

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICK LEE ASHBY,

Defendant-Appellant.

UNPUBLISHED

January 19, 2010

No. 287848

Kalamazoo Circuit Court

LC No. 2007-001764-FC

Before: Stephens, P.J., and Gleicher and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of three counts of first-degree criminal sexual conduct involving a person under 13 years old. MCL 750.520b(1)(a). The trial court sentenced defendant to 20 to 40 years' imprisonment for each conviction. Because we conclude that there were no errors warranting relief, we affirm.

Defendant was approximately 30 years old when he met the ten-year-old victim in January 1997. She was defendant's girlfriend's niece. Not long after they met, defendant engaged in sexual conduct with the victim, which ultimately included digital, penile and oral penetration. This behavior continued until after the victim turned 16 years old. At trial, the prosecutor called two of defendant's female relatives as witnesses. They testified that defendant sexually assaulted them when they were children.

Defendant argues on appeal that the trial court erred when it allowed the two female relatives to testify without considering whether their testimony should be excluded under MRE 403. This Court reviews a trial court's decision to admit evidence for an abuse of discretion and reviews de novo the proper interpretation of a statute or rule of evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Under MCL 768.27a, if a defendant is accused of committing a listed offense against a minor, the prosecution may present evidence that the defendant committed another listed offense against a minor. This statute permits the admission of evidence that might otherwise be inadmissible under MRE 404. *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007). Further, the prior acts may be admitted for any relevant purpose, including proof of the defendant's propensity to commit the charged offense. *Id.*; MCL 768.27a. However, the trial court must still determine whether evidence that is admissible under MCL 768.27a should nevertheless be excluded under MRE 403. *Pattison*, 276 Mich App at 620-621. Consequently,

the trial court erred when it determined that it had no discretion to exclude the testimony concerning defendant's prior acts against minors under MRE 403.

Although the trial court erred in this regard, the error does not warrant relief. The probative value of the testimony at issue was not substantially outweighed by the danger of unfair prejudice. MRE 403. "Unfair prejudice" does not mean "damaging"; any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). The evidence in this case does not rise to that level. Although dissimilar in some respects, we disagree with defendant's contention that the prior acts were of such different character that the jury would be unable to fairly weigh the evidence concerning the conduct at issue. The prior acts bore similarities to the charged conduct that tended to make the victim's version of events more plausible. The testimony established that defendant had a propensity to molest young girls and that he used his relationships with adults in the victims' lives to gain access to the victims. There were also similarities in the manner by which defendant initiated the sexual conduct. Thus, there was significant probative value to the testimony, which was clearly not outweighed by any prejudice beyond that which normally accompanies the type of testimony specifically permitted by MCL 768.27a. See MRE 403. Therefore, we must conclude that the trial court's erroneous conclusion that it could not apply MRE 403 was harmless. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Next defendant argues that the prosecution improperly asked defendant to comment on the veracity of the prosecutor's witnesses. Because defendant's trial counsel did not object to the specific instances at issue, we will review these claims for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

As the prosecution concedes on appeal, it was improper for the prosecutor to ask defendant to comment on the credibility of the prosecution's witnesses. See *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, after a later objection by defense counsel, the trial court informed the jury that questioning one witness on the credibility of another was improper. The trial court also instructed the jury that it was the jury's responsibility to assess the credibility of the witnesses and weigh the evidence. In light of these instructions and the significant evidence against defendant, we conclude that the prosecutor's improper cross-examination does not warrant relief. *Id.* at 18. Nevertheless, we caution the prosecutor against engaging in such blatant misconduct in the future.

There were no errors warranting relief.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Elizabeth L. Gleicher

/s/ Michael J. Kelly