STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH LEO-WILLIAM FLEESE,

Defendant-Appellant.

UNPUBLISHED
December 18, 1998

No. 201906
Barry Circuit Court
LC No. 96-000148 FH

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree criminal sexual conduct, MCL 750.520c(1)(b); MSA 28.788(3)(1)(b), fourth-degree criminal sexual conduct, MCL 750.520e; MSA 28.788(5), furnishing alcohol to a minor, MCL 436.33(1); MSA 18.1004, and distributing obscene material to a minor, MCL, 722.675; MSA 25.254(5). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to forty to sixty years' imprisonment. We affirm.

I

Defendant claims that the trial court erred in failing to grant his motion for severance of the charges related to the two victims. A trial court's decision on a motion to sever is reviewed for an abuse of discretion. See *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997); *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). The standard for reviewing a decision for an abuse of discretion is narrow; the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

MCR 6.120(B) provides:

> On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on

(1) the same conduct, or

(2) a series of connected acts or acts constituting part of a single scheme or plan.

After reviewing the transcript of the preliminary examination, we conclude that the trial court did not abuse its discretion in denying the motion to sever. Although he was acquitted on this count, defendant was charged with furnishing alcohol to the eight-year-old complainant. The latter testified that defendant offered him beer the same night that the touching happened, which was also the same night that he saw defendant "holding [the fifteen-year-old complainant] down." Thus, the charges involving one complainant can reasonably be viewed as providing a conceptual background for the charges involving the other complainant. Moreover, the complainants described the same people as being present that day, meaning that there would have been common witnesses at separate trials, possibly including both complainants. Furthermore, the trial court did sever the trial of a third complainant where the alleged acts clearly occurred on a different day. In sum, the facts were sufficient to permit the conclusion that the charges involving the two complainants were "connected acts." While, had we been in the trial court's position, we might have decided the question differently, we cannot find that the trial court's decision was violative of fact and logic or demonstrated a perversity of will, a defiance of judgment, or an exercise of passion or bias. See *Torres*, *supra*.

II

Next, defendant raises two issues regarding the prosecution witnesses Michael James and Jeremy Kidder.

A

Defendant argues that the trial court erred in allowing the prosecution to amend its witness list to include James and Kidder on the day of trial. However, MCL 767.40a(4); MSA 28.980(1)(4) allows a prosecutor to add or delete from the witness list at any time upon leave of the court and for good cause shown. Even if this statute is violated, a defendant must show prejudice from the violation. *People v Hana*, 447 Mich 325, 358, n 10; 524 NW2d 682 (1994). In the present case, defendant has failed to articulate any prejudice from the late endorsement of the witnesses. Defendant acknowledges in his appellate brief that defense counsel received a fax from the prosecutor prior to trial with the names of the two witnesses. Defendant was able to present a witness to rebut Kidder's testimony. Under the circumstances, we find no error requiring reversal.

B

Defendant claims that the trial court erred in admitting the testimony of James and Kidder. The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The admissibility of evidence of a defendant's other crimes, wrongs, or acts is governed by MRE 404(b). To be admitted at trial, such evidence must be offered for a proper purpose, which means that the evidence must be offered for some reason other than to show the character of a person

in an effort to prove conduct in conformity with such character. The evidence must also be relevant to an issue or fact of consequence at trial, other than by way of a showing of mere propensity. Finally, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. See *People v VanderVliet*, 444 Mich 52, 64, 74-75; 508 NW2d 114 (1993). In application, the admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *VanderVliet*, *supra* at 75.

When a defendant denies committing second-degree criminal sexual conduct, evidence of other acts may be admissible to show intent or sexual purpose. *Id*. at 84-85. Accordingly, the testimony was admissible for that end. In addition, James' testimony was relevant to show defendant's pattern or practice of making threats to a young child whom he had molested in order to deter the child from reporting the abuse. Furthermore, Kidder's testimony was relevant to show a pattern or practice of using alcohol and pornography to overcome the resistance of adolescents to sexual molestation. We agree with the trial court that the prejudicial effect of the testimony did not outweigh its probative value. See *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). Accordingly, the trial court did not abuse its discretion in admitting the testimony.

III

Finally, defendant asserts that his sentences violate the principle of proportionality. We disagree. Defendant has a history of sexually molesting children. A trial court does not abuse its discretion in imposing a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant is unable to conform his conduct to the laws of society. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). Defendant's sentences are proportionate to the seriousness of the circumstances surrounding the offenses and the offender. See *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Janet T. Neff