

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYAN KEITH LITTLE,

Defendant-Appellant.

UNPUBLISHED

December 13, 2005

No. 257330

Kalamazoo Circuit Court

LC No. 03-001861-FC

Before: Whitbeck, C.J., and Bandstra and Markey, JJ.

PER CURIAM.

Defendant Bryan Little appeals as of right from his jury trial conviction for two counts of second degree criminal sexual conduct with a child under 13 years of age.¹ The trial court sentenced Little to a prison term of 71 months to 15 years, with 202 days credit for time served. We affirm.

I. Basic Facts And Procedural History

Little's conviction arose out of accusations by the victim, Little's nine-year-old neighbor, that on three occasions he pulled down her pants and rubbed his exposed genitals against her genitals and buttocks, and that on the last of these three occasions he also inserted his penis deep into her mouth, causing her to throw up. According to the victim, these acts each occurred in Little's home when he was looking after her.

At trial, the prosecution introduced evidence of two prior acts of child molestation that Little allegedly committed. The prosecution introduced evidence of the first prior bad act through the testimony of a former New Hampshire police officer. The officer testified that, in 1991, Little confessed to him that, while babysitting the four-year-old cousin of his son, he placed the girl on his lap and began rubbing her crotch around the area of her vagina and vulva, though he claimed he never removed or went inside her clothes. Little claimed at trial that he was under duress when he made this confession.

¹ MCL 750.520c(1)(a).

The prosecution introduced the second prior bad act through the testimony of a ten-year-old boy and his mother, the sister-in-law of Little's ex-wife. The boy claimed that on more than one occasion, while Little's ex-wife babysat the boy, Little inserted his index finger in the boy's anus 40 or 50 times and then flipped the boy over and, as the boy put it, "peed in his mouth." The boy's mother testified that in 1998, when the boy was five, Little and his family lived with them. The boy's mother also testified that on one occasion, she saw the boy run down the stairs and throw up, with Little following him wearing nothing but boxer-briefs. Little claimed these accusations were untrue.

II. Prior Bad Acts Evidence

A. Standard Of Review

Little argues that the trial court erred in admitting the prior bad acts evidence under MRE 404(b), because it served no other purpose than to act as impermissible character evidence. This Court only reverses a trial court's decision regarding the admission of evidence of prior bad acts pursuant to MRE 404(b) if there has been a clear abuse of discretion.²

B. Legal Standards

The Michigan Supreme Court has adopted a four-part test to determine if prior bad acts evidence is admissible pursuant to MRE 404(b):

First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a "determination must be made whether the danger of undue prejudice substantially outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403." Finally, the trial court, upon request, may provide a limiting instruction under MRE 105.^[3]

C. Scheme, Plan, Or System

The prosecution argues that it offered the prior bad acts evidence to establish a common scheme, plan, or system that Little used to assault young children entrusted to his care. That is a proper purpose under MRE 404(b)(1). "[E]vidence 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."⁴ The scheme or plan need not be distinctive or unusual; evidence of prior

² *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

³ *People v Sabin*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), quoting *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993); mod 445 Mich 1205 (1994), quoting advisory committee notes to FRE 404(b) (citations in *Sabin* omitted).

⁴ *Sabin*, *supra* at 63-64.

bad acts is admissible if it indicates, from these prior bad acts, a method in which or circumstances under which defendant would commit the bad act in question.⁵ Thus, the jury can use this evidence of a common system “and consider evidence that the defendant used that system in committing the charged act as proof that the charged act occurred.”⁶

Here, the two prior allegations of sexual molestation showed that Little employed a common pattern or scheme to find and molest his victims. In all three cases, the victim was a child under the age of ten and was in constant, close proximity to Little. Little knew the victims’ parents, gained their trust, and was then placed in a position of authority over each child. In each case, Little would molest these children while babysitting or assisting another babysitter. Further, the alleged molestation in this case involved inappropriate touching and penile penetration of the victim’s mouth; Little engaged in at least one of these activities in each of the alleged prior acts of molestation.

We agree with the trial court that these similarities indicate a pattern or method in which Little placed himself in a position of authority over children and used that access to engage in inappropriate conduct. As such, we conclude that the trial court’s finding, that the evidence of prior bad acts was logically relevant evidence of a common method or scheme, was not an abuse of discretion.

Further, the danger of undue prejudice does not substantially outweigh the probative value of this evidence to demonstrate circumstances under which defendant would molest children. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.”⁷ In determining unfair prejudice, the relevant inquiry is whether the potential for the jury to convict on an impermissible inference that defendant acted in conformity with a flaw in [his] general character substantially outweighs its probative value in this regard.”⁸

The ten-year-old victim of this crime was the only direct witness of Little’s acts of molestation. The prior bad acts evidence establishing that Little engaged in a common plan or scheme in molesting children was highly probative because it indicated that the circumstances under which the victim testified she had been abused were consistent with circumstances under which defendant had molested children in the past. Therefore, we conclude that the risk that the jury might make an impermissible inference that Little acted in conformity with his character by molesting the victim does not substantially outweigh the probative value of this evidence to show that the victim’s allegations were consistent with a general plan or scheme Little employed to molest children.

Further, the trial court included limiting instructions under MRE 105 at Little’s request, as required under the *Sabin/VanderVliet* test. “A carefully constructed limiting instruction

⁵ *Id.* at 66.

⁶ *Id.* at 63, n 10.

⁷ *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

⁸ *People v Martzke*, 251 Mich App 282, 295; 651 NW2d 490 (2002).

rendered by the trial court would be sufficient to counterbalance any potential for prejudice spawned by the other acts evidence.”⁹ A jury is presumed to follow the instructions given to it.¹⁰ Therefore, we presume that the jury properly followed the limiting instructions in this case and only considered the prior bad acts evidence for a proper purpose.

In summary, we conclude that the trial court met the elements of the *Sabin/VanderVliet* test to determine the prior bad acts evidence was admissible under MRE 403(b). The trial court did not abuse its discretion by admitting the two prior accusations of sexual molestation against Little under MRE 403(b), because these prior bad acts indicate a common pattern, method, or scheme that Little used to molest children.

D. Fabrication Defense

As long as the bad acts evidence is admissible under one theory, the trial court may let it in.¹¹ Therefore, we need not address Little’s claim that his general denial of wrongdoing did not imply a fabrication defense.

E. Harmless Error

We need not address Little’s claim that the trial court’s admission of this evidence is not harmless. Where there is no error, this Court is not required to determine if it was harmless.¹²

III. Sentencing

Little submits that the trial court violated his Sixth Amendment right to be sentenced only according to factors by which he had been found guilty by a jury, as articulated in *Blakely v Washington*,¹³ when the trial court scored him 25 points pursuant to Offense Variable 13. However, Little concedes that his argument is not meritorious under *People v Claypool*,¹⁴ and raises this issue merely to preserve it should the Michigan Supreme Court reverse its decision in *Claypool*. Therefore, we decline to review this issue.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Jane E. Markey

⁹ *Id.*

¹⁰ *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

¹¹ *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998).

¹² *Ferguson v Gonyaw*, 64 Mich App 685, 691; 236 NW2d 543 (1975).

¹³ *Blakely v Washington*, 542 US 296, 303-304; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

¹⁴ *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).