

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER WILLIS BRABON,

Defendant-Appellant.

UNPUBLISHED

February 2, 1999

No. 202237

Allegan Circuit Court

LC No. 96-010230 FC

Before: Sawyer, P.J., and Wahls and Hoekstra, JJ.

MEMORANDUM.

Defendant appeals as of right his conviction after a jury trial for two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and habitual offender, fourth offense, MCL 769.12; MSA 28.1084. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arose out of the digital penetration of his twelve-year-old daughter on two occasions in January and February 1996. The trial court allowed similar acts evidence of defendant's inappropriate touching of a friend of his daughter under similar circumstances. Both girls were apparently asleep at the time of the assaults, when defendant entered their rooms and touched them. When the girls stirred, defendant pretended to be asleep, and then left the room.

MRE 404(b)(1) provides:

(1) Evidence of other crimes, wrongs, or bad acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrong, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 338 (1993). MRE 404(b) is consistent with an inclusionary, not exclusionary, theory of admissibility. *Id.* at 64-65. The decision to admit bad acts evidence is within the discretion of the trial court. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

The trial court did not abuse its discretion in admitting the evidence. The similar acts evidence was offered to show a plan or scheme, and to establish the absence of a mistake. These are permissible purposes, and the evidence was relevant. Where the similar act was not of an inflammatory nature, there was no showing that the probative value was substantially outweighed by the prejudicial effect of its admission. *People v Miller (On Remand)*, 186 Mich App 660; 465 NW2d 47 (1991).

The trial court properly declined to give a lesser included offense instruction for attempted first-degree criminal sexual conduct. A trial court is not required to give instructions of a cognate lesser included offense unless the instruction is supported by the evidence. *People v Bailey*, 451 Mich 657; 549 NW2d 325 (1996). The elements of attempt are not duplicated in the completed offense, thus a trial court is not required to instruct a jury on attempt without regard to the evidence presented at trial. *People v Adams*, 416 Mich 53, 59; 330 NW2d 634 (1982). The victim testified as to the completed offense, and there was no other evidence offered which would support an instruction on attempt.

Defendant's sentence of twenty to forty years' imprisonment was within the sentencing guidelines range, and presumptively proportionate. *People v Wybrecht*, 222 Mich App 160, 175; 564 NW2d 903 (1997). Defendant has failed to present any unusual circumstances which would overcome the presumption of proportionality. *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996).

Affirmed.

/s/ David H. Sawyer

/s/ Myron H. Wahls

/s/ Joel P. Hoekstra