STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 21, 1999
v	No. 205428 Saginaw Circuit Court
THOMAS LAVONNE COLEMAN, Defendant-Appellant.	LC No. 96-013019 FC

Before: Sawyer, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), assault with intent to rob while unarmed, MCL 750.88; MSA 28.283, and kidnapping by secret confinement, MCL 750.349; MSA 38.581. Defendant was sentenced to life in prison for the CSC conviction, 10 to 22-1/2 years for the assault conviction, and life in prison for the kidnapping conviction. He appeals as of right. We affirm.

I

First, defendant argues that the trial court erred in denying his pretrial motion for an independent psychiatric examination of the complainant. We disagree. The trial court has discretion to order discovery in a criminal case. *People v Graham,* 173 Mich App 473, 477-479; 434 NW2d 165 (1988). Thus, we review the lower court's decision for an abuse of discretion. See *id.*

In general, a trial court should grant discovery where the information sought is necessary to a fair trial and a proper preparation of a defense; it should not be granted where to do so would be to sanction a fishing expedition. *Graham, supra* at 477. Moreover, in granting or denying pretrial discovery in a criminal case, the trial court should consider whether the defendant's rights can be fully protected by cross-examination. *Id.* A trial court may order a psychological examination of the complaining witness in a criminal sexual conduct case, but there must be a compelling reason to do so. *Id.* at 478.

Here, defendant proffers that a psychological examination of complainant was necessary because of complainant's age, because a psychologist in a probate court hearing found that she suffered from dementia, and because the psychologist's tests of complainant did not address whether complainant could also experience hallucinations. However, the psychologist testified at both the preliminary examination and at trial that complainant was capable of identifying her perpetrator or accurately relating to others what happened because the event took place over a number of hours and caused significant emotional trauma. Moreover, the psychologist testified that complainant could not have hallucinated the events of the night in question and that further testing would not reveal that she had the capacity to hallucinate. Last, defendant's rights were fully protected by his cross-examination of complainant about her veracity and ability to recollect the details of the evening in question. Therefore, we conclude that the trial court did not abuse its discretion in denying defendant's request for an independent psychological examination of complainant.

II

Next, defendant argues that the trial court abused its discretion in refusing to admit evidence of "similar acts" indicating that complainant had previously made false accusations of crimes. We disagree. The trial court found that the majority of the evidence presented on a separate record was inadmissible pursuant to MRE 404(b), but the court permitted defendant to present evidence about how complainant had blamed defendant for her daughter's death and how she allegedly threatened to seek revenge on defendant.[1] The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

MRE 404(b) is not limited in application to the admission of evidence of a criminal defendant's acts but includes the acts of any person. *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991). To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, i.e., one other than establishing the person's character to show propensity to commit the act; (2) it must be relevant; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

Defendant argues that the evidence of complainant's prior false accusations should have been admitted because it revealed her motive to falsely accuse defendant in this case. However, the only evidence relevant to complainant's motive to lie in this case was that she blamed defendant for her daughter's death, which was evidence admitted at trial. Defendant desired the admission of the other evidence only to show that, by falsely accusing defendant of assaulting her, complainant was acting in conformity with other accusations she had made in the past. This is not a proper purpose under MRE 404(b). Similarly, to the extent that the testimony is relevant to complainant's motive, it is relevant only on the prohibited basis that, if complainant falsely accused once, she is likely to do it again. Last, the scant probative value of the evidence is substantially outweighed by its potential for unfair prejudice

against complainant. Therefore, the evidence was inadmissible pursuant to MRE 404(b), and we hold that the trial court did not abuse its discretion in refusing to admit it.

III

Next, defendant argues that the prosecution presented insufficient evidence for a rational trier of fact to find beyond a reasonable doubt that he forcefully or secretly confined complainant. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). However, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514.

A person can be convicted of kidnapping if the prosecution proves beyond a reasonable doubt that the person wilfully, maliciously, and without lawful authority forcibly or secretly confined or imprisoned any other person within this state against the other person's will. MCL 750.349; MSA 28.581; *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998). Here, defendant claims that the prosecution presented insufficient evidence that he forcefully or secretly confined complainant because he did not prevent complainant from leaving the house after she was assaulted. Defendant argues that his purpose in restraining the complainant was not to secretly confine her, but only to assault her.

Our Supreme Court has defined "secret confinement" as the "deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament." *People v Jaffray*, 445 Mich 287, 309; 519 NW2d 108 (1994). "Secret confinement," the Court explained, "is not predicated solely on the existence or nonexistence of a single factor[;] [r]ather, consideration of the totality of the circumstances is required when determining whether the confinement itself or the location of the confinement was secret, thereby depriving the victim of the assistance of others." *Id.* On the basis of the "totality of the circumstances," the Court in *Jaffray* concluded that sufficient evidence of secret confinement was established where the defendant tied the victim to a pole and gagged his mouth. *Id.* at 304.

Here, the prosecution presented evidence that defendant lured the victim into her bedroom, tied her limbs to the bed with telephone cords, and placed paper in her mouth. The fact that complainant was able to later spit the paper from her mouth and get away from the house does not negate the fact that a kidnapping occurred. Therefore, we hold that the evidence was sufficient to support a reasonable factfinder's conclusion that defendant confined the victim and intended to keep the confinement secret. See also *People v Hoffman*, 225 Mich App 103, 112; 570 NW2d 146 (1997).

IV

Next, defendant argues that the trial court erred in failing to sua sponte give the jury three standard jury instructions regarding his out-of-court statements, evidence of his flight, and evidence of his prior bad acts. We disagree. Use of the standard criminal jury instructions is not required, and a trial court should examine the standard instructions carefully to ensure their accuracy and their appropriateness to the case before it. *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996). It is the duty of the trial court to instruct the jury as is required and appropriate as to the applicable law. *Id.*, citing MCL 768.29; MSA 28.1052 and MCR 6.414(F). Here, defendant failed to object to the trial court's instructions at either of two opportunities to do so. Therefore, we review defendant's arguments only to determine whether his failure to object to the instructions waives error or whether relief is necessary to avoid manifest injustice. See MCL 768.29; MSA 28.1052, *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

First, defendant argues that the trial court erred in failing to sua sponte read CJI2d 4.1, which is the standard jury instruction on a defendant's statements, such as a confession or an admission. Defendant argues that the jury needed to know how to evaluate his out-of-court statements admitted in this case because the statements were "central" to the prosecution's case against him, but he fails to identify the alleged statements on which he wished to have the instruction given. Consequently, we deem defendant's argument abandoned as being insufficiently briefed. See *People v Dilling*, 222 Mich App 44, 51; 564 NW2d 56 (1997). Indeed, we note that the record contains no inculpatory statements by defendant because defendant maintained his innocence throughout the trial and sentencing.

Second, defendant argues that the trial court erred in failing to sua sponte read CJI2d 4.4, which is the standard jury instruction on flight, concealment, escape or attempted escape. Defendant argues that the standard jury instruction was necessary for the jury to determine how to evaluate the evidence of his flight in this case because the prosecution used this evidence as proof of his guilt. Specifically, defendant refers to how the prosecution "painted a picture of defendant as returning to the scene of the crime, breaking in and attempting to escape detection, and arrest." There was evidence in the record that a caller to the police department had left information that defendant was at complainant's home on the afternoon in question and that an investigation of complainant's house later that day revealed that the back door had been kicked off its hinges; however, this evidence was not conclusively linked to defendant. More important, this evidence did not reveal that defendant attempted to flee after the crime, that he concealed himself from the police, or that he escaped or attempted to escape after committing the crimes. Indeed, the evidence pertinent to those inquiries was a police officer's testimony that she went to locate defendant at complainant's home and that, when she arrived, defendant appeared to be sleeping in a chair. Therefore, defendant's argument that the trial court erred in failing to read CJI2d 4.4 is without merit because that instruction is inapplicable. The trial court instructed the jury as is required and appropriate as to the applicable law.

Third, defendant argues that, because the jury heard testimony of his probation violation, the trial court erred in failing to sua sponte read CJI2d 4.11, which is the standard jury instruction on

evidence of other offenses. Defendant argues that the standard jury instruction was necessary to instruct the jury on limiting the relevance of the evidence to a particular issue, especially after the prosecutor referred to the probation violation in his closing argument. However, our Supreme Court has declined to impose on trial judges a sua sponte duty to give such limiting instructions, noting that defense counsel may not request such an instruction because it might be counter-productive to emphasize the prior acts to the jury. *People v DerMartzex*, 390 Mich 410, 416-417; 213 NW2d 97 (1973). Here, too, where defendant did not request the instruction and did not object to the instructions as given, and the trial court instructed the jury as is required and appropriate as to the applicable law, we conclude that no manifest injustice resulted from the court's failure to give CJI2d 4.11.

V

Next, defendant argues that he was denied a fair trial by prosecutorial misconduct. We disagree. Prosecutorial misconduct issues are decided on a case-by-case basis, and we must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. See *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Further, we must read prosecutorial comments as a whole and evaluate them in light of defense arguments and the relationship they bear to the evidence admitted at trial. See *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992); *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980).

In this case, defendant makes several general allegations of prosecutorial misconduct but makes only two citations to the record to support his argument. To the extent that defendant argues that other instances of alleged prosecutorial misconduct occurred in addition to these two cited examples, we again deem defendant's argument abandoned for insufficient briefing. See *Dilling, supra*. An appellant must cite to specific page references in the record for the facts underlying an issue presented. MCR 7.212(C)(7).

Defendant's first specific allegation of prosecutorial misconduct concerns a statement of the prosecutor at the start of his closing argument thanking defendant for not killing the complainant in this case when he had the chance. The trial court sustained defense counsel's objection and subsequently instructed the jury that the attorney's statements and arguments were not evidence. It is well established that a prosecutor may not state his personal belief in a defendant's guilt. See, e.g., *People v Hill*, 258 Mich 79, 88; 241 NW 873 (1932).

Although the jury could have inferred from the prosecutor's statement that the prosecutor believed in defendant's guilt, that is a conclusion it would have reached in any event, just as it likely would have reached the conclusion that defense counsel believed that defendant was innocent. See *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973); *People v Erb*, 48 Mich App 622,

632; 211 NW2d 51 (1973). Without more, the prosecutor's statement in this case, "I thank the defendant for not killing her when he had the chance," does not represent an improper vouching for defendant's guilt, which is the critical inquiry in determining whether defendant was deprived of a fair trial. Compare *Erb, supra* at 631 and *People v Kulick*, 209 Mich App 258, 260; 530 NW2d 163 (1995).

Defendant's other allegation of prosecutorial misconduct is that, during rebuttal argument, the prosecutor appealed to the sympathies of the jurors by asking them to place themselves in complainant's position. However, defendant did not object to this alleged instance of prosecutorial misconduct; therefore, our review is precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This alleged misconduct by the prosecutor followed defendant's closing argument in which defense counsel emphasized the inconsistencies among the versions of the event that complainant told the investigating police officers and the hospital personnel.

A prosecutor has no duty to use the least prejudicial evidence available or to state inferences in the blandest possible terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995); *Ullah, supra* at 678. Indeed, emotional language is "an important weapon in counsel's forensic arsenal" and may be used during closing argument. *People v Mischley*, 164 Mich App 478, 483; 417 NW2d 537 (1987). We conclude that, in light of the many attacks upon complainant's veracity both during trial and during defendant's closing argument, the prosecutor likely intended to highlight the elderly complainant's state of mind at the end of the long night in order to explain the various inconsistencies. Moreover, we find that any prejudice that resulted from the prosecutor's statements could have been eliminated by a curative instruction had one been requested by defendant. See, e.g., *People v Hogan*, 105 Mich App 473, 485-486; 307 NW2d 72 (1981). Accordingly, appellate relief is not warranted.

VI

Next, defendant argues that the trial court failed to articulate reasons for the sentences imposed and that the trial court imposed disproportionate sentences. Provided permissible factors are considered by the sentencing court, our review is limited to whether the sentencing court abused its discretion. See *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998).

To facilitate appellate review, the sentencing court must articulate on the record the criteria considered and the reasons for the sentence imposed. *People v Peña*, 224 Mich App 650, 661; 569 NW2d 871 (1997), modified 457 Mich 885 (1998). From our review of the sentencing transcript in this case, it is clear that the atmosphere in which defendant's sentence was imposed was acrimonious and that the trial court at least attempted to articulate to defendant the reasons for its sentence. Defendant's interruption of the court's explanation cannot be a basis for finding that the court failed to sufficiently articulate on the record the criteria considered and the reasons for the sentence imposed. To hold otherwise would allow defendant to harbor error as an appellate parachute. See, e.g., *Fetterley, supra* at 520.

In any event, we note that, before defendant interrupted, the court stated on the record that it was relying upon the sentencing guidelines and described the seriousness of the crime in this case. Although the sentencing guidelines do not apply to habitual offenders, *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996), a trial court may consider them in imposing a sentence upon a defendant, *People v Haacke*, 217 Mich App 434, 438; 553 NW2d 15 (1996). Accordingly, where a court considers the guidelines, its statement on the record that it is relying on the sentencing guidelines is a sufficient explanation of the sentence. *People v Lawson*, 195 Mich App 76, 77; 489 NW2d 147 (1992); *People v Poppa*, 193 Mich App 184, 190; 483 NW2d 667 (1992).

Defendant also maintains that his sentences are disproportionate to the seriousness of the crime. See *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990); *Paquette, supra* at 344-345. Defendant contends that his sentences are disproportionate because complainant was not injured and that, "[a]s soon as she was able to, she left the home without any interference by Defendant."

From the record in this case, the jury found defendant guilty of committing first-degree criminal sexual conduct, assault with intent to rob and steal, and kidnapping against his great-grandmother. We reject defendant's claim that complainant was not injured by his crimes against her or that her ability to eventually flee from him are a credit to his person. These are not grounds for imposing lesser sentences. We conclude that the trial court did not abuse its discretion in sentencing defendant as it did.

VII

Next, defendant argues that he was denied the effective assistance of counsel at sentencing by his counsel's alleged failure to allocute on his behalf.

At sentencing, a trial court must on the record give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence. MCR 6.425(D)(2)(c); *People v Westbrook*, 188 Mich App 615, 616; 470 NW2d 495 (1991). Here, defense counsel first expressed some disagreement with the manner in which one of the offense variables was scored, but he noted that the alleged error made no difference in the final scoring. Next, counsel declined to make any comment on defendant's behalf, stating that this Court, rather than the sentencing proceeding, would be the more appropriate forum in which to raise various issues. Nonetheless, defense counsel commented about defendant's character and opined that defendant was innocent.

Several panels of this Court have emphasized that the decision to address the court at sentencing is a tactical one. *People v Allay*, 171 Mich App 602, 612; 430 NW2d 794 (1988); *People v Arney*, 138 Mich App 764, 766; 360 NW2d 291 (1984); *People v Williams*, 117 Mich App 262, 266; 323 NW2d 663 (1982). The fact that defense counsel otherwise remained silent because of his belief that the remaining issues about this trial were more appropriately addressed to an appellate court does not mean that defendant was denied the effective assistance of counsel. This Court

has properly remained reluctant to second guess a trial counsel's strategy because a difference of opinion as to trial tactics does not amount to ineffective assistance of counsel. See *Arney, supra*.

VIII

Last, there is no merit to defendant's argument that the cumulative effect of several errors denied him a fair trial where we have found that none of his issues on appeal reveal error.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Michael J. Talbot

[1] Regarding at least one witness' testimony about the false accusations complainant had allegedly made in the past, the trial court also ruled that the evidence was inadmissible because it was based on hearsay. Although defendant's discussion of this issue is limited to a discussion of MRE 404(b), we note that defendant did not proffer an exception to the hearsay rule to support admission of the out-of-court statements allegedly made by complainant; therefore, the trial court properly prohibited the testimony on this basis too.