STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 7, 2013
v	No. 305890 Eaton Circuit Court
WILLIAM THOMAS BEEBE, Defendant-Appellant.	LC No. 11-020108-FC

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age). He was sentenced as a fourth offense habitual offender, MCL 769.12, to a mandatory term of life imprisonment without the possibility of parole for each count of CSC I, and 25 to 50 years imprisonment for CSC II. Defendant appeals as of right. This panel differs as to the number of errors that took place at trial and as to the egregiousness of those errors, but we unanimously agree that defendant's trial did not suffer from errors that, under the current state of the law, compel us to reverse. Consequently, we affirm.

The victim in this case was a member of defendant's family. The victim testified that defendant assaulted her when she was 11 years old, while she was spending the night at his house. At trial, the prosecutor called two additional witnesses who testified regarding other acts evidence, specifically that defendant had engaged in improper sexual behavior with them approximately 20 years earlier. Both witnesses were also family members. Some of the other acts resulted in defendant being convicted of CSC II, by plea, in 1995.

First, defendant argues that MCL 768.27a infringed on his due process right to a fair trial. Specifically, he argues that MCL 768.27a is unconstitutional because it prevents the trial court from balancing the probative value and prejudicial effect of proffered other-acts evidence. Because defendant failed to raise this argument below, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

In *People v Watkins*, 491 Mich 450, 481; 818 NW2d 296 (2012), our Supreme Court held that MCL 768.27a is subject to MRE 403 balancing. Here, the trial court failed to engage in the MRE 403 balancing test and seemingly believed that it could not engage in this test.

Consequently, the trial court committed clear error. However, to merit reversal, this error must have prejudiced defendant's substantial rights, which it did not.

Watkins instructs that "other-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." *Id.* at 487. The Court instructed that "when applying MRE 403 . . . , courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Id.* at 487.[1] Here, the propensity inference is enhanced by the similarity between the charged acts and the prior behavior placed in evidence. One of the two other-acts witnesses testified to defendant engaging in sexual behavior with her, including penetration, beginning when she was 5 years old and ending when she was 11 or 12, and the other testified to witnessing such behavior. The second witness also testified that defendant had tried to touch her inappropriately when she was a young child. Given that the victim was the only witness who could testify to what happened between her and defendant, the other-acts evidence was highly probative. It is axiomatic that highly probative evidence favoring the prosecution will be highly prejudicial to the defense, but it is not thereby axiomatically *unfairly* prejudicial, especially because, as noted, propensity inferences are permitted under MCL 768.27a.

The other acts had occurred approximately 20 years prior to the charged offense. However, "[t]he remoteness of the other act affects the weight of the evidence rather than its admissibility." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011). It is conceivable that other acts that are sufficiently remote could eventually become so attenuated that a court could determine, with reasonable certainty, that they no longer carry enough weight to have enough probative value to outweigh the danger of unfair prejudice, confusing the jury, or similar concerns. However, that conclusion would be highly dependent on facts such as the individual circumstances of the case, the defendant, and the circumstances of the other acts; it would be impossible to craft a bright-line guide for the precise point at which judges should invade what is ordinarily the purview of the jury. The defense, of course, may always argue to the jury that they should not, in fact, give evidence from so far in the past any credence. In the absence of a blatantly obvious reason why the other-acts evidence at issue is so remote that it could not possibly have had any probative value, the courts should not second-guess its admissibility.

In addition, the trial court instructed the jury according to CJI2d 20.28a, which is the standard instruction of other-acts evidence of child molestation. "In cases in which a trial court

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[1] The Court also provided some considerations that a trial court could use to determine whether the other-acts evidence is overly prejudicial:

> 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. . . . [*Watkins*, 491 Mich at 487-488.]

determines that MRE 403 does not prevent the admission of other-acts evidence under MCL 768.27a, this instruction is available to ensure that the jury properly employs that evidence." *Watkins*, 491 Mich at 490. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant was not denied his due process right to a fair trial particularly in light of the fact that he was convicted by plea in 1995 for some of the other-acts evidence, which certainly makes the evidence more reliable and the acts were very similar in nature. *Watkins*, 491 Mich at 487-488.

