STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 8, 2001
v	No. 222611 Chippewa Circuit Court
PIERRE MITCHELL OUELLETTE, Defendant-Appellant.	LC No. 98-006670-FC

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

PER CURIAM.

Defendant appeals as of right from his conviction of first-degree criminal sexual conduct, MCL 750.520b(1); MSA 28.788(2)(1), for which the trial court sentenced him to ten to twenty years' imprisonment. We affirm.

When defendant and his wife began divorce proceedings, the wife's daughter, whom defendant had adopted, and who was then in college, came forward with accusations that defendant had sexually abused her from 1987 through 1994. Defendant maintained that no sexual misconduct occurred, but that the accusations were part of a scheme to provide his estranged wife an advantage in custody proceedings involving their younger daughter. The jury resolved the credibility contest against defendant.

I

Prosecutorial Misconduct

On appeal, defendant first argues that, in closing statements, the prosecutor engaged in improper argument, denying defendant a fair trial. Defendant failed to preserve this issue with timely objections below. "Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant asserts that the prosecutor improperly vouched for the credibility of the complaining witness, attempted to shift the burden of proof to the defense, argued facts not in

evidence, and urged conviction out of sympathy for the victim, and argues that the cumulative effect of these improprieties denied him a fair trial. Our review of the record persuades us that there was no prosecutorial misconduct, and thus no cumulative prejudicial effect warranting relief.

Early in closing statements, the prosecutor said, "there are only two witnesses that know what happened in the house . . . in the years from 1990 to 1994, that's [the complainant] and the defendant. What I believe is the truth came from the stand in the testimony of [the complainant] and this is why I believe it's true." Then, later in the argument, the prosecutor stated, "Ladies and gentlemen, I think—no, I don't think, I know, the facts that you heard over three days of testimony support the People's position that during the time period from 1990 to 1991 to 1994 . . . the defendant . . . did engage in sexual penetration." Defendant alleges that these statements constitute improper vouching for a witness. We disagree.

A prosecutor "cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). In this case, reviewing the prosecutor's remarks in context, we find that the prosecutor was asserting that the complainant's testimony made sense considering her maturity and comprehension, then, after stating that he believed that the truth had come from the complainant, reminded the jury that the complainant was a young girl when defendant came into her life, and when he allegedly began molesting her. We read the prosecutor's statement about what he believed not as any kind of personal bolstering of the witness' character or credibility, but only as reminders of the prosecutor's positions that defendant was guilty, and that the evidence proved it. The prosecutor was in fact arguing from the evidence, not personally vouching for the witness.

We likewise reject defendant's contention that the prosecutor sought to shift the burden of proof to the defense. Defendant takes exception to the prosecutor's insistence that the complainant's account of the offensive conduct was "uncontroverted," and from the statement in rebuttal, "Whether it is true or not is not the issue although I believe [the witness]." Defendant correctly points outs that the complainant's testimony was very much controverted—by defendant himself, as the defense argued in response to the prosecutor's remarks. However, on appeal, defendant suggests that the use of the word "uncontroverted" implied that he had some affirmative duty to present evidence of his innocence. This argument has no merit. The jury was properly instructed that defendant was presumed innocent, and that the burden of proof rested exclusively with the prosecutor, and both advocates likewise stated that the prosecutor bore the burden of proof. Only through a strained reading of the prosecutor's remarks could the remarks be taken as persuading the jury to deliberate with the impression that defendant was obliged to prove his innocence.

Finally, defendant points out that the prosecutor argued that defendant had commenced a "rein [sic] of terror," and that the complainant's boyfriend had acted as a bodyguard for her, in arguing that the prosecutor both argued facts not in evidence and tried to arouse the jurors' sympathies. Again we disagree with defendant's characterization of the prosecutor's argument.

A prosecutor enjoys wide latitude in fashioning arguments, and may argue the evidence and all reasonable inferences from it. *Bahoda*, *supra* at 282. The complainant's testimony that

defendant, her stepfather, molested her approximately weekly over a period of years, and that she felt extremely embarrassed, fearful, and sick in the matter, well supported the suggestion that a reign of terror had taken place. Similarly, there was no dispute that the complainant's boyfriend through most of her high school years visited the home for hours on a nearly daily basis, and the complainant herself testified that she liked having the young man around the house because she "felt safer." The prosecutor's suggestion that the boyfriend functioned as something of a bodyguard was a fair inference from the evidence.

