

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD A. HINDS,

Defendant-Appellant.

UNPUBLISHED

March 22, 2005

No. 250668

Crawford Circuit Court

LC No. 02-002047-FC

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

Defendant Ronald A. Hinds appeals as of right his jury trial conviction for second-degree criminal sexual conduct (CSC).¹ Defendant was sentenced to two to fifteen years' imprisonment. Defendant was convicted based on allegations of sexual abuse made by his three-year-old granddaughter, who was only four when she provided inconsistent testimony at defendant's trial. There was no independent corroboration of the allegations, a screen was placed between the complainant and defendant for no discernable reason in violation of defendant's Sixth Amendment right to confrontation, and the trial court improperly admitted testimony regarding twenty-year-old, uncharged, dissimilar acts of alleged sexual abuse committed by defendant. The cumulative effect of these errors was to deny defendant a fair trial. We, therefore, reverse defendant's conviction and sentence and remand for further proceedings consistent with this opinion.

I. Factual Background

Defendant's convictions arose out of allegations made by his four-year-old granddaughter. The complainant, who called defendant "Poppa Ron," sometimes visited and stayed overnight with defendant and her grandmother. At defendant's preliminary examination the complainant testified that, during one of these visits, "Poppa Ron" touched her "down there" and used his hand or finger to put cream on her bottom.² The complainant insisted at trial,

¹ MCL 750.520c(1)(a) (sexual contact with a victim under thirteen years of age).

² The complainant testified early during her direct examination at trial regarding penetration. However, the complainant continually denied that any penetration occurred throughout the remainder of her testimony.

however, that “Haley’s Poppa Ron,” a man she met once but could not describe, had injured her.³ The complainant was turned away from “Haley’s Poppa Ron” during the incident and could not see him, but she could see that his pants were on the floor. After he put lotion on her bottom, he pulled up his pants because “Grandma” came home. The complainant subsequently stated that it was actually Haley’s grandmother who came home. She testified that the incident occurred at Haley’s grandmother’s house. Yet, she also claimed that her own dogs were in the backyard playing at the time.

II. Competency to Testify

Defendant first argues that the four-year-old complainant was not competent to testify. We review a trial court’s determination regarding the competency of a witness for an abuse of discretion.⁴

All witnesses are presumed competent to testify.⁵ Pursuant to MRE 601:

Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.^[6]

MRE 601 “does not focus on whether a witness is able to tell right from wrong but, rather, on whether a witness has the capacity and sense of obligation to testify truthfully and understandably.”⁷ The trial court must question the child witness to determine to its own satisfaction that the child will tell the truth on the stand.⁸ “Once the trial court is satisfied that

³ Haley is the daughter of the complainant’s foster mother, Rebecca Darling. After the allegations in this case arose, the complainant was removed from her mother’s care and placed in foster care. Haley and the complainant met in October 2002, when the complainant stayed with Ms. Darling for three weeks while her assigned foster parents were out of the state. In January 2003, Ms. Darling became the complainant’s foster mother. There was undisputed evidence that Haley did not have a “Poppa Ron” and that neither of Haley’s grandfathers could have committed the charged acts. Ms. Darling testified that Haley had two grandfathers—Gerald Love and Douglas Darling. The complainant met Mr. Love on two occasions, both of which occurred after the preliminary examination. The complainant met Mr. Darling only once at a wedding. Ms. Darling testified that the complainant was never in the home of either man.

⁴ *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1998).

⁵ *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001).

⁶ MRE 601.

⁷ *Breck*, *supra* at 457, quoting *People v Burch*, 170 Mich App 772, 774; 428 NW2d 772 (1988).

⁸ See *Watson*, *supra* at 583 (the trial court ascertained that the child knew the difference between the truth and a lie and the child promised to tell the truth); *People v Cobb*, 108 Mich App 573, 575-576; 310 NW2d 798 (1981) (the trial court questioned the child witness to determine if he would tell the truth on the stand).

the child is competent to testify, a later showing of the child's inability to testify truthfully reflects on credibility, not competency.”⁹

In this case, both the trial court and defense counsel questioned the complainant to determine if she had the capacity and sense of obligation to testify truthfully and understandably. During the competency evaluation, the complainant testified about her age, her school, and her teacher. She indicated that she did not understand the meaning of the word “serious,” but knew what the phrase “very important” meant. The complainant testified that she knew the proceeding was not a game and was a very important matter. The complainant testified that she would tell the truth and appropriately answered questions to demonstrate that she knew the difference between the truth and a lie.

However, the complainant also testified that she could tell time, yet could not read the clock in the courtroom. She could not remember from one question to the next, despite constant reminders, to give understandable, verbal responses. The complainant also testified that she likes to call herself by the names of Disney characters. In light of the complainant's extremely young age, and her demonstrated inability to testify truthfully and to separate fantasy from reality, we do not find that the trial court properly determined that she was competent to testify. Based on her testimony during the competency evaluation, the trial court should have anticipated the complainant's subsequent problematic and inconsistent testimony. Accordingly, we find that the trial court abused its discretion in allowing the complainant to testify.

III. Confrontation

Defendant further argues that he was denied his Sixth Amendment right of face-to-face confrontation with his accuser because the trial court allowed a screen to be placed between the complainant and defendant in the middle of her direct examination. We review constitutional issues de novo.¹⁰

For whatever reason, the complainant refused to testify against defendant at trial, instead blaming “Haley's Poppa Ron” for her alleged injuries. As a result, the trial court allowed the use of a one-way screen, which permitted defendant, counsel, and the jury to see the complainant as she testified, but not vice versa. Even with the screen in place, however, the complainant refused to accuse defendant of any wrongdoing.

In *Maryland v Craig*,¹¹ the United States Supreme Court found that the right of face-to-face confrontation, although preferred, was not absolute.¹² The right of face-to-face confrontation may be dispensed with only where a denial of that right is necessary to further an

⁹ *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991).

¹⁰ *People v Levandoski*, 237 Mich App 612, 619; 603 NW2d 831 (1999).

¹¹ *Maryland v Craig*, 497 US 836; 110 S Ct 3157; 111 L Ed 2d 666 (1990).

¹² *Id.* at 844-847.

important public policy and only where the reliability of the testimony is otherwise assured.¹³ The *Craig* Court held that where the articulated state interest is the protection of the welfare of children from the trauma of testifying against an abuser, the right of face-to-face confrontation may be disregarded if the state makes an adequate showing of necessity.¹⁴ Under the Maryland statute upheld in *Craig*, the trial court must determine that the use of closed-circuit television to present the testimony of the child witness is necessary to protect the welfare of the child and that the child would be traumatized by the defendant's presence.¹⁵

This Court has specifically addressed and adopted the reasoning of *Craig*.¹⁶ “[W]hen necessary to further an important state interest, ‘the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.’”¹⁷ In *People v Sammons*, this Court upheld the use of a mask to hid the face of a witness where the prosecution established that the defendant and his friends had threatened the witness's life.¹⁸

This exception to the right of confrontation has also been enacted into statute. MCL 600.2163a allows for the elimination of face-to-face confrontation in order to protect the welfare of a child or developmentally disabled witness in certain circumstances at a trial or hearing, “in addition to other protections or procedures afforded to a witness by law or court rule.”¹⁹ Under the statute, a court may make special arrangements for the presentment of a witness's testimony if the witness will be psychologically or emotionally unable to testify. . . .”²⁰ In *People v Burton*,²¹ this Court upheld a trial court's decision to make such special arrangements for a thirty-six-year-old, emotionally disabled complainant in a brutal sexual assault case even though the witness did not meet the statutory definition of developmentally disabled.²² The record indicated that the complainant had trouble testifying and specifically stated that she felt pressured by the presence of the media and the jury and was frightened by the defendant.²³ An expert witness testified that if the complainant was forced to testify in front of the defendant, she would suffer permanent emotional damage.²⁴ This Court found that protecting the welfare of the

¹³ *Id.* at 850.

¹⁴ *Id.* at 855.

¹⁵ *Id.*

¹⁶ *People v Sammons*, 191 Mich App 351, 363; 478 NW2d 901 (1991).

¹⁷ *Id.*, quoting *Craig*, *supra* at 857.

¹⁸ *Id.*

¹⁹ MCL 600.2163a(19).

²⁰ MCL 600.2163a(17).

²¹ *People v Burton*, 219 Mich App 278; 556 NW2d 201 (1996)

²² *Id.* at 384.

²³ *Id.*

²⁴ *Id.*

complainant promoted the goals of the statute as her disability stemmed from childhood sexual abuse and as her mental capacity was further diminished by the brutal nature of the current attack.²⁵ However, this Court stressed that the need for protection arose due to the extreme nature of the current assault.²⁶

In *People v Hyland*,²⁷ the trial court removed the defendant from the courtroom after he interrupted his eight-year-old daughter's testimony on two occasions and, thereafter, the child could not continue to testify.²⁸ This Court found that the right of confrontation was not violated because the defendant watched the witness testify on closed-circuit television, the defendant was able to confer with his counsel, and the child was competent to testify.²⁹ Moreover, the judge, jury, and defendant were able to view the demeanor of the witness over a monitor while she testified in the courtroom that was occupied only by counsel for the prosecution and defense.³⁰

In this case, the one-way screen was not used to protect the complainant against any trauma. In fact, the trial court remarked that the complainant seemed calm and specifically called her precocious. There was no finding that the complainant was psychologically unable to testify or felt threatened by defendant. Rather, the trial court expressed concern about encouraging the complainant to testify truthfully.³¹ The record reveals that, before the complainant answered questions, she "regularly and frequently" looked at defendant. During a break in the testimony, the complainant repeatedly asked a deputy where her "Poppa" was going.

The record does not reveal any discernable reason for this procedure. The denial of defendant's right to face-to-face confrontation was not made for any proper purpose. As the trial court was concerned with the complainant's ability to testify truthfully, dispensing with confrontation could not increase the reliability of her testimony. Furthermore, the trial court's concern bolsters our determination that the complainant was not competent to testify. Accordingly, we find that defendant was denied his Sixth Amendment right of confrontation.

²⁵ *Id.* at 288.

²⁶ *Id.* at 289. After threatening the complainant on several occasions, the defendant brutally raped, molested, beat and traumatized her over an extended period of time resulting in her near death.

²⁷ *People v Hyland*, 212 Mich App 701; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996).

²⁸ *Id.* at 708.

²⁹ *Id.* at 709-710.

³⁰ *Id.*

³¹ The complainant did testify at defendant's preliminary examination that defendant had sexually abused her. However, her testimony at that proceeding was not subject to any face-to-face confrontation.

IV. Similar Acts Evidence Under MRE 404(b)

Defendant contends that the trial court improperly admitted similar acts evidence under MRE 404(b). Defendant argues that the evidence was admitted only to bolster the complainant's credibility, that the trial court's analysis of the issue was faulty, and that the alleged incidents were too old to be relevant. We review a trial court's decision to admit evidence for an abuse of discretion.³²

MRE 404(b) provides:

(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 this case.^[33]

Similar acts evidence may be admitted for purposes not enumerated in the rule if admission "does not risk impermissible inferences of character to conduct."³⁴ We evaluate the admission of other acts evidence by considering if: (1) it was offered for a proper purpose under MRE 404(b); (2) it was relevant; (3) its probative value was not substantially outweighed by unfair prejudice; and (4) a limiting instruction was requested and provided by the trial court.³⁵ In determining whether the evidence was offered for a proper purpose, "the courts must vigilantly weed out character evidence that is disguised as something else. The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized."³⁶

Before trial, the prosecution notified defendant of its intention to present the testimony of defendant's two adopted daughters and two of his natural daughters regarding past sexual abuse as similar acts evidence under MRE 404(b).³⁷ During the hearing on defendant's motion to exclude the testimony, the prosecutor indicated that he wanted the evidence admitted pursuant to *People v Starr* for the purpose of rebutting defendant's defense of fabrication. *The prosecutor conceded that the evidence was so dissimilar to the current alleged acts that it would be inadmissible for any of the delineated purposes in MRE 404(b).* The trial court technically

³² *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

³³ MRE 404(b)(1).

³⁴ *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

³⁵ *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205; 520 NW2d 338 (1994). See also *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

³⁶ *Sabin*, *supra* at 57 n 5, quoting *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998).

³⁷ We note that the complainant's mother did not testify against defendant on this ground.

admitted this dissimilar evidence for the prosecutor's stated purpose of rebutting a defense of fabrication. However, nowhere in the trial is there a specific claim of fabrication, other than a general challenge to the very young girl's credibility. Subsequently, at trial, the similar acts witnesses testified in detail regarding alleged acts of sexual abuse defendant committed more than twenty years prior to the trial, acts which were never reported, charged, or even discussed in twenty years. The trial court instructed the jury that the evidence could only be used to determine whether the complainant was fabricating her statements and to assess her credibility, not to determine whether defendant was a bad person or likely to commit a crime.³⁸

Evidence of prior bad acts is generally inadmissible due to "the desire to avoid the danger of conviction based upon a defendant's history of other misconduct rather than upon the evidence of his conduct in the case in issue [sic]."³⁹

The character evidence prohibition is deeply rooted in our jurisprudence. Far from being a mere technicality, the rule "reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence." *United States v Daniels*, 248 US App DC 198, 205; 770 F2d 1111 (1985). Underlying the rule is the fear that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged. Evidence of extrinsic bad acts thus carries the risk of prejudice, for it is antithetical to the precept that "a defendant starts his life afresh when he stands before a jury" *People v Zackowitz*, 254 NY 192, 197; 172 NE 466 (1930). As the United States Supreme Court recently noted in *Old Chief v United States*, 519 US 172, 181; 117 S Ct 644; 136 L Ed 2d 574 (1997), the problem with character evidence generally and prior bad acts evidence in particular is not that it is irrelevant, but, to the contrary, that using bad acts evidence can "weigh too much with the jury and . . . so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge." Quoting *Michelson v United States*, 335 US 469, 476; 69 S Ct 213; 93 L Ed 168 (1948). The fundamental principle of exclusion, codified by MRE 404(b), is woven into the fabric of Michigan jurisprudence:

There can be little doubt that an individual with a substantial criminal history is more likely to have committed a crime than is an individual free of past criminal activity. Nevertheless, in our system of jurisprudence, we try cases, rather than persons, and thus a jury may look only to the evidence of the events in question, not defendant's prior acts in reaching its

³⁸ In his brief on appeal, defendant also argues that the trial court's limiting instructions were improper. This issue is not properly presented to this Court, however, as defendant failed to raise it in his statement of the questions presented. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

³⁹ *Starr, supra* at 495, quoting *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982).

verdict. See *United States v Mitchell*, 2 US (2 Dall) 348, 357; 1 L Ed 410 (1795). [*People v Allen*, 429 Mich 558, 566- 567; 420 NW2d 499 (1988).]^{40]}

We agree with defendant that the similar acts evidence was admitted for an improper character purpose.⁴¹ The trial court's reliance on *Starr* was improper, as the facts of that case are inapposite. In *Starr*, the defendant alleged that his ex-wife fabricated his alleged sexual abuse of her daughter to hinder his ability to visit their children.⁴² He argued that that the charges were fabricated because the complainant waited two years to report the alleged abuse.⁴³ In that case, the prosecutor presented the testimony of the defendant's half-sister who claimed that the defendant had sexually abused her for a number of years. The Michigan Supreme Court did find the admission of the similar acts proper to refute the defendant's claim of fabrication. However, in doing so, the Court found the evidence relevant to give context to the testimony of the complainant and her mother.⁴⁴ The mother did not question the complainant about possible sexual abuse until the defendant's half-sister told her of the prior abuse.⁴⁵ However, the Court did not make a blanket determination that the evidence would be admissible to refute any question of the credibility of a witness. To do so would defeat the entire purpose of MRE 404(b).⁴⁶

