

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD STEVEN SUMNER,

Defendant-Appellant.

UNPUBLISHED

July 9, 2002

No. 226898

Oakland Circuit Court

LC No. 99-166810-FC

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a), involving his daughter. The trial court sentenced defendant to five to twenty years' imprisonment. He appeals as of right. We affirm.

Defendant argues that the trial court improperly admitted evidence of other alleged acts of sexual misconduct against the complainant and against defendant's stepdaughter. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, 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, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

"There is no policy of general exclusion relating to other acts evidence," and "no rule limiting admissibility to the specific exceptions set forth in Rule 404(b)." *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). "The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself." *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). "Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal

propensity of an individual to establish that he acted in conformity therewith.” *VanderVliet, supra*.

We find no abuse of discretion in the trial court’s admission of the evidence of other sexual acts allegedly perpetrated against the complainant by defendant. The evidence was offered for a proper purpose as it explained the complainant’s difficulty in pinpointing the time of the acts that formed the basis for the charges against defendant, and was therefore relevant to her credibility. *People v DerMartzex*, 390 Mich 410, 413-415; 213 NW2d 97 (1973). The testimony about other occasions of defendant’s improper behavior against the complainant also related to her credibility in that it tended to show that the two acts for which defendant was on trial were not isolated instances, but that the abuse occurred over a period of several years. *Id.* We conclude that “the evidence was offered for a proper purpose and was relevant to an issue of consequence at trial.” *People v Layher*, 238 Mich App 573, 586; 607 NW2d 91 (1999), *aff’d* 464 Mich 756 (2001). See *People v Sabin*, 463 Mich 43, 56; 614 NW2d 888 (2000); *Starr, supra* at 501-502; *DerMartzex, supra* at 414-415. Further, the probative value was not outweighed by the danger of unfair prejudice. MRE 403. The evidence was directly relevant to the complainant’s credibility and the trial court gave the jury a limiting instruction that the evidence must be considered only as it related to the complainant’s credibility. *Id.*

We also conclude that the trial court did not abuse its discretion in admitting evidence that defendant allegedly perpetrated sexual acts against his stepdaughter. The evidence showed that the complainant made the allegations in the instant case immediately after learning of defendant’s stepdaughter’s allegations. The court allowed the evidence for the narrow purpose of explaining the impetus for the complainant to come forward and disclose the sexual conduct when she did. In light of the delay of many years, the evidence was necessary to explain the circumstances that prompted her disclosure, and therefore was relevant to her credibility. See *Sabin, supra* at 56. We conclude the danger of unfair prejudice did not outweigh the probative value of the evidence. MRE 403. Further, the trial court instructed the jury that the other-acts evidence may only be used to assess credibility.

Defendant also contends that the trial court’s limiting instruction regarding evidence of uncharged acts was improper. Defendant did not object to the instruction below. Therefore, we review this issue for plain error affecting defendant’s substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Defendant challenges the trial court’s statement that there was “evidence that shows the defendant has engaged in improper sexual conduct,” rather than stating that the evidence “was introduced to show that defendant has engaged in improper sexual conduct,” CJI2d 20.28. Defendant argues that the court’s instruction was improper because it suggested that the sexual acts had in fact occurred. However, immediately after making the challenged statement, the trial court instructed the jury, “If you believe this evidence, you must be very careful to consider it for only one limited purpose.” Viewing the jury instructions in their entirety, *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995), it is apparent that the remainder of the court’s instruction made it clear that the jury was free to disbelieve the evidence. Thus, we find no plain error affecting defendant’s substantial rights. *Knapp, supra*.

Defendant argues that he was denied a fair trial because of misconduct by the prosecutor during closing argument. Because defendant did not preserve this issue with an appropriate objection at trial, we review the issue for plain error affecting defendant’s substantial rights.

People v Schutte, 240 Mich App 713, 720; 613 NW2d 370 (2000). Error requiring reversal will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Id.* at 721.

