STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOE A. ALVARADO,

Defendant-Appellant.

UNPUBLISHED
March 21, 1997

No. 171691
Oakland Circuit Court
Nos. 93-122408, 93-123324

Before: White, P.J., and Griffin, and D.C. Kolenda,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1); MSA 28.788(7)(1). Defendant subsequently pleaded guilty of two counts of habitual offender, second offense, MCL 769.10; MSA 28.1082. The court sentenced defendant to eight to twenty years for the two counts of first-degree criminal sexual conduct and four to ten years for the assault with intent to commit criminal sexual conduct. The court then vacated these sentences and sentenced defendant to concurrent terms of eight to twenty years and four to fifteen years for the habitual offender convictions. We affirm.

I

The charges against defendant arose from two separate incidents of sexual assault involving his nine year old daughter. Defendant and complainant's mother divorced in 1985 and complainant visited defendant at his apartment every other weekend during times pertinent to this case.

Complainant testified that the first incident occurred in October 1991. She was in bed sleeping and awoke as her father was pulling off her sweatpants and underwear. He vaginally penetrated her with his tongue and then with his finger. The second incident occurred around July 1992. Complainant awoke as defendant was pulling down her sweatpants and underwear. Defendant moved his face

* Circuit judge, sitting on the Court of Appeals by assignment.

toward complainant's genitals, and when he was five or six inches away she screamed and he stopped. Defendant then left the room.

II

Defendant first argues that the trial court abused its discretion in allowing the prosecutor to elicit from complainant's friend, complainant's mother, and a social worker prior consistent statements made by complainant. Defendant's theory at trial was that complainant's mother coached complainant to testify against defendant in order to prevent him from obtaining custody of complainant.

The decision whether to admit or exclude evidence is within the sound discretion of the trial court. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, modified and remanded on other grounds 450 Mich 1212 (1995). Reversal on the basis of evidentiary error is not warranted unless the error was prejudicial to the defendant. MCL 769.26; MSA 28.1096; MCR 2.613(A). Hearsay is a statement, other than the one made by the declarant while testifying at trial, offered to prove the truth of the matter asserted. *People v Hyland*, 212 Mich App 701, 707-708; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 900 (1996). The prosecutor is not permitted to bolster a witness' testimony by referring to prior consistent statements of that witness. *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987). However, under MRE 801(d)(1)(B) a prior consistent statement is not hearsay if the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is offered to rebut an express or implied charge of recent fabrication or improper influence or motive.

Complainant was the first to testify at trial. During cross-examination of complainant, defense counsel asked a number of questions implying that complainant's mother improperly influenced her to make up the charges that her father had abused her and to testify against her father, including whether she had lied for her mother before, whether her mother was the first to raise the issue of physical abuse, and whether her mother had told her what to say at trial.

Defendant argues that none of complainant's prior statements could have been made before her mother exerted improper influence on her since her mother was the actual source of the testimony. Plaintiff argues that defense counsel, through his questioning and closing argument, meant to convince the jury that complainant had been coached right up to the day she testified at trial, and that thus any statements complainant made until she took the stand could be admitted as prior consistent statements.

MRE 801(d)(1)(B) is identical to its federal counterpart, FRE 801(d)(1)(B), regarding prior consistent statements of a declarant to rebut a charge of recent fabrication, improper influence or motive. *People v Rodriguez (On Remand)*, 216 Mich App 329; 549 NW2d 359 (1996). In a case also involving child sexual abuse, *Tome v United States*, 513 US 150; 115 S Ct 696; 130 L Ed 2d 574, 588 (1995), the United States Supreme Court held that the FRE 801(d)(1)(B) permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent

fabrication or improper influence or motive. Thus, complainant's consistent statements made prior to her mother's alleged influence were admissible under MRE 801(d)(1)(B). *Rodriguez, supra.*

We reject plaintiff's argument that complainant's prior consistent statements made until the time of trial were admissible because defense counsel argued that complainant's mother's improper influence continued until the time of trial. The consistent statements must have been made before the alleged influence or motive to fabricate arose. *Tome*, 130 L Ed 2d at 582.

The trial court did not abuse its discretion in admitting Mary Michell's testimony. Complainant testified that Michell, her best friend, was the first person she told about the alleged incidents, around a month after school started (fourth grade), that she later reported the incidents to her mother, and that the day after she told her mother she was taken to the State Police. Mary Michell's testimony was in accord. Both testified that they argued after complainant told Michell about the incidents and that Michell insisted that complainant tell someone. Thus, there was evidence that complainant's statements to Michell were made before the motive to fabricate or alleged improper influence arose, *id.*, and the admission of the statements was not improper.

The prior consistent statements admitted at trial through social worker Erway were not made prior to the existence of complainant's mother's alleged influence on complainant, thus their admission was erroneous. *Rodriguez, supra* at 332. However, we conclude that the error was harmless because the challenged testimony was cumulative.

Defendant also argues that the trial court erroneously allowed complainant's mother to testify as to complainant's prior consistent statements. The record does not support defendant's argument. The testimony defendant challenges does not involve prior consistent statements. Rather, defendant challenges complainant's mother's testimony in response to the prosecution asking whether, in the time period before complainant told her about the alleged abuse, she had noticed changes in complainant's behavior. Defense counsel objected to this question on relevance, not hearsay, grounds. In response, the prosecutor argued that the testimony was relevant because it would corroborate that complainant was having problems in school with Mary Michell around that time. The trial court then overruled the objection, allowing the prosecutor to ask the question under MRE 801(d)(1)(B), noting "I am assuming you are trying to show a prior consistent statement where there is an allegation, an insinuation of recent fabrication . . ." The prosecution then asked complainant's mother what behavior problems complainant exhibited the week before complainant reported the abuse to her. She responded that complainant was moody, had frequent asthma attacks, and was not minding her, and that on a couple of occasions, she had trouble getting complainant to go to school.

A person's acts do not constitute "statements" under MRE 801 unless they are intended as assertions. MRE 801(a)(2); *Strach v St John Hospital Corp*, 160 Mich App 251, 278; 408 NW2d 441 (1987). There is no indication in the record, nor does defendant argue, that complainant intended her moodiness, asthma attacks, failure to mind her mother and reluctance to go to school as assertions. Thus, complainant's mother's testimony regarding behavior she observed by complainant was not a prior consistent statement and defendant has not established how he was prejudiced by this testimony.

Further, assuming that this testimony was regarding prior consistent statements, they occurred prior to the alleged improper influence and were thus admissible.

Complainant's mother also testified that complainant was the first to raise the fact that something sexual may have happened with her father, but did not testify as to the contents of the conversation. Given defendant's defense that complainant's allegations were the product of her mother's coaching, this testimony was admissible.

III

Next, we disagree with defendant's argument that prosecutorial misconduct denied him a fair trial. Because defendant failed to object to each instance of alleged prosecutorial misconduct, this issue is unpreserved unless a curative instruction could not have eliminated the prejudicial effect of the prosecutor's statements or the failure to consider this issue would result in a miscarriage of justice. *People v Price*, 214 Mich App 538, 546; 543 NW2d 49 (1995).

Although we agree with defendant that Erway's testimony that she "believed that the incident did happen" was improper, *People v Beckley*, 434 Mich 691, 729, 734; 456 NW2d 391 (1990), the testimony was not responsive to the prosecutor's question.[1] An unresponsive answer to a proper question is not usually error. *People v Measles*, 59 Mich App 641, 643; 230 NW2d 10 (1975). We also agree with defendant that the prosecutor's remark during closing argument that complainant's testimony had "remained consistent" throughout the investigation and court proceedings, and specifically, that it was consistent with the report she gave to Officer Dougovito was without foundation and improper.[2] Officer Dougovito did not testify at trial and his police report was not admitted into evidence. Nonetheless, we conclude that a timely requested curative instruction would have remedied any prejudicial effect the prosecutor's comment might have had. We also reject defendant's argument that the prosecutor commented on defendant's failure to testify, as it is unsupported by the record. Lastly, we conclude that the prosecutor did not improperly vouch for the truthfulness of complainant. The challenged remarks addressed issues raised by defense counsel, specifically, that complainant had been influenced to not testify truthfully. The prosecutor's remarks regarding complainant and Michell did not imply that the prosecutor had special knowledge that they were telling the truth, *Bahoda*, 448 Mich at 276, and addressed defendant's argument that complainant's mother influenced or coached complainant to testify against her father.

Under these circumstances, we conclude that defendant was not denied a fair trial.

IV

Next, defendant argues that he was denied the effective assistance of trial counsel. Effective assistance of counsel is presumed, and the defendant bears the heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 421 NW2d 557 (1994). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 687-688.

A

Defendant first argues that his attorney's failure to object to Erway's testimony and to comments made by the prosecutor during her closing argument and rebuttal, discussed above, had the effect of denying him a fair trial. We conclude that even if defense counsel was negligent in not objecting, defendant has not shown a reasonable probability that the result of his trial would have been different if his attorney had objected.

B

Next, defendant argues that he was denied effective assistance of counsel because his attorney stipulated to the consolidation of his trial for two counts of first-degree criminal sexual conduct and his trial for assault with intent to commit criminal sexual conduct. Defendant does not argue that consolidation of his cases was improper, only that his attorney committed a tactical error by stipulating to consolidation and that he was prejudiced by this error. Defendant argues that if he had been tried separately for first-degree criminal sexual conduct and assault with intent to commit criminal sexual conduct involving penetration, evidence of his first-degree criminal sexual conduct offenses would not have been admissible at his trial for assault with intent to commit criminal sexual conduct involving penetration, and vice versa.

Defense counsel testified at a *Ginther*[3] hearing that he thoroughly researched the issue of trial severance and decided that evidence of defendant's other acts would most likely be admitted in separate trials. We agree.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, 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.

Relevant other acts evidence does not violate MRE 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114, modified on other grounds 445 Mich 1205 (1993). Other acts evidence must be offered for a proper purpose, it must be relevant under MRE 402, and the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *Id.* at 74-75; *People v McMillan*, 213 Mich App 134, 137-138; 539 NW2d 553 (1995).

Evidence that defendant penetrated complainant with his tongue sometime in October 1991 would likely be admissible in a separate trial for assault with intent to commit criminal sexual conduct involving penetration on the basis that it would have made it more probable that defendant intended to

engage in cunnilingus with complainant when he pulled her pants down and began moving his face towards her genitals in July 1992. Further, this Court has approved the use of evidence of subsequent sexual conduct to prove a pattern of abuse, i.e., to show the existence of a scheme or plan under MRE 404(b) in order to address the "incredibility inherent in a seemingly isolated act of sexual misconduct within a household" between family members. *People v Dreyer*, 177 Mich App 735, 738; 442 NW2d 764 (1989); see also *People v Puroll*, 195 Mich App 170, 171; 489 NW2d 159 (1992).

In light of these considerations, we conclude that defense counsel's acquiescence to a consolidated trial did not amount to ineffective assistance of counsel. Stipulating to consolidation was a matter of trial strategy, which we will not second-guess. *Barnett*, *supra*.

C

Next, we reject defendant's argument that his attorney's refusal to call him to testify in his defense constituted ineffective assistance of counsel. Generally, the decision whether to call a defendant to testify in his defense is a matter of sound trial strategy that this Court will not second-guess. *People v Johnson*, 168 Mich App 581, 586; 425 NW2d 187 (1988). In light of defense counsel's stated concerns about defendant's veracity and demeanor, we consider his attorney's failure to call him as a witness a matter of sound trial strategy. Moreover, defendant must show that his attorney's failure to call him as a witness deprived him of a substantial defense, which is one that might have made a difference in the outcome of trial. *Hyland*, 212 Mich App at 710. Although defendant posits that testifying at trial would have made his acquittal possible, he does not reveal what, if any, substantive defense he would have introduced through his testimony.

Defendant also argues that defense counsel failed to call a number of witnesses at trial, including his therapist, his pastor, and his mother, and advances that the failure to do so amounted to ineffective assistance of counsel. Again, defendant can prove ineffective assistance of counsel only if his attorney's failure to call a witness deprived him of a substantial defense, which, as to these witnesses, he has not established. *Hyland*, *supra*. Although defense counsel failed to call the doctor who examined complainant and could not find evidence of sexual abuse, complainant's social worker testified that no medical evidence was found when complainant was examined. Apparently, this evidence did not make a difference in the outcome of defendant's trial.

IV

Finally, defendant argues that his eight- to twenty-year sentence for his habitual offender, second offense, conviction was disproportionate. Because sentencing guidelines do not apply to habitual offender sentences, appellate review of such sentences is limited to whether the trial court abused its discretion in imposing the sentence. *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Defendant argues that his good employment record, his educational attainments, and his familial support system are factors that should have influenced the trial court to reduce

defendant's sentence. Although we agree that defendant had a commendable employment history and educational record, we cannot conclude that the trial court abused its discretion in sentencing defendant to eight to twenty years' imprisonment for his habitual offender, second offense, conviction in light of the seriousness of the crimes and the fact that defendant was on probation.

Affirmed.

/s/ Helene N. White
/s/ Richard Allen Griffin
/s/ Dennis C. Kolenda

[1] The prosecutor asked:

> What was the final status of your case? After you made all those contacts did your case remain open or was it closed?
>
> A My case was done [sic] what was called an open-close, and what that means is that I substantiated, that based on the information that I had, that I believed that the incident did happen as she stated. At that I had already had contact from the mother's attorney, who was filing so that they would stop visitations. Mother was being cooperative and doing what she needed to do, so at that point I closed my case because I had no reason to believe that the child was going to have any continued contact with her father, so in protective service terms she was no longer felt to be at risk of any further abuse.

[2] The prosecutor argued:

> I'd also ask you to consider the consistency of Melissa's statements. Melissa has been questioned, the testimony showed, by the Michigan State Police, Dougovito in Flint, by the protective service worker, Carol Erway, who testified, by an assistant prosecutor at district court, I believe was her testimony, myself an assistant prosecutor, and Mr. Bates as a defense attorney. She was cross-examined at preliminary exam and she was cross-examined here. Her testimony has remained consistent . . . .
>
> . . . .She would not have remained consistent for two years, all those people, all that time passing, unless she was recalling something that actually happened to her.

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).