STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 11, 2007
v	No. 276094 Macomb Circuit Court
STEVEN MICHAEL WACLAWSKI, Defendant-Appellee.	LC No. 06-005398-FC

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

The prosecution appeals by leave granted the circuit court's opinion and order granting defendant's motion to exclude other acts evidence pursuant to MRE 404(b). We reverse and remand for further proceedings consistent with this opinion.

I. The Charges

On May 23, 2006, Defendant was charged with three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c) (during the commission of another felony),[1] two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (involving a child under the age of 13), five counts of using a computer to commit a crime, MCL 752.796, and production of child sexually abusive material, MCL 750.145c(2). The charges resulted from a search of defendant's computer, which revealed hundreds of images of male child pornography, some three dozen of which were taken in defendant's home and depicted three boys. The three boys had all spent the night at defendant's home on multiple occasions when no other adults were present, and defendant had named the computer photograph files with the boys' first names. Three of the images, taken on August 23, 2001, allegedly depicted defendant performing fellatio on a 14-year-old boy identified as "K." Other photographs, taken on March 1, 2000, allegedly depicted "P," a 12-year-old boy, with his penis was being measured with a ruler. Photographs taken on June 15, 2001, allegedly depicted "M," a 10-year-old boy who was

[1] Following a hearing regarding defendant's motion to exclude and several other motions that are not at issue in this appeal, the trial court granted defendant's motion to dismiss two counts of CSC I as duplicative because it concluded that the alleged facts only supported one act of penetration.

also photographed with his penis being measured with a ruler. None of the boys recalled the photographs being taken.

II. The Other Acts

On February 25, 2006, defendant contacted "jason_12parma" in a chat room, and they exchanged messages for about 45 minutes, discussing fellatio and a possible future sexual encounter. Defendant asserted that he was a 42-year-old man from Monroe, and "Jason" claimed to be a 12-year-old boy living in Ohio. "Jason" was actually an undercover police officer. Defendant and "Jason" communicated online on February 28, 2006, March 4, 2006, and March 6, 2006, discussing fellatio and the possibility of getting together so that defendant could perform fellatio on "Jason." On March 4, 2006, defendant asked "Jason" if he had been circumcised and whether he had ever measured his penis. When "Jason" stated that he had never measured it, defendant asked him to estimate its size.

On March 10, 2006, "Jason" contacted defendant and they communicated for about 90 minutes, discussing fellatio and arrangements they had made to meet on the following Friday. Defendant stated that he would find a "nice hotel" and perform fellatio on "Jason." On March 13, 2006, "Jason" contacted defendant, and they chatted about fellatio, masturbation, and the upcoming plans. On March 15, 2006, "Jason" contacted defendant, and they chatted about fellatio, masturbation, and they confirmed the upcoming plans for that Friday, March 17, 2006. Apparently, defendant did not arrive at the prearranged location on that date. Rather, he traveled to Wheaton, Illinois, for a similar encounter.

On March 4, 2006, defendant contacted "cotyme_91" in a chat room, and they exchanged messages for about 50 minutes, discussing fellatio, and specifically, defendant performing fellatio on "Coty." "Coty" lived in Illinois and claimed to be a 14-year-old boy. "Coty" was actually an undercover police officer. On March 15, 2006, "Coty" contacted defendant, and they chatted online, discussing defendant performing fellatio on "Coty" and a possible encounter the following weekend. "Coty" stated that his penis was small, and defendant asked how small. On March 17, 2006, "Coty" and defendant made arrangements to meet at a park in Wheaton on March 18, 2006, and go to defendant's hotel room, where defendant planned to perform fellatio on "Coty." When defendant arrived at the meeting place, he was arrested. In July 2006, defendant was convicted of indecent solicitation of a child, 720 Ill Comp Stat 5/11-6, and sentenced to two years in prison.[2]

III. Exclusion of Other Acts Evidence

Pursuant to MRE 404(b),[3] the prosecution filed a notice to admit evidence of defendant's online chats with "Coty" and "Jason;" defendant filed a motion to exclude this evidence. The

[2] Defendant is currently on parole.

[3] A prosecutor may not introduce evidence of other crimes, wrongs, or acts in order to prove a defendant's character or propensity for criminal behavior. MRE 404(b); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205; 520 NW2d 338 (1994). (continued…)

court granted defendant's motion, concluding the acts in Ohio and Illinois were "substantially different" than the acts alleged in the instant case and, therefore, the probative value was substantially outweighed by the danger of unfair prejudice. On appeal, the prosecution argues that the circuit court abused its discretion by using an incorrect standard in granting defendant's motion to exclude evidence of his online chats in Ohio and Illinois. We agree that the circuit court appeared to require a level of similarity that is contrary to caselaw.

The circuit court, relying on *People v Sabin (On Remand)*, 236 Mich App 1; 9; 600 NW2d 98 (1999), analyzed the issue under a "substantial similarity" test, and concluded that "circumstances underlying the charge in the case at hand and the subsequent acts are substantially different" because "the subsequent acts involved the use of internet chat rooms to entice young boys to meet with Defendant, where Defendant would perform sexual actions on the boy. The case at hand involves victims that frequented defendant's home, and allegedly had sexual actions performed on them." The circuit court further found that the other acts evidence had little probative value in proving a scheme, because "[t]here is no consistent pattern of approaching his victims. In addition, the fact that five years had passed between the alleged acts in this matter and the subsequent acts is too far removed to demonstrate a scheme or plan."

While the circuit court's reasoning would, indeed, be supported by this Court's decision on remand in *Sabin*, that decision was reversed in *People v Sabin (After Remand)*, 463 Mich 43, 614 NW2d 888 (2000), in which the Supreme Court concluded that the trial court's decision to admit the evidence was supported by the requisite degree of similarity.

> Today, we clarify that evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are

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(…continued)

However, the evidence may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case." MRE 404(b)(1).

> In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), this Court articulated the factors that must be present for other acts evidence to be admissible. First, the prosecutor must offer the "prior bad acts" evidence under something other than a character or propensity theory. Second, "the evidence must be relevant under MRE 402, as enforced through MRE 104(b)[.]" *Id.* Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).]

"MRE 404(b) permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct." *People v Watson*, 245 Mich App 572, 576; 629 NW2d 411 (2001), quoting *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

> manifestations of a common plan, scheme, or system. . . . Logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot. [463 Mich at 63-64.]

We recognize that the decision to admit certain other acts evidence under MRE 404(b) "is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, in the instant case it appears that the circuit court's discretion was exercised within an erroneous legal framework. We therefore remand for reconsideration in light of this opinion and the Supreme Court's decision in *Sabin (After Remand)*.[4]

Reversed and remanded for further proceedings consistent with this opinion[5]. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood

[4] We further observe that the evidence might be more probative with respect to some charges than others, and its relevance might depend on defendant's defenses. For example, evidence that defendant questioned two perceived prepubescent boys about their penis size, solicited them for the purpose of performing fellatio, and arrived in Illinois with a digital camera, intending to photograph the activities, may have considerably more relevance to defendant's intent in taking and saving the pictures found on his computer than to the CSC charges themselves. Or the other acts may become more relevant if defendant asserts that he had no involvement in generating the pictures, and possessed them innocently or for some benign purpose.

[5] Because the prosecution's issue regarding the admissibility of other acts evidence under MCL 768.27a was not raised before the trial court, it is unpreserved, and we do not address it here. The prosecutor may raise the issue on remand.