

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY MICHAEL PLUSH,

Defendant-Appellant.

UNPUBLISHED

February 5, 1999

No. 205463

Otsego Circuit Court

LC No. 97-002161 FC

Before: Gage, P.J., and MacKenzie and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted on one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b); MSA 28.788(3)(1)(b). Defendant was sentenced to a prison term of 20 to 40 years for the CSC I conviction, and terms of 10 to 15 years for each CSC II conviction. Defendant now appeals as of right. We affirm.

Defendant first contends that the trial court erred in permitting the prosecutor to introduce evidence that defendant's oldest stepdaughter had previously, in 1992, accused him of touching her breasts. Evidence that suggests a defendant's involvement in uncharged misconduct is not admissible to prove a defendant's character and show that the defendant took some action in conformity with that character. MRE 404(b). For other acts evidence to be properly admitted, the trial court must determine the following:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998), quoting *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).]

We review for an abuse of discretion a trial court's determination whether to admit other acts evidence. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Defendant's convictions arise from incidents spanning the period from January 1994 to May 1996, during which time he engaged in multiple acts of sexual contact with his three adopted stepdaughters. During this same period, defendant and his wife were involved in a divorce, but continued to live together. At trial, defendant advanced the theory that his stepdaughters' allegations were part of a scheme by their mother to extract from him a more lucrative property settlement and child support arrangement than she obtained in their divorce proceedings. In support of this theory, he testified that the girls' allegations of sexual abuse were untrue, that since he and the girls' mother married the girls had always called him "Dad," and that the girls had never indicated they had any reason to fear him. Subsequently, the trial court granted the prosecutor permission to ask defendant whether one of his stepdaughters had in 1992 alleged that defendant had touched her breasts, on the basis that this inquiry would impeach defendant's direct testimony that a harmonious father-daughter relationship had existed prior to the allegations underlying the instant action.

The trial court properly permitted the prosecutor to inquire regarding the stepdaughter's prior allegations. First, the prosecutor sought through this inquiry to impeach testimony offered by defendant, a proper noncharacter purpose. *Crawford, supra* at 385. Second, the inquiry regarding the stepdaughter's prior allegations was relevant because it was material to defendant's assertion that he and the girls had enjoyed a normal father-daughter relationship, and the inquiry had probative value, tending to disprove defendant's assertion of normalcy. *Id.* at 388-390. Third, the probative value of the prior allegations was not substantially outweighed by any danger of unfair prejudice. Defendant argues that "the prior allegation that the prosecution was allowed to elicit predated the beginning of the divorce proceedings and thereby devastated [defendant's] defense." However, that the allegation predated the divorce and directly contradicted and devastated defendant's theory merely indicates the high probative value of the evidence, not that defendant was unfairly prejudiced. *People v Sabin*, 223 Mich App 530, 537; 566 NW2d 677 (1997) ("unfair prejudice" does not mean "damaging," but denotes a situation in which there exists danger that marginally probative evidence will be given undue or preemptive weight by a jury, or that it would be inequitable to allow the evidence's proponent to utilize it). Defendant's argument that the prior allegations were prejudicial because they were unsubstantiated is also without merit. *Starr, supra* at 499 (MRE 404(b) specifically addresses the admissibility of uncharged conduct). To the extent defendant suffered any prejudice from the fact that the prior allegations involved conduct similar to that charged in the instant case, this prejudice did not substantially outweigh the prior allegations' significant probative value. Accordingly, we conclude that the trial court did not abuse its discretion in permitting the prosecutor to inquire about the oldest stepdaughter's 1992 allegations. *Crawford, supra* at 383.

Defendant next argues that the trial court erred when it allowed a Family Independence Agency (FIA) investigator to testify that after interviewing the stepdaughters, she identified defendant as the suspect in her investigation. However, we need not address the merits of defendant's contention that the investigator was offering an impermissible opinion on defendant's guilt and vouching for the veracity of the complainants. In light of the testimony of the three stepdaughters regarding defendant's abuse, we conclude that it is highly probable that any alleged error in admitting the FIA investigator's testimony did not affect the jury's verdicts. *People v Graves*, 458 Mich 476, 482-483; 581 NW2d 229 (1998).

Lastly, defendant complains that the prosecutor engaged in misconduct because on three occasions during his closing argument, after pointing out an inaccuracy in defense counsel's characterization of the evidence, he stated that the defense did not want the jury to decide the case on the basis of the facts. We review claims of prosecutorial misconduct case by case, looking at the challenged remarks in context and determining whether the defendant received a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Because defendant failed to object at trial to the prosecutor's remarks, this claim is unpreserved, and our review is precluded unless a curative instruction could not have eliminated any prejudice or our failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

After reviewing the challenged remarks in context and in light of defense counsel's arguments, we conclude that the remarks were not a personal attack on defense counsel, nor did they shift the focus to his personality. The essence of the prosecutor's argument was merely that defense counsel had inaccurately summarized the evidence presented. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996) (prosecutor's remarks not improper where prosecutor did not personally attack defense counsel or attempt to shift jury's focus from evidence to defense counsel's personality). Because these remarks were not improper and no miscarriage of justice will result from our refusal to consider this issue, we decline to further consider this issue. *Stanaway*, *supra*.

Affirmed.

/s/ Hilda R. Gage
/s/ Barbara B. MacKenzie
/s/ Helene N. White