

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
May 20, 2014

v

ROBIN LEROY HARVEY,  
Defendant-Appellant.

No. 314555  
Oakland Circuit Court  
LC No. 2012-242235-FC

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Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of five counts of first-degree criminal sexual conduct (victim under 13 years of age), MCL 750.520b(1)(a), following a jury trial. Defendant was sentenced to 25 to 50 years in prison for each of the five counts. On appeal, defendant claims that he was denied the effective assistance of counsel. Because defendant has abandoned the issue on appeal and because the issue has no merit in any event, we affirm.

Defendant was charged with five counts of first-degree criminal sexual conduct for acts committed against the complainant, his daughter, that were alleged to have taken place between September 2007 and May 2012. Before trial, the prosecution filed a notice of intent to introduce “other acts” evidence at trial under MCL 768.27a. The notice indicated that it sought to admit evidence of (1) other instances of first-degree criminal sexual conduct committed against the complainant that were not charged in the felony information (spanning from when complainant was 6 years old up until she was 11 years old in May 2012) and (2) instances of second-degree criminal sexual conduct that were committed against complainant’s 13-year old sister in March and April 2012.

Defendant contends on appeal that his defense counsel was ineffective for failing to object to the prosecution’s notice of intent to introduce evidence of “other acts” under MCL 768.27a.

To preserve a claim of ineffective assistance of counsel, a defendant must move, in the trial court, for a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Because defendant did not move for a new trial or a *Ginther* hearing, this issue is not preserved for review. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). “Unpreserved issues concerning ineffective assistance of counsel are reviewed for errors apparent on the

record.” *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* The court must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012).

To establish that a defendant’s trial counsel was ineffective, a defendant must show (1) that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

The statute under which the prosecution notified defendant of its intent to introduce evidence of other uncharged acts is MCL 768.27a. In a case in which the defendant is charged with a sexual offense against a minor, evidence that the defendant committed other such offenses “is admissible and may be considered for its bearing on any matter to which it is relevant.” MCL 768.27a(1); *People v Watkins*, 491 Mich 450, 469; 818 NW2d 296 (2012). The purpose of the statute is to broaden the range of evidence admissible in such cases. *People v Smith*, 282 Mich App 191, 204; 772 NW2d 428 (2009). However, evidence admissible under MCL 768.27a remains subject to exclusion under MRE 403. *Watkins*, 491 Mich at 481. MRE 403 precludes the admission of otherwise admissible evidence if the evidence’s “probative value is substantially outweighed by the danger of unfair prejudice.” “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Under normal circumstances, past acts used as propensity evidence is considered unduly prejudicial and not admissible for that purpose. *People v VanderVliet*, 444 Mich 52, 62-63; 508 NW2d 114 (1993), citing MRE 404(b); see also *Michelson v United States*, 335 US 469, 475-476; 69 S Ct 213; 93 L Ed 168 (1948) (stating that propensity evidence generally is barred not because it is irrelevant but because “it is said to weigh too much with the jury”). However, under MCL 768.27a, any propensity inference from the evidence is to be weighed *in favor* of its admission. *Watkins*, 491 Mich at 487. Because defendant did not object to the other acts evidence sought to be admitted under MCL 768.27a, the trial court did not evaluate the evidence under the balancing test of MRE 403 and subsequently allowed it to come in through the testimony of the complainant and her sister.

In determining whether to exclude MCL 768.27a evidence under MRE 403, the *Watkins* Court provided the following non-exhaustive, illustrative factors that a court may consider:

- (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) presence of intervening acts, (5), the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for

evidence beyond the complainant's and the defendant's testimony. [*Id.* at 487-488.]

On appeal, defendant cites the above factors but does not explain why the balancing of these factors would favor not admitting the evidence. Defendant's entire argument on this point is reproduced here:

If defense counsel had properly challenged the admission of these acts, pursuant to the criteria set forth in *Watkins*, supra, including, but not limited to the dissimilarity between the other acts and the charged crimes, the temporal proximity, the infrequency of the other acts, the presence of intervening acts, the lack of reliability of the evidence supporting the occurrence of the other acts, and the lack of need for evidence beyond [the complainant's] testimony, defendant would submit there was a reasonable probability that some of the acts would not have been admitted.

Defendant's mere recitation of the *Watkins* factors, without providing any argument or analysis regarding *why* these factors favored excluding the evidence, is inadequate to present the issue for our review. Notably, defendant does not assert that all of the evidence would be inadmissible but only evidence of "some of the acts" would be inadmissible. We are left to speculate which evidence was allegedly erroneously admitted. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claims. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Further, with respect to defendant's position regarding the *Watkins* factors, we are left to speculate how complainant's testimony regarding her being sexually penetrated over 20 times by defendant was dissimilar to the five charged counts of defendant sexually penetrating her. Likewise, we are left to wonder if defendant is suggesting that the "over 20" previous penetrations committed against the complainant should be considered "infrequen[t]." Consequently, defendant's cursory treatment of the issue has resulted in it being abandoned. See *id.* ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.").

Nevertheless, our review of the record reveals that defendant's claim of ineffective assistance of counsel has no merit because any objection to the other acts evidence would have been futile. See *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008) ("Counsel is not ineffective for failing to make a futile objection."). We conclude that had the trial court conducted the "balancing test" under MRE 403, the evidence would have been admissible even had defense counsel objected to it. The record shows that the *Watkins* factors favored the evidence's admission primarily because of (1) the similarity between the other acts and the charged crimes, (2) the contemporaneousness between the other acts and the charged crimes, and (3) the frequency of those other acts.

All of the other acts evidence involved similar scenarios where defendant was touching or penetrating his daughters for his own sexual gratification. Further, the notice for the other acts evidence stated that these other episodes of criminal sexual conduct took place between 2007 and 2012, which matches the time frame alleged for the five charged offenses. Plus, with respect to the frequency of these other acts, complainant testified that she was sexually assaulted "more than 20 times." Although the notice only indicated two instances of sexual misconduct that were

committed against complainant's sister, arguably<sup>1</sup> weighing in favor of not admitting the evidence, this one factor is not sufficient to overcome the other factors discussed previously that weigh heavily in favor of its admission under MRE 403. Cf. *Watkins*, 491 Mich at 481 (noting that MRE 403 only prohibits the admission of evidence if the evidence's probative value is *substantially* outweighed by undue prejudice, not merely outweighed).

Therefore, because the trial court would have admitted the other acts evidence even had defense counsel objected to it, defendant's counsel's performance was not objectively unreasonable. See *Horn*, 279 Mich App at 39-40.

Additionally, the court ultimately told the jury how to properly use the other acts evidence in accordance with the law when it subsequently gave the CJI2d 20.28(a) jury instruction, cautioning the jury against inappropriate use of the other acts evidence admitted at the trial. "In cases in which a trial court determines that MRE 403 does not prevent the admission of other-acts evidence under MCL 768.27a, this instruction is available to ensure that the jury properly employs that evidence." *Watkins*, 491 Mich at 490. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The impact of any prejudicial use by the jury of the other acts evidence was cured by the instruction. Thus, defendant cannot show that "there is a reasonable probability" that the outcome would have been different in the absence of the deficient performance, or that confidence in the outcome of the trial is undermined. *Strickland*, 466 US at 694.

Affirmed.

/s/ Michael J. Riordan  
/s/ Pat M. Donofrio  
/s/ Karen M. Fort Hood

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<sup>1</sup> We do not believe that these two instances actually do weigh against admissibility, but for argument's sake, we assume that they could be viewed as weighing against admissibility.