

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT L. MCELHINNEY,

Defendant-Appellant.

UNPUBLISHED

February 11, 2000

No. 212312

Wexford Circuit Court

LC Nos. 97-005070-FC

97-005069-FH

Before: McDonald, P.J., and Doctoroff and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b) (sexual penetration with victim 13 to 16 years old who was member of same household as defendant), and third-degree child abuse, MCL 750.136b(4); MSA 28.331(2)(4). The trial court sentenced defendant to twenty-four to thirty-six years' imprisonment for the CSC conviction and sixteen to twenty-four months' imprisonment for the child abuse conviction. The sentences are to be served concurrently. Defendant appeals as of right. We affirm.

The complainant, who was fifteen at the time of trial, is defendant's adopted daughter. She testified that defendant sexually abused her over a number of years. The complainant described the specific act of sexual abuse for which defendant was convicted in this case, an act of anal penetration that occurred in July 1997. The complainant also described a specific act of physical abuse that occurred around the same time, where defendant pounded her on the head with a closed fist several times and grabbed her face, leaving a cut and bruises.

Defendant first argues the trial court erred in admitting evidence of an uncharged act of physical abuse that occurred in February 1997.¹ We disagree. The trial court did not abuse its discretion in admitting the evidence. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). The evidence was properly admitted to help the jury to evaluate the context of the charged events and the relationship between defendant and the complainant. See *People v Daoust*, 228 Mich App 1, 13; 577 NW2d 179 (1998). Moreover, the trial court gave a limiting instruction to the jury that specifically cautioned the jury that it should not use the evidence to convict defendant because it concluded he was a bad person or likely to commit a crime. See *Starr*, *supra* at 496.

Defendant next argues the prosecutor engaged in misconduct by attempting to portray defendant as a violent person. Defendant also argues he received ineffective assistance of counsel because defense counsel did not object to the prosecutor's conduct at trial. We disagree with both contentions. First, we find the prosecutor's conduct did not raise to the level of denying defendant a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Moreover, the trial court properly instructed the jury that the arguments and questions of the attorneys were not evidence, which dispelled any prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Accordingly, defendant has failed to meet his burden of establishing that but for counsel's alleged error the result of his trial would have been different, *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), and his ineffective assistance claim fails.

Next, defendant argues the trial court should have granted his motion for a mistrial based on the comments of two prosecution witnesses. We disagree. The grant or denial of a motion for a mistrial rests within the sound discretion of the trial court. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). An abuse of discretion will be found only where the trial court's denial of the motion has denied the defendant a fair and impartial trial. *Id.*

The trial court's denial of defendant's mistrial motion was not an abuse of discretion. The trial court properly concluded that the challenged comments were unresponsive, volunteered answers to proper questions, which are not grounds for granting a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Moreover, immediately following both comments, the trial court gave sufficient cautionary instructions to the jury to dispel any possible prejudice. Defendant was not denied a fair and impartial trial.

Defendant next argues the cumulative effect of the witnesses' comments and the prosecutor's improper suggestive questioning of defense witnesses denied him a fair trial. *Bahoda*, *supra* at 292, n 64. We disagree. Considering the trial court's cautionary instructions and the nature of the alleged errors, defendant was not denied a fair trial.

Finally, defendant claims the trial court erred in qualifying Michael Willett as an expert in child sexual abuse.² We have examined Willett's testimony regarding his qualifications and defendant's claims regarding Willett's qualifications. We find the trial court did not abuse its discretion when it qualified Willett as an expert. *People v Beckley*, 434 Mich 691, 711; 456 NW2d 391 (1990); *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

Affirmed.

/s/ Gary R. McDonald
/s/ Martin M. Doctoroff
/s/ Janet T. Neff

¹ Defendant is not challenging the admission of evidence of uncharged acts of sexual abuse.

² Defendant does not challenge the substance of Willett's opinion, but instead argues that Willett was not sufficiently qualified to give it.