

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD ALLEN STEPHENS,

Defendant-Appellant.

UNPUBLISHED
November 4, 1997

No. 196162
Jackson Circuit
LC No. 96-075316 FC

Before: Young, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1), and first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (person under thirteen years of age). Defendant was sentenced to concurrent terms of five to ten years' imprisonment for the assault with intent to commit criminal sexual conduct involving sexual penetration conviction, and thirty to sixty years' imprisonment for the first-degree criminal sexual conduct conviction. We affirm.

I

Defendant first argues that the trial court erred in admitting other acts evidence under MRE 404(b). We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993).

In order to be admissible under MRE 404(b), other acts evidence must meet the following requirements: (1) it must be offered for a proper purpose; (2) it 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 under MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). If the evidence is admitted, the trial court may, upon request, give a limiting instruction. *Id.*

Here, we conclude that the other acts testimony in this case was properly admitted. First, it was offered for proper purposes. Defendant was charged with both assault with intent to commit criminal sexual conduct involving sexual penetration and first-degree criminal sexual conduct. Therefore, his

general denial of guilt presumptively put all elements of the charged offenses at issue, including, with respect to the assault charge, his intent to commit sexual penetration. See *VanderVliet*, *supra*, 78. In other words, the other acts testimony was probative of defendant's intent to commit sexual penetration when he fondled the victim. Moreover, because of the similarity of the acts at issue (like the victim, the witness was defendant's minor niece, and the sexual assaults occurred under similar circumstances), they were probative of defendant's scheme, plan, or system in committing both of the charged offenses. See *People v Miller (On Remand)*, 186 Mich App 660, 664; 465 NW2d 47 (1991).

Second, the danger of undue prejudice in admitting the other acts testimony did not substantially outweigh its probative value. All damaging evidence is prejudicial to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Unfair prejudice exists only when it is highly probable that the evidence will be given undue weight by the jury, or when its admission would be inequitable to the point that its probative value is *substantially outweighed* by the danger of unfair prejudice. *Id.* Here, the high degree of similarity between the prior sexual assaults and the charged offenses, and the fact that the other acts testimony was highly probative of defendant's intent, leads us to conclude that the danger of undue prejudice was not so great as to substantially outweigh its probative value. Finally, any possibility of unfair prejudice was cured by the trial court's instructions regarding the proper use of the evidence. We find no abuse of discretion in the trial court's decision.

II

Defendant next argues that there was insufficient evidence to sustain the jury's guilty verdict. We disagree. When reviewing a challenge to the sufficiency of the evidence to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

The elements of assault with intent to commit criminal sexual conduct involving sexual penetration are as follows: (1) the defendant committed an assault; (2) with the intent to commit sexual penetration. *People v Love*, 91 Mich App 495, 502; 283 NW2d 781 (1979). Here, the victim testified that on several occasions from the time she was seven years old until she was fourteen years old, defendant fondled her chest and vagina both on top and underneath her clothes and underwear. The victim's brother corroborated this, testifying that he saw defendant feeling his sister's breasts, buttocks, and vaginal area underneath her underwear. The victim also testified that defendant penetrated her vagina with his penis several times. She also testified that a knife was nearby during the assaults, and defendant told her not to tell anyone about the assaults because nobody would believe her. Based on these facts, there was sufficient evidence to permit a rational trier of fact to find beyond a reasonable doubt that defendant committed assault with intent to commit criminal sexual conduct involving sexual penetration.

Criminal sexual conduct in the first degree is committed when there is an intrusion into the genital or anal opening of another person under one of the circumstances enumerated in MCL

750.520b(1); MSA 28.788(2)(1), regardless of the sexual purpose of the actor. *People v Garrow*, 99 Mich App 834, 837-838; 298 NW2d 627 (1980). Here the victim testified that she was under the age of thirteen when defendant first vaginally penetrated her, thus fulfilling subsection (1)(a) of the statute: “other person is under 13 years of age.” However, defendant argues that because there was inconsistent and conflicting testimony, the evidence was insufficient to convict him. We disagree. In *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994), aff’d on other grounds 450 Mich 349 (1995), this Court stated:

[T]he question is not whether there was conflicting evidence, but rather whether there was evidence that the jury, sitting as the trier of fact, could choose to believe and, if it did so believe that evidence, that the evidence would justify convicting defendant. In this case, the victim, who was under the age of thirteen, testified that defendant had her perform fellatio on him on at least five separate occasions. If the jury chose to believe the victim’s testimony, they would be justified in convicting defendant of four counts of criminal sexual conduct in the first degree.

Because the jury obviously believed the victim’s testimony, it was justified in convicting defendant of first-degree criminal sexual conduct.

III

Finally, defendant argues that his sentence violates the principle of proportionality. We disagree. We review a trial court’s sentencing decision for an abuse of discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A sentencing court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Because defendant’s minimum sentence of thirty years was within the guidelines range of twenty to forty years, it is presumed to be proportionate. *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995). Defendant has presented no unusual circumstances to overcome that presumption. See *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Consequently, the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Stephen J. Markman
/s/ Michael R. Smolenski