

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID M. HARPER, SR.,

Defendant-Appellant.

UNPUBLISHED

July 3, 2001

No. 217761

Oakland Circuit Court

LC No. 97-155171-FC

Before: Smolenski, P.J., and McDonald and Jansen, JJ.

PER CURIAM.

Defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b, involving a seven-year-old child. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to a term of 20 to 35 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion in admitting testimony by another child, regarding what the complainant said about the alleged assault. Specifically, defendant challenges the child's testimony about complainant telling her that defendant had touched her in the "wrong spot" and that complainant was afraid to tell her mother because defendant and his son threatened to take her away from her parents. We generally review a trial court's determination of evidentiary issues for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998). In this case, we agree with the trial court that the statements were admissible as excited utterances. MRE 803(2). Complainant made the statements immediately after a startling event—the unexpected appearance of one of her alleged assailants—and while she was still frightened and crying. MRE 803(2); *Smith, supra* at 550.

Defendant next argues that the trial court erred in admitting "other acts" testimony by a child witness who alleged that defendant had fondled her on a previous occasion. Because defendant failed to object to the testimony at trial, we review this unpreserved issue for plain error. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). Evidence of similar misconduct is admissible where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). "The logical relevance of the evidence is based on the system, as shown through the similarities

between the charged and uncharged acts, rather than on defendant's character, as shown by the uncharged act." *Id.* at 63-64 n 10.

Here, both defendant's alleged assault of the child witness and his alleged assault of the complainant occurred while defendant was baby-sitting. Both incidents involved young girls, each of whom was the daughter of a friend of defendant's. During both incidents, defendant threatened the children that something bad would happen if they told anyone about his actions. The alleged assault of the child witness and the alleged assault of the complainant share sufficient common features to infer a plan, scheme, or system to commit the acts. The charged and uncharged acts in this case contained common features beyond mere commission of acts of sexual abuse. *Sabin, supra*. Accordingly, the admission of this evidence did not constitute plain error.

Defendant next argues that prosecutorial misconduct deprived him of a fair trial.

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).]

Contrary to defendant's suggestion, the prosecutor was permitted to comment on defendant's failure to call corroborating witnesses. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Defendant elected to testify at trial and arguments on the inferences created by his testimony did not shift the burden of proof. *Id.* The prosecutor was free to argue the credibility of witnesses and to argue from the inferences that defendant was guilty of the charged offenses. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). Accordingly, there is no merit to defendant's arguments.

Defendant next argues that his trial counsel was ineffective for failing to challenge the "other acts" testimony and for failing to object to the prosecutor's reference to the corroborating witness. Because defendant did not request a *Ginther* hearing,¹ this Court's review is limited to mistakes apparent on the record. *People v Randolph*, 242 Mich App 417, 422; 619 NW2d 168 (2000). The burden is on defendant to show that counsel made serious errors that prejudiced his defense and deprived him of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* Further, this Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Contrary to defendant's assertion, his trial counsel did raise an objection below to the prosecutor's remark about defendant's failure to call a corroborating witness. Therefore, defendant can not argue error flowing from a failure to object. As noted previously, the "similar acts" testimony was admissible for a proper purpose under MRE 404(b). Counsel was not required to raise a meritless objection to the admission of this testimony. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Accordingly, defendant's argument is without merit.

Finally, defendant argues that there was insufficient evidence to sustain his convictions. We review the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Our standard of review is deferential: we are required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *Id.* at 400. Here, the child complainant testified that defendant penetrated her mouth and vagina with his penis. The examining physician, qualified as an expert in sexual assault cases, testified that the child's hymen was flattened and that the physical findings were consistent with attempted sexual penetration. Viewing the evidence in a light most favorable to the prosecution and making all credibility choices in support of the jury verdict, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

Affirmed.

/s/ Michael R. Smolenski

/s/ Kathleen Jansen

I concur in result only.

/s/ Gary R. McDonald