A similar analogy can be drawn to the admission of a witness's prior consistent statements under MRE 801(d)(1)(B). Under that rule, a declarant's prior consistent statements are admissible "to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."⁴⁷ In interpreting the identical federal rule of evidence, the United States Supreme Court clarified that such statements may only be admitted to refute the claim of fabrication and not to bolster the credibility of the witness in general.⁴⁸ In a situation similar to that before us, the Court reasoned:

If the Rule were to permit the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness' in-court testimony results

⁴⁰ *Crawford, supra* at 383-384.

⁴¹ We note that Michigan has not adopted a version of FRE 414, which allows for the automatic admission of prior acts of child molestation in a criminal case.

⁴² *Starr, supra* at 501.

⁴³ *Id.*

⁴⁴ *Id.* at 502-503.

⁴⁵ *Id.*

⁴⁶ If we accepted the prosecution's argument that similar acts may be introduced any time a witness's credibility is questioned, the result would be the wholesale admission of such evidence. Every time a witness is subjected to cross-examination, his or her credibility is called into question.

⁴⁷ MRE 801(d)(1)(B).

⁴⁸ *Tome v United States*, 513 US 150, 157-158; 115 S Ct 696; 130 L Ed 2d 574 (1995).

from recent fabrication or improper influence or motive, the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones. The present case illustrates the point. In response to a rather weak charge that A. T.'s testimony was a fabrication created so the child could remain with her mother, the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount A. T.'s detailed out-of-court statements to them. Although those statements might have been probative on the question whether the alleged conduct had occurred, they shed but minimal light on whether A. T. had the charged motive to fabricate. At closing argument before the jury, the Government placed great reliance on the prior statements for substantive purposes but did not once seek to use them to rebut the impact of the alleged motive.^[49]

While this case involves the application of MRE 404(b) evidence, it is noteworthy that defendant never made a specific claim that the charges were fabricated. He merely challenged the complainant's credibility and competency.

As noted in this case, defendant generally denied the charge against him. As there was no corroborating medical evidence, the case was based solely on the credibility of the complainant and defendant. As such, evidence that tended to bolster the complainant's challenged credibility would be relevant. However, the testimony of the similar acts witnesses could only bolster the complainant's credibility by establishing that defendant had a propensity to commit the charged act—an improper purpose under MRE 404(b). Furthermore, the danger of prejudice clearly substantially outweighed the probative value of the evidence. As the complainant was not competent to testify and her testimony was replete with incredible and inconsistent statements, defendant's conviction could only be based upon the statements of these witnesses regarding the twenty-year-old, uncharged, dissimilar acts. As defendant could not have been found guilty beyond a reasonable doubt without this improperly admitted evidence, it was clearly highly prejudicial. We also question the trial court's determination regarding the similarity of the evidence when the prosecution readily admitted that it could not be used for any listed purpose under MRE 404(b). There is no precedent suggesting that the similarity requirement is relaxed when the "similar" acts are admitted for an unlisted purpose.

V. Sufficiency of the Evidence

Defendant also argues that the evidence was insufficient to support his conviction. In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.⁵⁰ "[C]ircumstantial evidence and

⁴⁹ *Id.* at 165.

⁵⁰ *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.”⁵¹

In order to support a conviction for second-degree CSC, there must be evidence that the defendant engaged in “sexual contact” with a victim under thirteen years of age.⁵² Sexual contact includes “intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.”⁵³ Defendant argues that there was insufficient evidence to identify him as the perpetrator and from which to conclude that the touching was for sexual gratification.

In light of our conclusions that the complainant was not competent to testify and that defendant’s conviction was based on highly prejudicial, improperly admitted similar acts evidence, we agree that the prosecution presented insufficient evidence from which a jury could find defendant guilty beyond a reasonable doubt. Accordingly, defendant’s conviction cannot stand.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper

⁵¹ *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

⁵² *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997), quoting MCL 750.520c(1)(a).

⁵³ MCL 750.520a(n).