STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD JOSEPH JOHNSON,

Defendant-Appellant.

UNPUBLISHED
April 4, 1997

No. 183334
Kent Circuit Court
LC No. 93-063579 FH

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of second-degree criminal sexual conduct (CSC). Defendant was sentenced as a fourth-offense habitual offender and a second-offense sex offender to ten to twenty years' imprisonment on each count. We affirm.

The complainant spent the night at Colleen Bennett's house on July 8, 1988. The victim was eight or nine years old at the time. Defendant was Bennett's mother's boyfriend and also stayed at Bennett's house that night. The victim testified that during the night defendant entered the room where she was sleeping and touched her breasts. Defendant came into the bedroom a second time that night and forced her to touch his penis. These two incidents represent the two counts of CSC against defendant. Defendant denied the allegations.

I

Defendant first contends that the trial court abused its discretion by failing to grant him five additional peremptory challenges. Defendant argues that an attorney's sensing of prejudice existing in a jury pool where half of the jury members had previously served as jurors in CSC cases during their jury term satisfies the showing of good cause required by MCR 6.412(E)(2). We disagree.

A trial court's authority to grant a party additional peremptory challenges is addressed in MCR 6.412(E)(2), which states as follows:

(2) *Additional Challenges*. On a showing of good cause, the court may grant one or more of the parties an increased number of peremptory challenges. The additional challenges granted by the court need not be equal for each party.

Good cause, as required by MCR 6.412(E)(2), has not been defined. This Court has held that widespread publicity of a case is not good cause for granting additional peremptory challenges, especially where the trial court excused for cause any prospective jurors expressing any opinion regarding the defendant's guilt or real knowledge of the case. *People v King*, 215 Mich App 301, 304; 544 NW2d 765 (1996); *People v Lee*, 212 Mich App 228, 252-253; 537 NW2d 233 (1995).

In this case, where the previously heard CSC cases were factually distinct and raised no issues similar to the case at bar, the trial court did not abuse its discretion in determining that good cause did not exist for granting additional peremptory challenges to defendant. Additionally, the trial court granted all of defendant's challenges for cause, dismissing three jurors who had been involved as either a victim or a witness in situations similar to the facts in this case.

II

Next, defendant contends that the trial court erred in allowing hearsay testimony to be admitted pursuant to MRE 803A. The trial court permitted the victim's aunt, Cynthia Coronado, to relay to the jury the victim's statements to Coronado describing defendant's actions.

MRE 803A, also known as the tender years rule, is an exception to the hearsay rule allowing a child's out-of-court statement of a sexual act performed on him or her to be admitted under certain limited circumstances. *People v Hammons*, 210 Mich App 554, 558; 534 NW2d 183 (1995). The rule states in pertinent part as follows:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstances; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant. [MRE 803A.]

MRE 803A became effective March 1, 1991.

Defendant first argues that application of MRE 803A in this case acts as an ex post facto law because the hearsay statements were uttered in 1988 and admitted at his 1994 trial even though MRE 803A did not become effective until 1991.

The promulgation of MRE 803A in no way makes defendant's punishment for his crime more burdensome, or deprives defendant of any defense available when the crime was committed. *People v Russo*, 439 Mich 584, 592; 487 NW2d 698 (1992). MRE 803A does not serve to punish an action that was innocent when done. *Id*. Additionally, the rules of evidence are procedural rules. MRE 101; *People v McDonald*, 201 Mich App 270, 272; 505 NW2d 903 (1993). Therefore, retroactive application of MRE 803A in this case does not act as an ex post facto law.[1]

Next, defendant argues that the admission of Coronado's testimony was erroneous because the victim's statements to Coronado were not made until either the day or the week after the events occurred and, therefore, were not spontaneous as required by MRE 803A(2). This Court has held that where a young victim of CSC did not relate the events that transpired for several days or even several months, the delay was excusable because of the victim's fear of reprisal from the defendant. *Hammons, supra* at 558; *People v Dunham*, 220 Mich App 268; ___ NW2d ___ (1996). In both cases, this Court held that the trial court did not err in finding the victim's statements spontaneous. *Hammons, supra*; *Dunham, supra*. In the present case, Coronado testified that the victim told her she was afraid and that the victim "just blurted it out." Therefore, the trial court did not err in finding that the victim's statements to Coronado were spontaneous and not manufactured, as required by MRE 803A(2).

Finally, defendant contends that the trial court erred in admitting Coronado's testimony because the victim made another corroborative statement immediately after the incident, and before her statement to Coronado, to Colleen Bennett. MRE 803A(4) states:

> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

The victim testified that after defendant left the bedroom, she went downstairs and told Bennett what defendant had done. Because the first corroborative statement was to Bennett and not to Coronado, the trial court erred in admitting the victim's later corroborative statement to Coronado under MRE 803A. However, given the persuasive evidence against defendant, and the brief testimony of Coronado, which introduced no additional allegations, the error in admitting Coronado's testimony was harmless. *Hammons, supra* at 558; *People v Spinks*, 206 Mich App 488, 493; 522 NW2d 875 (1994).

III

Defendant also contends that the trial court abused its discretion in admitting prior bad acts evidence under MRE 404(b)(1). Defendant argues that, because there was no evidence to show that defendant had a scheme, plan, or system to perpetrate sexual acts, the trial court abused its discretion in

admitting the testimony of three other females that defendant had entered their bedrooms and engaged in sexual activity with them.

To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) the evidence must be relevant to an issue other than propensity; (2) the evidence must be relevant to an issue or fact of consequence at trial; and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. *People v Vander Vliet*, 444 Mich 52, 74; 508 NW2d 114 (1993).

Application of the three-part test reveals that the testimony of the three young girls was properly admitted. Because the testimony of the three girls indicated that the circumstances of defendant's sexual conduct with them was similar to those regarding the victim, it was relevant to prove defendant's scheme, plan, or system in committing sexual acts against young girls, which was an issue of consequence at trial, and the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. Therefore, the trial court did not abuse its discretion in admitting such evidence. *Vander Vliet, supra* at 52.

IV

Defendant further contends that the prosecutor denied him his right to a fair trial by referring to various allegations of CSC against him, by referring to his prior convictions, and by using the prestige of the prosecutor's office to vouch for the credibility of the prosecutor's witnesses and case. We disagree.

While the prosecutor's suggestion, that his professional responsibility to seek justice was different from defense counsel's responsibility, would have been better left unsaid, *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995), we find any resulting error to be harmless given the overwhelming evidence against defendant. *People v Mezy*, 453 Mich 269, 285-286; 551 NW2d 389 (1996). Further, any prejudice was dispelled as a result of the court instructing the jury that the arguments of counsel were not evidence. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

V

Finally, defendant contends that the supplemental information charging him as a second-offense sex offender, MCL 750.520f; MSA 28.788(6), and a fourth-offense habitual offender, MCL 769.12; MSA 28.1084, was not filed promptly as required by *People v Shelton*, 412 Mich 565; 315 NW2d 537 (1982). Thus, defendant argues that his conviction under the habitual-offender statute, MCL 769.10 *et seq*.; MSA 28.1082 *et seq*., must be set aside and the case must be remanded for resentencing. We disagree.

"A supplemental information is filed 'promptly' if it is filed not more than 14 days after the defendant is arraigned in circuit court (or has waived arraignment) on the information charging the underlying felony, or before trial if the defendant is tried within that 14-day period." *Id*. at 569; MCR 6.112(C). The purpose of the fourteen-day rule is to provide a defendant with notice, at an early stage

of the proceedings, of the potential consequences should the defendant be convicted of the underlying offense. *Shelton, supra* at 569; *People v Manning*, 163 Mich App 641, 644; 415 NW2d 1 (1987).

On October 8, 1993, the same day as defendant's first arraignment in circuit court, a supplemental information charging him as a fourth-offense havitual offender was filed. Although an amended supplemental information was filed on February 22, 1994, adding the charge of second-offense sex offender, the original supplemental information was filed within the fourteen-day requirement and provided defendant with the required notice that if he was convicted of the underlying felony, he risked a conviction for habitual offender, fourth offense. *Id.* at 644.

The February 22, 1994, amended information, adding he charge of second-offense sex offender against defendant, was not filed within fourteen days of either arraignment. However, because the prosecutor filed the supplemental information twenty-five days after defendant waived arraignment on January 28, 1994, and more than ten months before the defendant's trial, the defendant was afforded fair notice of the second-offense sex offender charge. *People v Rush*, 118 Mich App 236, 240-241; 324 NW2d 586 (1982). Therefore, defendant's supplemental convictions shall stand.

Affirmed.

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

[1] We also note that defendant fled this jurisdiction in 1988 and was not apprehended until 1993. If defendant had not left the state, his trial may well have occurred before MRE 803A was promulgated. Thus, defendant, in a real sense, put himself in a situation where MRE 803A could be utilized to his detriment.