

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN ANTHONY MELLON, SR.,

Defendant-Appellant.

UNPUBLISHED
September 9, 2008

No. 277550
Washtenaw Circuit Court
LC No. 06-000275-FC

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

PER CURIAM.

A jury convicted defendant of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and the trial court sentenced him as an habitual offender, third offense, to a prison term of 3 years and 7 months to 30 years.¹ Defendant appeals as of right. We affirm.

Defendant's conviction arises from the sexual assault of his live-in girlfriend's daughter, "AJ". She testified that defendant began touching her in a sexual manner in the spring and summer of 2005. One incident occurred after AJ returned to her house from a friend's house at approximately 3:00 a.m. on June 11, 2005. She made herself a "slushy" and put it in the freezer. When she retrieved the slushy approximately one-half hour later, it tasted like gin, and she believed that defendant had put alcohol in it when she left it in the freezer. She drank half of the slushy and smoked marijuana with defendant when he asked her to do so. Defendant thereafter turned on a pornographic movie and felt her breasts and vagina with his hands. He then held her down and put his penis inside her vagina. He stopped when AJ's little brother came out of his bedroom.

AJ recalled another incident that occurred later that summer when she returned home intoxicated. Defendant told her that a cold shower would make her feel better. While she was in the shower, defendant came into the shower and felt her breasts and buttocks before penetrating her vaginally with his penis. AJ pushed him away and got out of the shower. Defendant

¹ In addition to the charge leading to his conviction, defendant was charged with and acquitted of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim between 13 and 15), and first-degree criminal sexual conduct, MCL 750.520b(1)(b) (victim between 13 and 15 and of same household).

presented an alibi defense at trial and theorized that AJ was lying to protect defendant's 20-year-old son, with whom AJ had had a consensual sexual relationship.

Defendant first argues that the trial court's admission of evidence involving his use of marijuana, possession of pornography, and sexual remarks to an underage girl denied him a fair trial. We disagree. Defendant preserved his challenge regarding his comments made to AJ's friend, "NW," by objecting to the admission of such evidence in the trial court. Therefore, we review that issue for an abuse of discretion. *People v Johnigan*, 265 Mich App 463, 466-467; 696 NW2d 724 (2005). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). Because defendant failed to object to the evidence regarding his marijuana use and possession of pornography, our review of his challenge involving those issues is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

MRE 404(b)(1) governs the admission of prior bad acts evidence. Whether other acts evidence is admissible under MRE 404(b)(1) depends on four factors. First, the evidence must be offered for a permissible purpose, i.e., one other than showing character or a propensity to commit the charged crime. *Knox, supra* at 509. Second, the evidence must be relevant under MRE 402. *Id.* Third, unfair prejudice must not substantially outweigh the probative value of the evidence under MRE 403. *Id.* Fourth, the trial court, if requested, may provide a limiting instruction to the jury under MRE 105. *Id.*

The trial court properly admitted evidence involving defendant's sexual remarks made to NW when she was 14 years old. NW testified that defendant answered AJ's cell phone when NW called AJ at approximately 2:00 a.m. one morning. Defendant told NW that he had been looking at her when she visited AJ and she had nice breasts and a nice "bottom." He asked her if she ever thought about him and if she was a virgin. He also asked her if she would come outside, but she said "no."² This evidence was properly admitted to show defendant's motive for committing the charged offenses, i.e., his sexual interest in young girls. NW and AJ were nearly the same age when the conduct at issue in this case occurred. Motive is a proper purpose for admitting other acts evidence under MRE 404(b)(1).

Further, the prejudicial effect of the evidence did not outweigh its probative value. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). "The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself." *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). The evidence was relevant to rebut defendant's theory that the allegations were fabricated and that AJ was lying to protect defendant's son, the alleged

² NW lived only three streets away from AJ and defendant.

true perpetrator. *People v Sabin (After Remand)*, 463 Mich 43, 71; 614 NW2d 888 (2000); *People v Layher*, 238 Mich App 573, 586; 607 NW2d 91 (1999). Thus, the evidence was not merely marginally probative, but was probative of the ultimate issue, i.e., whether defendant committed the offenses alleged. See *Sabin, supra* at 71. Accordingly, the trial court did not abuse its discretion by admitting the other acts evidence under MRE 404(b). *Johnigan, supra* at 466-467.

Likewise, the trial court did not err by admitting evidence regarding defendant's marijuana use and possession of pornography. Such evidence was properly admissible under the res gestae exception to MRE 404(b). This exception allows the admission of evidence of other bad acts when they are so connected to the charged offense that their admission is necessary for the jury to hear the "complete story." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). In *Sholl*, our Supreme Court recognized that "[i]t is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause." *Id.*, quoting *State v Villavicencio*, 95 Ariz 199; 388 P2d 245 (1964). In other words,

"[e]vidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." [*Id.*, quoting *Villavicencio, supra* at 201.]

Evidence regarding defendant's marijuana use and possession of pornography was admissible under the res gestae exception to MRE 404(b) because it provided the necessary context for defendant's first sexual contact with AJ. AJ testified that defendant asked her to smoke marijuana with him, and turned on a pornographic movie immediately before engaging in sexual contact with her. The evidence revealed the circumstances leading to defendant's first sexual assault of AJ, and defendant has failed to establish that the admission of the evidence constituted plain error. Because the evidence was admissible, defense counsel was not ineffective for failing to object to its admission. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant next argues that his rights to confrontation and to present a defense were violated when the trial court refused to admit evidence of AJ's prior false accusation of a sexual assault. We disagree. We review a trial court's decision regarding the admission or exclusion of evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Further, we review constitutional questions de novo. *People v Bassage*, 274 Mich App 321, 324; 733 NW2d 398 (2007).

Michigan's rape-shield statute bars evidence of all sexual conduct between the victim and a person other than the defendant unless the conduct involves "specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." MCL 750.520j(1); see also *People v Adair*, 452 Mich 473, 478; 550 NW2d 505 (1996). In certain situations, however, evidence that would otherwise be excluded under the rape-shield statute "may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation." *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). "Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past." *Id.* A trial court does not abuse its discretion by excluding proffered evidence

involving prior false accusations, however, unless the defendant shows that the victim's previous accusations were actually false. *People v Adamski*, 198 Mich App 133, 142; 497 NW2d 546 (1993); *People v Williams*, 191 Mich App 269, 272-274; 477 NW2d 877 (1991).

Here, the trial court did not abuse its discretion by excluding the proffered evidence. AJ testified that a classmate put his hand inside her pants while seated next to her on a school bus when she was in the sixth grade. She moved his hand away and hit him. The classmate then slid his hand up her shirt, and she again moved his hand away and hit him. The following day, she informed her school principal and a police officer of the classmate's conduct, but declined to press charges. Although a teacher witnessed AJ hit the classmate, she was unsure why AJ had done so and did not witness any improper touching. The teacher admitted that the fact that she did not see any improper touching did not mean that it did not occur. In addition, a fellow student confirmed AJ's allegations to the police officer investigating AJ's complaint. The trial court correctly concluded that defendant had failed to show that AJ falsely accused the classmate of sexual misconduct. As such, the court did not abuse its discretion by denying defendant's motion to admit the evidence, and defendant's right to confrontation was not implicated. *Adamski, supra* at 142; *Williams, supra* at 272-274.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald