

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ROBIDEAU,

Defendant-Appellant.

UNPUBLISHED

May 8, 2008

No. 276913

Otsego Circuit Court

LC No. 06-003530-FH

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of two counts of criminal sexual conduct in the second degree (CSC II), MCL 750.520c(1)(a) (victim under 13). Defendant challenges the admission of a prior conviction of criminal sexual conduct in the fourth degree. Because defendant's prior conviction was admitted in accordance with MCL 768.27(a)(1), (a)(2) and MCL 28.722(e)(x) and the statute suffers no constitutional impediment, we affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

I. Facts

Complainant, who was ten years old at the time of trial, testified that, while at her grandmother's house, she had fallen asleep while watching a movie, when defendant, whom she once called "Uncle Mark," began "rubbing my back," and added, "then he moved down to . . . my lower bikini area." The witness elaborated that defendant's hand was first under her shirt, and touched the area that the top of a bathing suit could cover, then touched, over her underwear, what the bottom part of a bathing suit would cover.

The prosecution introduced evidence that defendant had been convicted of criminal sexual conduct in the fourth degree, MCL 750.520e, in connection with a 15-year old girl who apparently had consented in fact to the sexual activity. Defense counsel objected, but was overruled on the ground that this evidence was admissible according to statute.

On appeal, defendant argues that the statute in question, MCL 768.27a, improperly intrudes on our Supreme Court's superior prerogative to prescribe the rules governing legal practice and procedure, see Const 1963, art 6, § 5, and that the rule of evidence limiting the use of other bad acts, MRE 404(b), should have prevailed. Defendant further asserts that application of the statute to his case constituted an improper ex post facto law. See US Const, art I, § 10, cl

1; 1963 Const, art 1, § 10. Defendant additionally argues that, even if the evidence in question were otherwise relevant and admissible, it should have been barred as greatly more prejudicial than probative. See MRE 403.

II. Standard of Review

We review a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). An abuse of discretion occurs where the trial court chooses an outcome falling outside a "principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "[I]t is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

III. The Statute and the Rule of Evidence

MRE 404(b)(1) establishes that evidence of other bad acts is not admissible to prove a person's character in order to show behavior consistent with those other wrongs. However, MCL 768.27a(1) provides that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." Criminal sexual conduct is among the listed offenses. MCL 768.27a(2) and MCL 28.722(e)(x). This statute thus, in its limited context, permits evidence of other bad acts to prove propensity. See *People v Pattison*, 276 Mich App 613, 618-619, 620; 741 NW2d 558 (2007). This Court has held that MCL 768.27a is a policy-based, substantive rule of evidence, and not purely one of procedure, and so constitutes no legislative intrusion on our Supreme Court's rule-making authority. *Id.* at 619-620. Accordingly, defendant's constitutional challenge to the statute, predicated on separation of powers doctrine, fails.

IV. Ex Post Facto

A party seeking relief from ex post facto law must establish that the law operates retrospectively, and to that party's disadvantage. *People v Potts*, 436 Mich 295, 301; 461 NW2d 647 (1990). There is no violation of the prohibition of ex post facto law where the law in question does not affect a party's "substantial personal rights." *Id.*, citing *Dobbert v Florida*, 432 US 282, 293; 97 S Ct 2290; 53 L Ed 2d 344 (1977).

A change in the rules of evidence can constitute an ex post facto law. *Pattison*, *supra* at 618. However, the change wrought by MCL 768.27a "does not lower the quantum of proof or value of the evidence needed to convict a defendant." *Id.* at 619. In this case, as was the case in *Pattison*, defendant could have been tried and convicted without the challenged statute solely on the basis of complainant's testimony. *Id.* Because this Court has already considered and rejected this challenge, we must reject defendant's challenge to the statute in question as an ex post facto law.

V. Prejudice

MRE 403 provides as follows: “[a]lthough 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” This Court has cautioned the trial bench to remain mindful of its obligation engage in such balancing when MCL 768.27a comes into play. *Pattison, supra* at 621.

In this case, defense counsel did not expressly invoke MRE 403, but impliedly did so by describing the evidence in question as “super prejudicial.” However, as defense counsel also pointed out at trial, there were major factual differences between the earlier crime, involving a consensual teenager, and the instant charges, concerning a sleeping pre-teen . A history of trying to strike up sexual relations with a woman less than a year under the age of consent suggests little propensity to take inappropriate liberties with a pre-adolescent by stealth. We accordingly conclude that those basic dissimilarities minimized the risk of any unfair prejudice, and the trial court did not err in failing to bar the evidence through application of MRE 403.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ William B. Murphy