

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EDWARD WARNER,

Defendant-Appellant.

UNPUBLISHED
February 18, 2003

No. 235370
Oakland Circuit Court
LC Nos. 00-175017-FH
01-176486-FH

Before: O’Connell, P.J., and Fitzgerald and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of three counts of criminal sexual conduct in the second degree (CSC II), MCL 750.520c, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant, defendant’s niece, alleged that when she was between seven and ten years old defendant touched her vagina and forced her to touch his penis. Prior to trial, the prosecution gave notice of intent to offer other acts evidence pursuant to MRE 404(b). The prosecution sought to offer the testimony of three witnesses, one of whom was Kristina Warner, defendant’s sister, to establish that defendant sexually molested young females pursuant to a motive, scheme, or plan. The trial court ruled that the testimony of Kristina Warner was admissible to show scheme, plan, or design. The court concluded that defendant’s alleged actions with Kristina and complainant were substantially similar in that they both involved sexual contact with a young female relative. The court excluded the testimony of the other witnesses on the ground that defendant’s alleged actions with those persons, who were not relatives, was not sufficiently similar to show scheme, plan, or design.

Complainant, who was fourteen years old at the time of trial, testified that on several occasions when she was seven years old defendant touched her vagina, and that on one occasion when she was ten or eleven years old defendant forced her to touch his penis. She maintained that her cousin Ashley, defendant’s daughter, was present on every occasion on which the sexual contact occurred. Complainant stated that defendant told her that if she told anyone about his actions, she would lose everything about which she cared. She acknowledged that she did not report defendant’s actions until after a school counselor expressed concerns to her mother. Kristina Warner, who was twenty-seven years old at the time of trial, testified that on one occasion when she was ten or eleven years old and defendant was sixteen or seventeen years old defendant touched her vagina under her clothing. Defendant told her that no one would believe

her if she reported his actions. Kristina acknowledged that she did not report the abuse until after Stacie made accusations against defendant. Ashley Warner, who was twelve years old at the time of trial, denied that she ever saw defendant touch complainant, or that defendant made complainant touch his penis.

The jury convicted defendant as charged. The trial court sentenced defendant as a second habitual offender to three concurrent terms of nine to twenty-two and one-half years in prison, with credit for 260 days. The minimum terms were within the applicable judicial sentencing guidelines.¹

Evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show that he acted in conformity with it, but may be admissible for other purposes, such as to show proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident. The other crimes, wrongs, or acts may be contemporaneous with or prior to or subsequent to the conduct at issue. MRE 404(b)(1). To be admissible, other acts evidence must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

Evidence of misconduct similar to that charged is logically relevant to show that the charged acts occurred if the charged acts and the other acts are sufficiently similar to support an inference that they are the manifestations of a common plan, scheme, or design. The charged acts and the other acts need not be parts of a single continuing plot. General similarity between the charged acts and the other acts does not, in and of itself, establish a plan, scheme, or design. There must be such a concurrence of common features so that the charged acts and the other acts are logically seen as part of a general plan, scheme, or design. *People v Sabin (After Remand)*, 463 Mich 43, 63-66; 614 NW2d 888 (2000).

The admissibility of bad acts evidence is within the discretion of the trial court. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). A preserved nonconstitutional error is presumed to be harmless. The defendant bears the burden of showing that the error resulted in a miscarriage of justice. The error justifies reversal if it is more probable than not that it affected the outcome of the case. *People v Lukity*, 460 Mich 484, 493-496; 596 NW2d 607 (1999); *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

We affirm defendant's convictions. As defendant acknowledges, *Sabin, supra*, controls in this case. We regret defendant's invitation to articulate a disagreement with the *Sabin* holding, for we have no such disagreement.

Here, the charged acts and the other acts introduced via the testimony of Kristina Warner were not merely similar. Complainant was defendant's niece, and Kristina was his sister.

¹ The offenses of which defendant was convicted occurred prior to January 1, 1999. Therefore, the statutory sentencing guidelines did not apply in this case. MCL 769.34(1).

Complainant and Kristina were both very young when the abuse occurred. Defendant engaged in the same type of sexual contact in both cases, and warned both complainant and Kristina to not tell anyone about his actions. The common features of the charged acts and the other acts supported an inference that defendant devised a plan or scheme and used it to sexually molest young female relatives. The testimony of Kristina Warner was properly admissible as other acts evidence showing plan, scheme, or design. *Sabin, supra*, 63-64. The trial court did not abuse its discretion by admitting this evidence. *Crawford, supra*. No error occurred.

Affirmed.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray