

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WARREN MCCLENDON,

Defendant-Appellant.

UNPUBLISHED

March 22, 2005

No. 249197

Wayne Circuit Court

LC No. 02-010872-01

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of six counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and sentenced to six concurrent prison terms of 12-1/2 to 30 years each. He appeals as of right. We affirm.

Defendant, aged forty at the time of his 2003 trial, is the complainant's uncle.¹ His convictions arise from allegations that, on numerous occasions, he sexually abused the complainant, aged thirteen at the time of trial. The complainant indicated that, over the years, he visited defendant on weekends and stayed for eight continuous days in 2002. Other young boys also stayed with defendant. According to the complainant, the first incident of inappropriate sexual activity, which involved only inappropriate touching, occurred when he was five years old. Defendant subsequently forced the complainant to engage in oral sex. When the complainant was seven years old, defendant began having anal sex with him. The complainant indicated that the anal sex occurred at least forty times. Defendant also forced the complainant to engage in sexual acts with another boy, JS. The complainant testified that if he refused to engage in sexual acts, defendant would strike him with belts and hangers. According to the complainant, the sexual acts between him and defendant ended in 2002, with the last act occurring on August 8, 2002, when he was twelve years old.

The complainant testified that he saw two videotapes while at defendant's house. One videotape showed the complainant and defendant engaging in oral and anal sex and also showed the complainant and JS engaging in sexual acts. The complainant claimed that defendant burned

¹ In the record, defendant is also referred to as the complainant's cousin.

the videotape. The complainant's cousin, TG, testified that he saw a videotape showing the complainant, defendant, and JS engaging in sexual acts, which was subsequently burned on a grill. TG also testified that, in June 2002, defendant had anal intercourse with him. The complainant testified that he observed defendant engage in anal sex with TG.

Defendant's stepson, LM, testified that when he was seventeen or eighteen years old, he and defendant engaged in oral and anal sex, and that defendant videotaped some of their sexual encounters. LM also testified that, on one occasion in 2000, he saw defendant watching JS lying on top of the complainant; both boys were naked. GB, a fourteen-year-old at the time of trial, testified that, while at defendant's house, defendant had him sit on his lap and defendant fondled his penis.

RG testified that defendant, whom he saw as a father figure, began fondling his penis and having oral sex with him when he was twelve years old. When RG was twelve or thirteen years old, defendant had anal sex with him. RG indicated that, after he moved in with defendant when he was fourteen years old, they engaged in sexual acts three times a week, and defendant videotaped some of their sexual encounters. According to RG, if he did not engage in sexual acts with defendant, defendant would hit him with hangers, belts, and extension cords; he also saw defendant hit other boys. RG testified that he observed defendant engage in oral and anal sex with the complainant more than fifty times. RG also saw a videotape of defendant, the complainant, and JS having sex.

Defendant argues that his convictions should be reversed because RG's testimony and a videotape showing him and RG engaging in sexual acts were inadmissible, under MRE 404(b), as "other acts evidence." We disagree.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). If there is an underlying question of law, such as whether admissibility is precluded by a rule of evidence, we review that question of law de novo. *McDaniel, supra*.

MRE 404(b) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). But other acts evidence is admissible under MRE 404(b) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In application, the admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *VanderVliet, supra* at 75.

In this case, the prosecution offered the other acts evidence for a proper purpose under MRE 404(b), i.e., as proof of a "scheme, plan, or system in doing an act." In *Sabin, supra* at 63,

our Supreme Court held that “evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.” See also *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). The *Sabin* Court noted that “[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts.” *Sabin, supra* at 64. “For other acts evidence to be admissible there must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan.” *Hine, supra*; see also *Sabin, supra* at 64-65. But “distinctive and unusual features are not required to establish the existence of a common design or plan. The evidence of uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense.” *Hine, supra* at 253, citing *Sabin, supra* at 65-66.

Defendant has not demonstrated that the trial court’s evidentiary ruling was an abuse of discretion. The evidence was not offered to show that defendant had a bad character. Rather, it assisted the jury in weighing the witnesses’ credibility, particularly where defendant claimed that he did not sexually abuse the complainant, and was also probative of defendant’s common scheme, plan, or system of taking advantage of similarly-situated young boys. We agree with the trial court that there was a sufficient similarity between the instant offense and the other acts to infer a common plan. The prosecutor theorized that, with both boys, defendant used a position of authority over them, had private access to them through their living arrangements, engaged in the same sexual acts with them, often using physical coercion, and videotaped his sexual encounters with them.

The complainant testified that defendant’s sexual abuse against him began when he was five years old and ended when he was twelve years old. RG testified that defendant abused him between the ages of twelve and fifteen. Both the complainant and RG viewed defendant as a father figure, and both boys stayed in defendant’s home at some time. Also, defendant would whip the boys with wire hangers and belts if they resisted his sexual advances. Defendant engaged in both anal and oral sex with both boys on numerous occasions; they were not isolated incidents. The sexual acts occurred in the privacy of defendant’s residence and, on occasion, each boy observed defendant engaging in sex with another boy. Defendant videotaped himself having sex with both the complainant and RG. It could be inferred from these common features that defendant had a system that involved taking advantage of the father-child relationship, particularly his control over the boys in his home, to perpetrate the sexual abuse. In sum, the commonality of the circumstances of the other acts evidence and the charged crime are sufficiently similar to establish a scheme, plan, or system in doing an act.

Defendant argues that the charged conduct and the other acts were not sufficiently similar because RG was older than the complainant, particularly noting that RG was fifteen years old in the videotape. Even if the boys’ ages is considered a dissimilarity, at most that would create a reasonable disagreement with regard to whether the charged acts and the other acts contained sufficient common features to infer the existence of a common system used by defendant in committing the acts. But a mere difference of opinion on a close evidentiary question will not qualify as an abuse of discretion. See *Hine, supra* at 250, and *Sabin, supra* at 67.

Furthermore, contrary to defendant’s claim, the evidence was not inadmissible simply because the very nature of the evidence is prejudicial, and defendant has not demonstrated that

he was unfairly prejudiced by the evidence. See MRE 403. While the acts described are serious and incriminating, such characteristics are inherent in the underlying crimes for which defendant was accused. The danger that MRE 404(b)(1) seeks to avoid is that of *unfair* prejudice, not prejudice that stems only from the offensive nature of the crime itself. See *Starr, supra* at 499. Moreover, the trial court gave a cautionary instruction to the jury concerning the proper use of the other acts evidence, thereby limiting the potential for unfair prejudice. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, this issue does not warrant reversal.

Defendant also claims that the trial court abused its discretion by allowing the videotape showing him engaging in sex with RG as corroborating evidence, because it was sexually explicit and cumulative to RG's testimony and, thus, unfairly prejudicial.² It is within the sole discretion of the trial court to admit or exclude photographic evidence, *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995), and the trial court's decision will not be disturbed on appeal absent an abuse of discretion, *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). With all photographic evidence, the proper inquiry is whether the probative value of the evidence is substantially outweighed by unfair prejudice. *Mills, supra*.

As discussed previously, the other acts evidence involving RG was relevant to the issues in the case, and defendant has not demonstrated that the videotape was unduly prejudicial because of its "graphic" and "explicit" nature. First, "[u]nfair prejudice" does not mean "damaging," as any relevant evidence will be damaging to some extent. *Mills, supra* at 75-76. Additionally, this Court has consistently held, in other contexts, that photographic evidence is not inadmissible merely because of its gruesome or shocking nature. See, e.g., *People v Howard*, 226 Mich App 528, 549-550; 575 NW2d 16 (1997), *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994), and *People v Alexander*, 104 Mich App 545; 305 NW2d 262 (1981). Furthermore, contrary to defendant's claim, the videotape was not excludable simply because RG testified orally about the information depicted in it. See *Mills, supra* at 76. Moreover, the videotape was properly offered as corroborating evidence, particularly because the defense claimed that RG was not credible. For these reasons, this claim does not warrant reversal.

Next, defendant argues that defense counsel was ineffective for failing to object to the testimony of the examining pediatrician and an expert witness who defendant maintains improperly vouched for the complainant's truthfulness. We disagree.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v*

² Defendant also argues that the videotape was inadmissible because RG was older than the complainant. As previously indicated, the dissimilar ages do not establish an abuse of discretion.

Effinger, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Dr. Kalavathy Srinivasan, the examining pediatrician, testified that the complainant's physical examination was normal, that she saw "no lacerations, no bleeding," and that she could not draw any conclusions from the normal examination. The following exchange then occurred between the prosecutor and Dr. Srinivasan:

Q. Could you form an opinion whether or not this child was penetrated in his rectum?

A. We mainly go by the history. If he said it happened, it happened. By exam, it was normal.

Q. So, does a normal exam mean that someone has - - has or has not been penetrated?

A. No, it doesn't mean that.

Q. Why?

A. Because most of the time, exams are normal.

During defense counsel's cross-examination of Dr. Srinivasan, the following exchange occurred:

Q. Did you say that if the kid comes in and says it happened, it happened, Doctor?

A. Most of the time, yes.

* * *

Q. Doctor, the report shows that the child is normal in all respects; isn't that true?

A. Yes.

Q. Okay; fine. And you are here today to explain away those results, aren't you?

A. Yes.

Thereafter, Dr. Kimberly Aiken, an expert in child sexual abuse, testified that the complainant's rectal examination was normal, but that a medical determination of child abuse is

not based only on the physical examination. She indicated, inter alia, that an anus could heal within ten days, that an anal sphincter can open to a two-inch diameter, and that the use of Vaseline may decrease potential signs of penetration. During defense counsel's cross-examination of Dr. Aiken, the following exchange occurred:

Q. Very good . . . Let's talk about those instances in which you—in which you do find evidence of sexual abuse.

I'd like to give you a history, okay? That's all I'm going to give you is a history. This child was abused 114 times over a period of five years. In my example, the child was subject to sexual abuse almost twice a month for—ever since, let's say, 1995, until, let's say, August 8th, 2002. Just pull a couple of names out the hat.

The child is abused—114 times, there is a penis in this child's anus. You would—And if he came in and got examined, and told you that's what happened to him—got it? Okay. Would you believe him?

A. Yes.

Q. And you would base your opinion on what the child said?

A. Yes.

Q. Okay. Now, here's my question for you.

What if the child lied to you? How good then is your opinion?

A. A medical opinion is based on a history and a physical, as well as any other ancillary tests or imagining or whatever. Based on that history, with a normal exam, I would believe him.

If he lied to me, I would still believe him. I'm a physician, not a judge or a jury.

Q. But - - but your results can be false if the information is false; isn't that correct?

A. Yes.

* * *

Q. So, have you ever testified that a child was not abused?

A. I would never testify that a child was not abused based on a normal exam. I would never testify to that.

Defendant has not overcome the presumption that defense counsel's decision not to object to the doctors' testimony was a matter of strategy. The facts that the complainant's

physical examination was normal and that a determination of child abuse may be based only on what a child says were presented to the jury. Given the circumstances of the doctors' method of determining whether a child was abused, defense counsel could have reasonably decided to develop those circumstances and attack the potential fallacy and bias in their method, as opposed to objecting to the testimony. Indeed, defense counsel adequately attacked the doctors' testimony through cross-examination and, during cross-examination, the expert witness acknowledged that, with no physical corroboration, a doctor could arrive at "an inappropriate diagnosis, prognoses, or opinion." "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Moreover, even if a reasonable attorney would have objected, given the substantial evidence in this case, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Effinger, supra*. Defendant is not entitled to a new trial.

Affirmed.

/s/ Donald S. Owens

/s/ David H. Sawyer

/s/ Helene N. White