STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES GILMAN UDELL,

Defendant-Appellant.

UNPUBLISHED
March 14, 1997

No. 180210
Muskegon Circuit Court
LC No. 93-35666-FH

Before: Fitzgerald, P.J., and MacKenzie and Taylor, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and of being an habitual offender, third offense, MCL 769.11(1)(a); MSA 28.1083(1)(a). He was sentenced to three concurrent prison terms of twenty to thirty years. Defendant appeals as of right. We affirm.

This case arises out of three instances of criminal sexual conduct occurring on March 8, 1993, when defendant, a substitute teacher at Twin Lake Elementary School, allegedly sexually assaulted three of his female students.

Defendant first argues that the trial court erred in denying his request to sever the three offenses into separate trials. Our review of a trial court's decision not to sever is two-part. First, we review *de novo* whether the joined offenses are related as a matter of law and thus eligible for joinder. MCR 6.120(B); *People v Tobey*, 401 Mich 141, 153; 257 NW2d 537 (1977). Second, if we conclude that the offenses are related and thus eligible for joinder, we next review the trial court's denial of defendant's motion to sever for abuse of discretion. *Id*.

MCR 6.120(B) provides as follows:

> On defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
>
> (1) the same conduct, or

(2) a series of connected acts or acts constituting part of a single plan or scheme.

This court rule represents a codification of our Supreme Court's decision in *Tobey*, *supra* at 141. In *Tobey*, our Supreme Court held as follows:

> [A] judge must sever two or more offenses when the offenses have been joined for trial solely on the ground that they are of the "same or similar character" and the defendant files a timely motion for severance objecting to the joinder; and a judge has no discretion to permit the joinder for trial of separate offenses committed at different times unless the offenses "are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." [*Id*. at 153.]

Therefore, pursuant to *Tobey*, a defendant has an absolute right to the severance of unrelated offenses into separate trials, and offenses must not be joined solely on the ground that they are of the "same or similar character." *Id.* at 151.

The first question we must address is whether the three offenses for which defendant was charged are related as a matter of law. We first recognize that the offenses are not based on the "same conduct" as contemplated by MCR 6.120(B)(1). "Same conduct" refers to "multiple offenses 'as where a defendant causes more than one death by reckless operation of a vehicle.'" *Id*. Further, the commentary to the ABA Standards Relating to Joinder and Severance, Standard 13-1.2, instructs:

> The simplest example of a "same conduct" offense may be the case where the defendant's single physical act injures two persons, as where a single gunshot hits two victims. More complex same conduct offenses may involve a course of conduct, as where the same series of physical acts generates charges of resisting arrest and assault.

We believe that in order to properly join multiple offenses under the "same conduct" provision of MCR 6.120(B)(1), each joined offense must have arisen from the same underlying physical behavior of defendant. Because the charges against defendant arose from three separate and distinct instances of sexual assault, joinder is not supported by the "same conduct" provision of MCR 6.120(B)(1).

Therefore, joinder of the offenses in this case must find support in the "single plan or scheme" provision of the rule. We believe that it does. Joinder of offenses under MCR 6.120(B)(2) is appropriate where the offenses are "part of a single plan or scheme," even if considerable time passes between the offenses. *Id.* at 152 n 15. Further, the commentary to the ABA Standards Relating to Joinder and Severance, Standard 13-1.2, provides the following instruction:

> Common plan offenses are the most troublesome class of related offenses. These offenses neither provide common conduct nor interrelated proof. Instead, the relationship among offenses (which can be physically and temporally remote) is dependent upon the existence of a plan that ties the offenses together and demonstrates that the objective of each offense was to contribute to the achievement of a goal not

> attainable by the commission of any of the individual offenses. . . . Common plan offenses may . . . be committed by a defendant acting alone who commits two or more offenses in order to achieve a unified goal. [Emphasis added.]

In the instant case the trial court found, pursuant to MCR 6.120(B), that the offenses were related because they were based upon "a series of . . . acts constituting parts of a single plan or scheme." The trial court stated:

> Well, [the offenses] are certainly connected in time, and they are connected in terms of the similarity of what occurred. But based on the offer of proofs, do they constitute a single scheme or plan. I think they do, and I will indicate why.
>
> Based on the prosecution's representations that this defendant had been twice convicted before of sex offenses involving children, and these sex offenses occurred while he was a teacher and had authority over these children in the classroom, I think that the court is free to make a logical inference that this defendant not only utilized his job as a substitute teacher to gain income and to practice his profession, but also as an outlet for his sexual interest.
>
> * * *
>
> I think strongly it would show an act constituting part of a single scheme or plan -- that is, he takes those jobs not just for income, but as a way to express himself illegally and improperly sexually with minor children. So I think that the scheme or plan element is satisfied.

Our review of the record leads us to agree with the trial court that three offenses for which defendant was charged are related pursuant to MCR 6.120(B)(2).

The evidence presented at the hearing on the motion to sever revealed that defendant had a prior history of sexually assaulting female students while serving as a teacher. In particular, in 1962 defendant was convicted of sexually assaulting female students in the classroom while serving as a teacher. As a result of the conviction, defendant's teaching license was suspended for a period of time. Defendant, however, reacquired his license and, in 1985, was again convicted of sexually assaulting students in the classroom. As a result of that conviction, defendant's license was permanently revoked. At the hearing, the prosecution contended that defendant fraudulently represented to the Muskegon Area Intermediate School District that he possessed a valid teaching certificate, thereby once again gaining access to children for the purpose of illicit sexual activity. We find, as did the trial court, that the evidence offered by the prosecution established that defendant committed the three offenses as part of "a series of . . . acts constituting part of a single plan or scheme."

We next must determine whether the trial court abused its discretion in denying defendant's motion to sever the related offenses into separate trials. *Id*. at 151. An abuse of discretion occurs in criminal cases 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 Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). This discretionary component of a severance analysis permits a trial court to grant a severance "whenever . . . it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense." *Tobey*, *supra* at 151; MCR 6.120(C). However, severance of related offenses is merely permissible and therefore can be contrasted with defendant's absolute right to severance of unrelated offenses. MCR 6.120(C). Relevant factors for considering a permissible motion to sever include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial. MCR 6.120(C). We believe that in considering the facts on which the trial court acted, it cannot be said that the trial court was without justification or excuse for its denial of defendant's motion to sever; therefore, the trial court did not abuse its discretion.

Defendant next argues that the trial court erred in allowing the prosecution to present the testimony of three prior sexual assault victims of defendant. We review a trial court's decision to admit bad acts evidence for abuse of discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

One victim was in defendant's fourth grade class in 1973. She stated that on about five or six occasions defendant called her up to the front of the classroom to sit at his desk where he would put his hands up her skirt and rub her legs and bottom. Another victim was in defendant's second grade class in 1978. She recalled that defendant would call her to sit by his desk where he would rub her legs and bottom. She also testified that she witnessed defendant touch other girls in a similar fashion. A third victim was in defendant's fourth grade class in 1969. She, too, recalled an incident where defendant rubbed the back of her thigh and bottom while she was standing at his desk.

Use of bad acts as evidence of character is excluded to avoid the danger of conviction based on a defendant's history of misconduct. *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982). To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id*.

In the case at bar, the trial court, in reliance on *Golochowicz*, allowed the prosecutor to present the challenged testimony. Presently, however, *VanderVliet*, decided after *Golochowicz*, is the primary case in this state for determining the admissibility of bad acts evidence. Accordingly, we will address whether the trial court abused its discretion in admitting the challenged evidence pursuant to our Supreme Court's clarified standard in *VanderVliet*.

First, the evidence must be offered for a proper purpose. *Id.* at 55. In this case, the trial court found that the evidence tended to support the conclusion that defendant was engaged in a scheme or a plan, evinced defendant's intent, and showed absence of mistake or accident. Defendant concedes that

the testimony has some probative value in this regard, but argues that the remoteness in time of the alleged prior instances of misconduct to the present charges rendered the evidence inadmissible. We disagree. We do not believe that, in this case, the remoteness in time between the charged offenses and the prior bad act lessens the probative value of the other acts. Further, given the prosecution's theory that defendant engaged in a long-term plan or scheme to sexually assault young students, coupled with a defense theory that defendant did not do the acts as interpreted and described by the present victims, the challenged testimony was offered for a proper purpose under MRE 404(b).

Second, the evidence must be relevant under MRE 402. *Id*. MRE 402 provides that all relevant evidence is generally admissible. Relevant evidence, defined by MRE 401, is evidence having any tendency to make a fact of consequence more probable or less probable than it would be without such evidence. In the case at bar, the challenged testimony was relevant because it tended to make the present allegations of sexual assault more probable than they would be without such testimony.

