

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 3, 2013

v

LARRY DEAN KONYHA,
Defendant-Appellant.

No. 306740
Oakland Circuit Court
LC No. 2011-235820-FH

Before: RONAYNE KRAUSE, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (sexual contact with person under 13 years of age). Defendant was sentenced to one year of imprisonment and five years of probation. We affirm.

The victim in this case was an eight-year-old girl, EF, who met defendant when she was attending church with her mother and two sisters in early 2010. Shortly after their meeting, defendant and his wife began babysitting EF and her sisters while their mother worked. Several months later, the babysitting situation evolved to defendant and his wife receiving a temporary guardianship of the girls, and the girls would stay with defendant and his wife during the week, while returning to their mother for the weekends. One weekend night in the fall of 2010, EF stayed at defendant's house without her two sisters. EF went to bed as usual that night, but she could not fall asleep. EF testified that at some point, defendant entered her bedroom, kissed EF on her forehead, pulled the covers off her and touched her "private" with his finger on top of her pajama pants. Within a few days, EF told her mom what happened with defendant in her bedroom. Subsequently, law enforcement was contacted, and defendant was arrested.

I. MOTION FOR ADJOURNMENT

On appeal, defendant first contends that the trial court abused its discretion by denying his motion for an adjournment, which he requested for the following reasons: (1) to allow our Supreme Court to decide *People v Watkins*, 491 Mich 450; 818 NW2d 296 (2012), a case with issues similar to those in defendant's case, (2) to investigate the proposed other acts evidence of a witness that was recently deemed admissible, and (3) to produce an expert witness to testify about transference as part of his defense. We disagree.

We review a trial court's decision on a motion to adjourn the trial proceedings for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). The trial court abuses its discretion when it chooses an outcome that falls outside of the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). When reviewing a trial court's decision to deny a defendant an adjournment or continuance, we consider whether the defendant showed good cause, i.e., (1) asserted a constitutional right, (2) provided a legitimate reason for asserting the right, (3) had been negligent in asserting the right, and (4) had requested prior adjournments. *Coy*, 258 Mich App at 18. We may also consider the trial court's interest in the efficient administration of justice. *People v Akins*, 259 Mich App 545, 557-558; 675 NW2d 863 (2003). Even if a defendant shows good cause for granting an adjournment, the trial court's denial of a request for adjournment is not grounds for reversal unless the defendant shows that prejudice resulted from the abuse of the trial court's discretion. *Coy*, 258 Mich App at 18-19.

We hold that the trial court did not abuse its discretion when it denied defendant's motion to adjourn. Defendant first asserted that the trial court should grant an adjournment until our Supreme Court decided *Watkins*, *supra* (consolidated with *People v Pullen*) and the matter of whether MCL 768.27a violated due process. The trial court denied defendant's request, noting that this case was one of the oldest on its docket and determining that defendant should have anticipated that other acts testimony would be admitted based on the current state of the law.

In the *Watkins* and *Pullen* cases, the Michigan Supreme Court granted leave to determine whether MCL 768.27a prevailed over MRE 404(b) to permit other acts evidence for the purpose of showing a propensity to commit a similar act. *People v Watkins*, 489 Mich 863; 795 NW2d 147 (2011); *People v Pullen*, 489 Mich 864; 795 NW2d 147 (2011). Our Supreme Court ruled on this matter and held that MCL 768.27a does not infringe on the Court's authority regarding rules of practice and procedure. *People v Watkins*, 491 Mich at 455-456. Similarly, case law at the time of defendant's trial upheld the constitutionality of MCL 768.27a as it is substantive in nature and does not violate principles concerning the separation of powers. *People v Watkins*, 277 Mich App 358, 365; 745 NW2d 149 (2007); *People v Pattison*, 276 Mich App 613, 620; 741 NW2d 558 (2007). The trial court was required to follow *Pattison* and *Watkins*, which were binding precedent. See MCR 7.215(C)(2). Accordingly, the trial court specifically referenced *Pattison* in its ruling on defendant's motion to preclude the other acts evidence and determined that the evidence was admissible pursuant to MCL 768.27a. The trial court made proper consideration utilizing existing law, and its finding was not clearly erroneous. Contrary to defendant's claim, the trial court did not base its decision solely on its docket. Therefore, the trial court's holding fell within the permissible range of principled outcomes.

