STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICKIE MARIE NICOLAS,

Defendant-Appellant.

UNPUBLISHED
September 14, 2001

No. 220566
Oakland Circuit Court
LC No. 98-163303-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree child abuse, MCL 750.136b(2), and one count of third-degree child abuse, MCL 750.136b(4). She was sentenced to prison terms of ten to fifteen years and one to two years, respectively, to be served concurrently. She appeals as of right. We affirm.

I

Defendant argues that reversal is required because the jury heard evidence concerning alleged abuse that occurred outside the time frame charged in the information and, therefore, may have convicted her based on that abuse, thereby violating her right to due process and adequate notice of the charges on which she was called to defend. We disagree.

Defendant concedes that she did not raise this issue in the trial court. Thus it is unpreserved. Therefore, we will not reverse absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

At trial, the two child victims, who were thirteen and fifteen years old, had difficulty recalling exactly when the alleged abuse occurred. The children had lived with defendant for many years and it was difficult for them to provide specific time frames for the charged abuse. However, the children were more specific with regard to abusive acts committed in late 1997, when one of the victims finally came forward to seek help. The information charged defendant with abusing the children from September 1997 to December 1997, because the abuse was worse during that period. However, it should be noted that the trial court sustained several defense objections to the testimony of witnesses other than the victims that concerned matters occurring outside the relevant time period.

As a matter of due process, a defendant "shall not be called upon to defend himself against a charge of which he was not sufficiently apprised." *People v Higuera*, 244 Mich App 429, 442-443; 625 NW2d 444 (2001), quoting *People v Mast*, 126 Mich App 658, 661; 337 NW2d 619 (1983), *(On Rehearing)*, 128 Mich App 613; 341 NW2d 117 (1983).

In this case, however, it was not improper to charge defendant with conduct from September 1997 to December 1997. MCL 767.45(1)(b) only requires that the prosecution state in the information the "time of the offense as near as may be." MCL 767.45(1)(b) further provides that "[n]o variance as to time shall be fatal unless time is of the essence of the offense." See also MCL 767.51 and MCR 6.112(D) and (G). Indeed, we have observed that, in cases involving crimes committed against young children, it is often difficult to pinpoint an exact date and time for the offense. See *People v Miller*, 165 Mich App 32, 46-47; 418 NW2d 668 (1987), remanded on other grounds 434 Mich 915 (1990), affirmed on remand 186 Mich App 660 (1991); *People v Stricklin*, 162 Mich App 623, 634-635; 413 NW2d 457 (1987); *People v Naugle*, 152 Mich App 227, 233-235; 393 NW2d 592 (1986). Accordingly, even if children cannot state with specificity when individual acts of alleged abuse occurred, this defect in the proofs, when compared to the information, is not fatal to the prosecution. See also *People v Howell*, 396 Mich 16, 26-29; 238 NW2d 148 (1976). Here, while there was some variance between the dates charged in the information and the proofs at trial, defendant has not shown that any variance was fatal or prejudicial.

Defendant also argues that the children's testimony concerning earlier acts of abuse was inadmissible under MRE 404(b). MRE 404(b) prohibits the admission of evidence of a defendant's other bad acts, unless the acts are relevant to something other than the defendant's bad character and the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. The logic behind the rule is that a jury must convict a defendant on the facts of the crime charged, not because the defendant is a bad person. *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998).

In *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996), our Supreme Court reaffirmed that evidence of other crimes or bad acts is also admissible, without regard to MRE 404(b), where that evidence is part of the complete story of the case or is directly related to the circumstances of the crime. Our Supreme Court opined:

> Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime. [*Id.* at 742, quoting *State v Villavicencio*, 95 Ariz 199; 388 P2d 245 (1964).]

In the instant matter, the evidence showed that the children were subject to continuous and ongoing abuse over a protracted period of time. The earlier acts of abuse were relevant to explain why the victims did not come forward sooner, a point put into issue by the defense to challenge their credibility. Moreover, the earlier bad acts suggested that the severity of the abuse escalated over time, which provided a background to the more egregious abuse that was found to occur during the time period covered in the information. Thus, we are not persuaded that the admission of evidence of other acts of abuse plainly violated MRE 404(b).

Defendant also argues that the prosecutor's statements and arguments improperly referred to these earlier acts of abuse. Claims of prosecutorial misconduct are decided case by case. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). We review the prosecutor's remarks "in context to determine whether the defendant was denied a fair and impartial trial." *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

In the instant matter, contrary to defendant's assertion, most of the challenged remarks were proper commentary on the evidence. We are troubled, however, by the prosecutor's statements that children "don't have a [public] voice" and "don't vote," and that "[s]omeone has to speak on their behalf." The prosecutor implied that, by finding defendant guilty, the jury would be "speaking on their behalf." This remark could be viewed as attempting to garner sympathy for the victims or perhaps even asking the jury to decide defendant's guilt based upon a civic duty. We have held that "a prosecutor may not appeal to the jury to sympathize with the victim." *People v Modelski*, 164 Mich App 337, 347; 416 NW2d 708 (1987). In addition, our Supreme Court has opined that "prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members . . . ." *Bahoda, supra* at 283. However, considering that the remark was isolated, a curative instruction could have cured any possible prejudice, thereby preventing an error requiring reversal. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant also argues that the trial court's instructions compounded the foregoing, alleged errors because they failed to make clear that the jury was required to decide this case based upon evidence limited to the dates set forth in the information. We find no merit to this issue. The record reveals that the trial court instructed the jury regarding the dates set forth in the information consistent with CJI2d 3.10 and 4.12. Therefore, we are not persuaded that the trial court's instructions improperly broadened the scope of the charges set forth in the information.

II

Next, defendant argues that she was denied the effective assistance of counsel because her trial attorney did not object to the prosecution's efforts to expand the scope of the dates set forth in the information, as discussed above. Because defendant did not raise this issue in the trial court, our review is limited to errors apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Generally, there is a strong presumption that counsel was effective. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). To overcome this presumption, defendant must establish that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, but for counsel's unprofessional error, the outcome of the proceedings would have been different." *Id.* Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

As discussed previously, the fact that the children were unable to provide specific dates on which various acts of alleged abuse occurred was not fatal to a successful prosecution. Moreover, to the extent that some of the testimony referred to abusive conduct that occurred

outside the charged time frame, the testimony was admissible to explain both the circumstances surrounding the charged abuse and why the children did not come forward sooner. Under the circumstances, defense counsel was not ineffective for failing to object to these matters at trial. Similarly, having found no error with the trial court's instructions regarding the dates of the charged offenses, we conclude that defense counsel was not ineffective for failing to object.

Further, counsel was not ineffective for failing to object to the prosecutor's remarks, most of which were not improper. Although an objection may have been warranted when the prosecutor referred to children not having a voice, we do not believe that the isolated remark was so prejudicial that it affected the outcome of the case. Moreover, it is plausible that defense counsel feared that an objection would have drawn additional attention to the comment, outweighing the benefit of a curative instruction. Accordingly, we do not believe that defendant has overcome the strong presumption that defense counsel's failure to object was sound trial strategy. *Tommolino, supra* at 17.

III

Defendant argues that the trial court erred at sentencing when it refused to delete a reference to a dismissed manslaughter charge in Gratiot County from defendant's presentence report. We disagree.

According to the presentence report, defendant was charged with manslaughter in Gratiot County in connection with the 1996 death of the victims' younger sibling, but the charge was dismissed in February 1999.[1] Defendant moved to strike any reference to the Gratiot County charge. The trial court refused to strike the information because it accurately reported that the charge had been dismissed.

At sentencing, the prosecution is permitted to advise the sentencing court of any circumstances that it should consider before imposing its sentence. MCR 6.425(D)(2)(c); see also *People v Granderson*, 212 Mich App 673, 678-679; 538 NW2d 471 (1995). Although a sentencing court has the duty to respond to challenges to the accuracy of information in the presentence report, it has wide latitude in how it responds to the challenges. *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991); see also MCR 6.425(D)(3). The sentencing court "may determine the accuracy of the information, accept the defendant's version, or, as a matter of expediency, disregard the challenged information." *Newcomb*, *supra* at 427. Nevertheless, if the sentencing court decides that it will disregard information in a presentence report challenged as inaccurate, the defendant is entitled to have that information stricken from the report. *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993); MCL 771.14(5); MCR 6.425(D)(3).

In the instant matter, the trial court found that the presentence report was accurate insofar that it reflected that the manslaughter charge had been dismissed. Defendant has not shown that

[1] The parties have since supplemented the record on appeal to establish that the manslaughter case was actually dismissed, without prejudice, on June 13, 2000, due to insufficient evidence because the prosecutor's office had difficulty locating witnesses.

the information was incorrect. Instead, because the charge was dismissed, the presentence report is accurate. Accordingly, defendant was not entitled to have the information stricken from the record. *Britt, supra*, at 718.

IV

Finally, defendant argues that her ten to fifteen year sentence for first-degree child abuse is disproportionate and fails to reflect appropriate consideration of mitigating factors. We review the trial court's sentencing decision for an abuse of discretion by applying the principle of proportionality to determine whether the sentence imposed is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

As noted above, we find no merit to defendant's claim that the trial court improperly considered the manslaughter charge from Gratiot County. On the contrary, the record reflects that the trial court was well aware that the manslaughter charge had been dismissed. Further, there is no indication in the record that the trial court made an independent finding of guilt in connection with that offense or enhanced defendant's sentence as a result.

Defendant also argues that the trial court failed to consider her lack of a prior criminal record and her history of psychological problems. The record does not support these claims. The trial court specifically stated on the record that defendant did not have a prior criminal record. Moreover, the trial court stated that it had carefully reviewed the presentence report, which discussed defendant's mental health history.

Although defendant did receive the severest sentence possible for her crime, the trial court found that such a sentence was justified because of the vicious and sadistic manner in which defendant brutalized the children, who suffered not only physical abuse, but emotional abuse as well. The trial court felt that defendant was a threat to others within the community. Under the circumstances, defendant's sentence does not violate the principle of proportionality.

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Talbot