

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS R. WARNKE,

Defendant-Appellant.

UNPUBLISHED

August 14, 2003

No. 240369

Wayne Circuit Court

LC No. 01-002162

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of four counts of first-degree criminal sexual conduct (under thirteen), MCL 750.520b(1)(a), and three counts of second-degree criminal sexual conduct (under thirteen), MCL 750.520c(1)(a).¹ The trial court sentenced defendant concurrently to twelve to twenty-five years in prison for each CSC-I conviction, and five to fifteen years in prison for each CSC-II conviction. We affirm.

I. Videotapes

Defendant first argues that the trial court erred in admitting into evidence the adult videotapes seized by police from defendant's home, contending the prosecution used the tapes to improperly bolster the victim's credibility. Defendant further argues that even if such bolstering was proper, the videos were not relevant to any matter at issue in this case and they were unduly prejudicial. We disagree. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). An abuse of discretion occurs if an unprejudiced person, considering the facts available to the trial court, would find no justification for the ruling made. *Id.*

As defendant correctly points out, generally, all relevant evidence is admissible, while irrelevant evidence is not. MRE 402. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the

¹ This case involves three victims. Defendant was convicted of all the charges brought against him with regard to one of the victims. With regard to the other two victims, defendant was charged with six counts CSC-II (under thirteen) of which he was found not guilty.

action more probable or less probable than it would be without the evidence.” MRE 401. Relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" MRE 403.

Upon review of the record, we find the trial court properly admitted the adult videotapes into evidence. The evidence was relevant because the videotapes, found in defendant’s home, made it more likely than not that the victim was telling the truth when she testified that defendant had shown her an adult video while she was in his home. The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice because there was nothing about the adult videotapes, in and of themselves, indicating that it was more likely that defendant sexually assaulted children in his home. Further, the court gave a limiting instruction that the evidence was admitted only to show that evidence obtained from defendant’s home corroborated some portion of the victim’s testimony. Therefore, we find the trial court did not abuse its discretion and reversal is unwarranted.

II. Rebuttal Testimony

Defendant next argues the trial court abused its discretion in admitting the testimony of assistant prosecutor Daniel Less, who had conducted the forensic interview of the victim, because he impermissibly vouched for the victim’s credibility. We disagree.

Rebuttal evidence is limited to relevant and material evidence. To be admissible on rebuttal, the evidence must address an issue properly raised. *People v Vasher*, 449 Mich 494, 505; 537 NW2d 168 (1995). Proper rebuttal evidence includes testimony that contradicts the testimony of the other party's witness if the evidence tends to disprove the prior witness' testimony. *Id.* at 505- 506. Evidence may not be introduced on rebuttal unless it relates to a substantive matter. *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997). The test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered by the prosecutor in his case in chief, but whether the evidence is "properly responsive to evidence introduced or a theory developed by the defendant." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

Here, defendant presented Patrick Ryan, Ph.D. who testified that the forensic interviewing protocol might not have been properly employed, and as a result, the interviewing process involving the victim may have been contaminated. As a rebuttal witness, Less testified that the victim did not appear to be repeating things she had been told to say and the victim shared new information that he believed to be important and crucial enough to make further inquiry necessary. Less’ testimony was properly admitted for the limited purpose of explaining that the proper forensic interview protocol was followed when interviewing the victim. See *People v Nantelle*, 215 Mich App 77, 86; 544 NW2d 667 (1996) (rebuttal testimony properly admitted where it served to contradict an implication created by the defense). Less did not testify regarding any of the factual details shared by the victim during the interview. Less did not vouch for the victim’s credibility, nor did he express his personal opinion about defendant’s guilt. We find the trial court did not abuse its discretion in permitting this rebuttal testimony.

III. Joinder

Finally, defendant argues that the trial court erred in granting the prosecutor's motion for joinder of the charges related to the victim with the charges related to two other victims who alleged that defendant sexually assaulted them. We review the trial court's decision regarding joinder for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

MCR 6.120 provides:

(A) **Permissive Joinder.** . . . Two or more informations or indictments against a single defendant may be consolidated for a single trial.

(B) **Right of Severance; Unrelated Offenses.** On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on

(1) the same conduct, or

(2) a series of connected acts or acts constituting a single scheme or plan.

(C) **Other Joinder or Severance.** On the motion of either party, except as to offenses severed under subrule (B), the court may join or sever offenses on the ground that joinder or severance is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial. Subject to an objection by either party, the court may sever offenses on its own initiative.

The prosecution argued that the charges being brought against defendant involved the same conduct or a series of connected acts constituting a part of the same scheme or plan pursuant to MCR 6.120(B). In response, defense counsel argued that the alleged conduct in each case was different and did not constitute a series of connected acts or indicate any type of scheme, plan, or design. Defense counsel asserted that the motion was an attempt to prejudice defendant and to convenience the prosecutor, not the witnesses. The court permitted joinder of the cases, ruling that the cases were related and based on the same conduct, a series of connected acts, and that all of the children involved were of similar age. The court noted that it believed that joinder of the cases would promote fairness to the parties.

In *People v McCune*, 125 Mich App 100, 103; 336 NW2d 11 (1983), this Court discussed offenses related as part of a single scheme or plan such that joinder of several informations is appropriate. The Court relied on American Bar Association Standards for Criminal Justice (2d ed), Joinder and Severance, as approved by the House of Delegates in 1978, and quoted the commentary to Standard 13-1.2:

“Common plan offenses are the most troublesome class of related offenses. These offenses involve neither common conduct nor interrelated proof. Instead, the relationship among offenses (*which can be physically and temporally remote*) is dependent upon the existence of a plan that ties the offenses together and demonstrates that the objective of each offense was to contribute to the achievement of a goal not attainable by the commission of any of the individual offenses. A typical example of common plan offenses is a series of separate offenses that are committed pursuant to a conspiracy among two or more defendants. Common plan offenses may also be committed by a defendant acting alone who commits two or more offenses to achieve a unified goal.” [*Id.* at 103 (emphasis added).]

In *McCune*, this Court affirmed the trial court’s decision to join cases that involved five separate incidents of conspiracy and robbery or breaking and entering at four separate locations over a span of nearly five months. *Id.* at 101-102. Similarly, in *People v Miller*, 165 Mich App 32, 44-45; 418 NW2d 668 (1987), remanded on other grounds 434 Mich 915 (1990), this Court determined that two offenses involving the same victim were properly joined even though they occurred at different times.

[T]he victim’s testimony revealed that these incidents occurred during warm weather and at the learning center in locations of seclusion. These facts indicate a single plan or scheme on the part of defendant to sexually molest the victim when the opportunity presented itself.

Moreover, the trial did not involve substantially different proofs on these charges to the extent that it would confuse the defendant in his defense, or deprive him of any substantial right. [*Id.* at 45.]

As in *McCune* and *Miller*, we conclude that the testimony in the present case indicates that the inappropriate sexual acts allegedly committed against the victim and the other two victims occurred while they were all in defendant’s home being either baby sat or tutored, when defendant’s wife was not around. These facts indicate the alleged offenses were “part of a single scheme or plan” of defendant to sexually molest young girls in his home under the pretext of either baby sitting them or tutoring them. Although defendant contends that the time frames for the charges involving the victim were very different from those charges involving the other two victims, we note that temporal proximity is not a requirement for establishing a single scheme or plan under MCR 6.120(B). Further, the record reveals that the victims knew each other, and saw each other in or around defendant's house during the time frames of the incidents. Accordingly, we hold that the offenses were related pursuant to MCR 6.120(B)(2).

In addition, we find no unfair prejudice to defendant because of the joinder. The offenses did not involve substantially different proofs such that the jury would be confused by the testimony. *Miller, supra* at 45. Nor did the number of charges or the evidence itself result in any unfair prejudice. MCR 6.120(C). The victim’s individual testimony was sufficient to establish the elements of the crimes against her. The counts were separately delineated on the verdict form with reference to each victim individually. We also find that the parties’ resources and the convenience of witnesses were served by joinder in this case. MCR 6.120(C). Additionally, the evidence with respect to each victim would have been admissible in each of the trials, if held

separately, as evidence of a common plan or scheme under MRE 404(b). See, generally, *Duranseau, supra* at 208. Because the testimony of each victim would be admissible in trials involving the other victims, we disagree with defendant that the outcome of the cases would have been different if the cases were tried separately. Finally, we note that the jury found defendant not guilty of the charges relating to the other two victims, indicating that the jury was aware that even though they were joined for trial, the charges against defendant were separate with respect to each of the victims. In sum, the offenses were related such that joinder was appropriate, and the trial court did not abuse its discretion in joining the cases.

Affirmed.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Kirsten Frank Kelly