NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

CRAIG A. LEE

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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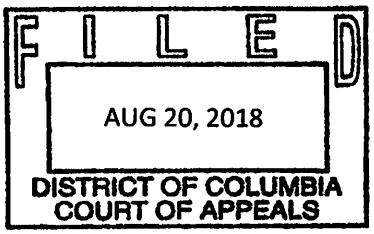
APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-CF-611



CRAIG A. LEE, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court
of the District of Columbia
(CF1-19185-12)

(Hon. Robert E. Morin, Trial Judge)

(Argued February 15, 2018 Decided August 20, 2018)

Before GLICKMAN and MCLEESE, *Associate Judges*, and RUIZ, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant Craig Lee challenges his conviction for attempted first-degree child sexual abuse, arguing that the trial court erred in admitting evidence of Mr. Lee's prior sexual assault of a twelve-year-old girl. We affirm.

I.

Viewed in the light most favorable to the verdict, the government's evidence at trial was as follows. Mr. Lee was dating Danyell Holston, the older cousin of complainant D.W., a fifteen-year-old girl. In September 2011, D.W. met Mr. Lee at Ms. Holston's apartment. D.W. was spending the night at Ms. Holston's apartment while Ms. Holston attended a party at D.W.'s mother's house. D.W. went to bed on a box spring in the bedroom of one of Ms. Holston's sons.

D.W. was awakened in the early morning by someone's hands rubbing her buttocks. D.W. did not know who was rubbing her, but the rubbing continued for one to two minutes while D.W. pretended to be asleep. A few seconds later, D.W. felt someone pull down her pants and rub the outside of her vagina with what felt

like a wet cloth. D.W. then felt someone stick his penis inside D.W.'s vagina and begin thrusting. The assault ended about two minutes later.

The as-yet unidentified man laid down beside D.W., pulled up D.W.'s pants and underwear, and turned on his cell phone. From the light of the cell phone, D.W. saw Mr. Lee's face. Mr. Lee asked if D.W. was going to tell anyone, whispered D.W.'s name three times, told D.W. not to tell anyone, and then continued to talk for three to five minutes. During that time, Mr. Lee told D.W. she was beautiful, asked if she was okay and if she needed any money, and offered to get her something to eat or drink. D.W. shook her head, and Mr. Lee eventually left the room.

D.W. waited a couple minutes and sent a text message to her boyfriend at 3:00 a.m., telling him what happened. In the morning, D.W. got out of bed and went with Ms. Holston and Ms. Holston's sons to another cousin's birthday party. D.W. eventually went back to her mother's house and showered. D.W. did not tell anyone else about the assault until school on Monday. A school counselor called D.W.'s mother, and D.W.'s mother and the police came to school.

Detective Kenneth Carter was assigned to investigate the assault. Detective Carter interviewed D.W. Visibly shaken and upset, D.W. identified Mr. Lee by his nickname, Reds, as the person who had assaulted her. About a week after D.W. reported the assault, D.W. identified Mr. Lee as her assailant from a photographic lineup prepared by Detective Carter.

After interviewing D.W., Detective Carter drove D.W. and her mother to the hospital, where a sexual-assault nurse examined D.W. The nurse swabbed D.W.'s genitalia and thighs. Testing was performed on the vaginal/cervical and external genitalia swabs, which tested negative for the presence of semen. A microscopic examination of the sample taken from D.W.'s thigh revealed the presence of at least one sperm cell. The sample was insufficient for conducting traditional laboratory DNA testing, and the sample was sent for a special type of analysis, YSTR testing. Mr. Lee's YSTR profile was consistent with the partial YSTR profile derived from the fraction of the sample. Male relatives of Mr. Lee, however, could not be ruled out as possible contributors of the male DNA on the YSTR profile.

During the investigation, Detective Carter did not collect evidence from Ms. Holston's apartment, including the bedding that was on the box spring where the assault occurred. Nor did Detective Carter see or attempt to retrieve any footage

from the security cameras outside of Ms. Holston's building. Detective Carter also never interviewed Ms. Holston's children. Although D.W. emailed Detective Carter copies of the messages D.W. sent to her boyfriend, a power surge at Detective Carter's building wiped out the email.

The defense put on evidence that D.W. was not a truthful person, had been sexually active before the assault, and had previously claimed that she had been raped. Additionally, M.H., one of Ms. Holston's sons, testified that D.W. left the apartment on the night of the assault for a period of time. M.H. also testified that Mr. Lee left Ms. Holston's apartment while D.W. was awake and did not return to Ms. Holston's apartment on the night of the assault. To explain the presence of DNA consistent with Mr. Lee's on the sample taken from D.W.'s thigh, the defense introduced evidence that Mr. Lee's infant son would crawl all over the apartment and that the towels in the bathroom were used by both Mr. Lee and his son.

The parties stipulated that in 1996 Mr. Lee had vaginal intercourse with the twelve-year-old daughter of Mr. Lee's then-girlfriend. The assault occurred in the home of Mr. Lee's then-girlfriend while other members of the household were present but asleep. The trial court instructed the jury that the evidence of Mr. Lee's prior assault was admitted for the limited purpose of establishing whether Mr. Lee had an unusual sexual preference for engaging in sexual relations with underage girls.

The jury was unable to reach a verdict on first-degree child sexual abuse, but found Mr. Lee guilty of the lesser-included offense of attempted first-degree child sexual abuse.

II.

