STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2012
v	No. 307782 Kent Circuit Court
GREGORY TODD MULDER, Defendant-Appellant.	LC No. 11-006290-FC

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Defendant was convicted at a jury trial of one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13), and two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent sentences of 20 to 30 years' imprisonment for second-degree criminal sexual conduct and 45 to 100 years' imprisonment for each count of first-degree criminal sexual conduct. Defendant appeals as of right. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The victim was approximately eight years old when defendant, her babysitter, engaged in three separate sexual acts with her. Defendant touched the victim and inserted his penis in her mouth while she slept. Defendant also showed her pornography and made her touch his penis with her hand. Defendant engaged in penile-vaginal penetration as well. Prior to trial, the prosecution provided defendant notice that it sought to introduce other-acts evidence in the form of defendant's former stepdaughter's testimony. Defendant had pleaded guilty to second- and fourth-degree criminal sexual conduct against his stepdaughter approximately 10 years before the assaults on the victim in this case.

The trial court held a hearing on the prosecution's motion to admit the stepdaughter's testimony, and admitted the testimony under both MRE 404(b) and MCL 768.27a. The stepdaughter testified[1] that defendant had abused her for about four months when she was 14

[1] The stepdaughter refused to testify at trial; consequently her preliminary examination testimony was read into the record.

years old. She testified that defendant would get home from work in the middle of the night and would come into her room. While she pretended to sleep, he would touch her chest and genitals under her clothes. Defendant would also take her hand and use it to masturbate himself.

II. ADMISSION OF EVIDENCE UNDER MCL 768.27a AND MRE 404(b)

On appeal, defendant argues that the trial court erred in allowing the testimony because the challenged evidence was too dissimilar to be evidence of a common plan or scheme under MRE 404(b) and the only purpose for the stepdaughter's testimony was for impermissible propensity purposes. Defendant also argues that the trial court erred in failing to conduct an analysis of the admissibility of the evidence under MRE 403.

This Court reviews for abuse of discretion a trial court's decision to admit evidence of prior bad acts. *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007). A trial court abuses its discretion when it fails to select a principled outcome from a range of reasonable and principled outcomes. *People v Babcock*, 496 Mich 247, 269; 666 NW2d 231 (2003).

MCL 768.27a(1) provides:

> Notwithstanding [MCL 768.27], 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. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

"Listed offenses" under MCL 768.27a include, in relevant part, second- and fourth-degree criminal sexual conduct. *Id.*; MCL 28.722. A minor is someone under the age of 18. MCL 768.27a.

MCL 768.27 was the precursor to MRE 404(b), which essentially states that other-acts evidence can be admitted for an enumerated list of reasons, of which propensity is not one. *People v Watkins*, 491 Mich 450, 470-471; 818 NW2d 296 (2012). MRE 404(b) provides:

> 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, plan, knowledge, identity, or absence of mistake or accident, provided, that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

To be admissible under MRE 404(b), bad-acts evidence must be offered for a proper purpose, that is, one other than showing that a defendant has a propensity to commit the charged offense.

MRE 404(b); *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). MCL 768.27a contains no such limitation. It creates an exception to MRE 404(b) in cases presenting a charge of sexual misconduct against a minor. *Watkins*, 491 Mich at 471.

Defendant's argument on appeal is premised primarily on his contention that MRE 404(b) controls over MCL 768.27a. However, our Supreme Court recently considered this exact issue in *Watkins*, and held that MCL 768.27a and MRE 404(b) conflict, and that the statute prevails over the rule of evidence. *Watkins*, 491 Mich at 472-481. MCL 768.27a makes it clear that evidence can be admitted under the statute to show that a defendant had a propensity to commit certain crimes. *Watkins*, 491 Mich at 471-472. Defendant's argument that use of the challenged evidence as propensity evidence was improper is without merit. *Id.* Nevertheless, we note that the trial court, in admitting the evidence, limited its use to purposes other than showing propensity. While this limitation was error, it inured to defendant's benefit, and was thus harmless and not grounds for a grant of a new trial. See MCL 769.26; MCL 2.613(A); *People v Mateo*, 453 Mich 203, 210, 212; 551 NW2d 891 (1996).

III. ADMISSIBILITY OF THE EVIDENCE UNDER MRE 403

Evidence offered for admission under MCL 768.27a may still be inadmissible if precluded by MRE 403. *Watkins*, 491 Mich at 481-486. MRE 403 excludes otherwise-admissible evidence if the "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." "The 'unfair prejudice' language of MRE 403 refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011) (internal quotations omitted). "Moreover, admission of '[e]vidence is unfairly prejudicial when . . . [the danger exists] that marginally probative evidence will be given undue or preemptive weight by the jury.'" *Id.*

Defendant argues in regard to MRE 403 that the trial court erred in failing to conduct an MRE 403 balancing analysis. There is no record of evidence that the trial court conducted an MRE 403 analysis. However, any such error in the trial court's failure to conduct such an analysis would be harmless if the evidence is in fact not excluded by MRE 403. See *Watkins*, 491 Mich at 491 (affirming this Court's holding that the trial court's failure to conduct an MRE 403 analysis was harmless because probative value of that evidence was not substantially outweighed by the danger of unfair prejudice).

MRE 403 excludes evidence if the "probative value is substantially outweighed by the danger of unfair prejudice . . . ." In *Watkins*, 491 Mich at 481-486, the Court identified a non-exhaustive list of six factors for a trial court to consider when deciding whether the probative value was substantially outweighed by the danger of unfair prejudice: "(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." *Id.* at 487-488. The Court also instructed that courts must weigh the propensity inference in favor of the probative side of the equation. *Id.* at 487.

In this case, the probative value of the other-acts testimony was not substantially outweighed by the danger of unfair prejudice. Defendant's sexual attraction to young girls was highly probative of whether he committed the offense charged. The charged conduct was also similar to the other acts. While the evidence from 10 years prior may be more prejudicial than more recent evidence, a 10-year span between the offered evidence and the charged offense does not render the evidence per se irrelevant. *Id.* at 490-491. Further, the fact that the evidence was reasonably necessary (given the young age of the victim and the lapse between offense and trial) increases the probative value of that evidence while not adding appreciably to the danger of prejudice. Most notably, the fact that defendant was convicted for his prior acts was highly significant and tips the scale heavily in favor of the probative value. See *Id.* at 488 n 84, citing with approval *United States v LeMay*, 260 F3d 1018 (CA 9, 2001), cert den 534 US 1166; 122 S Ct 1181; 152 L Ed 2d 124 (2002). Conversely, the danger of unfair prejudice was minimized because defendant was actually convicted of those prior crimes. The remaining two factors, the presence or absence of intervening events and the frequency of the other acts, do not appreciably weigh in favor of admission or exclusion.

On balance, we find that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. MRE 403. Therefore, the other-acts evidence was admissible under MCL 768.27a because it met all the prerequisites. Because the evidence was admissible under MCL 768.27a, the propriety of its admission under MRE 404(b) is irrelevant. *Watkins*, 491 Mich at 476-477. We find no error requiring reversal in the trial court's admission of evidence in this case.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra