

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 16, 2011

v

ANTHONY WILLIAM VRONKO,

Defendant-Appellant.

No. 297792
Kent Circuit Court
LC No. 09-005703-FH

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

Defendant was convicted by a jury of accosting a child for immoral purposes, MCL 750.145a, and sexual offender loitering in a school safety zone, MCL 28.734(2)(a). He was sentenced as a third habitual offender to concurrent prison terms of 12 to 24 months on the safety zone violation and three to eight years on the accosting a child conviction.¹ Defendant appeals as of right. We affirm.

Complainant alleged that defendant drove by complainant's home and yelled out to complainant's five-year-old daughter, "I want to suck your pussy." Defendant maintained that he was singing along with his radio to a song called "The Streak", which had the lyric, "Ethel come back you shameless hussy." The parties stipulated that defendant had been required to register as a sex offender. Because defendant was on parole, his movements were monitored by a GPS device. The device showed that defendant had been on complainant's street at the approximate time in question and had also been in the vicinity of two schools.

Defendant had previously molested his stepdaughter when she was five to six years old. She testified that he watched pornography in her presence, touched her inappropriately, and had her perform a sexual act she characterized as "dry humping." He also performed oral sex on her, and once masturbated while he apparently thought she was sleeping. The stepdaughter testified

¹ These sentences were made consecutive to the sentence of one day to life for indecent exposure as a sexually delinquent person defendant was serving on parole at the time he committed the instant offenses.

that on one occasion defendant was driving with her and her brothers when he stopped in front of a house and looked inside the window. On another occasion, he yelled out the window to a woman who was jogging. Other evidence showed that defendant was observed apparently masturbating while in his car while children were walking to a nearby school.

Defendant first argues that it was error to admit the evidence of prior acts pursuant to MCL 768.27a, which provides:

(1) Notwithstanding section 27, [MCL 768.27, the statutory counterpart to MRE 404(b)], in a criminal case in which the defendant is accused of committing a listed offense against a minor, [i.e., a listed offense as defined in section 2 of the sex offenders registration act, MCL 28.722], evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. . . .

Defendant argues that in enacting MCL 768.27a, the Legislature unconstitutionally infringed on our Supreme Court's authority to regulate practice and procedure under Mich Const 1963, art 6, § 5. Defendant asserts that the statute is in conflict with MRE 404(b), and that, in adopting this evidentiary rule, the Court set forth a procedural due process protection that precluded the use of propensity evidence to prove that a defendant committed a charged offense. Defendant recognizes that this Court reached the opposite conclusion in *People v Pattison*, 276 Mich App 613; 741 NW2d 558 (2007), but raises the issue to preserve his right to advance it in the Supreme Court.

Under MCR 7.215(C)(2), a published Court of Appeals decision has precedential effect under the rule of stare decisis. See also MCR 7.215(J)(1) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this [conflict] rule."). Defendant is not entitled to relief on this issue.

Defendant next argues that even if evidence is admissible under MCL 768.27a, it may not be admitted if it is more prejudicial than probative under MRE 403. *Pattison* indicates that an MRE 403 analysis must be done before evidence is admitted under MCL 768.27a. See 276 Mich App at 621; see also *People v Mann*, 288 Mich App 114; ___ NW2d ___ (2010). The *Mann* Court held:

[T]he probative value of the [MCL 768.27a] evidence was not substantially outweighed by the danger of unfair prejudice. Whether the minors in this case were telling the truth had significant probative value because it underlies whether Mann should be convicted of the crimes for which he was charged. Further, the trial court specifically instructed the jury on two occasions that the only purpose for which the evidence could be considered was to help them judge the believability of the testimony regarding the acts for which Mann was on trial. And jurors are presumed to follow their instructions. Moreover, the trial court took precautions to limit any prejudicial effect by ensuring that the videotape of Mann's guilty plea to the prior offense was not played for the jury. Instead, the

trial court allowed a stipulation that Mann committed the act to be entered into evidence. [288 Mich App at 118-119 (footnotes omitted).]

Here, the witnesses testified to the prior incidents. There was no stipulation that the prior events occurred but also no indication that defendant was willing to stipulate to these occurrences. In instructing the jury, the trial court did not state, as in *Mann*, that this evidence was limited to judging whether the defendant was believable. Rather, consistent with the statute, the jury was told that if it believed that defendant committed acts of sexual misconduct involving a child, it could consider the acts in “deciding if the defendant committed the offenses for which he is now on trial.” The jury was cautioned as follows:

You must not convict the defendant in this case solely because you think he is guilty of other bad conduct in the past. The evidence in this case must convince you beyond a reasonable doubt that the defendant committed the crimes for which he is currently on trial.

Where the defense was a claim that defendant’s actions were innocent, the value of this evidence would be to contradict defendant’s veracity.² On this point, the probative value of the evidence was not outweighed by the potential for prejudice.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Peter D. O’Connell
/s/ Donald S. Owens

² In addition, since defendant claimed that what he said while driving by the child was innocuous and the complainant simply misheard it, the prior act is also admissible under MRE 404(b) to show an “absence of mistake”. MRE 404B(b)(1).