Next, defendant argues that the prosecutor improper elicited "human lie detector" testimony from a police officer. Defendant failed to raise the issue below, so we again review for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

The record does not indicate that the prosecutor elicited the cited testimony in bad faith. "It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *Id.* at 71. However, under MRE 701, police officers can testify about their opinions or inferences formed by their observations and rational perceptions as police officers. *People v Oliver*, 170 Mich App 38, 49-50; 427 NW2d 898 (1988).

Contrary to defendant's assertion, the officer in question did not comment on defendant's credibility. Without prompting by the prosecutor, the officer gave a description of interrogation and interview techniques and explained to the jury the process that occurs. From there, the prosecutor followed up with a question regarding the importance of observing a suspect's demeanor. The officer responded by explaining what a suspect's particular demeanor indicates. The officer then described defendant's demeanor during his interrogation, and what those actions *can* indicate. However, the officer did not purport to explain what defendant's actions *actually did* indicate. Indeed, the officer's explanation was phrased in terms of what is common, not in terms of certainties. The officer never stated whether she believed defendant to be lying and why. Consequently, unlike the "human lie detector" doctor in *People v Izzo*, 90 Mich App 727; 282 NW2d 10 (1979), who purported to state with certainty that he *would* know if a witness had been truthful to him, the officer here did not express a conclusion about defendant's credibility. It was proper for her to testify about her observations of defendant based on her interrogation training.

Next, defendant claims that he received ineffective assistance of trial counsel. We disagree. "[O]ur review is limited to mistakes apparent from the record" because defendant did not raise the issue of ineffective assistance of counsel in a motion for a new trial or request a *Ginther* hearing.[2] *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).

To prove defendant received ineffective assistance of counsel, a defendant must show: (1) "that counsel's performance was deficient in that it fell below an objective standard of

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

professional reasonableness," and (2) that there is a reasonable probability the outcome of the trial would have been different but for counsel's performance. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). There is a presumption of effective assistance of counsel and the burden is on defendant to prove otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

First, defendant argues that defense counsel was ineffective for informing the jury of the incestuous relationships in defendant's family. However, the record indicates that it was defense counsel's trial strategy to introduce the subject. Before trial, defense counsel was aware that the other-acts evidence would be admitted. In his opening statement to the jury, counsel preemptively cautioned the jurors to listen carefully to the trial court's instructions on how to treat such evidence. He also wove that evidence into a theory of defense, which he carried through his closing statement. It is objectively reasonable for an attorney faced with the introduction of damaging other-acts evidence to assimilate that evidence into the attorney's own presentation of the case, and to do so before the opposing party has an opportunity to do so. Defense counsel here could have decided that mentioning the general outlines of the family sexual dynamic before the prosecution did would, even minimally, lessen the impact it would have. In addition, counsel used this family history to help portray the victim as "damaged," and thereby contest the validity of her testimony without calling it perjurious. The fact that the trial strategy was unsuccessful does not constitute ineffective assistance. *People v Stewart* (*On Remand*), 219 Mich App 38, 42; 555 NW2d 715 (1996).

Second, defendant argues that defense counsel was ineffective for failing to object to a police officer testifying that he interviewed defendant at the sheriff's department, "where he was incarcerated at that time." The record indicates that the comment was unanticipated. The prosecutor asked when and where the officer interviewed defendant, and not why the interview occurred at that particular location. Further, the comment was brief, and it is possible defense counsel did not want to draw attention to it by objecting. "Declining to raise objections can often be consistent with sound trial strategy." *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008). Defendant has not overcome the strong presumption that defense counsel's failure to object was sound trial strategy.

Finally, defendant claims that his mandatory sentence of life imprisonment without the possibility of parole, pursuant to MCL 750.520b(2)(c), is cruel and unusual punishment. We rejected this same argument in *People v Brown*, 294 Mich App 377, 390-392; 811 NW2d 531 (2011). However, we note that even if we entertained defendant's argument that his sentence should be proportionate to an individual analysis of the circumstances under which the crime occurred and his probability of rehabilitation, we do not find that his sentence here is disproportionate. Not only has the Legislature appropriately recognized that such a violation generally has devastating lifelong consequences, the victim here discussed her own ongoing physical and emotional problems and fear of retaliation from defendant. Indeed, she indicated that he had "destroyed her life," The evidence showed that defendant has an ongoing pattern of taking advantage of and destroying the lives of others in a similar manner. It may be that, defendant is, as one prior police report put it, "a product of his environment" and a dysfunctional family filled with "rampant sexual abuse," but no explanation changes the facts. Simply put, life imprisonment without the possibility of parole does not in any way appear disproportionate to

defendant's conduct and potential for rehabilitation. Consequently, defendant's sentence did not constitute cruel or unusual punishment.

Affirmed.

/s/ Amy Ronayne Krause

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GLEICHER, J., (*concurring*).

I concur with the lead opinion's decision to affirm defendant's convictions and sentence, but am unable to adopt its analyses concerning the admission of other-acts evidence and the "human lie detector" testimony of an investigating police officer.

I.

The prosecutor charged defendant with having sexually assaulted his niece in 2008. Before trial, the prosecutor notified defendant that she planned to introduce evidence of "other acts of criminal sexual conduct by defendant" committed in 1991 and 1992. The prosecutor's evidence consisted of a police report detailing the assaults and a retired state trooper's testimony that defendant pleaded guilty to second-degree criminal sexual conduct in 1993. Defendant preserved his objection to the introduction of the other-acts evidence by raising the evidence's remoteness in his written objection to the prosecutor's notice filed pursuant to MCL 768.27a. Defendant then objected at trial that this evidence was too old to demonstrate propensity, and thus was more prejudicial than probative. The following colloquy ensued:

> [*Defense Counsel*]: Your Honor, my objection is based primarily on the fact that this entire intention to introduce evidence is evidence that's some twenty years old. And, I think when we look at 403 in conjunction with the MCLA . . . 768.72 [sic], that there is a clear division of responsibility. And, I think it's incumbent upon the Court to look at both of those things in conjunction. And, I would say I think that the report that's going to be introduced, which is a police report going back nineteen years, is going to talk about some acts of an entire family along with Mr. Beebe, none of which led to a CSC first conviction, it was a conviction by plea of no contest I think in 1992 to second degree, for which he served a year in the county jail. I just don't think that that evidence is anything

other than prejudicial to my client. I don't think it's probative, I don't think it shows a propensity, I don't think it does anything that would enable a juror to come to a fair decision.

* * *

The Court: All right. Well, I've reviewed—I've had a chance to now review the law on this. I'm—I think there has to be a clear distinction made between MCL 768.27a, which by case law trumps the similar acts provision where there is a weighing of prejudicial versus probative, where the Court is given discretion.

In this case—and the statute says not that the Court may permit it but evidence 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.

Certainly there is some relevance. I would agree with the defense that it is fairly remote. However, courts have also ruled that the remoteness goes to the weight, not the admissibility, which seems to this Court to be a strange interpretation, but there it is. I think by the mandatory nature of MCL 768.27a and the court's ruling that the remoteness goes not to the admissibility but to the weight I think the defense is entitled to an instruction on that. But, I believe that it is admissible even though I certainly have some strong reservations about the fairness to the defendant. But, I believe I'm required by the present state of the law to admit it.

The lead opinion concedes that "the trial court failed to engage in the MRE 403 balancing test and seemingly believed that it could not engage in this test," but holds that this error did not merit reversal. While I agree that the trial court's error qualifies as harmless, I believe that this call is far closer than the lead opinion suggests.

