

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS PAUL HICKS,

Defendant-Appellant.

UNPUBLISHED

January 16, 2007

No. 262567

St. Clair Circuit Court

LC No. 04-001965-FH

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his conviction and sentence for two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) [victim under 13 years of age]. Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to 8 to 30 years for each count. We affirm.

Defendant's convictions arose from alleged incidents of sexual contact with a friend of his daughter's, who testified that defendant came into his daughter's bedroom, where the girls were sleeping, and rubbed his genitals against her buttocks.

Defendant first argues that testimony regarding prior alleged incidents of sexual contact with his stepdaughter was improperly admitted because those alleged incidents differed in severity from those underlying the instant charges and because his stepdaughter recanted her testimony regarding those incidents after his conviction. We disagree.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion, while preliminary questions of law regarding the admissibility of evidence are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court's decision whether to grant a motion for a new trial is reviewed for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

Michigan Rule of Evidence 404(b) governs the admissibility of evidence of "other crimes, wrongs, or acts." MRE 404(b); *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). "Evidence of extrinsic crimes, wrongs, or acts of an individual generally is inadmissible in a criminal prosecution to prove that the defendant possessed a propensity to commit such acts." *People v Hall*, 433 Mich 573, 579; 447 NW2d 580 (1989). The purpose of this rule is to prevent a conviction based on defendant's history of misconduct, rather than the facts of the

instant case. *Starr, supra* at 495. However, such evidence is not universally excluded. Other acts evidence may be admitted where: (1) the evidence is offered for some purpose other than under a character-to-conduct theory, or a propensity theory, (2) the evidence is relevant to a fact of consequence at the trial, and (3) the trial court determines under MRE 403 that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *Hall, supra* at 579-580. A proper purpose is one other than showing the defendant's propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The prosecutor has the burden of showing the evidence is relevant. *Knox, supra* at 509. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by a jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

When a juror learns that a defendant has previously committed the same crime as that for which he is on trial, the risk is severe that the juror will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he "did it before he probably did it again." [*Id.*]

But where the other acts evidence is of the same crime as the case at bar, it is much more likely that similarities can be found between them, if for no other reason than the fact that both crimes would satisfy the same elements. And, where there are enough commonalities between two acts they can be considered evidence that those commonalities are caused by an individual's general plan of action. *People v Sabin (After Remand)*, 463 Mich 43, 63-65; 614 NW2d 888 (2000). Such commonalities need not be distinctive or unusual, and a common scheme may be found even where there are many dissimilarities between the acts. *Id.* at 65-67. Where reasonable people could disagree on whether the similarities outweigh the differences, a trial court will not be found to have abused its discretion. *Id.* at 67.

In this case, there is a distinctive similarity between defendant's alleged prior acts with his stepdaughter and those underlying the instant charges. Both involve defendant rubbing his lightly-clothed or naked penis up against the buttocks of a pre-teen girl in defendant's care, in a bed or swimming pool. While there were some differences in circumstances between the prior acts and the current offenses, the similarities outweigh these differences. Further, defendant's prior behavior with his stepdaughter is relevant to any assertion by defendant that his contact with the victim here was accidental or unintentional. And while the prior acts testimony is certainly prejudicial to defendant, its strong relevance is not substantially outweighed by any danger of *unfair* prejudice. Finally, the testimony was introduced for a proper purpose, to show a similar plan or scheme and to negate any assertion of mistake or accident. Therefore, the trial court did not abuse its discretion when it admitted evidence of those prior acts. *Sabin, supra* at 65-67.

This conclusion is not altered by defendant's stepdaughter's recantation of her testimony following defendant's conviction. First, when the trial court made its ruling, defendant's stepdaughter had not yet recanted. Further, "Michigan courts have expressed reluctance to grant new trials on the basis of recanting testimony." *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992). This is because "[t]here is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character." *Id.* at 559-560.

The witness recanting here is not a witness to the current charges against defendant. Rather, she gave testimony regarding defendant's prior acts for the limited purpose of establishing a common plan or scheme and refuting any claim of accidental contact. In addition, defendant's stepdaughter does not now claim that her account was false or fabricated; she only asserts that her testimony was not based on her own memory at trial but rather on a written statement she gave to police a year before trial. Even that limited assertion lacks credibility given that the witness never provided a written statement to police or the prosecutor, but rather, like the victim, was interviewed at Care House after the instant complaint was made. Thus, there is nothing to suggest the trial court abused its discretion in denying defendant a new trial based on this rather suspect post-conviction recantation.

Defendant next argues that the trial court improperly admitted the tape of the victim's interview at the Care House. We agree, but find the error harmless.

"Generally, a witness's prior consistent statement is inadmissible as substantive evidence." *Palmer v Hastings Mut Ins Co*, 119 Mich App 271, 273; 326 NW2d 476 (1982). But such statements are not hearsay when the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." MRE 801(d)(1)(B). "While a consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived, consistent statements made after the motive to fabricate arose provide very little support against a charge of fabrication. . . . Therefore, . . . a consistent statement made after the motive to fabricate arose does not fall within the parameters of the hearsay exclusion for prior consistent statements." *People v Rodriguez*, 216 Mich App 329, 331-332; 549 NW2d 359 (1996).

At trial, the prosecutor sought to admit the videotape of the victim's interview at Care House to establish that the victim's account of the offenses during that interview was consistent with her testimony at trial, so as to rebut defendant's attempts during cross-examination to establish some inconsistency between the victim's testimony at trial and at the preliminary examination. Defendant also commented during his closing remarks that perhaps the victim "was crying [during her testimony] because of the fact that she concocted the story and now it's gone this far," suggesting that the victim fabricated her story. However, the record does not indicate that defendant was suggesting that the complainant only decided to fabricate a story about defendant assaulting her *after* the Care House interview in which she described those assaults. And if a motive to fabricate arose after that interview, plaintiff has not indicated what that motive might be or why it would have arisen at that time and not before. It seems much more likely that defendant was suggesting that the victim's claim that defendant assaulted her was fabricated from the beginning, before the Care House interview, in which case, the prior consistent statement exception to hearsay does not apply to that interview. *Rodriguez, supra* at

332. Thus, the trial court abused its discretion in admitting the victim's prior consistent statements in the Care House interview.¹

Additionally, the trial court further abused its discretion by admitting the victim's entire interview,² not merely the victim's prior consistent statements made during that interview.

Plaintiff asserted, and the trial court agreed, that admission of the entire interview was proper under the rule of completeness set forth in MRE 106. However, that conclusion is founded on a serious misapprehension of that rule, which reads as follows:

When a writing or recorded statement or part thereof is introduced by a party, an *adverse party* may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. [Emphasis added.]

MRE 106 thus allows a party to bring into evidence a complete writing that a party opponent has admitted in part, to put things in context. It does not, by its plain language, allow a party to admit whatever part of a writing or recorded statement is admissible and then use that as a basis to admit whatever inadmissible evidence might be included in the writing or statement on the bootstraps of the admissible evidence. Therefore, we agree with the merits of defendant's assertion that the trial court abused its discretion in admitting the videotape of the victim's interview in its entirety. However, we do not find this error to warrant reversal.

In a criminal case, reversal is not warranted unless, upon examination of the entire case, it appears more probable than not that the error was outcome determinative. MRE 103(a); *Lukity, supra*, at 495-496. With respect to the MRE 106 argument, defendant has not suggested what portion of the taped interview, improperly introduced, prejudiced his defense. Having reviewed the tape, we see no prejudice in this regard. As to the more general error in admitting the tape at all, the victim's statements during the Care House interview were substantially the same as her trial testimony. Any minor inconsistencies could easily be considered by a trier of fact to be related to the victim's young age, nervousness, and trauma at having been molested. And, to the

¹ A prior consistent statement of a witness also is admissible to rehabilitate the witness following impeachment by a prior inconsistent statement, where the prior inconsistent statement has been put in evidence, and the prior consistent statement is of such character as to be probative upon the issue of whether or not the prior inconsistent statement was in fact made. *People v Hallaway*, 389 Mich 265, 276-277; 205 NW2d 451 (1973); *People v Davis*, 106 Mich App 351, 354-355; 308 NW2d 206 (1981). While the prosecutor noted defense counsel's attempts to impeach the victim with inconsistencies between her trial testimony and her testimony at defendant's preliminary examination, there is no assertion that the prior consistent statements, contained in the Care House interview, are probative as to whether the prior inconsistent statements, during preliminary examination testimony, were in fact made.

² A small portion of the interview, pertaining to something that happened to another girl, was redacted before the interview was admitted into evidence and played for the jury.

extent the jury found inconsistencies to be of import, those would likely have undermined the witness's credibility.

In any event, the critical question in this case was whether the trier of fact believed the victim's testimony regarding defendant's conduct, or whether defendant was more credible. Even if the tape had been entirely excluded, the jury would have been aware that there was a Care House interview and that, following that interview, defendant was arrested and charged with the instant offenses. Therefore, that the Care House tape was generally consistent with the victim's trial testimony likely was of no surprise or import to the jury. Further, defendant testified at trial that he entered his daughter's bedroom on three occasions, that he twice moved his daughter over onto her side of the shared bed and that while doing so the first time, he lost his balance and inadvertently touched the victim's shoulders with his forearms after which he gently rubbed her shoulder to indicate that he was sorry. Defendant denied any sexual contact with the victim. However, the investigating officer testified that defendant's trial testimony was inconsistent with his prior statement to police, in which defendant denied entering his daughter's room or having any contact with his daughter or the victim at all after they went to bed that night. And defendant's stepdaughter testified that defendant previously rubbed his genitals on her buttocks on number of occasions, including while they were in bed, in a swimming pool and in a truck, thus tending to negate any assertion of mistake or accident implicit in defendant's testimony. Reviewing the entire record, we cannot say that it appears more probable than not that the tape altered the outcome of this trial. Consequently, reversal is not warranted. *Lukity, supra* at 495-496.

Defendant argues that the prosecution played a different tape for the jury during deliberations than was played during its case in chief, and that this denied him his constitutional right to cross-examine the witnesses against him. Defendant notes that the "new" tape played during deliberations had better audio than that played earlier, and as a result, defendant was denied the opportunity to question the victim regarding statements that he previously had not been able to hear. Defendant further argues that the prosecution's introduction of that "new" tape was prosecutorial misconduct, because the prosecutor should have made that tape available to the defense prior to the trial. We disagree.

The Care House tape was entered into evidence as exhibit 1, after which it was in the custody of the court clerk until it was played at the request of the jury during deliberations. There is no evidence that the tape played during deliberations was not the same tape used throughout the proceedings. Any differences in sound quality may be attributed to the use of different replay equipment when the tape was played the second time. Defendant was provided with a copy of the tape prior to the trial and was given ample opportunity to cross-examine the victim at trial. Defendant was thus not denied his constitutional right to cross-examine the victim. Similarly, there simply is no evidence the prosecutor switched the tape after it was admitted into evidence or that the prosecutor otherwise failed to provide defendant with this nonexistent "new" tape before trial. Therefore defendant's assertion of prosecutorial misconduct lacks any basis in fact.

Defendant also claims that the introduction of the victim's testimony that, earlier in the day, defendant rubbed his genitals on her buttocks in the swimming pool was an invalid attempt to constructively amend the indictment to encompass that alleged incident. We disagree. Defendant was convicted of two counts of CSC II for incidents that occurred in his daughter's

bedroom, as originally charged. There was no attempt to convict defendant based on his conduct in the pool and thus, there was no improper constructive amendment of the indictment.

Defendant next argues that the trial court improperly scored Prior Record Variable (PRV) 2 at ten points because a prior offense in Florida in 1983 was not properly determined to have been equivalent to a felony in Michigan. However, any error in this regard would be harmless. Even if one were to accept defendant's contention that PRV 2 should have been scored at five points instead of ten, the sentencing guidelines range would remain the same. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Defendant also asserts that the trial court improperly scored Offense Variable (OV) 10 at 15 points for defendant's prior predatory behavior with the victim in the swimming pool earlier on the day of the instant offenses. We disagree.

OV 10 scores points for "[e]xploitation of a vulnerable victim." MCL 777.40. OV 10 is scored at 15 points for "[p]redatory conduct," defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(1)(a); MCL 777.40(3)(a). In scoring OV 10 at 15 points, the trial court characterized defendant's earlier conduct with the victim in the pool as "grooming," explaining that "this all started in the pool . . . and then it led to the bedroom." The victim testified that defendant rubbed his genitals on her buttocks while they were in the swimming pool and that she did not complain about this at any time before the alleged assaults later that night while the victim was sleeping in defendant's daughter's bedroom. This testimony supports the trial court's inference that defendant "groomed" the victim for the later assaults by rubbing up against her in the pool, where he plausibly could have claimed it was an accident if the victim complained and, if she did not complain, he could attempt further contact later while the victim was sleeping in his daughter's bedroom. Therefore, there is record evidence to support the trial court's scoring of 15 points for predatory conduct under OV 10.

Finally, defendant claims that the trial court determined his sentence based on facts that were not found beyond a reasonable doubt by the jury, thus denying him his constitutional right to due process, notice, and a trial by jury. We disagree. A defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range. *People v Drohan*, 475 Mich 140, 160, 164; 715 NW2d 778 (2006). "As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.* at 164. Thus, defendant's rights to due process, notice, and trial by jury were not affected by the trial court's findings independent of the jury on issues that only affected his sentencing guidelines score.

We affirm.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra