

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVIN LAVEL JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

May 8, 2007

No. 267660

Wayne Circuit Court

LC No. 05-006126-01

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years of age). Because defendant's due process rights were not violated by the timeframe in which he was charged, and the trial court did not abuse its discretion when it admitted similar acts evidence at trial, we affirm.

Defendant was incarcerated for an unrelated crime until September 29, 2002, when he was released on parole. The crime at issue, defendant's sexual assault of his 12-year-old daughter occurred in February 2003. Due to an unrelated technical parole violation, defendant returned to prison on March 31, 2003. The victim reported the sexual assault to police on July 16, 2004. Defendant was charged with the crime on April 21, 2005, and defendant finished serving a maximum prison term for the unrelated crime on June 1, 2005. Jury trial commenced on the instant charges on November 30, 2005 and the jury found him guilty as charged on December 2, 2005. The trial court sentenced defendant to 210 to 600 months' imprisonment.

Defendant argues on appeal that he was denied due process of law due to the delay between when the victim reported the assault and when the police arrested him for the crime. Criminal defendants are guaranteed the right to a speedy trial by the United States Constitution, US Const, Am VI, and the Michigan Constitution, Const 1963, art 1, § 20. *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). Generally, a defendant must be arrested to invoke the speedy trial guarantee. Prearrest timing limitations are generally governed by the applicable statute of limitations, but oppressive prearrest delays can also deprive a defendant of due process and require a dismissal of charges. *People v Tanner*, 255 Mich App 369, 414; 660 NW2d 746, rev'd on other grounds 469 Mich 437 (2003), citing *United States v Marion*, 404 US 307, 324-326; 92 S Ct 455; 30 L Ed 2d 468 (1971).

This Court applies a two-part balancing test to determine if an oppressive prearrest delay violated a defendant's due process rights. *People v Bisard*, 114 Mich App 784, 791; 319 NW2d 670 (1982). First, the defendant must establish "some actual and substantial prejudice." *Id.* "Substantial prejudice is prejudice of a kind or sort that the defendant's ability to defend against the charges was so impaired that it likely affected the outcome of the trial. Actual prejudice is not established by general allegations or speculative claims of faded memories, missing witnesses, or other lost evidence." *Tanner, supra* at 414 (citations omitted). Second, the prosecution must have intended to gain a tactical advantage by delaying charges. *Id.*

Defendant claims in particular that the prosecution's witnesses were unable to specifically remember when events occurred, and this inability to remember dates prejudiced defendant because he was thereby unable to present an alibi defense that he was in prison at the time of the events. Defendant was released from prison on September 30, 2002. One stepdaughter testified that defendant began sexually abusing her approximately two months after he came back, around December 2002. The victim testified that her father sexually abused her around Christmas 2002, and New Year's 2003, and again a month after that, but could not remember the exact dates. A third daughter testified that defendant was sexually inappropriate with her in February 2003. Defendant returned to prison in March 2003. A review of the record reveals that none of the witnesses wavered from the timeframe of when the events they described transpired, and none of them testified that any abuse took place after February 2003. In addition, defendant himself gave a statement where he admitted to being present during the time when the victim said the abuse occurred. The witnesses' inability to remember exact dates did not preclude defendant from presenting an alibi.

Defendant also claims that it was more difficult to persuade the jury that the victim was mistaken when she testified as a 15-year-old rather than the 12-year-old that allegedly experienced the assault. But defendant does not explain or support this contention. Regardless, there was only a ten-month delay between when the incident was reported and when defendant was charged, and therefore, the victim would have been only ten months younger had defendant been arrested the same day that the assault was reported.

Defendant also claims that the prearrest delay prevented him from making chemical comparison tests of a yellow substance the victim saw on toilet paper she used following the assault. Defendant does not show how a ten-month prearrest delay would have any effect on this evidence. If the victim had preserved the toilet paper until she reported the crime in July 2004, it would be logical to assume she would have either turned it over to the police when she reported the assault, or continued to preserve it until defendant was arrested and brought to trial.

In sum, defendant was unable to show how the delay prejudiced his defense. Defendant has presented no evidence to show that the prosecution deliberately delayed charging him in order to gain a tactical advantage. Rather, police testified at trial that the delay was due to defendant not being in the area, combined with the victim not being in any immediate danger. Defendant's due process rights were not violated by any prearrest delay.

Defendant also asserts that the trial court abused its discretion by admitting similar acts evidence. This Court reviews a trial court's decision to allow MRE 404(b) evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). A trial court

abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The charged crime involved defendant having anal intercourse with the victim under the guise of disciplining her. The trial court admitted the following testimony under MRE 404(b):

1. Defendant had both anal and vaginal intercourse with his stepdaughter, claiming he was disciplining her. Thereafter, he sexually abused her until he impregnated her.
2. Defendant penetrated the victim's anus with his finger, claiming he was disciplining her, and told her he would put something bigger in her behind the next time she got in trouble.
3. Defendant drove the victim to a park and told her to undress, telling her she needed to be comfortable while naked in front of her father. She complied and cried, and defendant drove her home.
4. Defendant drove another daughter to a park and told her to take off her pants. She complied and cried, and defendant drove her home.

Generally, similar act evidence is admissible under MRE 404(b) if offered for a proper purpose, the evidence is relevant, and its probative value is not substantially outweighed by its prejudicial effect. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). The prosecution bears the burden of establishing the relevance of the similar act evidence and the trial court must "closely scrutinize" the logical relationship between the similar act evidence and the fact in issue. *Crawford, supra* at 388.

Defendant argues that his theory of the case was that the incident did not happen, and not that the victim misconstrued innocent conduct or that defendant never intended to touch her. Therefore, defendant claims that, because absence of mistake, state of mind, and intent were not at issue, the similar acts evidence was not relevant. However, defendant gave a statement to police where he admitted to being in the same bed with the victim, but that the victim mistook his erect penis between her legs for anal intercourse. Because the statement was read at trial, defendant's lack of innocent intent and the absence of mistake would be at issue. Thus, the similar acts evidence would be relevant to negative defendant's innocent intent, and to show absence of mistake on behalf of the victim.

In addition, defendant claims that the evidence did not approach the level of similarity required to support a common scheme or plan theory. On the contrary, there was a father-daughter relationship between defendant and each of his victims. All of the acts occurred within a five-month time span. Defendant claimed he was disciplining the victim when he digitally penetrated her anus and when he committed the charged crime, and he claimed he was disciplining his stepdaughter the first time he had anal and vaginal intercourse with her. In addition, defendant drove the victim to a park and told her to undress, and when she cried he took her home, and then he did the same act with another daughter. While there are minor dissimilarities in the evidence, there are enough common features to infer that defendant had a

system of taking advantage of his parental authority over his daughters. The similar acts evidence was relevant to show a scheme, plan, or system of doing an act.

Defendant also contends that he was unfairly prejudiced because it was inevitable that the jury would use the evidence to conclude defendant had a propensity to sexually abuse the victim or, alternatively, that if he did not abuse the victim, he must have done something wrong to someone. However, the similar acts evidence admitted here was probative of whether defendant sexually abused the victim and in rebutting his theory that the victim fabricated the claim. Therefore, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to defendant. The trial court did not abuse its discretion in its determination to admit the similar acts evidence pursuant to MRE 404(b).

Affirmed.

/s/ Michael J. Talbot  
/s/ Pat M. Donofrio  
/s/ Deborah A. Servitto