According to the lead opinion, the admission of evidence concerning events that occurred 20 years earlier did not "prejudice[] defendant's substantive rights." Contrary to the lead opinion's conclusions, the other-acts evidence, including the state trooper's description of remote events as "one of the worst examples of family incest" he had ever encountered, was highly prejudicial, and potentially *unfairly* prejudicial. Whether the remoteness of the challenged evidence created a danger of unfair prejudice that substantially outweighed its probity was never considered by the trial court. In my view, the answer to this question flows from meticulous application of the balancing process contemplated in MRE 403, which safeguards the right to a fair trial in cases also governed by MCL 768.27a. To the extent the lead opinion brushes aside the importance of rigorous analysis under MRE 403, I must respectfully disagree.

By failing to weigh whether the prejudicial nature of the evidence concerning the 1991-1993 events overcame its probative value, the trial court abused its discretion. See *People v Cherry*, 393 Mich 261; 224 NW2d 286 (1974) (the court's failure to recognize its discretionary power is itself an abuse of discretion). While the other-acts evidence was indisputably probative

of defendant's propensity to commit sexual crimes against minors, it remained subject to analysis under MRE 403. The record simply does not reflect that the trial court understood that it could have exercised its discretion and disallowed evidence regarding the 1991 and 1992 assaults based on their remoteness in time.

In *People v Watkins*, 491 Mich 450, 487; 818 NW2d 296 (2012), the Supreme Court specifically identified "the temporal proximity of the other acts to the charged crime" as one of the analytical considerations "that may lead a court to exclude such evidence." The *Watkins* Court emphasized, "[T]here is simply no legal basis for concluding that the lack of a temporal limitation in MCL 768.27a somehow means that the length of time since the other act of sexual misconduct against a minor occurred cannot be considered when weighing prejudice under MRE 403." *Id.* at 488. In fact, "[t]rial courts should apply this balancing to each separate piece of evidence offered under MCL 768.27a." *Id.* at 489. Thus, I believe the admissibility question presented in this case requires deeper analysis than a stark conclusion that because the evidence was "highly probative," it should have been admitted.

Evidence of a defendant's previous sex crimes against children is also highly prejudicial, particularly when those crimes occurred 20 years earlier. Indisputably, Michigan's Rules of Evidence recognize that convictions over 10 years old present a danger of unfair prejudice when used to impeach a witness's credibility. MRE 609(c). Indeed, MRE 609(c) creates a presumption that when introduced as impeachment evidence, such convictions are more prejudicial than probative. Thus, whether the more than 20-year-old evidence employed as *substantive evidence of guilt* qualified as substantially more unfairly prejudicial than probative requires careful consideration.[1]

"[T]emporal remoteness depreciates the probity of the extrinsic offense." *United States v Beechum*, 582 F2d 898, 915 (CA 5, 1978). Remote evidence of past misconduct may be excluded under MRE 403 for a variety of reasons, including a defendant's subsequent rehabilitation and the natural erosion of memories. Here, the two-decade temporal gap between the prior acts and the current ones may signify a lessened likelihood of a propensity to commit sex crimes against children. That defendant was only 12 years old when he sexually abused his sister, supports the notion that time may have brought a change in his behaviors. On the other hand, courts have acknowledged that the similarity between prior acts and the charged offense may outweigh any remoteness concerns. See *United States v Larson*, 112 F3d 600, 604-605 (CA 2, 1997) (discussing the history of FRE 414, the federal counterpart of MCL 768.27a).

The remote acts introduced in this case involved an 11-year-old family-member victim. The charged misconduct also involved a young (11-year-old) family-member victim. In both

[1] I respectfully disagree with lead opinion that "[t]he remoteness of the other act affects the weight of the evidence rather than its admissibility." This conclusion puts the cart before the horse. The remoteness of the evidence must be considered in determining whether the evidence should be admitted at all—in other words whether its relevance outweighs any countervailing unfair prejudice arising from its staleness.

cases, defendant had easy access to the victims during family get-togethers. Evidence that defendant had a propensity to commit sexual offenses against young, female family members bore substantial probity. The trial court's failure to weigh the similarity of the other acts evidence against its remoteness requires this Court to either strike the balance, or to conclude that admission of the evidence was harmless error.

In *Watkins*, the trial court similarly failed to apply MRE 403. The Supreme Court held this omission harmless as "[i]n addition to being probative because of the propensity inference, the other-acts evidence also supported the victim's credibility, presented circumstances similar to those underlying the charged offense, and established Watkins's modus operandi." *Watkins*, 491 Mich at 491. While I believe the question in this case to be far closer than it was in *Watkins*, given the other evidence presented, any error in admitting the other-acts evidence did not constitute a miscarriage of justice.

II.

I also respectfully disagree with the lead opinion's conclusion that a testifying police officer "did not express a conclusion about defendant's credibility." The parties stipulated that the jury would view defendant's recorded interview with state trooper Nicole Hiserote. At the conclusion of Hiserote's testimony, the following colloquy ensued:

> *Q.* Now, part of – when you do this interrogation part is it important to be looking at the interviewee's demeanor?
>
> *A.* Yes, it is.
>
> *Q.* And, why is that important? What do you look for?
>
> *A.* Especially once you have made that accusation it's very common for them to kind of close themselves in, possibly cross their legs. It's an instinct to protect sensitive spots, possibly crossing arms, lack of eye contact, looking down, so forth.
>
> *Q.* And, in watching the video *what are some of the demeanor, the actions that you saw of the defendant*?
>
> *A.* I definitely saw some crossed arms and some legs crossed, failing to turn towards me or open himself up to me. We're taught that when you're doing the interview and the interrogation that you make yourself very open, because if someone's being honest with you they will also often feel very open and face you and have a conversation. *If you are being very open to them and they're not being truthful with you, a lot of times they will turn, maybe try to extend back from you again, cover up or cross*. [Emphasis added].

With this testimony, Hiserote informed the jurors that when they saw defendant crossing his arms or legs or turning away from the interviewer, they could reliably assume that defendant was lying.

Hiserote began her testimony by explaining that she had received "further training other than just what's provided in the academy as far as interviewing and interrogation techniques." This Court has held that an expert cannot be used as "a human lie detector" to give "a stamp of scientific legitimacy to the truth" of the witness' statement. *People v Izzo*, 90 Mich App 727, 730; 282 NW2d 10 (1979). Hiserote's "further training" in suspect interviewing lent her the air of an expert witness. It is readily apparent that when eliciting Hiserote's testimony concerning a suspect's body language, the prosecutor anticipated that the jury would compare Hiserote's description of deceptive behaviors with those demonstrated by defendant in the recording. Although Hiserote did not *expressly* state a conclusion about defendant's credibility, she implicitly did exactly that. I would hold that the prosecutor's deliberate orchestration of Hiserote's inadmissible opinion testimony amounted to prosecutorial misconduct. Nevertheless, I conclude that the introduction of this improper evidence does not mandate reversal of defendant's convictions, as this testimony likely did not undermine the reliability of the jury's verdict.

/s/ Elizabeth L. Gleicher

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SHAPIRO, P.J., (*concurring*).

Judge Gleicher's concurrence raises valid questions as to the challenged evidentiary rulings, but like each of my colleagues, I agree that affirmance is proper. I write separately to note my concerns that the Legislature's prohibition against a judge imposing any minimum sentence less than 25 years violates the constitutional doctrine of separation of powers. See, Note, *Trial by Legislature: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine*, 19 B.U. Pub. Int. L.J. 285(2010). This constitutional question should, however, be resolved in a case where the issue has been squarely raised and fully briefed.

/s/ Douglas B. Shapiro