

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELBERT N. BREEDING,

Defendant-Appellant.

UNPUBLISHED

June 19, 1998

No. 201168

Oakland Circuit Court

LC Nos. 95-142307 FC and

95-142308 FC

Before: Sawyer, P.J., and Kelly and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(i); MSA 28.788(1)(1)(b)(i). The trial court sentenced defendant to twenty-five to fifty years' imprisonment for each conviction. Defendant now appeals as of right. We affirm.

First, defendant claims he was denied a fair trial where the prosecutor failed to provide notice of his intention to introduce testimony from the victim regarding prior bad acts. The victim testified that defendant (1) threatened to beat the victim if he told anyone about the incidents; and (2) had "beaten" the victim "so many times and pushed [the victim] around" on previous occasions. Moreover, defendant argues that defense counsel's failure to object to the testimony on the stated grounds constituted ineffective assistance and deprived defendant of a fair trial. We disagree.

MRE 404(b)(1) provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove character of a person in order to show action 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.

The test for admissibility of prior bad acts considers whether the testimony was:

(1) offered for a proper purpose rather than to prove defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to prevail the MRE 403 balancing test. [*People v Sabin*, 223 Mich App 530, 533; 566 NW2d 677 (1997).]

MRE 404(b)(2) provides the prerequisites for admitting evidence under MRE 404(b)(1), as follows:

The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence.

With respect to the victim's reference to being beaten and pushed around by defendant on prior occasions, such statements were offered for the proper purpose of placing the victim's perception of the threats in context of the events, including the victim's delayed reporting of the incidents, for the jury's benefit. The Michigan Supreme Court has noted that bad acts may be admissible if the jury needed an "intelligible presentation of the full context in which disputed events took place" and the more the jury knew about the transaction that "happened during a private event between two persons" the "better equipped they were to perform their sworn duty." *People v Scholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996).

The evidence of defendant's bad acts of beating and pushing the victim around are so connected to the events that the jury needed the victim's explanation in order to fully understand the complete version of the events and to have perspective on the victim's credibility based on the late reporting of the incident. Because the victim's credibility was a key factor in this case, a person's delay in reporting is admissible. *People v Watts*, 145 Mich App 760, 763-764; 378 NW2d 787 (1985). The testimony explained the victim's reasons for not reporting the crimes for a substantial period of time. Without explaining the coercive activities of defendant in the past, the failure to report was not readily apparent from the circumstances of the crime. Thus, the bad acts testimony was relevant and served a proper purpose of explaining the circumstances of the victim's delayed reporting which was connected to the victim's recounting of the circumstances of CSC incidents.

Defendant argues that the lack of notice of the prosecutor's intent to raise the bad acts resulted in an unfair trial. Defendant argues that the facts of this case were akin to the facts of *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996). However, the circumstances are more limited, here, reducing the prejudice of the bad acts testimony. The line of questioning in this case was not followed-up in closing argument or further explored suggesting that the prejudice was not so strong that defendant did not receive a fair trial. The prosecution did not seek a detailed explanation of the prior beatings. A juror could have concluded that the statements were simply a child's commentary on the fear inherent in the circumstances of a child in a coercive relationship with an adult, and not related to any actual physical beatings because the prosecutor did not ask for any details. Moreover, the fact that the victim explained that he was "paranoid" that his mother would get hurt if he told, suggested that the victim only feared defendant and that no actual bad acts occurred as to the victim's mother. Moreover, we note that defendant was on notice of the testimony from the testimony presented at the preliminary

examination, albeit not in strict compliance with MRE 404(b)(2). We believe that the prosecution's non-compliance is not a sufficient reason in itself to suggest a denial of a fair trial. Thus, defendant was not denied a fair trial.

We further disagree with defendant's argument that defense counsel's failure to object to the admission of the testimony constituted ineffective assistance of counsel. Because the bad acts testimony was admissible for the stated reasons, defendant was not denied effective assistance of counsel based on counsel's failure to object to it. See *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant's second claim on appeal is that the prosecutor reversibly erred when he deliberately elicited a police officer's testimony regarding his guilt, and when he misconstrued the statements of the police officer in closing argument.

The objection to the police officer's testimony at trial was based on the witness' ability to testify as an expert, to which it appears the trial court disagreed. Defense counsel did not object on the grounds that a prosecutor may not inquire into a witness' belief of a defendant's guilt or innocence, as defense counsel raised in his brief on appeal. Defendant's objection on expert qualifications was insufficient to preserve this issue for appeal. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). However, this Court will grant relief despite the failure to object, where the prosecutorial misconduct resulted in a denial of a fair and impartial trial to the defendant. *People v Bahoda*, 448 Mich 261, 267, 281; 531 NW2d 659 (1995).

Prosecutors have a special duty to refrain from asking or permitting police officers from exploring "forbidden areas of testimony which may prejudice the defense." *People v McCarver (On Remand)*, 87 Mich App 12, 15; 273 NW2d 570 (1978). See also *People v Harvey*, 167 Mich App 734, 750; 423 NW2d 335 (1988). Additionally, it is a long-established rule that a witness is forbidden from expressing an opinion concerning the guilt or innocence of a defendant. *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). By analogy, it would be improper for a prosecutor to explore such an area and would likewise constitute error if the prosecutor failed to prevent a police officer from so testifying if he or she had reason to anticipate it. *People v Moreno*, 112 Mich App 631, 635; 317 NW2d 201 (1981). However, if a prosecutor's remarks or questioning is responsive to questions or arguments made by defense counsel, no error occurs. *Id.*

Although it is troubling that the prosecution initially asked the question regarding whether defendant vigorously denied his guilt, we believe that the prosecutor's conduct did not deny defendant a fair and impartial trial. Defense counsel did question the police officer's premise on cross-examination and suggested that it was possibly not valid in this case. In closing argument, the prosecution did not refer to the police officer's opinion, but commented only as to the reaction of defendant. Additionally, the content of the questions, as opposed to the form of questioning, on direct was permissible in that a defendant's conduct upon arrest or charge is admissible as circumstantial evidence of defendant's guilt. See *People v Cutchall*, 200 Mich App 396, 401, 405; 504 NW2d 666 (1993). Under the circumstances we find that any error was

harmless. *cf People v Buckey*, 424 Mich 1; 378 NW2d 432 (1985); *People v Adams*, 122 Mich App 759, 767; 333 NW2d 538 (1983), rev'd on other grds, 421 Mich 865 (1985). Thus, we find that defendant was not denied a fair and impartial trial.

Defendant's final claim on appeal is that the prosecutor improperly elicited testimony from the victim that he learned the behavior from defendant that eventually resulted in the victim's placement in a youth facility for CSC behavior. We disagree.

Defendant challenges the admissibility of the victim's statements under MRE 402 and MRE 403. MRE 402 provides that "all relevant evidence is admissible" MRE 403 limits the admission of relevant evidence providing that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" In order to determine whether evidence is relevant, it must be both material, meaning a fact of consequence, and it makes a "fact of consequence more or less probable than it would be without the evidence." *People v Mills*, 450 Mich 61, 67; 537 NW2d 909 (1995).

Thus, this Court is first called upon to determine whether the victim's explanation for his knowledge of how to engage in CSC behavior was relevant. Prior to the victim's disputed statement, the jury had learned that the victim had committed CSC crimes and that was the reason that he was in the youth facility. Had the jury not heard the testimony that the victim learned how to abuse others from defendant, the conclusion was somewhat inescapable that defendant may have played a role in teaching the victim the behavior associated with CSC. The testimony helped eliminate misunderstandings regarding the victim's proclivity for truthfulness as to the incidents if the victim testified that he learned the behavior from other sources. Therefore, the victim's statement was relevant and proper where the probative value of the statement outweighed the prejudicial nature of the statements.

Defendant argues that the prosecutor's statement to the jury about the victim's learning of CSC behavior resulted in an unfair trial. A prosecutor is permitted wide latitude to present theories of the case to the extent the facts support the argument, and such argument is not prosecutorial misconduct. *Bahoda, supra* at 282. The prosecution's statements were not necessarily misstatements of the victim's testimony, but reasonable inferences derived from the victim's testimony. The victim testified that he was at the youth facility because he committed CSC crimes with two males, ages four and twelve, and a female. Thus, based on the testimony, the prosecution could reasonably argue in accord with the evidence that the victim learned his behavior from defendant. Moreover, the trial court's instruction that statements of a prosecutor were only arguments cured any potential prejudice from the prosecutor's statements. See *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996).

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Michael R. Smolenski