Mr. Lee challenges the admission of evidence of his prior sexual assault. Most broadly, Mr. Lee argues that the unusual-sexual-preference exception is inconsistent with the general prohibition on using prior conduct to prove criminal propensity, as articulated in cases such as *Drew v. United States*, 118 U.S. App. D.C. 11, 15-16, 331 F.2d 85, 89-90 (1964). Whatever we might think of this argument as an original matter, the argument was rejected by a division of this court in *Howard v. United States*, 663 A.2d 524, 527-30 (D.C. 1995) ("[A] number of decisions ... apply the 'lustful disposition' or 'unusual sexual preference' exception as permitting 'other crimes' evidence for the sole purpose of showing

that a defendant had a predisposition to commit the charged offense.") (footnotes omitted). We are bound to follow the holding of *Howard*.

Mr. Lee also argues that even if the unusual-sexual-preference exception is valid, the trial court erred in admitting the evidence at issue in this case. We review for abuse of discretion a trial court's decision to admit evidence. *Menendez v. United States*, 154 A.3d 1168, 1175 (D.C. 2017). We conclude that the trial court did not abuse its discretion.

First, Mr. Lee claims that the government could not establish an unusual sexual preference because D.W. and the 1996 victim shared no common attributes except that both were under the age of eighteen. Mr. Lee also argues that D.W. was a biologically developed and sexually active fifteen-year-old, whereas the 1996 complainant was only twelve. We are not persuaded by these contentions.

The 1996 victim had the physical appearance of someone "a bit older" than twelve, which tended to reduce the significance of the age difference upon which Mr. Lee relies, particularly given that Mr. Lee was substantially older than both D.W. and the 1996 victim. Moreover, in *Johnson v. United States*, 610 A.2d 729 (D.C. 1992), we upheld the admission of unusual-sexual-preference evidence where the victims of both the charged and uncharged conduct were "teenaged girls." *Id.* at 730. (According to the briefs in *Johnson* the victims of the charged offenses were twelve and thirteen at the time of some of the conduct at issue, and one of the victims of the uncharged conduct was fifteen at the time of the incident.) Turning to the question of sexual activity, it is unclear what if any significance should be given to the evidence that D.W. had engaged in prior sexual activity, given that there was no evidence that Mr. Lee was aware of prior sexual activity by D.W. In sum, we cannot say the trial court abused its discretion by failing to exclude the evidence at issue based on differences between D.W. and the 1996 victim.

Second, Mr. Lee argues that the probative value of the 1996 incident was minimal and was far outweighed by the incident's prejudicial effect. "[T]he evaluation and weighing of evidence for relevance and potential prejudice is quintessentially a discretionary function of the trial court, and we owe a great degree of deference to its decision." *Koonce v. United States*, 993 A.2d 544, 554 (D.C. 2010) (internal quotation marks omitted). In deciding whether the danger of unfair prejudice substantially outweighs probative value, the trial court considers a number of factors, including "the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, . . . and the

degree to which the evidence probably will rouse the jury to overmastering hostility." *Legette v. United States*, 69 A.3d 373, 388-89 (D.C. 2013) (internal quotation marks omitted).

We cannot say that the trial court abused its discretion in weighing the probative value and prejudicial effect of the evidence at issue. Mr. Lee argues that the evidence of the 1996 sexual assault had slight probative value because it was not similar to the charged offense. To the contrary, both incidents allegedly involved similar sexual misconduct -- similar sexual assaults on young teenage girls. Nor did the trial court abuse its discretion by failing to exclude the evidence at issue based on the fifteen-year gap between the 1996 incident and the charged offense, because it appears to be undisputed that Mr. Lee was incarcerated for approximately ten of those fifteen years, and then was on supervised probation for an additional five years. *See, e.g.*, *Legette*, 69 A.3d at 389 (six-year gap did not significantly reduce probative value, where defendant "was incarcerated for a portion of that time period"). Further, the United States had a legitimate need for the evidence, given that -- as Mr. Lee himself argues -- the government's case was not overwhelming, in light of the lack of definitive medical evidence connecting Mr. Lee to D.W., the shortcomings of the detective's investigation of the case, and the credibility issues surrounding D.W.'s testimony. Finally, the trial court reduced the potential prejudicial effect of the evidence at issue by asking the parties to present a stipulation in lieu of live testimony and by providing a limiting instruction to which the defense did not object at trial. *See Frye v. United States*, 926 A.2d 1085, 1094 (D.C. 2005) (limiting instructions can "reduce, if not dissipate, the danger of unfairness and prejudice") (internal quotation marks omitted); *cf. Rollerson v. United States*, 127 A.3d 1220, 1229 (D.C. 2015) (acknowledging persuasive power of live testimony over stipulations).

For the foregoing reasons, the judgment of the trial court is

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

APPENDIX B

District of Columbia
Court of Appeals

No. 16-CF-611

CRAIG A. LEE,

Appellant,

v.

CF1-19185-12

UNITED STATES,

Appellee.

BEFORE: Blackburne-Rigsby, Chief Judge; Glickman,* Fisher, Thompson, Beckwith, Easterly, and McLeese,* Associate Judges, and Ruiz,* Senior Judge.

ORDER

On consideration of appellant's petition for rehearing or rehearing *en banc*, and appellee's response thereto, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing *en banc*. It is

FURTHER ORDERED that the petition for rehearing *en banc* is denied.

PER CURIAM

Copies to:

Honorable Robert E. Morin

Director, Criminal Division