STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

INEZ VICENCIO, JR.,

Defendant-Appellant.

UNPUBLISHED
September 10, 1999

No. 200962
St. Clair Circuit Court
LC No. 96-001939 FC

Before: Holbrook, Jr., P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of one count of first-degree criminal sexual conduct with a person under age thirteen, MCL 750.520(b)(1)(a); MSA 28.788(2)(1)(a), and two counts of first-degree criminal sexual conduct with a person at least thirteen but less than sixteen years of age, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b). Defendant was sentenced to concurrent terms of sixteen to twenty-four years' imprisonment on each count. We affirm.

Defendant first argues that reversal is required because he was denied a fair trial when the prosecutor made three disparaging remarks about defense counsel during the prosecutor's rebuttal closing. However, none of the alleged errors has been properly preserved for our review. As a result, review by this Court is precluded unless the conduct "was so egregious that no curative instruction could have removed the prejudice . . . or if manifest injustice would result from our failure to review the alleged misconduct." *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Two of the remarks were not objected to below. MRE 103(a)(1). We conclude that manifest justice would not result from our failure to review these remarks.

As for the third remark, defendant's allegation of error is unpreserved because his objection was on a ground different than he now argues on appeal. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). Defendant claimed that the remark was a mischaracterization of testimony. Not only do we conclude that the challenged remark was proper commentary but also note that the court insinuated the jury would have to rely on its own memory as to what the witnesses said during their testimony. Finding no error, we conclude that manifest injustice will not result from our failure to further review the matter. *People v Kuchar*, 225 Mich App 74, 78; 569 NW2d 920 (1997).

Defendant next argues that the prosecutor impermissibly asked a police witness whether the officer believed defendant was guilty. Again, because defendant is arguing a different ground on appeal, this issue is not preserved. *Nantelle*, *supra* at 86-87. In any event, after examining the questioning in context, we conclude that there was nothing in the questions or the responses that could be interpreted as commentary of defendant's guilt. Rather, the prosecutor was attempting to elicit what the witness did upon being dispatched to the complainant's home.

Defendant's third argument is that his constitutional right of confrontation was violated when the trial court limited his ability to cross-examine the complainant regarding other sexual activity or abuse. We disagree. The record reveals that defendant was given the opportunity to question the complaining witness about other alleged sexual abuse and sexual encounters in order to establish that there were other potential causes for the physical condition of her hymen. The trial court's restriction of the scope of this area of inquiry was a reasonable exercise of its discretion. *People v Hackett*, 421 Mich 338, 350; 365 NW2d 120 (1984).

Defendant's next argument is somewhat unclear. Appellant claims that the trial court reversibly erred when it admitted evidence of "sexual activity, *other than between the defendant-appellant and the purported victim*." (Emphasis added.) If defendant's assertion is referring to the potential testimony of Jenny Loxton, the record clearly establishes that the trial court ruled that her testimony would not be admitted. However, the argument does not appear to be referencing Loxton. Rather, defendant appears to be focused on testimony by the complaining witness about other instances of sexual abuse that were specifically charged. Because defendant did not specifically raise this argument in his question presented,[1] our review of the matter is inappropriate. See *Miller v Allied Signal, Inc*, ___ Mich App ___; ___ NW2d ___ (1999), (Docket No. 203395, issued 06/04/99)(slip op at 3).

The decision whether to admit bad acts evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). In order for bad acts evidence to be admissible, the trial court must apply the following four part standard:

> 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 VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).]

After reviewing the record, we conclude all prongs of the *VanderVliet* standard to have been satisfied. Accordingly, we find no abuse of discretion.

Defendant next argues he was prejudiced by the cumulative effect of the prior claimed errors. Having found no error on any of these issues, we necessarily conclude likewise this argument to be without merit. *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996).

Finally, defendant argues not only that his sentences are disproportionate but are so to the extent that they amount to cruel and unusual punishment under both the United States and Michigan Constitutions.[2] We disagree. Defendant's sentences fall within the guidelines and are therefore presumptively proportionate.[3] Moreover, there exists no evidence to rebut the presumption of proportionality nor does evidence exist that his sentences are cruel and unusual.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy
/s/ Michael J. Talbot

[1] Indeed, the question presented seems to implicitly acknowledge that testimony about the uncharged acts of abuse was properly admitted.

[2] US Const, Am V; Const 1963, art 1, § 16.

[3] The guidelines recommended a sentence of sixteen to twenty-four years' imprisonment.