Defendant argues that the prosecutor improperly asked the jurors to place themselves in the "shoes" of the complainant. Although the prosecutor could have more artfully worded her argument, we conclude that "the crux of the prosecutorial argument was proper." *People v Cooper*, 236 Mich App 643, 653; 601 NW2d 409 (1999). The remark was made in the context of arguing the complainant's credibility by explaining the delay in reporting the allegations and observing that she had nothing to gain by testifying. Further, a cautionary instruction could have cured any prejudice. *Id.* at 653-654; *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). Also, the trial court instructed the jury that counsels' statements and arguments are not evidence. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Defendant has not shown plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Next, the prosecutor did not improperly suggest that there was other evidence that defendant was a bad person. Rather, the prosecutor was stating that any negative evidence not involving the charged crimes, whether it related to the victim or defendant, was not relevant. Viewed in this context, the statement did not affect defendant's substantial rights.

Defendant also contends that the prosecutor advanced an improper civic duty argument by stating that the jury could make defendant accountable. *Bahoda, supra* at 282. Any prejudice that did arise from the remark could have been cured by a cautionary instruction upon timely request. Thus, this statement does not warrant reversal.

Although defendant also complains that the prosecutor misrepresented the concept of reasonable doubt, the record indicates that the prosecutor made clear that the court would define this term, which it did. Therefore, plain error has not been shown. Also, the court instructed the jury that its verdict must be based only on the court's instructions on the law, and that "if a lawyer says something different about the law," the jury must follow the court's instructions.

Finally, the challenged remarks during rebuttal were responsive to arguments and issues raised by defendant and, as such, were not improper. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001).

Defendant also argues that he was denied the effective assistance of counsel. Defendant's motion for a new trial on this basis was denied following a *Ginther*¹ hearing. To establish ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that he was not acting as the "counsel" guaranteed by the Sixth Amendment and that the deficient representation prejudiced the defense so as to deprive defendant of a fair trial. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996); *Knapp, supra* at 385. There is a strong presumption that counsel's conduct was reasonable. *Id.* 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), nor will it assess counsel's competence with the benefit of

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

hindsight, *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Decisions about calling and questioning witnesses are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Here, the trial court concluded after sitting through both the trial and the evidentiary hearing that defendant's representation was "outstanding." Defendant had the option throughout this process of firing his retained counsel. There were strategic reasons for counsel's decisions regarding the calling and examination of witnesses, and the presentation of the defense. Defendant has not overcome the presumption that counsel's actions were reasonable or that any alleged defects detrimentally affected the result of the trial. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Next, defendant argues that a new trial should have been granted because of newly discovered evidence, a one-page police report that allegedly was not provided to defense counsel before trial. Defendant asserts that the evidence could have been used to impeach the prosecution's witnesses. We disagree. The portion of the police report on which defendant relies states:

THERESA STATED THAT [THE COMPLAINANT] CAME UP TO HER RIGHT AFTER SHANNON HAD MADE THE REPORT AND TOLD HER THAT SUMNER HAD ALSO STUCK HIS FINGER IN HER VAGINA WHEN SHE WAS 5 YRS OLD.

We find no basis for admitting this evidence for impeachment purposes because the evidence is not inconsistent with the witnesses' testimony at trial. The trial court did not abuse its discretion in denying defendant's motion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

Finally, defendant argues that the trial court improperly coerced the jury into returning a verdict by instructing it to continue deliberating after the jury indicated that it was "hopelessly deadlocked." Defendant did not object to the court's instructions, which encouraged the jurors to continue deliberating but not to give up their honest opinions. There was nothing coercive about the jury charge in this case. *People v Hardin*, 421 Mich 296, 316; 365 NW2d 101 (1984); *People v Vettese*, 195 Mich App 235, 244-245; 489 NW2d 514 (1992). Further, the court did not threaten the jury or require the jury to deliberate for an unreasonable length of time. The court indicated on Friday afternoon that the jury could resume deliberations the following Monday if necessary. *Id.* We find no error.

Affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot