

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND LEROY ROHM,

Defendant-Appellant.

UNPUBLISHED

January 22, 2004

No. 241755

Barry Circuit Court

LC No. 01-100266-FC

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of five counts of delivery of a controlled substance to commit criminal sexual conduct, MCL 333.7401a, three counts of first-degree criminal sexual conduct, the victim being under thirteen years of age, MCL 750.520b(1)(a), two counts of attempted first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of child sexually abusive activity, MCL 750.145c(2). Defendant appeals as of right. We affirm.

I. Facts

The charges arose as a result of defendant's sexual molestation of his stepdaughter who was seven or eight years old. The complainant testified that defendant would call her into his bedroom where he would be naked and he would instruct her to close the door and to remove her clothes. He would then touch her "secret place" either with his hands or with his "secret place" which he called "Homer." Sometimes he touched her on the outside of her "secret place" and sometimes he would touch her on the inside. He would also ask her to touch his "secret place" after which white "love juice" would come out. The complainant also testified that her mother would sometimes videotape defendant as he was "f-bad word – i n g" the complainant. The complainant also watched defendant and her mother engage in intercourse. On one occasion, the complainant sucked her mother's breast. The complainant testified that, in exchange for allowing defendant to do these things, defendant gave her several gifts.

The complainant's mother testified as part of a plea bargain. She testified that defendant supported her drug addiction. She had parenting time with the complainant on weekends. Every Friday and Saturday nights, defendant directed the complainant's mother to give the complainant a capsule he prepared from a mixture of oxycontin and vicodin. On other times, she would give the complainant orange juice mixed with vodka and benedryl. The complainant would fall asleep within twenty minutes after taking the drugs and remain asleep until the next morning.

The next morning, defendant would inform the complainant's mother that he had "f***ed his little [complainant]." On one occasion, defendant told the complainant's mother that he inserted the head of his penis into the complainant's vagina but that he did not ejaculate inside her to avoid leaving any evidence. At that time, the complainant's mother found the complainant asleep on the love seat in the living room, naked from the waist down with her bottom resting on the edge of the seat and her legs spread over the arms of the seat. The complainant's mother testified that she video-recorded defendant as he performed sexual acts on the complainant.

Defendant testified on his behalf, denying that anything improper had ever occurred. He also presented the testimony of the brother of the complainant's mother, who testified to the mother's general reputation for untruthfulness. Defendant also presented the testimony of his former attorney, who testified that the complainant had earlier recanted her initial statements to the police that implicated defendant.

II. Analysis

A. Other Bad Acts

Defendant argues that the trial court abused its discretion in admitting evidence of sexual acts between defendant and his stepdaughter from an earlier marriage. The sexual acts allegedly began about twenty-five years before trial when the stepdaughter was nine years old and continued until she moved out of defendant's house at the age of sixteen.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998). Use of other acts evidence reflecting on a defendant's character is limited by MRE 404(b) to avoid the danger of conviction based on past misconduct. *People v Starr*, 457 Mich 490, 494-495; 577 NW2d 673 (1998). MRE 404(b) provides, in pertinent part:

(1) 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.

To be admissible, the evidence (1) must be offered for a proper purpose under MRE 404(b); (2) it must be relevant under MRE 402, as enforced through MRE 104(b), to an issue or fact of consequence at trial; (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under the balancing test of MRE 403; and (4) the trial court may provide a limiting instruction if requested. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id.*

Here, the prosecution offered the other acts evidence for purposes listed as proper under MRE 404(b): to prove defendant's common pattern, scheme, plan, or system in preying on children. The prosecutor also offered the evidence to rebut a claim of fabrication. The trial court

did not address the four-pronged *VanderVliet* test. Rather, the trial court admitted the evidence for the limited purpose of assessing credibility and stated that it would provide the jury with a limiting instruction upon defendant's request. Contrary to defendant's assertion on appeal, the trial court did not instruct the jury to consider the other acts evidence only as it relates to the complainant's testimony. At the conclusion of the stepdaughter's testimony, the trial court instructed the jury to only consider the testimony as a means to help the jury "judge the believability of testimony regarding the acts for which defendant is now on trial."

