

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE RAFAEL TORRES,

Defendant-Appellant.

UNPUBLISHED

September 16, 2003

No. 240738

Oakland Circuit Court

LC No. 2001-181975-FC

Before: Fitzgerald, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant Jose Rafael Torres was convicted as charged of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), stemming from the alleged assault of the then eight-year-old complainant. Defendant was sentenced to concurrent terms of twenty to fifty years in prison. Defendant now appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I

Defendant first contends that the trial court abused its discretion by admitting evidence of uncharged prior sexual acts between defendant and the victim pursuant to MRE 404(b). We disagree.

In this case, defendant was charged with three counts of first-degree criminal sexual conduct (fellatio, cunnilingus, and digital penetration of the vagina) occurring around Christmas 1998 at the house where defendant and his mother resided. Defendant's mother provided daycare in her home and had been the victim's babysitter for several years. At the time of trial in February 2002, the victim was eleven years old.

Prior to trial, the prosecution filed notice and moved to admit evidence of defendant's other crimes or wrongs pursuant to MRE 404(b). The prosecution sought to admit evidence of prior similar uncharged sexual acts by defendant against the victim. The trial court initially denied the motion without prejudice; however, at the time of trial, the court ultimately granted the prosecution's motion for reconsideration, finding that the evidence regarding other uncharged sexual acts was admissible pursuant to *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973).

We review a trial court's decision to admit other acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse is found only where an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). A trial court's decision regarding a motion for reconsideration is likewise reviewed for an abuse of discretion. *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 709; 609 NW2d 607 (2000).

MRE 404(b) provides in pertinent part:

(1) Evidence of other crimes, wrongs, or 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, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In order for evidence of other crimes, wrongs, or acts to be admissible under MRE 404(b), it must be (1) offered for a proper purpose rather than to prove the defendant's character or propensity to commit a crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to prevail under the balancing test set forth in MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). MRE 404(b)(1) is a rule of inclusion that includes a nonexclusive list of grounds on which evidence may be admitted. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). MRE 404(b)(1) thus permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct, *id.*, *VanderVliet, supra* at 65, and weighs admissibility by a determination "whether the probative value is *substantially* outweighed by the risk of unfair prejudice." *Starr, supra* at 499 (emphasis in original). If such evidence is admitted, either party may request that the court instruct the jury not to consider the evidence for any purposes beyond those for which it was offered. *VanderVliet, supra* at 75. In *DerMartzex, supra*, our Supreme Court held that evidence of other sexual acts between a defendant and the minor victim may be admissible if the defendant and victim live in the same household and if, without such evidence, the victim's testimony would seem incredible. Noting that the credibility of the alleged victim is typically the principal issue in a criminal sexual conduct case, the Court held that "[l]imiting her testimony to the specific act charged and not allowing her to mention acts leading up to the assault would seriously undermine her credibility in the eyes of the jury." *Id.* at 414-415. Thus, "the probative value outweighs the disadvantage where the crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense." *Id.* at 413. See also *People v Sabin (After Remand)*, 463 Mich 43, 69-70; 614 NW2d 888 (2000).

Here, defendant generally denied the allegations, which placed all elements of the charges against him at issue. *Starr, supra* at 501. As in *DerMartzex*, the other acts evidence was relevant to the victim's credibility. The facts indicate that there was a close, almost family-like relationship: the victim's and defendant's mothers were best friends. Defendant's mother babysat the victim five to six days a week for several years. The two families spent many other times together, including holidays. The victim's testimony concerning a seemingly isolated

incident around Christmas 1998 may well have appeared incredible without the other acts evidence, particularly where the victim, as here, could not give a specific date for the charged events and gave seemingly inconsistent reports and testimony. For example, the victim was able to explain that the sexual activity with defendant happened almost every time she was at defendant's home, but she specifically remembered it happening around Christmas 1998. She was able to explain that some of the details she had given related to the uncharged acts.

All of the charged and uncharged acts occurred at defendant's house. For all of the acts, the victim was taken to a room by defendant and separated from others in the house. She was then sexually assaulted by defendant in the same manner with regard to both the charged and uncharged acts. According to the victim, the same December 1998 charged conduct occurred on almost a daily basis for several years. Such evidence established a pattern of conduct, scheme, or plan by defendant, which was used to commit the charged acts.

Without evidence of defendant's inappropriate sexual conduct toward defendant before the charged assaults, the jury would have been forced to examine her testimony about the offenses in question in a vacuum. We agree with the trial court that the uncharged acts evidence is relevant and probative of the victim's testimony and her credibility, *DerMartzex, supra*, as well as of defendant's scheme or plan in molesting the victim.

We further conclude that the trial court properly determined that the probative value of the uncharged other acts evidence was not substantially outweighed by unfair prejudice. MRE 403; *Starr, supra*; *VanderVliet, supra* at 75. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford, supra* at 398. The evidence here was not marginally probative but, as noted, bore directly on the victim's credibility and also significantly showed that defendant employed a scheme or plan in sexually assaulting the victim in his home. Further, the trial court gave an appropriate cautionary instruction. *VanderVliet, supra*.

Moreover, although defendant complains that the trial court abused its discretion when it granted the prosecution's motion for reconsideration on the morning of trial, we note that the prosecutor's original motion was heard and denied without prejudice within a few weeks of the trial. Presumably, the defense was prepared at that time with a strategy had the motion been granted, knowing that the victim's credibility was the primary issue in the case. Thus, there was no resultant unfair prejudice to defendant when the court granted the prosecution's reconsideration motion. In sum, the trial court did not abuse its discretion by admitting the other uncharged acts evidence pursuant to *DerMartzex, supra*.

II

Defendant next argues that insufficient evidence was presented at trial to sustain his convictions of three counts of first-degree criminal sexual conduct. We disagree.

In determining whether sufficient evidence has been presented to sustain a conviction, this Court reviews the evidence de novo in the light most favorable to the prosecution in order to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). "The standard of review is deferential: a reviewing court is required to draw all

reasonable inferences and make credibility choices in support of the jury verdict.” *Id.* at 400. Circumstantial evidence and reasonable inferences drawn from the evidence can constitute satisfactory proof of the elements of a crime. *Id.*; *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). The prosecution need not negate every reasonable theory consistent with innocence; instead, the prosecution is bound to prove the elements of the crime beyond a reasonable doubt. *Nowack, supra* at 400.

The testimony of the complainant alone may constitute sufficient evidence to establish the defendant’s guilt beyond a reasonable doubt. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997); *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). “Questions of credibility are left to the trier of fact and will not be resolved anew by this Court.” *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Thus, a conviction seldom will be overturned on the basis of the credibility of a witness, *People v Hughes*, 217 Mich App 242, 248-249; 550 NW2d 871 (1996); *People v Crump*, 216 Mich App 210, 215-216; 549 NW2d 36 (1996), and we decline to do so under the present circumstances. Ample evidence supporting the charges of first-degree criminal sexual conduct, MCL 750.520b(1)(a), was presented through the testimony of the complainant and the investigating detective, who testified that defendant acknowledged “he did play around with her” and further admitted to acts of fellatio and cunnilingus with the victim. Although defendant argues that the victim’s testimony was uncorroborated and inconsistent with prior testimony and reports to police, such credibility issues are for the jury. *McFall, supra*. Moreover, as in *Avant, supra* at 506, “defense counsel ensured that the jury was well aware of the discrepancies in [the victim’s] various accounts of the incident,” and, through cross-examination, made the jury fully aware of the circumstances surrounding defendant’s statement.

Viewing the evidence in a light most favorable to the prosecution, we conclude there was sufficient evidence of the essential elements of first-degree criminal sexual conduct to support defendant’s convictions.

III

Defendant next alleges that the three concurrent twenty to fifty year sentences imposed for his criminal sexual conduct convictions are disproportionate within the meaning of *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). We disagree.

A trial court’s imposition of a sentence is reviewed for an abuse of discretion. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). A sentence constitutes an abuse of discretion if it violates the principle of proportionality, i.e., the sentence imposed by a trial court must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.*; *Milbourn, supra* at 636.

In the instant case, the trial court employed the former judicial guidelines at sentencing because the offense date was December 1998.¹ The applicable guidelines range was ten to

¹ The legislative guidelines, MCL 777.1 *et. seq.*, apply to crimes committed after January 1, 1999.

twenty-five years' imprisonment, and because defendant's sentences were within the guidelines, they are presumptively proportionate. *Rice, supra* at 447. "In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000). To this end, defendant emphasizes his youth, his minimal prior record, his lack of education, and his own status as a victim of sexual abuse.

However, none of these reasons are notably "unusual" so as to render the sentences imposed disproportionate. Defendant's prior record consisted of two misdemeanors and a youthful trainee act violation. Although defendant was only twenty years old at the time of sentencing, he had engaged in sexual activity with the victim on almost a daily basis from the time she was four until she was eight years old. Although defendant could not read or write English and only completed ninth grade, he was of average intelligence and knew that what he had been doing to the victim was wrong. Defendant's claim of being victimized himself is not particularly persuasive considering the circumstances of this case. Defendant and his mother were considered family friends. Defendant abused this relationship and sexually assaulted the young victim for several years. The assaults ended when the victim was eight years old – at the same age when defendant's mother stopped babysitting her. None of the sexual activity came to light until the victim was eleven years old and she finally told someone about it. She has been receiving counseling ever since.

We conclude that there are no "unusual circumstances" or sufficient mitigating factors that would overcome the presumption of proportionality in this case. Defendant's sentences were warranted under the circumstances, and the trial court therefore did not abuse its discretion in sentencing defendant.

In light of our conclusion that defendant's sentences are proportionate, his related argument that his sentences constitute cruel and unusual punishment is without merit. A proportionate sentence is not cruel and unusual. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002); *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard Allen Griffin
/s/ Henry William Saad