

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KURT MICHAEL HADDEN,

Defendant-Appellant.

UNPUBLISHED

May 5, 2005

No. 253084

Cheboygan Circuit Court

LC No. 03-002712-FC

Before: Fort Hood, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from a conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and his sentence of 30 months to 15 years. We affirm.

I. FACTS

Devon Honson, son of defendant's adult stepdaughter Rebecca Johnston, testified that shortly before 12:35 a.m., on January 9, 2003, defendant entered a bedroom in his home where he, his mother, and his two brothers were sleeping. Devon testified that defendant was "all drunk," and he asked Devon to come to defendant's bedroom. Devon ignored defendant's request and feigned sleep. Defendant then licked Devon's mouth before turning him over and licking his back. Devon testified that defendant put his hand in Devon's pants and put his fingers in Devon's rectum. In response, Devon started coughing, and defendant in turn jumped up and left the bedroom.

Devon testified that the next morning, he told Rebecca, "Kurt's a faggot" before telling her that defendant had put his hand in Devon's pants the previous night. Devon did not initially tell his mother that defendant had inserted his fingers in Devon's rectum. In response to Devon's allegation, Rebecca and her mother (defendant's wife), Kathy Hadden, took Devon and his two brothers to the Michigan State Police Post in Cheboygan. There, Trooper Ronald Beckett interviewed Devon.

Defendant's stepson, Travis Johnston, testified regarding three occasions during which defendant rubbed his back and shoulders while Travis pretended to be sleeping on the living room couch. Travis, who was twenty-years-old at the time of trial, testified that the incidents took place after defendant had been drinking a few weeks before defendant molested Devon. During the third incident, Travis saw defendant nude, and he heard a "smacking noise" that

“sounded like . . . [defendant] was masturbating.” Travis testified that the touching seemed “sexual,” more than just “friendly,” and he stopped staying at the house after the third incident. Defendant testified that he never touched Travis, but he had covered Travis with a blanket on a couple of occasions.

A jury convicted defendant of CSC II. He was acquitted of one count of CSC I, MCL 750.520B(1)(a). He now appeals.

II. ALTERNATE CSC CHARGES AND JURY INSTRUCTIONS

Defendant first argues that the trial court erred in allowing the prosecutor to charge him with alternate counts of CSC I and CSC II. He also argues that the court erred in instructing the jury on those counts. We disagree.

A. Standard of Review

Claims of instructional error are reviewed de novo. *People v Reid*, 233 Mich App 233 Mich App 457, 466; 592 NW2d 767 (1999).

B. Analysis

Defendant argued below and argues here as well that our Supreme Court’s decision in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), barred the court from instructing the jury as it did because CSC II is a cognate lesser offense of CSC I. Defendant also argues that the trial court violated *Cornell* in allowing the prosecutor to charge the two CSC crimes alternatively.

In *Cornell*, *supra* at 354, our Supreme Court held that a jury could not consider cognate lesser offenses to charged offenses. Defendant aptly notes that the question of whether CSC II is a lesser included offense of CSC I has already been answered by our Supreme Court in *People v Lemons*, 454 Mich 234; 562 NW2d 447 (1997). The Court determined that “because CSC II requires proof of an intent not required by CSC I – that defendant intended to seek sexual arousal or gratification – CSC II is a cognate lesser offense of CSC I.” *Id.* at 253-254.

However, *Cornell* does not apply to this case because it was clear from the outset that the prosecutor brought the two CSC charges alternatively. It is equally clear that the jurors were instructed to consider them as such. The court instructed as follows:

The defendant is charged with one wrongful act and alternative counts. That is, he may be guilty of [CSC I] or [CSC II], but not both. You should consider these alternatives separately in light of all the evidence. You might – you may find the defendant not guilty, guilty of [CSC I], or guilty of [CSC II].

We are therefore satisfied that the trial court did not violate *Cornell* in instructing the jurors as it did because the CSC II charge was not actually given as a lesser offense instruction, but rather CSC II was itself a charged offense in this case.

III. SENTENCING

Defendant next argues that the trial court violated his Sixth Amendment right to a jury trial when it engaged in judicial factfinding and elevated his sentence based on that factfinding. We disagree.

A. Standard of Review

This issue is reviewed for plain error affecting defendant's substantial rights because it was not raised below. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

B. Analysis

Defendant's argument depends on the United States Supreme Court's recent decision in *Blakely v Washington*, ___ US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court, however, has since determined that *Blakely* does not bear on Michigan's sentencing guidelines. *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004). In doing so, the Court reasoned as follows:

Blakely concerned the Washington state determinate sentencing system, which allowed a trial judge to elevate the maximum sentence permitted by law on the basis of facts not found by the jury but by the judge. Thus, the trial judge in that case was required to set a fixed sentence imposed within a range determined by guidelines and was able to increase the maximum sentence on the basis of judicial fact-finding. This offended the Sixth Amendment, the United States Supreme Court concluded, because the facts that led to the sentence were not found by the jury.

Michigan, in contrast, has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum. The maximum is not determined by the trial judge but is set by law. MCL 769.8 Accordingly, the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment. [*Claypool, supra* at 730-731 n 14 (citations omitted).]

Thus, *Blakely* does not help defendant in his appeal of his sentence based on the trial court's application of the sentencing guidelines. Defendant has established no plain error with regard to his sentence.

IV. PRIOR ACTS—MRE 404(b)

Defendant next argues that the trial court erred in admitting MRE 404(b) prior acts evidence, specifically, testimony from defendant's wife and others that defendant often used the Internet to watch certain pornography at home and testimony from defendant's stepson regarding previous incidents of unwanted touching. We disagree.

A. Standard of Review

This issue is reviewed for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

B. Analysis

MRE 404(b) allows for the admission of other acts evidence in limited circumstances. It provides in relevant part:

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 the case. [MRE 404(b)(1).]

A three-part test applies to determine admissibility under this rule. First, the prosecutor must offer the evidence for a proper purpose and not in furtherance of “a character to conduct or propensity theory.” *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000). Second, the evidence must be relevant. *Id.* Third, under MRE 403, the evidence’s probative value must not be substantially outweighed by the danger of undue prejudice that may result from its admission. *Id.* at 55-56, quoting *People v Vandervliet*, 444 Mich 52, 75; 508 NW2d 114 (1993).

We are satisfied that the evidence regarding defendant’s pornography use was properly admitted to show defendant’s motive or intent in touching the complainant as he did. See *People v Hoffman*, 225 Mich App 103; 570 NW2d 146 (1997). The testimony was significant evidence that defendant had a sexual interest in young males, and, accordingly, was relevant as evidence that defendant possessed the requisite specific intent to sustain a conviction of MCL 750.520c(1)(a), i.e., that his touching of the boy was sexually motivated.

We are likewise satisfied that the trial court did not abuse its discretion in allowing defendant’s stepson to testify regarding three incidents during which defendant rubbed his stepson’s shoulders and back as the stepson appeared to sleep. This evidence was properly admitted under MRE 404(b) to show a common “plan, scheme, or system.” The incidents with defendant’s stepson and the complainant shared “such a concurrence of common features that the uncharged and charged acts are naturally explained as the individual manifestations of a general plan.” *People v Hine*, 467 Mich 242; 251; 650 NW2d 659 (2002) (citation omitted). There was evidence that all of the alleged incidents took place at night after defendant had been drinking and while the other person appeared to be sleeping. The incidents with defendant’s stepson occurred over three consecutive nights just a few weeks before the incident at issue, according to the stepson’s testimony. And the incidents involving defendant’s stepson became increasingly sexual over the course of the three nights. The jury could have inferred that defendant was building up his courage during this relatively short period of time to sexually abuse one of the

young male occupants of his household.

Affirmed.

/s/ Karen Fort Hood

/s/ Patrick M. Meter

/s/ Bill Schuette