Defendant first argues that the other acts evidence is not relevant because the acts to which his stepdaughter testified were not sufficiently similar to those alleged to have been perpetrated against the complainant in this case to make that testimony probative of defendant's scheme, plan, or system. We disagree. There was physical similarity in the alleged acts. In both cases, the biological mothers knew about the abuse but were under defendant's control and were unable or unwilling to stop the abuse. The stepdaughter testified that she informed her mother who, in turn, was promised by defendant that the incident would not happen again. The stepdaughter testified that she dropped charges against defendant so that defendant would allow her to stay in touch with her mother. In this case, the complainant's mother testified that defendant forced her to drug her daughter prior to the sexual molestation and there was evidence establishing defendant's control over the complainant's mother through letters he wrote while both were arrested for the instant charges. The stepdaughter testified that defendant threatened to destroy her pet cow and defendant forced her to shoot a cat that frequented the house when she refused to comply with the sexual advances. Her pet dog also inexplicably disappeared. The complainant's mother testified that defendant killed the complainant's pet chick when the complainant refused to allow defendant to perform anal sex. The stepdaughter testified that defendant told her about "dry sex" in which he would not ejaculate inside her vagina so as not to leave any trace of evidence. The complainant's mother testified that defendant told her that he inserted the head of his penis inside the complainant's vagina but did not ejaculate inside her so as not to leave any trace of evidence. Further, the stepdaughter testified that defendant took sexually explicit Polaroid pictures of her and several years later took a sexually explicit video recording of her when she was an adult. The complainant and her mother both testified to defendant's video recordings of his sexual molestation of the complainant in this case. Thus, while we agree with defendant that several dissimilarities between the acts exist, we conclude that the similarities and circumstances were substantial.

Defendant next argues that the evidence was improperly used to bolster the complainant's credibility. In support of his argument, defendant relies on the decision in *People v Sabin (After Remand)*, 463 Mich 43, 70; 614 NW2d 888 (2000), which declined to reconsider the decision in *People v Jones*, 417 Mich 285, 289-290; 335 NW2d 465 (1983), that "evidence of sexual acts between the defendant and persons other than the complainant is not relevant to bolster the complainant's credibility because the acts are not part of the principal transaction." *Sabin, supra* at 70. We disagree. When logically relevant, other acts evidence is admissible as a proper purpose to rebut an implied charge of fabrication. *Starr, supra* at 501-502.

Under MRE 401, evidence is relevant if it is material and has probative value. *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). To be material, the proffered evidence must be related, or logically relevant, to an issue or fact of consequence at trial. *Id.* at 388-389. Evidence has probative value if it has any tendency to "make a material fact at issue more

probable or less probable than it would be without the evidence.” However, our Supreme Court cautioned that

the proffered evidence truly must be probative of something *other* than the defendant's propensity to commit the crime. If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded, notwithstanding its logical relevance to character. [*Crawford, supra* at 390 (emphasis in original).]

In *Starr*, our Supreme Court found that testimony of the defendant's younger half-sister that defendant had abused her before abusing the victim in that case, his minor adopted daughter, was admissible

to rebut defendant's claim of fabrication of the charges. Indeed, the half-sister's testimony was the only evidence to explain why the mother specifically questioned the victim about her relationship with her father, and why the victim waited two years before telling her mother about the abuse she suffered at the hands of defendant. [*Starr, supra* at 501.]

Here, as in *Starr*, defendant denied the alleged incidents of abuse and his theory of the case was that the complainant's mother fabricated the allegations of sexual abuse against defendant because she was the one who raised the complainant on “a steady diet of inappropriate adult sexuality, lies and depravity.” At trial, the complainant's mother was shown repeatedly to be a less than credible witness, with numerous inconsistencies in her testimony brought to the jury's attention, including recanted statements that she was sexually molested by her physician and the arresting officer in this case. The defense presented testimony from her own brother that she was not a truthful person, and testimony from defendant's former attorney in this case, that she had admitted to him that she had “an overactive imagination.” Under these circumstances, the credibility of both the complainant's mother and defendant was the ultimate issue in the case.

Contrary to defendant's argument on appeal, the evidence was not introduced to corroborate the complainant's testimony or the testimony of the complainant's mother. By itself, testimony that defendant controlled the complainant's mother to the degree that she aided defendant in committing the sexual molestation, that he killed the complainant's chick when the complainant refused to engage in anal sex with him, and the video recording of the sexual molestation after which defendant would destroy the recordings may not have seemed credible to the jury. Testimony from defendant's stepdaughter made the testimony of the complainant's mother credible.

We conclude that the other acts evidence was relevant to proving the charged acts. Although the trial court abused its discretion in failing to address the issue, the other acts were sufficiently similar to show a common plan or scheme, and the elements of that scheme were probative of how defendant controlled the circumstances to allow for the sexual molestation to occur. From this, the jury could conclude that the complainant's mother was telling the truth. Thus, the other acts evidence tended to prove a material fact or issue, other than defendant's bad character, which is probative of the ultimate issue.

The third prong of the *VlanderVliet* test requires a determination that the probative value of the evidence is not substantially outweighed by unfair prejudice under the balancing test of MRE 403. The probative value of this evidence is relatively high. This case was essentially a credibility contest between the complainant's mother and defendant. The credibility of the complainant's mother was highly suspect in this case. There was no other conclusively corroborative evidence from the medical reports and examination or witness testimony. Because the other acts were substantially similar to those alleged by the victim, the potential that the jury would use the evidence improperly to infer defendant's bad character was also high. However, the MRE 403 balancing test requires that the evidence be excluded only in unfair prejudice substantially outweighs the probative value of the evidence. On balance, we conclude that the trial court properly admitted the evidence. Contrary to defendant's assertion on appeal, the trial court gave an appropriate limiting instruction to the jury. *VanderVliet, supra* at 71 n 26. Therefore, we find that the court did not abuse its discretion in admitting testimony regarding defendant's alleged molestation of his stepdaughter.

