' testimony confirmed that he had previously invited groups of children to stay overnight with him, despite his having a similarly sparsely furnished house without proper sleeping arrangements for them.

Given the probative value of the evidence, the trial court also did not err when it found that the value of Rios' testimony outweighed its potential unfair prejudice to defendant. As noted in *Sclafani v Cusimano, Inc*, 130 Mich App 728, 735; 344 NW2d 347 (1983): "[a]ny

relevant testimony will be damaging to some extent," however, damaging evidence does not necessarily create unfair prejudice. Here, Rios' testimony did not present the problem of "evidence which is minimally damaging in logic [that] will be weighed by the jurors substantially out of proportion to its logically damaging effect." *Id.* There was some risk that the testimony would create inferences about defendant's character that could prejudice him in the eyes of the jury, despite the limiting instruction given by the trial court. The damaging effect of Rios' testimony, however, resulted largely from its logical relevance; it tended to prove that defendant employs a particular plan in order to molest children. Therefore, we do not find that the trial court's reasoning was palpably violative of fact and logic or "that there was no justification or excuse for the ruling made." *Jackson, supra* at 277; *Tate, supra* at 559.

Defendant's second argument on appeal is that the trial court erred when it sentenced him to a minimum of four years in prison for each of his two accosting a child convictions. We agree. However, this error does not require resentencing.

Defendant did not preserve this issue for review at his sentencing hearing, in a motion for resentencing, or in a motion to remand. However, since the sentence is outside the sentencing guidelines range, it may be reviewed for plain error. *People v Kimble,* 470 Mich 305, 312; 684 NW2d 669 (2004). To meet the plain error standard, defendant's claim must satisfy the four-part test established in *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999). See also *Kimble, supra* at 312. Initially, defendant must show: (1) there was an error; (2) the error was clear or obvious; and (3) the error affected the outcome of the proceedings. If these three prongs are satisfied, reversal is then warranted only if the error also resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763.

Generally, a trial court must impose a minimum sentence that falls within the statutory sentencing guidelines range. MCL 769.34(2); *People v Babcock,* 469 Mich 247, 255-256; 666 NW2d 231 (2003). To determine a minimum sentence under the sentencing guidelines, a trial court should identify the offense category, score the appropriate offense variables and prior record variables, and use the resulting points to identify the proper sentence range in the statutory sentencing grids. MCL 777.21(1)(a)-(c); *People v Morson,* 471 Mich 248, 255; 685 NW2d 203 (2004). Here, the relevant charge was accosting a child for immoral purposes, MCL 750.145a, which is a Class F crime. MCL 777.16g. Defendant's total offense variable ("OV") score was fifty-five, which resulted in an OV level of III. His prior record variable ("PRV") score was ninety-five, which corresponds with PRV level F. Accordingly, the sentencing guidelines required a minimum sentence of fourteen to twenty-nine months, MCL 777.67, which was increased to 14 to 43 ½ months because defendant was a third habitual offender.[1] MCL 777.21(3)(b). Thus, the trial court's imposition of minimum sentences of four years, or forty-

[1] MCL 777.21(3)(b) increases the upper limit of a third habitual offender's minimum sentence range by fifty percent. Here, the original upper limit was twenty-nine months. Therefore, fifty percent of twenty-nine, which is 14 ½, is added to twenty-nine for a new upper limit of 43 ½ months.

eight months, in prison was an upward departure of 4 ½ months from the minimum sentencing guidelines limit of 43 ½ months.

A court may depart from the minimum range only when there is a substantial and compelling reason to do so. MCL 769.34(3); *Babcock, supra* at 255-256. Further, a reason for departure must be articulated by the trial court on the record. MCL 769.34(3); *Babcock, supra* at 258. Here, the trial court did not mention departing from the minimum sentencing guidelines range, nor did it articulate a substantial and compelling reason for its departure. Therefore, the trial court clearly erred, and further, the error technically affected the outcome of the proceedings because it resulted in longer minimum sentences than were otherwise authorized by the guidelines. Nonetheless, for the error to require reversal it also must have resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763.

An error in calculating the minimum sentencing guidelines range "affect[s] the fairness, integrity and public reputation of judicial proceedings [when it] send[s] an individual to prison . . . depriving him of his liberty for a period longer than authorized by the law." *Kimble, supra* at 313; *People v Brown,* 265 Mich App 60, 66-67; 692 NW2d 717 (2005). Here, however, defendant was sentenced to a minimum of fifty years in prison for each of his three CSC I convictions and a minimum of fifteen years in prison for the CSC II conviction; these sentences are to run concurrently with the sentences for accosting a child. Thus, the fairness, integrity or public reputation of the judicial proceedings was not seriously affected by the sentencing error. *Carines, supra,* at 763. Rather, the additional 4 ½ months' imprisonment imposed by the improper minimum sentences for the accosting a child convictions do not affect the length of time defendant will spend in prison. Therefore, resentencing is not required under the plain-error standard.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Talbot
/s/ Stephen L. Borrello