

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCELLUS DEMETRIUS JONES,

Defendant-Appellant.

UNPUBLISHED
September 6, 2002

No. 225346
Oakland Circuit Court
LC No. 99-165732-FH

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to seven to fifteen years' imprisonment. He appeals as of right. We affirm.

On appeal, defendant first argues that his counsel was improperly precluded from eliciting testimony that the victim had previously made a false criminal sexual conduct claim. The scope of cross-examination on matters of credibility is left to the sound discretion of the trial court. *People v Bouchee*, 400 Mich 253, 267; 253 NW2d 626 (1977); *People v Von Everett*, 156 Mich App 615, 623; 402 NW2d 773 (1986).

Evidence that a victim has made false accusations of sexual misconduct in the past is relevant and admissible "in subsequent prosecutions based upon the victim's accusations because the fact that the victim has made prior false accusations of rape directly bears on the victim's credibility and the credibility of the victim's accusations in the subsequent case and preclusion of such evidence would unconstitutionally abridge the defendant's right to confrontation." *People v Dale Williams*, 191 Mich App 269, 272; 477 NW2d 877 (1991). To justify the admission of evidence of prior false accusations, however, a defendant must make a sufficient offer of proof. "[T]he defendant is obligated initially to make an offer of proof with regard to the proposed evidence and to demonstrate its relevance to the purpose for which the evidence is sought to be admitted." *Id.* at 273, citing *People v Hackett*, 421 Mich 338, 350; 365 NW2d 120 (1984). The defendant is not, however, entitled to have the court conduct a trial within the trial to determine whether there was a prior accusation and whether that prior accusation was true or false. *Williams*, *supra* at 274. Where a defendant cannot make a sufficient offer of proof, he is not entitled to reversal on the ground that his cross-examination was improperly limited with respect to false accusations. *Id.*

In this case, defendant was on a fishing expedition. Defendant's private investigator's report indicated that there were other allegations of criminal sexual conduct in the trailer park. The allegations involved the victim's friend and were made against someone other than defendant. The private investigator reported that the victim was a witness in the other case but later recanted testimony favorable to her friend; however, this conclusion was not supported by police records. Moreover, Detective Robert Shelide of the Southfield Police Department informed the prosecutor that the case to which the private investigator referred was his case and that it was "absolutely not true" that the victim was a witness and later recanted statements with respect to the other incident. Under the circumstances, the trial court did not abuse its discretion in precluding cross-examination on the matter. Defendant was not entitled to have a mini-trial within the trial to determine whether any statements the victim made with respect to another child's allegation of abuse were true or false. Defendant failed to make an adequate offer of proof that he had evidence of a prior false accusation. Reversal on this alleged evidentiary error is therefore not required. See *id.*

Defendant also argues that his counsel was improperly denied the right to cross-examine the victim with respect to the contents of her diary. In particular, defendant argues that the trial court abused its discretion when it limited questions about the "street terms" used in the victim's diary, causing him to be unable to "expose the false innocence" of the victim's trial demeanor. We disagree and find no abuse of discretion in the trial court's decision to preclude defendant from using the diary to demonstrate that the victim was more sophisticated with respect to sexual terms than she allegedly led the jury to believe. See *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). Evidence that a victim is sexually experienced is irrelevant to her character for truthfulness. *People v Cash*, 419 Mich 230, 247-248; 351 NW2d 822 (1984). Moreover, the victim's use of slang words for body parts was irrelevant because it did not tend to make facts of consequence more or less probable. See MRE 401. In other words, it was not more or less probable that defendant rubbed the victim's breasts and vagina because she knew slang terms for those body parts. Defendant did not have a right to unlimited cross-examination on issues related to general credibility or irrelevant issues. See *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

Next, defendant argues that reversal of his conviction is required because the trial court failed to give a specific unanimity instruction. He argues that the instructions given did not require the jury to be unanimous with respect to the specific act upon which they were convicting, i.e., whether the jury convicted defendant for touching the victim's genital area or her breasts. Defendant failed to object to the jury instructions therefore this issue is unpreserved and reviewed for plain error. See *People v Carter*, 462 Mich 206, 213-215; 612 NW2d 144 (2000); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

There is no plain error requiring reversal in this case. Defendant was charged and convicted under MCL 750.520c(1)(a), which prohibits sexual contact with a person under the age of thirteen. Sexual contact is defined as the intentional touching of the victim's intimate parts or clothing covering the immediate area of the victim's intimate parts for purposes of sexual gratification. See MCL 750.520a(k). Intimate parts are the "primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(c). Here, there was one incident of improper touching, involving two different intimate parts. The acts are not materially distinct and the touching of either part, the breasts or genitals, would sustain the conviction. See

People v Cooks, 446 Mich 503, 524, 528-529; 521 NW2d 275 (1994); *People v Gadomski*, 232 Mich App 24, 30-31; 592 NW2d 75 (1998). Further, there was no indication of juror confusion or disagreement over the incident forming the basis of the conviction. See *Cooks*, *supra* at 524.