B. Expert Witnesses

Defendant next argues that the trial court abused its discretion when it allowed into evidence a medical report that defendant claims to have supported the complainant's credibility and when the court allowed a medical expert to opine that there was probable sexual abuse in this case. Because defendant failed to preserve the question whether the evidence constituted improper bolstering of the complainant's credibility, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

It is improper for a witness to comment upon or give an opinion as to the credibility of another witness because matters of credibility are for the trier of fact to determine. *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985). In this case, the report prepared by an expert from the child protection team at the hospital where the complainant was examined did not constitute an impermissible comment on the complainant's credibility. The expert who prepared the report after interviewing the complainant testified that her role at the interview was not to make an opinion as to whether the complainant was telling the truth or not, but rather to merely document what the complainant said and to gather information objectively to assist the physicians in their medical examination of the complainant. The fact that the report referred the complainant for sexual abuse counseling is irrelevant because the report was never intended to be a statement of the expert's belief, or lack of belief, in the complainant's credibility.

Similarly, the testimony by Dr. Vincent Palusci, a pediatrician specialized in the area of child sexual abuse and maltreatment who examined the complainant, did not constitute improper bolstering of the complainant's credibility. Although Michigan courts have reversed cases based on improper testimony from a lay or expert witness concerning the credibility of another witness, it is not the rendering of the opinion itself that is problematic. Expert opinion testimony will not be excluded merely because such testimony concerns the ultimate issue in a case. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986). Rather, a problem arises with such testimony only when the challenged witness' opinion testimony lacks adequate foundation. In *Smith*, the challenged witness' testimony that the complainant had been sexually assaulted was impermissible because the opinion was based "not on any findings within the realm of his medical capabilities or expertise . . . but, rather, on the emotional state of, and the history given by, the complainant" and the record did not support a finding that the witness possessed

specialized knowledge that would allow him to draw such inferences from that evidence. *Id.* at 112-113. Similarly, in *People v Izzo*, 90 Mich App 727; 282 NW2d 10 (1979), the expert witness' testimony was impermissible because the witness had been qualified solely to establish that the complainant had suffered mental anguish and the challenged testimony went beyond establishing mental anguish and "amounted to unwarranted reinforcement" of the complainant's testimony. *Id.* at 10-11. In *People v McGillen*, #2, 392 Mich 278; 220 NW2d 689 (1974), a doctor's testimony as to whether or not the complainant had actually been raped was impermissible because the doctor leant his medical opinion to support a claim that was beyond the realm of his medical capabilities and expertise. *Id.* at 285.

Here, Dr. Palusci specifically explained that his assessment that sexual abuse probably existed in this case was not solely based on the complainant's emotional state or history but also upon the findings of his own objective physical examination of the complainant. The testimony did not constitute improper bolstering of the complainant's credibility.

Defendant argues that he was deprived of the effective assistance of counsel for his counsel's failure to object to the above evidence. We disagree. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Therefore, defendant's claim is without merit.

C. Prosecutorial Misconduct

Defendant next argues that he was denied due process by the prosecutor's misconduct by making a comment during closing argument that was not supported by the evidence. Because defendant failed to preserve the issue, our review is limited to plain error on the record affecting defendant's substantial rights. *Carines, supra*.

A prosecutor is specifically prohibited from making statements to the jury that are unsupported by the evidence on the record. *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). 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). Even if there was error, the error is not a ground for reversal unless, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative, and defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

The prosecution concedes on appeal that the prosecutor erroneously stated that a medical examination found that the complainant's hymen was injured. Nonetheless, defendant is not entitled to reversal or remand because the error was not outcome determinative and did not affect defendant's substantial rights. The medical findings were clearly presented in the prosecutor's case in chief. The error constituted only a minor part of the prosecution's closing argument and the prosecutor specifically informed the jury that his comments did not constitute evidence. Further, the trial court instructed the jury not to consider the attorneys' arguments as evidence. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). We conclude that this plain error did not affect defendant's substantial rights.

For the same reason, defendant's claim of ineffective assistance of counsel for counsel's failure to object is without merit. Defendant cannot demonstrate that, but for trial counsel's mistake in failing to object to the prosecution's error, there is a reasonable probability that the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

D. Cumulative Error

Finally, defendant argues that the cumulative effect of several errors deprived him of due process of law. Only actual errors are aggregated to determine their cumulative effect. *People v Bahoda*, 448 Mich 261, 293 n 64; 531 NW2d 659 (1995). Because we have found only one individual plain error, there is no cumulative effect.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot