

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMMY ALLEN NICHOLS,

Defendant-Appellant.

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UNPUBLISHED  
February 17, 2011

No. 294469  
Berrien Circuit Court  
LC No. 2009-001112-FC

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his conviction of ten counts of criminal sexual conduct (CSC), including five counts of first-degree CSC, MCL 750.520b; one count of second-degree CSC, MCL 750.520c(1)(b); three counts of third-degree CSC, MCL 750.520d(1)(a); and one count of fourth-degree CSC, MCL 750.520e(1)(a). We affirm.

Defendant's convictions arose from his sexual abuse of his niece. Defendant began inappropriately touching his niece when she was approximately 10 or 11 years old. The sexual abuse escalated, and defendant started sexually penetrating her. The abuse continued for several years. On appeal, defendant argues the trial court abused its discretion by admitting other-acts evidence under MRE 404(b), which in turn violated defendant's due process rights. We disagree.

The evidence at issue concerns incidents of sexual abuse against other minors and defendant's 1996 conviction for CSC. Defendant objected to the admission of this evidence as highly prejudicial. We review the preserved evidentiary issue for abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

Defendant's arguments on appeal are founded solely on MRE 404(b); he fails to address admissibility of the evidence under MCL 768.27a. Defendant fails to recognize that MCL 768.27a is controlling over MRE 404(b). *People v Watkins*, 277 Mich App 358, 365; 745 NW2d 149 (2007). MCL 768.27a provides, in pertinent part, "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.”<sup>1</sup> “Where listed offenses are at issue, the analysis begins and ends with MCL 768.27a.” *People v Smith*, 282 Mich App 191, 205; 772 NW2d 428 (2009). Propensity evidence that would otherwise be inadmissible under MRE 404(b) may be admitted under MCL 768.27a. *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007). This Court has explained that under MCL 768.27a “a defendant’s propensity to commit criminal sexual behavior can be relevant and admissible . . . to demonstrate the likelihood of the defendant committing criminal sexual behavior toward another minor.” *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008).

To admit evidence under MCL 768.27a, the trial court must weigh the probative value of the evidence against its undue prejudicial effect. *Pattison*, 276 Mich App at 621. “[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .” MRE 403. Damaging evidence is not necessarily unfairly prejudicial; the evidence must be excluded only when the danger of unfair prejudice substantially outweighs the probative value. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). Unfair prejudice occurs where “there is a danger that the evidence will be given undue or preemptive weight by the jury” or where its use would be inequitable. *People v Gipson*, 287 Mich App 261, 263; 787 NW2d 126 (2010), quoting *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

We conclude, as did the trial court, that the evidence was admissible under MCL 768.27a on the ground that the defendant’s prior acts of sexual abuse were relevant to his propensity to commit the charged acts of CSC. See *Pattison*, 276 Mich App at 620. Moreover, as the trial court correctly determined, the evidence was not unduly prejudicial. Like all incriminating evidence, the challenged evidence was damaging to defendant’s case. However, the prejudicial nature of the evidence did not outweigh its probative value with respect to determining the credibility of the victim of the charged crimes. The other-acts evidence was thus admissible under MCL 768.27a, and the trial court was within its discretion in admitting the evidence.

Affirmed.

/s/ William C. Whitbeck  
/s/ Peter D. O’Connell  
/s/ Kurtis T. Wilder

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<sup>1</sup> “Listed offense” means the term as defined in section 2 of MCL 28.722. MCL 768.27a(2)(a). The crimes in MCL 750.520b-750.520g are “listed offenses.” MCL 28.722.