

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLEN F. BUNNELL,

Defendant-Appellant.

UNPUBLISHED

October 18, 2002

No. 224413

Genesee Circuit Court

LC No. 99-004547-FC

Before: Murphy, P.J., and Markey and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b), and one count of third-degree CSC, MCL 750.520d(1)(a). He was sentenced to concurrent prison terms of twenty-five to fifty years each for the first-degree CSC convictions and seven to fifteen years for the third-degree CSC conviction. He appeals by right. We affirm.

Defendant was convicted of sexually abusing his daughter. The victim's parents were divorced. The victim formerly lived with her mother, but, when she was thirteen years old, she moved in with defendant. At the time, the victim was having disciplinary problems at home and had a reputation for lying and stealing from her mother. According to the victim, when she was about to turn fourteen years old, she spoke to defendant about being able to have boyfriends. Defendant told the victim that the sooner they "experimented," the sooner she would be allowed to have boyfriends. The victim claimed that defendant subsequently engaged in various sexual activities with her. Defendant denied the allegations of sexual abuse and theorized that the victim was lying because of her disciplinary problems and because she was told that she might have to leave defendant's home because of her behavioral problems.

I

During trial, the trial court permitted defendant's former wife, who was the victim's mother, to testify about certain sexual practices that she engaged in with defendant while they were married. Defendant argues that the court erroneously permitted the testimony under MRE

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

404(b). We disagree.

The decision whether to admit or exclude evidence is within the trial court's discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). This Court will find an abuse of discretion only when an unprejudiced person considering the facts on which the trial court acted would say there was no justification or excuse for the ruling made. *Id.*

At trial, the victim testified that defendant once penetrated her with a "dildo," that he once made her watch an x-rated video before engaging in sexual activity, and that he engaged in anal intercourse. Over defendant's objection, defendant's former wife was permitted to testify that, while married, they engaged in anal sex, watched the Playboy Channel, and used a vibrator, all at defendant's request. During the second episode of anal intercourse, defendant's former wife asked defendant to stop because of the pain, which defendant did.

MRE 404(b) prohibits evidence of other bad acts by a defendant unless offered to prove 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. MRE 404(b). The logic behind this 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). Evidence of other crimes, wrongs or acts is admissible under MRE 404(b) if the evidence is (1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Additionally, upon request, the trial court may provide a cautionary instruction. *Id.* at 75.

In this case, the evidence of defendant's past sexual behavior with his former wife was offered for a proper purpose under MRE 404(b), to show defendant's scheme or plan relative to his sexual activities and to bolster the credibility of the victim, who testified regarding similar conduct by defendant. It was not offered for the improper purpose of showing defendant's bad character. Further, because the victim's credibility was a central issue in the case, the evidence was relevant to an issue of fact of consequence at trial. Also, the probative value of the evidence of defendant's sexual practices with his former wife was not substantially outweighed by the danger of unfair prejudice. MRE 403. Defendant's past sexual interests and activities with his former wife occurred in the context of a marital relationship, were consensual, and did not involve any criminal activity. As such, the evidence was not unfairly prejudicial. Furthermore, the trial court gave a cautionary instruction regarding the limited purpose of the evidence.

The trial court did not abuse its discretion by allowing defendant's former wife's testimony.

II

Defendant next argues that the trial court erred by allowing the jury to hear that he voluntarily released his parental rights to the victim before trial. Defendant argues that the evidence was not relevant and unfairly prejudicial. We disagree.

Relevant evidence is generally admissible. MRE 402; *People v Campbell*, 236 Mich App 490, 503; 601 NW2d 114 (1999). Evidence is relevant if it tends to make the existence of a fact at issue more or less probable than it would be without the evidence. MRE 401; *Campbell, supra*. Under MRE 403, however, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000). Unfair prejudice does not mean any prejudice; it refers to “the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock.” *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994), quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). See also *People v Vasher*, 449 Mich 494, 501-502; 537 NW2d 168 (1995).

In this case, the evidence was relevant in light of the defense theory that the victim fabricated the allegations of sexual abuse because she wanted to leave defendant's home. The evidence that defendant had released his parental rights to the victim established that reunification was no longer possible and, therefore, made it more probable than not that the victim was not fabricating the allegations because of a concern over the possibility of being returned to defendant. Further, we are not convinced that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. MRE 403. Defendant explained that he released his parental rights because he thought he had no chance at establishing a relationship with the victim in the future. He said he regretted the decision and did not realize it was a permanent separation at the time he agreed to release his parental rights.

Accordingly, we conclude that the trial court did not abuse its discretion in allowing this evidence. *McAlister, supra*. See also *People v Larry Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998) (where a trial court's ruling on an evidentiary issue is a close question, it is not for the appellate court to reverse simply because it would have reached a different result).

III

Next, defendant argues that the trial court erred by excluding evidence that the victim made false accusations of sexual abuse against others.¹ Again, we review the trial court's decision for an abuse of discretion. *McAlister, supra*.

At trial, the defense wanted to call certain family members to testify that the victim had previously accused a neighbor and other family members of sexual abuse. Although defendant argues on appeal that the testimony was admissible under MRE 801(d), he did not identify this evidentiary rule as a basis for admitting the evidence at trial. Thus, defendant failed to establish that the victim's past accusations of sexual abuse were admissible.

¹ As part of its ruling, the trial court agreed that the witnesses could testify as to the victim's reputation for truthfulness in general, but could not testify about specific instances of conduct to prove that she was not being truthful. See MRE 608(a). Defendant does not address this portion of the court's ruling.

Defendant also argues that evidence that the victim had sexual relations with others could explain the absence of the victim's hymen. The trial court apparently disallowed the testimony under the rape-shield statute, MCL 750.520j. Except for the two narrow exceptions set forth in MCL 750.520j, the rape-shield statute bars evidence of sexual activity of the victim not incident to the charged offense. As our Supreme Court observed in *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996):

“The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation.” [Quoting *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984).]

The rape-shield statute also provides that such evidence is admissible only to the extent that it is “material to a fact at issue in the case” and “its inflammatory or prejudicial nature does not outweigh its probative value.” MCL 750.520j(1); *Adair*, *supra* at 485.

In the case at bar, defendant never made a credible offer of proof that the proposed evidence fell within one of the statutory exceptions. The trial court did not abuse its discretion in barring the proposed evidence.

IV

Defendant next argues that the trial court erred by prohibiting his wife and stepdaughter from testifying about the stepdaughter's history of sexual abuse by her own natural father. Through this testimony, defendant intended to show that both witnesses had a special sensitivity to the issue of sexual abuse, so if the victim were being sexually abused, they would have noticed warning signs that others may have missed. The court excluded the evidence under MRE 403 because any probative value was minimal and outweighed by the danger of unfair prejudice and confusion of the issues.

We find no abuse of discretion by the trial court. *McAlister*, *supra*. The court allowed both witnesses to testify that they had not observed any signs of sexual abuse and, if they had, they would have reported it. To allow the witnesses to go beyond the scope of that testimony to explain that they had a special understanding of sexual abuse situations because of their own prior experiences would have injected collateral issues into the case. In any event, defendant failed to sufficiently establish that the witnesses had a special expertise in this area. At best, the witnesses could only offer that they did not observe any signs of sexual abuse and would have reported it if they had, which is what the trial court permitted.

V

Next, defendant argues that he was denied a fair trial because he was shackled during trial and because the prosecutor brought attention to that fact by questioning him about his restraints.

A defendant's freedom from shackling is an important part of the right to a fair trial. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). As a result, shackling of a defendant during a trial is permitted only under extraordinary circumstances. *Id.* Ordinarily, shackling should be permitted only to prevent escape, to protect bystanders or officers of the court from injury, or to maintain a quiet and peaceable trial. *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994). The trial court must find that there is record evidence to support the use of restraints. *Id.* at 427. In this case, however, there is no indication on the record that defendant objected to the use of restraints during trial. Because defendant failed to preserve this issue with an appropriate objection at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

It is not plainly apparent that restraints were not justified in this case. Apart from the fact that defendant never complained about having to wear restraints, the record discloses that the court later instructed the jury that the restraints were something required of all jail inmates as a security device to guard against escape, which is a recognized purpose for allowing restraints. Defendant has not shown that the use of restraints in this case was plain error. Furthermore, even if error, defendant has not shown that his substantial rights were affected. The record indicates that the jury could not see the restraints. Where restraints are unobtrusive, this Court will generally not conclude that the defendant was prejudiced. *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988); *People v David Johnson*, 160 Mich App 490, 493; 408 NW2d 485 (1987).

Defendant argues, however, that he was prejudiced because the prosecutor subsequently questioned him about the leg restraints. On cross-examination, the prosecutor questioned defendant about why he limped and alluded to a leg brace that defendant was wearing:

Q. [The prosecutor:] One other thing. You walked up with this leg brace, I mean, with what we would see as a limp. But that's not a physical condition, that's because of the security measure.

MR. BRECZINSKI [defense counsel]: Hey, I object.

MR. BERKMAN: No, wait, wait, wait.

MR. BRECZINSKI: This is totally improper.

MR. BERKMAN: This whole thing is standard to every person.

THE COURT: Please, please, Mr. Berkman.

MR. BERKMAN: Okay.

THE COURT: He's made an objection, so you stop when he makes an objection.

MR. BERKMAN: I apologize.

THE COURT: Thank you. Mr. Breczinski, both of you approach, please.

(3:01 p.m., bench conference off the record.)

THE COURT: And I'm gonna sustain your objection, Mr. Breczinski.

MR. BRECZINSKI: Thank you, your Honor.

Q. (By Mr. Berkman, continuing:) Physically you can walk just fine; correct?

A. I can walk fine.

The prosecutor subsequently explained that he had questioned defendant about his limp because the jury was already aware that defendant was in jail, and defendant's wife had testified about defendant having a physical disability. The prosecutor wanted to clarify the reason for the limp because it had been alleged that defendant could not negotiate the steps to the basement of his home, which was where some of the sexual abuse allegedly occurred. The court indicated that it would give a special instruction on this point so that the jury was not misled.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267, nn 5-7; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Prosecutorial misconduct, however, cannot be based on good faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *People v Missouri*, 100 Mich App 310, 328; 299 NW2d 346 (1980). The prosecutor, as an advocate for the state, is entitled to attempt to introduce evidence which he legitimately believes will be accepted by the court so long as that attempt does not actually prejudice the defendant. Absent a showing of bad faith by the prosecutor, this Court will not reverse simply because defense counsel was required to do his job and object. *Id.* at 328-329.

Here, defendant's physical condition was an issue in the case, and the prosecutor was seeking to establish that defendant's limp was not attributable to his physical condition. Thus, there is no indication of bad faith by the prosecutor. Furthermore, we are satisfied that defendant was not prejudiced by the prosecutor's question. First, the trial court sustained defendant's objection to the question, so the jury should have disregarded the reference to the leg restraint. Second, the jury was already aware from the testimony that defendant was a jail inmate. Third, the court subsequently gave a special instruction to the jury in which it clarified that all county inmates were required to wear leg restraints and that the restraints were not to be considered as evidence of defendant's guilt. The court's instruction sufficiently served its purpose of curing any prejudice caused by the prosecutor's question. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Accordingly, this issue does not require reversal.

VI

Defendant next argues that the trial court erred by not allowing him to reopen the proofs in order to present evidence that a witness, Nurse Hartwig, was biased against defendant.

Shortly before closing arguments, defense counsel informed the court that defendant's family members had allegedly overheard Hartwig state in the hallway "that Allen [defendant]

may as well hang himself as to pull him [sic] in here away from her patients.” Defendant wanted to have his stepdaughter testify to the statements she overheard Hartwig make. The trial court declined to reopen the proofs because of the confusion it would create. Further, the court had questions about the accuracy of the proposed testimony and also was concerned because it did not relate to the ultimate issue in the case.

Whether to allow the reopening of proofs is within the sound discretion of the trial court. *People v Keeth*, 193 Mich App 555, 560; 484 NW2d 761 (1992). In deciding whether to allow the proofs to be reopened, the trial court must consider whether the party moving to reopen the proofs, would have obtained an undue advantage and whether there is any showing of either surprise or prejudice to the opposing party. *Id.*

Here, the court’s reasons for refusing to reopen the proofs do not reveal an abuse of discretion. In addition, as the prosecution argues, defendant appeared to be relying on extrinsic evidence for the purpose of attacking the witness’ credibility, which is prohibited by MRE 608(a).

VII

Next, defendant argues that the jury’s verdict was against the great weight of the evidence and, therefore, the trial court erred in denying his motion for a new trial. We disagree.

A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000). A trial court may grant a motion for a new trial based upon the great weight of the evidence only where the evidence preponderates heavily against the verdict so that a miscarriage of justice would result if the verdict was allowed to stand. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

Here, any inconsistencies in the victim’s testimony were not significant or prevalent enough to justify setting aside the jury’s verdict. The trial court did not abuse its discretion in denying defendant’s motion for a new trial.

VIII

Defendant argues that other misconduct by the prosecutor requires reversal. Defendant concedes that he did not object to the prosecutor’s challenged comments and questions. Therefore, we review this unpreserved issue for plain error affecting defendant’s substantial rights. *Carines, supra*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Reversal is not warranted if a cautionary instruction could have cured any prejudice. *Stanaway, supra* at 687.

A prosecutor is afforded great latitude in closing arguments and is permitted to argue the evidence and reasonable inferences in order to support his theory of the case. *Bahoda, supra* at 282. However, the prosecutor must refrain from prejudicial remarks, and may not intentionally inject inflammatory comments with no apparent justification except to arouse the jurors’ prejudice. *Id.* at 266, 283. A prosecutor also may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses’ truthfulness. *Id.* at 276. Nor

may a prosecutor appeal to the jury to sympathize with the victim, or argue facts not in evidence. *People v Modelski*, 164 Mich App 337, 347; 416 NW2d 708 (1987).

Defendant first argues that the prosecutor improperly questioned witnesses and improperly argued that the experts had formed opinions on the victim's credibility. Considered in context, the prosecutor's questions to Janice Valentine did not elicit improper opinion testimony about the victim's credibility. Valentine's responses were consistent with why she was treating the victim. Her responses did not indicate that she personally felt that the victim was being truthful about the abuse.

While the prosecutor's remarks in closing argument urging the jurors to take into account the expert witnesses' opinions about the victim's credibility, bordered on being improper, they do not constitute plain error. Further, to the extent the questions could be characterized as improper, a cautionary instruction could have cured any possible prejudice. *Stanaway, supra*. Thus, this issue does not warrant reversal.

The prosecutor's statements to the jury that the victim was telling the truth were based on the evidence presented at trial, and, as such, did not constitute improper vouching.

We also reject defendant's claim that the prosecutor improperly urged the jurors to decide the case based upon sympathy for the victim. The prosecutor only asked the jurors to consider all of the circumstances in the case and the consequences to the victim in determining if she would have made the allegations against defendant if they were not true. This was not improper. *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994).

Defendant has not shown that the prosecutor committed plain error affecting his substantial rights.

IX

Next, defendant argues that the cumulative effect of each of the errors in this case denied him a fair trial. We disagree.

Although a single error may not necessarily provide a basis for granting a new trial, it is possible that the cumulative effect of multiple minor errors may add up to error requiring reversal. *People v Anderson*, 166 Mich App 455, 472-473; 421 NW2d 200 (1988). The test is whether the cumulative effect of several errors deprived the defendant of a fair and impartial trial. *People v Taylor*, 185 Mich App 1, 10; 460 NW2d 582 (1990). Because defendant has failed to show any error in this case, he cannot show that a new trial is required because of cumulative error.

As part of his argument for this issue, defendant also raises additional claims of prosecutorial misconduct. In the two examples cited by defendant, the trial court sustained a defense objection. While some of the prosecutor's questions and comments were found to be objectionable by the trial court and stricken, they were not so prejudicial to require reversal. Furthermore, even if these questions and comments are considered with the other errors

defendant alleges, reversal is not required because he has not demonstrated that the cumulative effect of the claimed errors deprived him of a fair trial.

X

In his final issue, defendant challenges the proportionality of his twenty-five to seventy-five year sentences for first-degree CSC.

Because the offenses for which defendant was convicted occurred in 1998, the earlier sentencing guidelines promulgated by our Supreme Court apply. The legislative guidelines apply only to offenses committed on or after January 1, 1999. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

The sentencing guidelines recommended a minimum sentence range of 180 to 360 months, or life. On appeal, defendant refers to the effect of his fifty point score for offense variable (OV) 12 on the ultimate recommended sentence range, but does not specifically assert that OV 12 was erroneously scored. We agree that the record factually supports the court's scoring of OV 12 and, accordingly, will not disturb that scoring decision. *People v Raby*, 456 Mich 487, 497-498; 572 NW2d 644 (1998).

Because defendant's sentences are within the guidelines range, they are presumptively proportionate. *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Defendant must demonstrate unusual circumstances to overcome the presumption of proportionality. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

Defendant refers to a prior plea bargain offer made by the prosecution as evidence that his sentences are disproportionate. That offer was to the lesser charge of third-degree CSC. The maximum sentence for third-degree CSC is fifteen years. The prosecutor informed defendant that the sentencing guidelines range for third-degree CSC would be five to ten years. Under the two-thirds rule, the trial court could not impose a sentence greater than ten years for third-degree CSC. Moreover, the plea offer was made before trial. The trial court was entitled to consider the evidence at trial in determining an appropriate sentence.

Furthermore, defendant had two prior felony convictions and two prior misdemeanor convictions, including a prior conviction for child abuse involving the same victim. He also failed to comply with the terms of his probation in connection with his prior convictions.

Defendant has failed to overcome the presumptive validity of his sentences. Defendant's sentences do not violate the principle of proportionality.

We affirm.

/s/ William B. Murphy

/s/ Jane E. Markey

/s/ Roman S. Gribbs