

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFFORD EDWARD BRITTON,

Defendant-Appellant.

UNPUBLISHED

May 18, 2006

No. 259700

Alger Circuit Court

LC No. 03-001558-FH

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

Defendant appeals by leave granted from his jury trial convictions of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age), and gross indecency between a male and female, MCL 750.338b (masturbation in the presence of a minor). The trial court sentenced defendant to concurrent terms of 4 to 15 years' imprisonment for the CSC II conviction and 3 to 5 years' imprisonment for the gross indecency conviction. We affirm.

The complainant testified about several sexual touchings that occurred before she was aged 13. She testified that on one occasion defendant touched her between the legs near the crotch of her pants with a vibrator. When she rolled over, defendant touched the vibrator to her back near her buttocks. The complainant also testified about another incident when defendant rubbed his penis against her back while she was sleeping between him and her mother. The complainant was sleeping in the bed because she had been sick. The complaint also recalled how defendant had masturbated in front of her in a reclining living room chair while watching a pornographic movie. The prosecution also presented testimony from several other women who recounted incidents of sexual contact between themselves and defendant when each woman was a minor.

Defendant first argues that he was denied a fair trial by improper admission of other acts evidence under MRE 404(b). We disagree. We review a trial court's admission of other acts evidence for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). Erroneous admission of similar acts evidence will not warrant reversal unless it is more probable than not that the error resulted in a miscarriage of justice. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227. To be admissible under MRE 404(b), other acts evidence must be offered for a purpose other than to show character or propensity, it must be

relevant, and its probative value must not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Defendant argues that the testimony from the other women was not relevant to any proper purpose. We agree in part. Because defendant generally denied the charges against him, all elements of the charged crimes at issue, including the very doing of the charged acts, were at issue. *Sabin, supra* at 60. Our Supreme Court has explained 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. 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. . . . [T]he degree of similarity between the uncharged and charged conduct required as a threshold for admissibility in such a case [is] higher than that needed to prove intent, but not as great as that needed to prove identity. [*People v Hine*, 467 Mich 242, 251-252; 650 NW2d 659 (2002).]

The complainant's cousin testified that she witnessed defendant masturbating in the living room recliner while he was watching pornographic movies. The daughter of a woman with whom defendant lived at one time testified to several sexual incidents, including one where defendant masturbated in front of her while he was watching pornographic movies. Defendant's daughter testified that she had her appendix removed when visiting defendant for the summer, and while she was recovering at home defendant lay next to her in her bed and began to rub himself against her buttocks and vagina. There are some differences between the incidents testified to by the other acts witnesses and the acts here charged, but the similarities are sufficient for us to conclude that the trial court did not abuse its discretion in admitting this evidence. See *Sabin, supra* at 67.¹

The testimony of a defendant's niece was not sufficiently similar to be relevant under the plan, scheme, or system theory. She testified that defendant asked her to masturbate him while she was visiting her grandmother's home. Her age at the time was similar to the complainant's and the other victims', but the reported sexual activity is too dissimilar to show a common plan, scheme, or system. *Hine, supra*. However, we find no miscarriage of justice, given the weight of the other evidence presented. *Knox, supra*. Further, the jurors were properly instructed that defendant was not on trial for any other bad acts that he may have committed and that they had to find that he committed the crimes for which he was charged in order to find him guilty. We presume these jurors followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

¹ However, while recognizing that the trial court did not abuse its discretion, we note that our review would have been facilitated had the trial court specified its reasons for admitting the evidence under the rule.

We also reject defendant's contention that the probative value of the other acts evidence was substantially outweighed by the danger of unfair prejudice. The evidence was highly probative on the question whether the charged acts occurred, a disputed element in both offenses. Given its probative value, and mindful that balancing such evidence under MRE 403 is "best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony," *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993),² we conclude that no error occurred in allowing this evidence under MRE 403.

Defendant argues that the trial court erred by excluding evidence that he was not brought to trial on charges stemming from two previous investigations into the uncharged acts. Defendant argues that this evidence was relevant to a determination of the credibility of the other act witnesses, to a determination of whether the other acts actually occurred, and to providing the jury with a complete picture of the evidence. We disagree. The prosecutorial decisions not to bring charges based on the accusations of defendant's biological daughter and to drop the charges based on the accusations of the complainant's cousin do not make the underlying acts more or less likely, so they have little if any bearing on a fact of consequence to the determination of the action. See *People v Bolden*, 98 Mich App 452, 459-462; 296 NW2d 613 (1980) (upholding the trial court's decision to exclude evidence establishing that the defendant was acquitted of charges related to other acts evidence). In any event, we note that despite the court's ruling, some testimony was presented to the jury about the dispositions of the prior allegations.

Defendant next argues that he was denied effective assistance of counsel. We disagree. Defendant must show that counsel's performance was objectively substandard and "demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (emphasis in original).

Defendant asserts that counsel should have objected to the introduction of evidence concerning his physical abuse of the complainant's mother and of others. The record shows that counsel's trial strategy was to establish that the complainant and the other witnesses fabricated their stories out of a desire for revenge. The prosecutor alluded to violence in the complainant's home during her opening statement, but defense counsel first openly discussed defendant's history of violence. Defense counsel emphasized this violence as a motive for the other acts witnesses to fabricate their testimony. Defendant has failed to overcome the presumption that counsel's actions were part of a sound trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Likewise, counsel's failure to object to the single, brief, non-responsive mention by the mother of one of the other-acts witnesses that defendant had previously been incarcerated for burglary was likely sound trial strategy to avoid drawing additional attention to the remark. *People v Griffin*, 235 Mich App 27, 36-37; 597 NW2d 176 (1999).

² Amended on other grounds 445 Mich 1205; 520 NW2d 338 (1994).

Finally, defendant asserts that trial counsel was ineffective for failing to obtain the records of a former Health Department social worker's prior investigation into allegations of sexual abuse perpetrated by defendant. Even if those records existed and had been used to refresh a witness's recollection of who conducted the interviews in that investigation, the other testimony at trial already tended to show that the former investigation found the sexual abuse "unsubstantiated." Because the records would probably not have affected the outcome of the proceedings, we conclude that defendant has failed to meet his burden of establishing that he was denied effective assistance of counsel. *Rodgers, supra* at 714.

Defendant finally argues that the trial court erred in assigning 25 points for offense variable thirteen (OV 13), resulting in a sentence outside his appropriate guidelines range. We disagree. OV 13 concerns continuing patterns of criminal behavior. MCL 777.43(1). MCL 777.43(1)(b) provides that 25 points should be assessed if "[t]he offense was part of a pattern of felonious criminal activity involving three or more crimes against a person." The statute further states, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). See also *People v Francisco*, ___ Mich ___; ___ NW2d ___ (2006), slip op p 4.

Defendant argues that gross indecency is classified as a crime against public order, not a crime against a person, MCL 777.5; MCL 777.16q, so the gross indecency allegations may not be used to assess points under OV 13. Even if true, the complainant testified about an incident involving defendant touching her between her legs with a vibrator and an incident where defendant rubbed his penis on her back,³ both of which took place between 1995 and 2000. Defendant's biological daughter testified that in 1996 defendant came into her room and began rubbing himself on her buttocks and touched her vagina. Both victims were under the age of 13, so these offenses would all constitute CSC-II, 750.520c(1)(a), and are therefore crimes against a person. See MCL 777.16y. Therefore, there was evidence establishing that defendant perpetrated the sentencing offense during a five-year period in which he committed two other offenses that constitute crimes against a person. Accordingly, the record evidence adequately supports the trial court's scoring of OV 13.

Affirmed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Alton T. Davis

³ One of these incidents formed the actus reus of defendant's CSC II conviction.