STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 17, 2012
v	No. 304150 Oakland Circuit Court
ROBERT BENJAMIN MEIZLER, Defendant-Appellant.	LC No. 2010-233624-FH

Before: SERVITTO, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim younger than 13). He was sentenced under MCL 750.520f (second or subsequent offense) to 60 to 270 months' imprisonment. Because the trial court did not abuse its discretion in admitting prior acts evidence, we affirm.

On April 11, 2009 then 9-year-old M. spent the night at her aunt's home. M. slept in her aunt's bed, while her aunt fell asleep on a chair in the living room. When M. awoke the next morning, she was surprised to find her aunt's roommate, defendant, next to her in the bed. Defendant touched M.'s breast and vagina, at which point, M. left the bed and told her aunt what had just occurred. M.'s mother was called and the police immediately contacted. Defendant denied that any inappropriate contact had occurred but was nonetheless convicted of two counts of second-degree criminal sexual conduct, as indicated above.

On appeal, defendant challenges only the admission of evidence regarding a prior criminal sexual conduct conviction and the testimony of the victim of the prior criminal sexual conduct. A trial court's decision to admit evidence is reviewed for an abuse of discretion, although underlying issues of law are reviewed de novo. *People v Mann*, 288 Mich App 114, 117; 792 NW2d 53 (2010).

Under MCL 768.27a, when a defendant is charged with a listed offense, including second-degree criminal sexual conduct against a minor, evidence that the defendant committed another listed offense against a minor is admissible for its bearing on any matter to which it is

relevant, including propensity to commit the offense. See *Mann*, 288 Mich App at 118.[1] However, the trial court must still determine whether the risk of unfair prejudice substantially outweighs the probative value of the evidence, MRE 403. *People v Brown*, 294 Mich App 377, 386; 811 NW2d 531 (2011); *People v Pattison*, 276 Mich App 613, 621; 741 NW2d 558 (2007). "[W]hen applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. That is, other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference." *People v Watkins*, ___Mich ___; ___ NW2d ___ (2012).

In the present case, defendant argues that the trial court failed to apply this balancing test. However, the court need not state on the record how it balanced the prejudicial effect and probative value. *People v Smith*, 243 Mich App 657, 675; 625 NW2d 46 (2000). Defense counsel stated on the record that he argued in the off-the-record bench conference the prejudicial effect of the evidence outweighed the probative value. The trial court then denied defendant's objection to the evidence without further discussion. The trial court was presumed to know the law. See *People v Garfield*, 166 Mich App 66, 79; 420 NW2d 124 (1988). The trial court clearly found that the prejudicial effect did not substantially outweigh the probative value.

Defendant argues further on appeal that the risk of unfair prejudice substantially outweighed the evidence's probative value. All evidence is essentially offered to "prejudice" the other party; however, evidence is unfairly prejudicial if it injects extraneous considerations, like bias, sympathy, anger, or shock. *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994). Evidence of criminal sexual conduct against minors inherently creates an emotional reaction, but MCL 768.27a reflects the policy decision that juries should sometimes be able to consider the defendant's behavioral history. See *Pattison*, 276 Mich App at 620.

The evidence was relevant in the present case because it tended to show it was more probable than not that the young witness was telling the truth, particularly when there was no other evidence of the crime and her inability to remember certain details was questioned. See *Mann*, 288 Mich App at 118. True, the risk of unfair prejudice was increased because the prior acts involved repeated abuse and attempted penetration, unlike the charged offenses. However, the trial court reduced the risk by instructing the jury to consider the evidence only in regard to credibility and not as evidence defendant was a bad person or likely to commit crimes. Further, the testimony of prior acts was brief and not overly emotional.

In arguing that the probative value of the evidence was outweighed by unfair prejudice, defendant compares this case to *People v Pullen*, unpublished opinion per curiam of the Court of Appeals, issued February 15, 2011 (Docket No. 298138). However, that case involved acts for

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[1] The Supreme Court has recently determined that MCL 768.27a irreconcilably conflicts with MRE 404(b) and that the statute prevails over the court rule. *People v Watkins*, ___Mich ___ (June 8, 2012). The Supreme Court also held that evidence admissible under MCL 768.27a is subject to MRE 403.

which the defendant had never been charged, and this Court affirmed the trial court's decision not to admit the evidence because it was a close question. More importantly, our Supreme Court recently reversed our *Pullen* decision, in part because the trial court failed to weigh the propensity inference in favor of the evidence's probative value. See, *Watkins*, ___Mich ___. In this case, the testimony concerning the prior acts supported the victim's credibility and rebutted the defendant's attack of the same, defendant was convicted of the prior acts by a jury and, as previously indicated, the testimony concerning the prior acts was brief. We thus find that the trial court did not abuse its discretion when it admitted the evidence.

Affirmed.

/s/ Deborah A. Servitto
/s/ Patrick M. Meter
/s/ Karen Fort Hood