Moreover, even if the evidence supported a special unanimity instruction, reversal is not required. The defense in this case was that the incident was fabricated. The jury had to determine whether the victim was credible with respect to the existence of the assault and, obviously, the jury believed that the victim was credible and that the incident occurred. See *id.* at 528-529; *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993). In addition, defendant's ineffective assistance of counsel claim based on his counsel's failure to request a specific unanimity instruction is abandoned because defendant merely announced his position without explanation or analysis. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Next, defendant raises two allegations of prosecutorial misconduct stemming from the following, emphasized comments:

And let's just stop for a moment and let's look at things from this man's point of view. There are a lot of men on this jury. Put yourself in this man's shoes for just a moment, if you would. Here you've met this woman in November or December, you move in with her, she's got a child Mouna's age, and within one or two months of being there, you are accused of sexual misconduct with that child. *If you're innocent, you're going to get yourself out of that trailer.*

* * *

If you're innocent, you get yourself out of that trailer. What kind of a man would stay there, having been accused by this woman's daughter? He's got no long term commitment there, he's known her since into November or December. I tell you the kind of man that stays there, the kind of man that stays there, figures Mouna's easy picking, she's a kid, nobody's going to believe her, and after the first incident even her mother either did not believe her or didn't care to protect her. He stays there.

Defendant first argues that the comments required him to explain damaging evidence, which in turn violated his constitutional right to refrain from testifying and shifted the burden of proof. This allegation of prosecutorial misconduct is preserved because defendant objected to the prosecutor's argument on the ground that it was "dangerously close" to shifting the burden of proof. We review preserved claims of prosecutorial misconduct in context to determine if the defendant was denied a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

Defendant's theory was that he was innocent and the charges were fabricated. The prosecutor argued in closing, permissibly utilizing the evidence and reasonable inferences to be drawn, that defendant would have behaved differently if he was innocent. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). She asked the jurors to use their common sense when looking at the evidence. She did not call upon defendant to refute, prove, or explain

anything. There was nothing impermissible about her comments nor did they lead to defendant being denied a fair trial. See *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). We agree with the trial court that the prosecutor's argument did not shift the burden of proof.

Defendant also argues that the prosecutor's argument vouched for the prosecutor's belief in defendant's guilt. This argument is unpreserved because an objection raised on one ground is insufficient to preserve an appellate attack based on a different ground. See MRE 103(a)(1); *People v Cain*, 238 Mich App 95, 115; 605 NW2d 28 (1999). We find no plain error. See *Aldrich, supra*. The prosecutor did not vouch for defendant's guilt or express any personal belief in defendant's guilt by her comments. The prosecutor did nothing more than argue that, based on the testimony and inferences, defendant did not act the way an innocent man would act. Moreover, we note that the trial court instructed the jury that the lawyer's arguments were not evidence.

Next, defendant argues that the trial court abused its discretion by refusing to grant a mistrial after a pretrial ruling was violated during trial. We disagree. We review a trial court's decision to deny a mistrial for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* at 514. Further, we review the admission of evidence for an abuse of discretion. *Herndon, supra*. We find no abuse of discretion in this case.

Before trial, defendant moved to preclude the prosecutor from mentioning that the victim was removed from her mother's home or, in the alternative, to limit testimony about the removal so that there was no mention of the involvement of the juvenile court system. The prosecutor agreed to omit references to other court proceedings; however, she wanted to argue that the victim was credible, in part, because she was willing to lose her home rather than recant the allegations. The trial court ruled:

Miss Mara [the prosecutor] is not planning on advising the jury that there was other court proceedings that gave credibility to the child's allegations, but simply that the child is no longer in the home, has not been in the home, has not been in the home since X date, and has been away from the mother - - is no longer available, her father's no longer available, and therefore, there is a basis for credibility for her. Certainly that is permissible.

The court further ruled:

We certainly can look at each question that's asked by Miss Mara, and if in the event the borders of that question are too wide and provide too much of an opportunity for a narrative by particular witnesses that could engage an answer that would - - would create an unfair bias or prejudice, then certainly we can jump in at that time, Mr. Garrison. So I think we just have to be alert.

The court indicated that both counsel should be vigilant and that both would be held accountable in that regard.

Defendant argues that the order was violated several times. We disagree. First, the victim testified that, after defendant was arrested, she went to Children's Village. The victim subsequently testified that she later went to court and, thereafter, went to live with Mrs. Hunt, her foster mother. While the victim mentioned going to court, she gave no specifics about why she went to court or what occurred there. Second, during the prosecutor's direct examination of Sally Keys, a Children's Protective Services worker, the prosecutor elicited testimony, without objection, that the victim was removed from her mother's home, placed in Children's Village, and subsequently placed in foster care. Juvenile court was not mentioned. When the trial court directly questioned Keys using questions formulated by the jury, however, it asked whether a psychological evaluation was ordered for the victim. Keys replied that she did not know "but typically, in the juvenile courtroom, when they assume jurisdiction, one of the things that they do prior to disposition is a psychological evaluation." Defense counsel immediately requested a bench conference, after which the trial court gave the following cautionary instruction:

The jury should also understand that any other prior court activities are not relevant to your inquiry and, therefore, any suggestion of any other hearings in any other court setting should not be part of your discussions in your deliberations, and that's a curative instruction that I'll give for what has just been stated, the way she responded to the question.

Later, a record was made to preserve that defendant had requested a mistrial at the bench conference. The motion was denied.

The trial court did not abuse its discretion in denying the motion. The victim's reference to "going to court" was vague. Only through the process of deduction would one conclude that the victim went to court with respect to her living arrangements. There was no direct testimony about the nature of her appearance in court or about any rulings from the court. Further, Keys' testimony was general. While she testified that a psychological examination was usually ordered by juvenile court, she did not know if one was ordered in this case. Keys never testified that the victim actually went through the juvenile court system. Moreover, the trial court gave a cautionary instruction. Thus, we find no prejudice under the circumstances. The record does not support defendant's claim that the victim was found credible in any juvenile court proceeding. Further, the fact that the victim was removed from her mother's care was not a reflection on defendant or his guilt. It was a reflection on the inadequate care and protection the victim's mother gave in light of the allegations. We note that, while defendant repeatedly argues that the references to other court appearances were prejudicial, he does not adequately articulate the nature of the prejudice or demonstrate that it impaired his right to a fair trial. We also disagree with defendant that an evidentiary error cannot be cured with a curative instruction. Contrary to defendant's argument, the assumption that curative instructions are effective is not "unmitigated fiction." See *People v Dennis*, 464 Mich 567, 581-582; 628 NW2d 502 (2001).

Defendant next argues that the trial testimony about the shower incident was irrelevant and inadmissible under MRE 404(b). He further argues that any probative value the evidence had was substantially outweighed by unfair prejudice and that there was no reason or proper purpose but to paint defendant as a bad man with a lustful disposition. Because defendant did not object to the challenged testimony at trial, this issue is not preserved and is reviewed for plain error. *Carines, supra*.

At the outset, we note that defendant complains that “repetitive” hearsay statements with respect to the shower incident were elicited at trial. This representation is not supported by the record. In fact, defendant cites to only one specific reference. A witness, Wednesday Bally, testified that the victim was very excited and crying and stated that “she went to take a shower and that he [defendant] tried to touch her.” This testimony fits within the excited utterance exception to the hearsay rule. MRE 803(2). The trial testimony that the victim reported the shower incident to other witnesses was not hearsay. The witnesses to whom the victim reported did not testify about any details that the victim gave. The mere fact that she reported the incident was not used to prove the truth of the matter, i.e., to show that the incident occurred.

We also note that defendant argues that the victim gave different accounts of what occurred in the bathroom. However, the trial record indicates that the victim was not inconsistent. She stated that defendant entered the bathroom while she was showering and indicated that he had to use the bathroom. It was the first time he had ever done so. The victim thought defendant was reaching for the shower curtain. She was scared. Defendant would not leave when she asked him to leave. She threw things at him. He said nothing. Eventually he left. The victim fled her house. The victim never testified that defendant touched her. Moreover, her statement to Bally was not entirely inconsistent with her trial testimony. Bally testified that the victim reported that defendant tried to touch her. The victim testified that she believed defendant was reaching for the shower curtain. Given that defendant had sexually assaulted her on the couch bed in the past, it was reasonable for the victim to believe that defendant was planning to touch her when he reached for the curtain. This fear was reinforced because defendant told the victim that no one would believe her if she told on him.

We disagree with defendant that all of the evidence with respect to the shower incident was irrelevant and inadmissible under MRE 404(b). MRE 404(b)(1) permits the admission of other acts evidence if (1) it is offered for a proper purpose; (2) it is relevant to an issue or fact of consequence at trial; and (3) its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). It is insufficient for the proponent of the evidence to merely recite one of the purposes articulated in MRE 404(b). *Id.* The proponent must also explain how the evidence relates to the recited purposes. *Id.*

Here, the evidence of the shower incident was introduced for a proper purpose and was relevant to facts of consequence at trial, specifically the victim's credibility. As in *People v Starr*, 457 Mich 490, 501-502; 577 NW2d 673 (1998), the evidence was relevant and probative to rebut defendant's claim that the victim fabricated the charged sexual assault. The evidence also gave the jury a chronological and conceptual context that the sexual assault did not occur in a vacuum. See *id.* at 502, citing *VanderVliet*, *supra* at 81. After the sexual assault, the victim reported the incident to her mother. Her mother assured her that the conduct would not occur again. Nevertheless, her mother did not remove defendant from the house or report his conduct to authorities. Sometime thereafter, defendant acted in an inappropriate fashion while the victim was naked and in the shower. The victim, when confronted by defendant wearing only underwear and reaching for the shower curtain, became scared, threw items at defendant, and then fled to a friend's home where she reported the conduct to the friend and her mother. During

the incident in the bathroom, defendant told the victim that no one would believe her. Although the victim had previously reported defendant's conduct without any result, she nevertheless again reported defendant's conduct. This gave credence to the victim's testimony and rebutted the charge of fabrication. Further, the fact that defendant's improper behavior toward the victim was not an isolated incident tended to lend credibility to her charge. The evidence was clearly not offered only to prove character and defendant's conformity therewith. See *VanderVliet*, *supra* at 74.

Further, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. While all relevant evidence is inherently prejudicial and damaging, only unfairly prejudicial evidence requires exclusion. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified 450 Mich 1212 (1995). Relevant considerations in determining unfair prejudice include whether the jury will give the evidence undue or preemptive weight. *Id.* at 75-76. In this case, the prosecutor did not use the evidence for impermissible character reasons. She specifically reminded the jury during closing argument that defendant was not charged with the conduct that occurred in the bathroom. Moreover, the evidence was not entirely damaging to defendant in that it showed that defendant did not take advantage of the vulnerable victim in the circumstances described by her and was supportive of his defense. Further, the trial court gave a cautionary instruction to the jury with respect to how they could consider that evidence.

Defendant also argues that counsel's failure to object to evidence of the allegations regarding the shower incident constituted ineffective assistance of counsel. Again, defendant does not explain or analyze his position in this regard. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Kelly*, *supra*. We therefore deem the issue abandoned and do not address it.

Defendant next argues that the combination of errors committed in this case requires reversal. We disagree because we have found no errors that denied defendant a fair trial. See *Herndon*, *supra* at 422-423.

Defendant also argues that he should be credited with an additional sixty days of sentence credit for time served in jail while awaiting trial and sentencing pursuant to MCL 51.282(2). Defendant's unpreserved argument has no merit. There is no authority to support defendant's position that persons who are in jail pending sentencing and commitment to prison are to accrue good time credits pursuant to MCL 51.282. Indeed, case law suggests otherwise. See *People v Resler*, 210 Mich App 24, 28; 532 NW2d 907 (1995); *People v Cannon*, 206 Mich App 653, 657; 522 NW2d 716 (1994). Defendant was not serving a sentence while he was in the county jail but was awaiting trial and sentencing, which sentence was to be served in prison. Therefore, defendant was not entitled to additional credit on his prison sentence.

Defendant finally argues that two offense variables (OV), OV 4 and OV 10, were improperly scored. Defendant does not specifically dispute the findings or scoring but argues that the jury, not the trial court, should have made the factual determinations because they necessarily increased the penalty for the crime. Defendant's argument is without merit. There is "no requirement that a jury find the facts that form the basis for the scoring of the guidelines." *Williams*, *supra* at 276. "[A]ll that is required is that evidence exists that is adequate to support a particular score." *Id.* Moreover, defendant was sentenced for a felony punishable by imprisonment for no more than fifteen years. MCL 750.520c(2). The trial court did not increase

the penalty for that crime. Defendant, an habitual offender, was sentenced to seven to fifteen years' imprisonment. Defendant's reliance on *Apprendi v New Jersey*, 530 US 466, 120 S Ct 2348; 147 L Ed 2d 435 (2000), is misplaced. In that case, the Supreme Court held that any fact, except the fact of a prior conviction, *which increases the penalty for a crime beyond the prescribed statutory maximum* must be submitted to the jury and proved beyond a reasonable doubt. *Id.* at 490 (emphasis added). Defendant is not entitled to resentencing.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder