STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON CHARLES VANBENNEKOM,

Defendant-Appellant.

UNPUBLISHED
November 18, 2021

No. 352554
Kent Circuit Court
LC No. 19-001858-FC

Before: RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ.

PER CURIAM.

Defendant, Jason Charles VanBennekom, was convicted by a jury of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) (victim under 13 years of age). Defendant was sentenced to serve two concurrent terms of 15 to 30 years' imprisonment. We affirm defendant's convictions but vacate his sentences and remand for further proceedings consistent with this opinion.

I. BACKGROUND

This case stems from defendant's sexual abuse of the victim, who is his younger sister. The sexual assaults occurred between 1998 and 2004. In 2018, the victim reported the assaults to a friend who then told law enforcement. When defendant was interviewed, he admitted to touching the victim and acknowledged that the victim had performed fellatio on him. However, defendant denied that he had "take[n]" the victim's "virginity." Defendant was charged with four counts of CSC-I.

The victim testified at trial that defendant began sexually assaulting her when she was five years old and defendant was 15 years old. According to the victim, the sexual assaults occurred more times than she could recall and involved oral, vaginal, and anal penetration with defendant's penis. The victim also testified that defendant would "occasionally" penetrate her vagina with his finger. The prosecutor presented other-acts evidence at trial through the testimony of AR, who testified that defendant sexually assaulted her when she was 15 years old. Specifically, AR testified that she was familiar with defendant because he was friends with her sister. On one occasion in 2007, AR accompanied defendant back to his apartment and they consumed alcohol

and marijuana, which defendant supplied. According to AR, defendant "inappropriately touch[ed]" her "genital area" over her clothing and placed her hand on his penis. AR left defendant's apartment and soon thereafter reported the assault to law enforcement.

The jury convicted defendant of the counts of CSC-I involving oral and digital penetration. The jury was unable to reach a verdict on the remaining counts, and the prosecutor successfully moved the trial court to dismiss those charges. Defendant was sentenced as described above, and this appeal followed.

II. ANALYSIS

A. ADMISSIBILITY OF OTHER-ACTS EVIDENCE

Defendant argues that the trial court abused its discretion by admitting the other-acts evidence because it was unfairly prejudicial. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Cameron*, 291 Mich App 599, 608; 806 NW2d 371 (2011). "A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes." *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013).

Under MRE 404(b), "evidence of other crimes, wrongs, or acts is inadmissible to prove a propensity to commit such acts." *People v Spaulding*, 332 Mich App 638, 649; 957 NW2d 843 (2020) (quotation marks and citation omitted). However, if "a defendant is charged with a sexual offense against a minor, MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b)," even if the evidence is pure "propensity evidence."[1] *People v Watkins*, 491 Mich 450, 472; 818 NW2d 296 (2012) (quotation marks and citation omitted). Nevertheless, such evidence remains subject to exclusion "if 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]' " *Id*. at 481, quoting MRE 403.

In this case, defendant was charged with sexual offenses against his underaged sister, and the other-acts evidence at issue consists of evidence of his uncharged sexual offenses against another minor female. Defendant does not seriously dispute that the evidence concerning AR is admissible under MCL 768.27a. Rather, defendant argues that the evidence should have been excluded under MRE 403 because its relevance is minimal and its prejudicial effect is significant. We disagree.

[1] Evidence of defendant's alleged assault against AR falls within the listed offenses as defined in MCL 768.27a. MCL 768.27a(2)(a) refers to MCL 28.722 for the definition of "listed offense." MCL 28.722(i) defines a "listed offense" as "a tier I, tier II or tier III offense." The list of Tier II offenses includes accosting, enticing, or soliciting a child for immoral purposes, MCL 750.145a; see MCL 28.722(t)(*i*), and fourth-degree criminal sexual conduct, MCL 750.520e; see MCL 28.722(t)(*x*).

"[O]ther 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." *Watkins*, 491 Mich at 487.

> 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. This list of considerations is meant to be illustrative rather than exhaustive. [*Id*. at 487-488 (citation omitted).]

When conducting the MRE 403 balancing test, the trial court "must weigh the propensity inference *in favor of the evidence's probative value* rather than its prejudicial effect." *Watkins*, 491 Mich at 487 (emphasis added).

Applying the *Watkins* factors here, we conclude that there were sufficient similarities to render the other-acts evidence probative to the jury's determination of the issues before it. Both the charged and prior conduct involved defendant's sexual assaults of minor females while they were alone with him. Although there was an age difference between the victim and AR, both the victim and AR were legally unable to consent to sexual activity given their ages. Therefore, the evidence that defendant committed a sexual offense against 15-year-old AR was probative to his propensity to engage in sexual activity with other underage females, such as the victim at issue in this case. Additionally, each incident involved defendant luring or grooming a minor female with gifts just before a sexual assault. Although there are relevant differences between the charged and prior conduct, such as the relative severity of the assaults, we conclude that these differences did not create a serious concern that the jury would render its verdict on anything but its thoughtful consideration of the relevant evidence. Indeed, the other-acts evidence, which was undeniably offensive to AR, was of a lesser statutory degree than the charged conduct. Consequently, it is not likely that the jury in this case found defendant guilty of comparatively worse conduct on the basis of its reaction to comparatively lesser conduct.[2]

With respect to temporal proximity, we disagree with defendant that the assaults were too distant in time to support a finding that they had any probative value. Indeed, defendant's alleged assault of AR took place only a few years after defendant's last sexual contact with the victim. Although there was only one incident with AR, defendant appears to have taken advantage of an opportunity to get her alone when presented with it. After the alleged assault occurred, law enforcement was contacted, AR's father was notified, and AR was instructed to not have contact

[2] We note that the trial court instructed the jurors that they could consider the prior acts to determine whether defendant committed the charged offenses, but could not convict defendant solely because they believed that he was guilty of the other bad conduct. "Jurors are presumed to follow their instructions[.]" *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

with defendant. Furthermore, there were no intervening acts that would render the evidence unfairly prejudicial, and defendant does not suggest that any exist. To the contrary, when viewed as a whole, defendant's actions toward the victim and AR demonstrate a continued series of related events.

As to reliability, AR testified at trial that she had memory issues. However, as even defendant admits, the reliability of AR's claim is bolstered because AR reported the alleged assault within a short period of time after it occurred. AR's father testified that he was informed that AR had gone to defendant's apartment where "some inappropriate things happened . . . of a sexual nature." Although no criminal charges were filed, there is no indication in the record why criminal charges were not pursued, and defendant offers no reason why the testimony of AR was so inherently unreliable that it should not have been presented to the jury. In addition, contrary to defendant's arguments on appeal, we conclude that AR's testimony was necessary to support the prosecution's case in light of the lack of physical evidence, the victim's delayed reporting, and the defense's argument that the victim was not credible.

In sum, we conclude that defendant has not shown that the other-acts evidence was substantially more prejudicial than probative under MRE 403. Therefore, the trial court did not abuse its discretion by admitting the evidence under MCL 768.27a.

Furthermore, even if we were to conclude that the trial court abused its discretion by admitting the challenged evidence under MCL 768.27a, the error would be harmless. An error is harmless if, "after an examination of the entire cause," it affirmatively appears "that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). "An error is outcome determinative if it undermined the reliability of the verdict; in making this determination, this Court . . . focus[es] on the nature of the error in light of the weight and strength of the untainted evidence." *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010) (quotation marks and citation omitted).

The victim testified that, in 1998, defendant instructed her to give him oral sex when they were in the bathtub together. The victim testified that she could recall defendant "telling [her] how to do it and what to do," and the victim provided detailed testimony about this assault. The victim also testified that defendant would "occasionally" penetrate her vagina with his finger. During defendant's interview with law enforcement in 2018, defendant admitted that he had touched the victim "when she was younger." Defendant also acknowledged that the victim had performed fellatio on him. Defendant expressed remorse during the interview. To the extent that defendant argues that the victim's testimony was not credible or that defendant was coerced into providing statements to law enforcement, "[w]e do not interfere with the jury's assessment of the weight and credibility of witnesses or the evidence[.]" *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013).

Thus, given the victim's testimony and defendant's admissions, we conclude that there was overwhelming evidence of defendant's guilt. Even if we were to conclude that the trial court abused its discretion by admitting the other-acts evidence, defendant would not be entitled to a new trial because the admission of such evidence would not pass the "more probable than not" test laid out in *Lukity*. See *Lukity*, 460 Mich at 495-496.

B. SENTENCING

Defendant next argues that the trial court erred when it assessed 50 points for offense variable (OV) 11, MCL 777.41, and that he is, therefore, entitled to resentencing. We agree.

This Court reviews de novo whether a trial court properly interpreted and applied the sentencing guidelines. *People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009). "We review for clear error the trial court's factual determinations, which must be supported by a preponderance of the evidence." *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Blevins*, 314 Mich App 339, 348-349; 886 NW2d 456 (2016).

In this case, the trial court assessed 50 points for OV 11. As noted by this Court in *People v Baskerville*, 333 Mich App 276, 297-298; ___ NW2d ___ (2020):

> The trial court must score 50 points for OV 11 if "[t]wo or more criminal sexual penetrations occurred." MCL 777.41(1)(a). In scoring OV 11, a trial court may not count a sexual penetration that formed the basis for the conviction, MCL 777.41(2)(c), but may score all other "sexual penetrations of the victim by the offender arising out of the sentencing offense," MCL 777.41(2)(a). The phrase "arising out of" suggests "a causal connection between two events of a sort that is more than incidental." *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006) . . . . "Something that 'aris[es] out of,' or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen." *Id.* (alteration in original). Therefore, in order to count the penetrations under OV 11, there must be the requisite relationship between the penetrations by defendant ("the offender") and the sentencing offense[.]
>
> In scoring OV 11, a trial court may score all "sexual penetrations of the victim by the offender arising out of the sentencing offense," and any additional instances of penetration "extending beyond the sentencing offense" are accounted for in OVs 12 or 13. MCL 777.41(2)(a) and (b). [Footnote omitted.]

The record evidence does not support that multiple penetrations arose from either of the sentencing offenses, which are identical. Although the victim described multiple forms of penetration that occurred between 1998 and 2004, the victim's testimony does not support that multiple penetrations occurred during the sentencing offenses, i.e., that she and defendant engaged in multiple forms of penetration during each encounter. Therefore, the trial court erred when it assessed OV 11 at 50 points. Indeed, the "arising out of" standard "requires more than the mere fact that the penetrations involved the same defendant and victim." *People v Johnson*, 298 Mich App 128, 132; 826 NW2d 170 (2012). The trial court should have assessed OV 11 at zero points.

Resentencing is warranted because subtracting 50 points from defendant's OV score of 75 changes the recommended guidelines minimum sentence range. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). See also MCL 777.62. In so holding, however, we note that MCL 777.41(2)(b) provides that "[m]ultiple sexual penetrations of the victim by the offender

extending beyond the sentencing offense may be scored in offense variables 12 or 13." MCL 777.43(1)(a) provides for a 50-point score under OV 13 when "the offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person . . . less than 13 years of age[.]" Because the trial court declined the prosecution's request to assess OV 13 at 50 points because it had already done so for OV 11, we encourage the trial court to revisit the scoring of OV 13 on remand.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Thomas C. Cameron
/s/ Michelle M. Rick