Concerning juror sympathy, it is well established that a prosecutor may not urge a jury to convict out of sympathy for the victim. See *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988), and *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Even so, however, a prosecutor need not confine argument to the "'blandest of all possible terms.'" *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973). In this case, the prosecutor's statements of which defendant now complains were delivered in the context of asserting that the crime had occurred, in other words that certain criminal elements were satisfied, not in the course of any suggestion that the complainant deserved vindication.

For these reasons, we conclude that defendant has shown no plain error that affected his substantial rights, or that impugned the fairness, integrity, or reputation of the proceedings below. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999), citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993); *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994).

II

Evidence of Uncharged Bad Acts Under MRE 404(b)

At trial, the defense persuaded the trial court that evidence of similar misconduct against other victims should not be admitted at trial. On appeal, defendant asserts that the prosecutor nonetheless elicited such evidence, in violation of both the court's ruling and the notice requirements of MRE 404(b). We disagree.

MRE 404(b)(1) establishes that evidence of other bad acts is not admissible to prove a person's character, or behavior consistent with those other wrongs, but provides that such uncharged conduct may 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 . . . ." MRE 404(b)(2) in turn requires that a prosecutor wishing to introduce such evidence provide notice of that intent. See also *People v VanderVliet*, 444 Mich 52, 89; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Defendant asserts that the prosecutor improperly elicited bad-acts evidence on three occasions: (1) when the complainant explained that she came forward with her story out of fear for her younger sister after the complainant came to understand that she "was not the only one;" (2) when the complainant's younger sister testified that defendant had unzipped her pants; and (3) when the complainant's cousin affirmed that she had "had problems" with defendant herself.

Concerning the first instance, when the complainant testified that she finally went to the police because she had heard from her mother that defendant had engaged in similar conduct with other girls, defense counsel objected, but expressed no grounds for the objection, and thus tacitly accepted the trial court's and prosecutor's apparent treatment of the issue as a hearsay question. Thus, the issue concerning procedures required by MRE 404(b) in this instance was not preserved. To preserve an evidentiary issue for appellate review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Welch*, 226 Mich App 461, 464; 574 NW2d 682 (1997). In any event, this testimony was not elicited as bad-acts evidence. The truth behind the innuendoes was never asserted, and thus no procedures under MRE 404(b) needed to come into play. Because the credibility of the complaining witness was a central question before the jury, the witness was properly allowed to explain what propelled her to go to the police after her long silence. Further, counsel was free to request a cautionary or limiting instruction concerning how the evidence was to be considered. See *VanderVliet, supra* at 75.

Concerning the second instance, the prosecutor elicited from the complainant's younger sister, without objection, that defendant had unzipped her pants because she was suffering from itching, and that defendant acted in order to apply medicine. The witness responded ambivalently regarding how she felt in the matter. There was no undue prejudice to defendant. The prosecutor elicited a benign reason for defendant's disrobing of his young daughter. The response indicated that the daughter did not suffer the kind of humiliation or other discomfort that the complainant described in her allegations. Viewed in context, the testimony concerning defendant unzipping his daughter's pants is not bad-acts evidence at all. Although the testimony helped explain why suspicions developed concerning defendant that eventually propelled the complainant to take her story to the police, the testimony did not in fact suggest that defendant had abused his younger daughter.

Finally, defendant points to a moment in the proceedings when the complainant's cousin testified that she had talked to her parents about her concerns over what seemed to be happening with the complainant, plus her concern that defendant's younger daughter might become a victim as well. The prosecutor asked, "Did you ever tell your parents about your problems with the defendant?" Defense counsel objected, but before the court could respond the witness replied, "Yes, I did." The jury was excused, and defense counsel developed the objection on the ground that there had been no notice that 404(b) evidence would be introduced. The prosecutor offered to withdraw the last question, and assured the court that he did not intend to bring up allegations raised by other persons. On appeal, in addition to suggesting that the testimony from the complainant's cousin was improper bad-acts evidence, defendant further asserts that the prosecutor asked the cousin if defendant had sexually assaulted her. However, defendant provides no record citation in support of the latter assertion, and we have found no such question in the transcript.

Concerning the question about the witness' "problems" with defendant, we conclude that the question and answer did not imply that the witness had been the victim of some misconduct by defendant. In common usage, to "have problems" with a person does not necessarily mean to have personally suffered at that person's hands, but as easily suggests simple dislike of, objections to, or suspicions about the person. Any juror who took the challenged exchange as

evidence that defendant had actually molested the cousin would have been taking a leap into the realm of speculation. Further, again, the defense was free in any event to request a special instruction on the matter.

For these reasons, we conclude that no improper bad-acts evidence tainted the proceedings below.

III

Discovery Rules

Defendant next argues that the prosecutor and the police denied defendant a fair trial by withholding information they were obliged to disclose under the rules of discovery. We disagree.

MCR 6.201(B) provides as follows:

> Upon request, the prosecuting attorney must provide each defendant:
>
> (1) any exculpatory information or evidence known to the prosecuting attorney;
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> (2) any police report concerning the case, except so much of a report as concerns a continuing investigation;
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> (3) any written or recorded statements by a defendant, codefendant, or accomplice, even if that person is not a prospective witness at trial;
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> (4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and
>
> (5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

MCR 6.201(H) in turn provides that a party has a continuing duty to provide additional discovery as new discoverable material comes to light. MCR 6.201(J) grants a trial court the discretion to order any suitable remedy for violations of discovery rules.

Not at issue is that the defense requested that the prosecutor provide all the customary discoverable materials, including witness lists, police reports, or exculpatory information. Defendant asserts that the prosecutor violated the rules of discovery in connection with Aaron Mattson, the complainant's former boyfriend, by calling Mattson as a witness despite never listing him as such, and by maintaining that there was no police report or other discoverable material concerning him. We find no error.

Despite defendant's implication that the prosecutor called Mattson, the latter appeared only as a defense witness and was questioned by the prosecutor only on cross-examination. The prosecutor elicited from Mattson that once, on a Monday after school, he was asked to delay coming to visit the complainant at home. This comported with evidence that defendant routinely

abused the complainant early in the week, the implication being that Mattson was asked to wait until defendant was finished with the complainant on that one occasion. On appeal, defendant argues that the defense was prejudiced because the prosecutor did not disclose that a police interview turned up that Mattson had been sexually active with the complainant, on the ground that, had the defense been armed with that information, counsel could have used it to suggest that Mattson, who thus may have been criminally liable for sexual misconduct himself owing to the complainant's youth at the time, had a motive to provide testimony favorable to the prosecutor. Defendant further argues that such information could have explained the complainant's familiarity with the particulars of sexual activity apart from the allegations concerning defendant.

However, defendant fails to offer any evidence that a police report or other discoverable material stemming from the police interview with Mattson existed. We have not been presented with any reason to doubt the prosecutor's explanation to the trial court that the police interviewed Mattson only after Mattson had been noticed as a defense witness, and that the officer generated no police report. Defendant additionally cites authority for the proposition that, where police destroy notes in order to prevent cross-examination, a defendant's rights are violated, but does not assert that the police destroyed any notes in this instance. Defendant further argues that this Court should disapprove of police officers' declining to prepare reports for the purpose of limiting defendants' access to useful discovery materials, although defendant cites no authority for the proposition that a police officer is ever *obliged* to prepare a report for such purposes. Because defendant's innuendoes fall short of presenting any plausible assertion that any discoverable document ever existed but was withheld, defendant's claim that there was a discovery violation under MCR 6.201(B)(2) or (3) is without merit.

Further, the kind of information defendant argues should have been disclosed to him in this instance was not exculpatory in nature. Exculpatory evidence or information is that which "extrinsically tends to establish defendant's innocence of crimes charged as differentiated from that which, although favorable, is merely collateral or impeaching." Black's Law Dictionary (6th ed, 1990), p 566 (citation omitted). Mattson's testimony that he was once asked to delay visiting the complainant under circumstances that comported with the theory that defendant commonly abused the complainant after school early in the week provided at best weak support for the prosecutor's theory of the case. Mattson never testified to any direct knowledge that abuse was taking place, and thus no impeachment of Mattson's credibility could be considered exculpatory evidence. Thus, if the police did indeed know that Mattson had been sexually active with the complainant, any failure to reveal that information did not constitute improper withholding of exculpatory information under MCR 6.201(B)(1).

Moreover, even if there had been some failure to comply with the rules of discovery in this case, failure to disclose possible impeachment evidence does not warrant a new trial unless there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998) (citations omitted). We agree with the trial court that Mattson's testimony concerning being asked to delay coming to the complainant's home on a single Monday afternoon had little bearing on the case.

Defendant additionally complains of a lack of disclosure of any materials or information resulting from a police interview with one George Martelle,[1] arguing that, although Martelle was not called as a witness, he "could have" provided exculpatory or otherwise favorable information to the defense. However, defendant offers no hint as to the nature of any such information Martelle might have provided, seemingly resting the whole argument on sheer speculation that someone the police interviewed *might* have provided information that the defense would have found useful. Defendant offers nothing in support of the implication that Martelle offered any information at all that the prosecutor was obliged to disclose, or that any police report ever existed. For these reasons, the lack of any disclosure of information stemming from the interview with Martelle affords no basis for appellate relief.

IV

Hearsay

Defendant next argues that the trial court erred in allowing the complainant's current boyfriend to testify that the complainant had spoken in 1996 of being abused by defendant during her childhood. We disagree.

Asked if the complainant had ever confided in him concerning defendant, the boyfriend answered that, in late 1996, "She told me that [defendant] had sexually molested her for a long period of time. . . . At the time she wasn't comfortable discussing—actually she was very uncomfortable about the situation, but [defendant] molested her sexually as a child for quite some time." Defense counsel objected on hearsay grounds, but the prosecutor persuaded the trial court to admit the testimony on the ground that the testimony was offered to rebut the charge that the complainant had recently fabricated her allegations.

MRE 802 establishes the general inadmissibility of hearsay evidence. MRE 801(a)-(c) sets forth the familiar definition of "hearsay," then subrule (d)(1) exempts from that definition evidence of a witness' prior consistent statement where "[t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . ."

In this case, the defense at least implied that the complainant revived or fabricated the allegations of sexual abuse against defendant in order to help her mother prevail in her custody battle with defendant over the couple's younger daughter. Thus, the boyfriend's testimony that the complainant had said in 1996 that she had been the victim of a long pattern of sexual abuse at the hands of defendant very well fit the elements of MRE 801(d)(1)(B) for an exemption from

[1] Defendant also complains incidentally that the police interviewed defendant's estranged wife's sister, and that there was no disclosure of the results of that interview. However, defendant develops no argument at all regarding that person, apparently choosing not to make issue of her. Failure to present cogent argument on appeal is failure to present a cognizable issue for our consideration. MCR 7.212(C)(7); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

the definition of "hearsay." The complainant testified at trial and was subject to cross-examination concerning her reasons for making her allegations or not at various times, and her boyfriend's report that she had revealed her allegations to him in 1996 rebutted an express or implied charge that she went to the police with her allegations in order to influence the custody battle waging between defendant and her mother. The testimony further operated to rebut the suggestion that if the complainant's allegations were true all along she should have raised them earlier. See *People v Stricklin*, 162 Mich App 623, 629; 413 NW2d 457 (1987).

V

Motion for New Trial

Finally, defendant argues that the trial court abused its discretion in denying his motion for a new trial. We disagree.

MCR 6.531(B) establishes that a court may grant a motion for new trial "on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." That court rule supersedes earlier authorities that suggested that a trial court might grant a new trial simply because the court thought that justice had not been done.[2] *People v McEwan*, 214 Mich App 690, 693 n 1; 543 NW2d 367 (1995). See also MCL 769.26; MSA 28.1096 ("No judgment or verdict shall be set aside or reversed or a new trial be granted . . . unless in the opinion of the court . . . it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.").

For this issue, defendant mainly reiterates several claims of error already considered and found to lack merit in this appeal. The only additional justification for a new trial that defendant presents is an incidental complaint that the trial court "did not think his comments or questioning of [defendant's estranged wife] mattered." However, defendant alleges no specific impropriety in the matter, and provides neither a record citation nor supporting authority for any allegation of error, thus failing to present a question for this Court's consideration. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). See also MCR 7.212(C)(7), and *In re Hamlet (After Remand)*, 225 Mich App 505, 521; 571 NW2d 750 (1997) ("A party may not merely announce a position and leave it to us to discover and rationalize the basis for the claim.").

Affirmed.

/s/ David H. Sawyer
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

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[2] See MCL 770.1; MSA 28.1098, and *People v Johnson*, 391 Mich 834; 218 NW2d 378 (1974).