Furthermore, defendant has not shown actual prejudice. The trial court applied the MRE 403 balancing test to weigh the probative value of the other acts testimony against the prejudicial effect on defendant. As we conclude in a subsequent analysis, the trial court did not err in finding that the evidence was more probative than prejudicial and permitting its admission. Because defendant has not demonstrated actual prejudice, we will not reverse his conviction based on this ground.

Defendant next asserted that the trial court should grant an adjournment because he had recently received the order allowing the other acts testimony pursuant to MCL 768.27a and

needed additional time to investigate. Again, the trial court denied defendant's request, ruling that defendant should have anticipated that the other acts testimony would be admitted based on the current state of the law. We agree.

On April 8, 2011, defendant received notice that plaintiff sought to have a witness, AF, testify of a prior instance of sexual abuse by defendant pursuant to MCL 768.27a. Thereafter, defendant filed a motion to preclude plaintiff from introducing AF's testimony, but the trial court did not deny defendant's motion until July 26, 2011. Defendant did not request an adjournment until August 1, 2011, and trial did not begin until August 15, 2011. Defendant was thus aware that AF might testify relatively early in the proceedings and had over four months to prepare before the trial commenced. Defendant did not offer an explanation for his lack of preparation. Moreover, because, as the trial court indicated, the current law permitted admission of the other acts evidence, the trial court's denial of defendant's request to adjourn was within the permissible range of principled outcomes. Therefore, defendant's motion for adjournment to prepare for trial was not based on good cause and diligence and the trial court did not abuse its discretion in denying defendant's motion on this basis.

Defendant lastly contended that the trial court should grant an adjournment to allow additional time to produce an expert witness to testify to a matter "crucial" to his defense. Defendant sought to introduce a psychologist, to testify "as to the psychological aspects of the [c]omplainant." Defendant requested more time because the expert was having surgery and would be unavailable at the time of trial. The trial court denied defendant's request.

When presenting his request to adjourn, defense counsel did not offer proof demonstrating the substance of the expert's proposed testimony and how her testimony was crucial to the defense. And, defendant made the request two weeks before trial and was aware of the nature of the trial. Defendant may have had enough time to locate another expert, had such testimony been crucial, although no attempt was made to secure another expert. Therefore, defendant did not establish good cause and diligence to support an adjournment.

Additionally, in his brief on appeal, defendant asserts that the expert witness was crucial to his defense "to explain how [EF] could transfer a bad dream about the sexual abuse from her grandpa to the defendant." However, the trial court previously precluded defendant from questioning EF about her alleged prior sexual abuse by her grandfather. Therefore, the expert's testimony about "perpetrator transference" would not have benefitted the jury when the jury was not allowed to hear evidence of EF's alleged prior sexual abuse. We thus hold that the trial court's ruling on this matter was within the permissible range of principled outcomes.

Again, defendant has also not shown actual prejudice. Even without the additional time, defendant was able to present a coherent defense and witnesses to support it. Defendant offered testimony from the preliminary examination and two witnesses to support his arguments that EF was not telling the truth and that EF was asleep when defendant went into her bedroom and she confused the touching with a bad dream. Because defendant has not demonstrated actual prejudice, we will not reverse his conviction based on this ground.

II. REQUEST TO ADMIT HEARSAY EVIDENCE

Next, defendant argues that the trial court abused its discretion by denying his request to question EF's mother about EF's statement that defendant touched her like grandpa did pursuant to MRE 803A. We disagree.

Evidentiary rulings are within the discretion of the trial court and are reviewed on appeal for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). The trial court abuses its discretion when it chooses an outcome that falls outside of the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217. Whether defendant was denied his Sixth Amendment right to a defense is a constitutional question that this Court reviews de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

Prior to trial, the prosecutor submitted a "Notice of Intent to Introduce Hearsay Evidence Pursuant to MRE 803A." The notice referenced testimony from EF's mother and appears to have included statements concerning what EF had said about her grandfather's actions toward her. During his opening argument, defense counsel told the jury they would hear testimony from EF's mother that EF had said defendant touched her just like grandpa did. The prosecutor objected, stating that she had told counsel she would not be introducing any of EF's statements to her mother. Defendant thereafter argued for the admission of EF's statement to her mother about her grandfather based on the hearsay exception under MRE 803A on his own behalf. The trial court denied the request finding that MRE 803A precluded the admission. MRE 803A provides for the "tender years" exception to the hearsay rule and states, in relevant part:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- (1) the declarant was under the age of ten when the statement was made;
- (2) the statement is shown to have been spontaneous and without indication of manufacture;
- (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
- (4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

Defendant argues that the requirements set forth in MRE 803A were met and that so long as the requirements are fulfilled, either the defense or the prosecutor can introduce this evidence. Furthermore, defendant contends that his counsel's request to admit EF's statement that defendant did to her what grandpa did pursuant to MRE 803A was completely different from his request to cross-examine EF regarding the prior sexual abuse by her grandfather.

In a pretrial order, the trial court specifically precluded defendant from cross-examining EF regarding the alleged sexual abuse by her grandfather. Nevertheless, defendant sought to introduce virtually the same evidence under MRE 803A. This rule of evidence does not apply to the statement at issue. Pursuant to MRE 803A, to be admissible, the statement must describe “an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice.” The statement that defendant sought to introduce was not a statement about a sexual act performed on EF by defendant or an accomplice. Rather, the evidence was a statement about the past occurrence of alleged sexual abuse by the grandfather. Therefore, we conclude that the statement was inadmissible according to the plain language of MRE 803A, and the trial court did not abuse its discretion in denying defendant’s request to admit the statement. Because there was no abuse of discretion, defendant was not deprived of his right to a fair trial.

III. SIMILAR ACTS EVIDENCE

Defendant next contends that the trial court erred by admitting AF’s testimony as other acts evidence pursuant to MCL 768.27a because the statute violates due process and interferes with judicial power to ensure a fair trial. We disagree.

“Constitutional questions and issues of statutory interpretation are questions of law, which this Court reviews de novo.” *Watkins*, 491 Mich at 466-467. Moreover, we review for an abuse of discretion a trial court’s decision to admit or exclude evidence. *Id.* The trial court abuses its discretion when it chooses an outcome that falls outside of the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

MCL 768.27a, provides in relevant part that “in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.” In *Watkins*, 491 Mich at 455, our Supreme Court recently held that MCL 768.27a is constitutional despite its conflict with MRE 404(b), which precludes the introduction of other acts evidence for the purpose of establishing a defendant’s propensity to commit similar acts. The Supreme Court found that the statute “reflects a substantive legislative determination that juries should be privy to a defendant’s behavioral history in cases charging the defendant with sexual misconduct against a minor.” *Id.* at 476. Thus, the Court determined that the statute prevails over the court rule “because it does not impermissibly infringe on this Court’s authority regarding rules of practice and procedure under Const 1963, art 6, § 5.” *Id.* at 455-456. It further held that the other acts evidence permitted under MCL 768.27a is subject to the balancing test under MRE 403, but “courts must weigh the propensity inference in favor of the evidence’s probative value rather than its prejudicial effect.” *Id.* at 456. In other words, “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.” *Id.* at 487. In light of the above-stated decision, defendant’s arguments regarding the constitutionality of MCL 768.27a lack merit.

Furthermore, the trial court relied on current law and properly admitted the other acts evidence after weighing its probative value against its prejudicial effect. As the *Watkins* Court confirmed, MCL 768.27a requires a balancing test under MRE 403. *Id.* at 456. Although the propensity inference must be weighed in favor of the evidence’s probative value, “[t]his does not

mean, however, that other-acts evidence admissible under MCL 768.27a may never be excluded under MRE 403 as overly prejudicial.” *Id.* at 487. Our Supreme Court set forth the following non-exhaustive list of factors that might lead a trial court to exclude such evidence, “(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant’s and the defendant’s testimony.” *Id.* at 487-488. Furthermore, it is appropriate for a trial court to consider whether charges were filed or a conviction rendered when balancing the factors. *Id.* at 489.

At trial, plaintiff presented other acts evidence pursuant to MCL 768.27a.¹ Defendant’s niece, AF, testified that in June 2007 when she was aged 16, she stayed the night at defendant and his wife’s house. The following morning, defendant woke her up by kissing her all over her face, including her forehead, cheek and mouth. Defendant then “reached under the cover” and touched her “vaginal area” with his hand. Defendant’s hand stayed on top of the shorts she was wearing, but moved. Defendant stopped when AF closed her legs and turned over.

In ruling on the admissibility of the above evidence, the trial court weighed the evidence under MRE 403 and determined that AF’s testimony was more probative than prejudicial. Specifically, the trial court found that the previous offense occurred in 2007, concerned similar allegations, showed that defendant had a propensity to commit sexual acts against minors and indicated that defendant chose victims with whom he had a close relationship. The trial court found that the prior incident was no more severe than the charged offense and that it was probative concerning EF’s credibility.

We hold that the trial court properly determined that the other acts evidence was admissible pursuant to MCL 768.27a. The evidence was probative because of the propensity inference. Likewise, it bolstered EF’s credibility, offered circumstances similar to those of the charged offense, and confirmed defendant’s modus operandi. *Watkins*, 491 Mich at 491. The fact that charges were never brought concerning the other act did not negate its probative value in this case, and its prejudicial effect was lessened when defense counsel informed the jury of this lack of prosecution. And, the jury was instructed on how to properly use the other acts evidence. *Id.* at 490. Accordingly, the trial court’s denial of defendant’s motion to preclude the other acts evidence was not an abuse of discretion.

IV. RIGHT TO CONFRONTATION

¹ Although defendant argues on appeal that plaintiff failed to specify the listed offense under MCL 768.27a, the sexual abuse against AF qualifies as a listed offense. Pursuant to MCL 28.722(u)(ix), “A violation of section 520c, 520e, or 520g(2) of the Michigan penal code, 1931 PA 328, MCL 750.520c, 750.520e, and 750.520g, committed against an individual 13 years of age or older but less than 18 years of age” constitutes a listed offense. Defendant engaged in criminal sexual conduct against AF when she was 16 years old.

Finally, defendant claims that the trial court abused its discretion by precluding him from cross-examining EF concerning her allegation of prior sexual abuse by her grandfather, and thereby, deprived defendant of his constitutional right to confrontation. We disagree.

We review a trial court's decision to preclude evidence under the rape shield statute for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). The trial court abuses its discretion when it chooses an outcome that falls outside of the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217. Whether defendant was denied his Sixth Amendment right to confrontation is a constitutional question that this Court reviews de novo. *People v Fackelman*, 489 Mich 515, 524; 802 NW2d 552 (2011).

Defendant asserts that the rape shield statute does not apply because the evidence pertained to prior sexual abuse, not prior sexual conduct. MCL 750.520j, Michigan's rape shield statute, provides, in pertinent part:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

It is generally accepted that the rape shield statute applies in cases of child sexual abuse, both voluntary and involuntary. See, e.g., *People v Arenda*, 416 Mich 1, 6, 14-15; 330 NW2d 814 (1982), where our Supreme Court did not make any distinction between voluntary and involuntary sexual conduct in excluding evidence of all instances of prior sexual conduct between the eight-year-old victim and any person other than the defendant. We note the concurring opinion in *People v Parks*, 483 Mich 1040, 1049; 766 NW2d 650 (2009), where Justice Young stated, "[T]here is a strong textual basis for concluding that the term 'conduct,' as it is used in the rape shield statute, encompasses both voluntary and involuntary behavior." True, in *People v Morse*, 231 Mich App 424, 437; 586 NW2d 555 (1998), a panel of this Court held that evidence of a child complainant's involuntary prior sexual conduct may be admissible at trial despite the rape shield statute. However, Morse cautioned that the admissibility of such evidence was strictly limited to specific circumstances to rebut inferences "that flow from a display of unique sexual knowledge . . ." *Id.* at 434. Those circumstances are not present in this case where EF did not display a "unique sexual knowledge" that, if not rebutted could potentially only be attributed to having been learned from defendant, but rather alleged that defendant touched her private area over her pajama bottoms on one occasion. Accordingly, we conclude that EF's prior alleged sexual abuse by her grandfather fell within the purview of the rape shield statute.

Next, defendant asserts that his constitutional right of confrontation was denied by the preclusion of the evidence concerning EF's grandfather. A criminal defendant has the constitutional right to confront an adverse witness. US Const, Am VI; Const 1963, art 1, §20. Nonetheless, that right is not without limitation, and the Sixth Amendment may "bow to accommodate other legitimate interests in the criminal trial process." *Michigan v Lucas*, 500 US 145, 149; 111 S Ct 1743; 114 L Ed 2d 205 (1991) (quotation marks and citations omitted).

The rape-shield statute represents a legislative determination that in most instances evidence of a rape victim's past sexual conduct with others when offered to establish that the conduct at issue was consensual or for impeachment purposes is inadmissible. *People v Hackett*, 421 Mich 338, 347-348; 365 NW2d 120 (1984). However, there are certain limited situations where the evidence must be admitted to preserve a defendant's constitutional right to confrontation. *Id.* at 348. For instance, where the defendant offers evidence of a rape victim's prior sexual conduct for the purpose of proving the victim's bias or an ulterior motive for making a false accusation, such evidence should be admitted. *Id.* Moreover, a defendant may prove that the victim made prior false accusations of rape. *Id.* "The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation." *Id.* at 349.

Because the evidence of prior sexual abuse by EF's grandfather was protected under the rape shield statute, it was up to defendant to make an offer of proof of the relevance of the evidence and its application to one of the limited circumstances that would implicate the confrontation clause. *Hackett*, 421 Mich at 348, 350. Defendant sought to introduce evidence of EF's allegation that her grandfather previously sexually abused her. Specifically, defendant wanted to question EF regarding incidents where her grandfather repeatedly touched her with his fingers "right where the pee comes out." Defendant maintained that the acts in the instant case did not occur and that the facts are false and the product of the prior sexual abuse. Defendant claimed that the evidence was relevant to show the origin of EF's allegations of sexual abuse by defendant, the source of her knowledge on how to make sexual abuse allegations against male authority figures as well as what to say to involve law enforcement, and the existence of her willingness to make false claims to garner attention. These claims, however, do not amount to an offer of proof that would establish that the alleged prior sexual abuse would show that EF was biased against defendant or had a specific ulterior motive for making a false accusation. Defendant argues that the alleged touching by defendant was "strikingly similar" to the description of the touching by the grandfather. Even assuming the two incidents were similar, there is no proof in the circumstances surrounding the events that EF had a bias against defendant or against men, in general. Likewise, the similarity in the incidents did not prove a specific ulterior motive for making a false accusation against defendant. In essence, defendant expected the trial court to imply a motive of ill-will based on the mere fact that EF made a prior allegation of sexual contact.

Additionally, defendant offered no credible evidence to show that EF falsely accused her grandfather, and EF has not acknowledged that her allegation was false. Defendant's right to confront the witness does not function to permit a "fishing expedition" on the guilt or innocence of her grandfather. See, *People v Garvie*, 148 Mich App 444, 449; 384 NW2d 796 (1986).

Therefore, the trial court did not abuse its discretion when it determined that defendant failed to demonstrate that the evidence was of a character that would place it within one of the “limited situations” where the Confrontation Clause would be implicated and require the admission of the evidence.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Deborah A. Servitto

/s/ Douglas B. Shapiro