Court of Appeals, State of Michigan

ORDER

People of MI v Rusty Kalen Baldwin

Docket No. 312730

LC No. 2011-000937-FH

Jane M. Beckering
Presiding Judge

Jane E. Markey

Mark T. Boonstra
Judges

Pursuant to MCR 7.205(D)(2), in lieu of granting the application for leave to appeal, the Court VACATES the circuit court's September 25, 2012, order granting defendant's motion in limine, which precluded the prosecution from introducing evidence of other similar bad acts under MCL 768.27a. In *People v Watkins*, 491 Mich 450, 487-488; 818 NW2d 296 (2012), our Supreme Court provided a nonexhaustive list of six factors courts are to use when determining how the MRE 403 balancing test should be applied in the context of evidence sought to be introduced under that statute.[1] We find that the circuit court misapplied several of those factors and thereby abused its discretion in ordering that the proposed evidence be excluded.[2]

The circuit court inappropriately assigned a neutral tint to the "dissimilarity" factor regarding the proposed testimony of both Hankins and Lewis. The acts to which both proposed witnesses would testify were very similar to the acts forming the basis for the charged crime, so this factor should have been weighed in favor of admitting the testimony. In *People v Allen*, 429 Mich 558, 606; 429 NW2d 499 (1988), the Court said, "The prejudice factor would, of course, escalate with increased similarity." However, that was when propensity was to be considered on the prejudice side of the scale. That is, the more similarity, the more it shows propensity. But now that propensity is to be weighed on the probative side of the scale when considering acts sought to be admitted under MCL 768.27a, *Watkins*, 491 Mich at 486, it is the probative factor that escalates with increased similarity.

The circuit court also inappropriately weighed the "temporal proximity" factor against probativeness. The acts to which Lewis would testify are alleged to have occurred between two and four years before the charged crime; hence, they are relatively recent. So, regarding her proposed testimony, this factor should have been weighed on the probative side of the scale. Those alleged by Hankins occurred seven years before the charged crime. In several contexts, our Legislature and our Supreme Court have indicated that prior bad acts or convictions occurring within ten years of the charged crimes have some probative value. See MCL 768.27b(4), MRE 609(c) and *Allen*, 429 Mich at 606, n 32. Because seven years is closer to the high end of that ten-year range, the probative value is lessened, but not eliminated to the degree that this factor should be weighed against probativeness, as the circuit court

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[1] We note that defendant did not contend that the proposed evidence was not relevant. He only argued that it does not survive the MRE 403 balancing test.

[2] We review a trial court's decision to exclude evidence for an abuse of discretion. *Watkins*, 491 Mich at 467.

did, particularly considering the high degree of similarity to the charged acts. (See *Allen*, 429 Mich at pp 610-612, where the Court assessed the vintage of the prior convictions together with their relative probative value.)

With regard to the "infrequency of the other acts" factor, the trial court found that it did not weigh in favor of either admitting or excluding the evidence. Assuming the alleged act involving Hankins was a one-time occurrence and the alleged acts involving Lewis occurred twice, we do not find that the trial court abused its discretion in finding that this factor did not sway the analysis either way.[3]

We agree with the trial court that the "intervening acts" factor does not seem to apply.

The circuit court placed its greatest emphasis on the fifth factor, "the lack of reliability of the evidence supporting the occurrence of the other acts." The circuit court relied on the fact that no charges were brought or even requested by the police regarding Hankins' allegations and that in the case of Lewis, a prosecutor determined that a forensic interview was "weak," and that there was "no reasonable likelihood of conviction." At first blush, that would seem to call the reliability of the evidence into question. However, in many cases, there are considerations other than actual guilt that inform the decisions of whether to arrest and prosecute. That is especially true in child sexual abuse cases where the decision may turn more on the perceived ability of the victim to adequately articulate the circumstances of the sexual assault, and thus, be an effective witness, than it does on whether the police or prosecutor believe the assault actually happened. It is true that *Watkins* permits a court to "consider whether charges were filed or a conviction rendered when weighing the evidence under MRE 403." But, logically, that should be considered in the context of the reliability inquiry. As indicated, the mere fact that the police do not request an arrest warrant, or that a prosecutor decides not to charge, is not, in and of itself, an indication of the unreliability of the proposed evidence.

Furthermore, because the jurors will actually see Hankins and Lewis testify and will be able to determine for themselves whether Hankins and Lewis are believable, the circuit court's concern about having the police, prosecutor and child protective services worker from the prior cases testify is unwarranted. It should be the jurors in the present case, rather than the police and prosecutors in the prior cases, who determine the credibility of Hankins and Lewis. The prosecutor only sought admission of Hankins' and Lewis' testimony. The court's concern was apparently related to the possibility that the defense may wish to call the other witnesses to challenge the testimony of Hankins and Lewis. The mere fact that additional witnesses may be needed does not weigh against admitting the testimony where, as will be explained *infra*, there is little danger of the jurors becoming confused by the additional witnesses.

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[3] In its application for leave to appeal, the prosecution claims that Hankins is expected to testify that defendant "tickled" her vaginal area on the outside of her clothing almost every time she came over to play with defendant's daughter, and that it occurred more than ten times. If the prosecution accurately reflects Hankins' anticipated testimony, it would further support a finding that the other acts evidence weighs on the probative side of the scale. The prosecutor did not make this clear at the December 16, 2011 hearing, however, and we do not have any other evidence indicating that this information was conveyed to the trial court; thus, the trial court did not err in its analysis of the third *Watkins* factor.

Regarding the sixth factor, "the lack of need for evidence beyond the complainant's and the defendant's testimony," we note that the problems inherent with child sexual abuse victim witnesses are well-known. They are often frightened and apprehensive because not only do they have to recount horrific acts before strangers in an imposing and unfamiliar environment, they must do so under the gaze of the very person they contend committed those acts. That can result in the witnesses being less than articulate in their testimony, which, in turn, can affect the jurors' perception of that testimony. The very reason that MCL 768.27a permits the admission of prior acts is "[b]ecause a defendant's propensity to commit a particular crime makes it more probable that he committed the charged offense," which "tends to make the complainant's story more believable." *Watkins*, 491 Mich at 470, 492-493, n 92. And that is especially true where, as in the present case, the prior acts are very similar to the acts that form the basis for the charged offense. With passage of MCL 768.27a, our Legislature has determined that such evidence is appropriately used to bolster the alleged victim's credibility. Because the circuit court incorrectly assessed the need for the proposed testimony, it erred in its consideration of this factor.

The circuit court's concern about the jurors being misled or about confusion of the issues is unwarranted because that concern was related to the court's belief that the evidence lacked reliability. As we have indicated, this is an unfounded concern, at least on the record now before us. It was also related to the court's belief that CJI2d 20.28a will not keep the jury "on track" because it does not indicate what standard the jurors should use to determine whether defendant actually committed the prior acts. If the circuit court were correct, that jury instruction would always be found wanting. But that is inconsistent with our Supreme Court's statement that the instruction is "[a] final tool available for trial courts when admitting other-acts evidence under MCL 768.27a." *Id.* at 490.

In sum, we find that the circuit court abused its discretion when it excluded the proposed evidence. The circuit court's decision is REVERSED.

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

MAR 0 7 2013
Date

Chief Clerk