Third, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice to defendant. *Id*. Assessing probative value against prejudicial effect requires a balancing of factors, including the time necessary to present the evidence and the potential for delay, whether the evidence is cumulative, how directly the evidence tends to prove the fact in support of which it is offered, how important the fact sought to be proved is, the potential for confusion, and whether the fact can be proved another way with fewer harmful collateral effects. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 533 NW2d 373 (1995). In this regard the trial court found as follows:

> What I have to determine is whether the probative value outweighs the danger of unfair prejudice. In this type of case where young girls are testifying, there is usually major credibility issues that the jury has to resolve, and it boils down to: Who do you believe in terms of what happened, and why was it done[?] And I think in this case the probative value of the testimony of the four proffered witnesses [(only three actually testified)] under 404(b) outweighs any prejudicial effect.

Consistent with a general MRE 404(b) analysis, a trial court's assessment of the probative value and prejudicial effect of evidence will not be reversed on appeal absent an abuse of discretion. *Gillam v Lloyd*, 172 Mich App 563, 586; 432 NW2d 356 (1988). Accordingly, given the trial court's articulation for finding the probative value of the evidence to not be substantially outweighed by the danger of unfair prejudice to defendant, we cannot say that the trial court's decision was an abuse of discretion.

Thus, given the evidence before the trial court at the motion hearing and the court's articulation of its reasons for admitting the challenged evidence, it cannot be said that the trial court's decision to admit the challenged testimony was without justification or excuse; therefore, the trial court did not abuse its discretion in admitting the challenged evidence.

Defendant next argues that the trial court erred, under MRE 404(b), in admitting excerpts from a book seized during the execution of a search of defendant's home. However, in order to preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection which it asserts on appeal. MRE 103(a)(1); *Temple v Kelel Distributing Co*, 183 Mich App 326, 329; 454 NW2d 610 (1990). In the instant case, defendant objected at trial to the admission of the challenged evidence solely on the basis of relevance; thus, this issue is not preserved as to the MRE 404(b) contention.

We will not review an unpreserved allegation of error unless the error affected defendant's substantial rights. *People v Grant*, 445 Mich 535, 552; 520 NW2d 123 (1994). To have affected defendant's substantial rights in this case, we must find that the admission of the book excerpts could have been decisive of the outcome of the trial. *Id*. at 553. Because our review of the record leads us to conclude that the admission of the challenged evidence could not have been decisive of the outcome of the trial, we will not review defendant's unpreserved claim of error.

Defendant next argues that the prosecutor failed to give notice of his intent to offer the hearsay statement of the mother of a victim sufficiently in advance of trial as required by MRE 803A. At trial, the mother testified that her daughter told her, on the evening following the sexual assault, that defendant had sexually assaulted her. She testified in detail to the contents of her conversation with her daughter, and her testimony was consistent with the previous testimony given by her daughter. Further, our review of the record reveals that the mother's testimony was merely cumulative of her daughter's previous testimony and, therefore, the challenged testimony could not have affected defendant's substantial rights. *People v Van Tassel* (*On Rem*), 197 Mich App 653, 655; 496 NW2d 388 (1992). Thus, we need not review the claim of error. *Grant*, *supra* at 552.

Defendant next argues that the prosecutor engaged in several instances of misconduct during trial. Appellate review of allegedly improper prosecutorial remarks is precluded if the defendant fails to timely and specifically object at trial unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In this case, defendant failed to object at trial to any of the alleged instances of misconduct. Nonetheless, our review of the record reveals that defendant's allegations of prosecutorial misconduct are without merit.

Defendant finally argues that the trial court erred in sentencing defendant to three concurrent terms of twenty to thirty years' imprisonment. We disagree. The sentencing guidelines do not apply to habitual offender convictions. *People v Chandler*, 211 Mich App 604, 615; 536 NW2d 799 (1995). Therefore, in reviewing sentences enhanced under an habitual offender statute, we must only consider whether the trial court abused its discretion in imposing the sentence. *People v Cervantes*, 448 Mich 620, 626; 532 NW2d 831 (1995).

A given sentence constitutes an abuse of discretion if the sentence violates the principle of proportionality, which requires that sentences imposed by trial courts be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435

Mich 630, 636; 461 NW2d 1 (1990). In this case, the trial court properly considered defendant's prior criminal history, the severity and nature of defendant's crimes, and defendant's prospects for rehabilitation. Moreover, the trial court recognized that for over thirty years defendant had engaged in the type of illicit behavior for which he was convicted, resulting in nine verifiable victims. In light of the factors articulated by the trial court, we find that defendant's sentence was proportionate both to circumstances surrounding the seriousness of the offenses and the offender and therefore was not an abuse of discretion.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Clifford W. Taylor