STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2004
v	No. 246812 Wayne Circuit Court
RODNEY DOUGLAS KIMBROUGH, JR., Defendant-Appellant.	LC No. 02-005702

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant was sentenced to nine to twenty years in prison for each first-degree criminal sexual conduct conviction, and five to fifteen years in prison for the second-degree criminal sexual conduct conviction. We affirm.

Defendant first argues that the trial court erred in allowing evidence of prior bad acts. We disagree. A trial court's decision to admit prior bad acts evidence under MRE 404(b) is reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). "An abuse of discretion exists when an unprejudiced person, considering the facts upon which the trial court acted, would say there was no justification or excuse for the ruling." *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997), citing *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Defendant contends that evidence of his prior sexual relations with the victim's aunt when she was somewhere between nine and fourteen years old was improperly admitted as prior bad acts evidence. The evidence of prior bad acts was properly admitted against defendant to show a common plan, scheme, or system in abusing a female child and/or to establish credibility of the victim. See MRE 404(b). Use of bad acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *Starr, supra* at 495. To be admissible under MRE 404(b)(1), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366

(2004); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Evidence is not necessarily subject to MRE 404(b) analysis because it discloses a bad act; bad acts can be relevant as substantive evidence, admissible under MRE 401, without regard to MRE 404. *Knox, supra* at 509; *VanderVliet, supra* at 64; *People v Hall*, 433 Mich 573, 580, 583-584 (Boyle, J.), 588-589 (Brickley, J.); 447 NW2d 580 (1989). The list of exceptions in MRE 404(b) is nonexclusive. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000).

In this case, the challenged evidence was offered for a proper purpose. When logically relevant, our Supreme Court has stated that other acts evidence is admissible as a proper purpose to rebut a charge of implied fabrication. *Starr, supra* at 501-502. In this case, defense counsel's opening statement and entire theory of the case was that the victim was fabricating the events to include defendant because it was too difficult to tell people that her stepfather impregnated her.

Furthermore, the trial court ruled that the evidence of defendant having sexual relations with the victim's aunt when she was nine to fourteen years old was admissible as evidence of a common scheme, plan, or system. To be admissible as part of a common scheme, plan or system under MRE 404(b), the acts may be substantially similar to the acts related by the victim in that they indicate that defendant had some unique, consistent pattern or scheme in approaching, overcoming, or treating his victims. *People v Sabin*, 236 Mich App 1, 9; 600 NW2d 98 (1999). In this case, both the victim and the victim's aunt were assaulted at roughly the same age and the assaults all took place because of defendant's relationship with the family. This develops a common pattern in how defendant chose and approached his victims.

The evidence offered by the victim's aunt was relevant. Evidence is relevant if it has any tendency to make the existence of a fact of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998); *People v Gonzalez*, 256 Mich App 212, 218; 663 NW2d 499 (2003). Evidence is admissible if it is helpful in throwing light on any material point, *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001), and all facts on which any reasonable presumption of the truth or the falsity of a charge can be founded are admissible, *People v Lewis*, 264 Mich 83, 88; 249 NW 451 (1933). A general denial of guilt puts all elements of a charged offense at issue, regardless whether any of them are specifically disputed or are stipulated. *Sabin (After Remand), supra* at 60; *People v Mills*, 450 Mich 61, 69-70; 537 NW2d 909, modified, remanded 450 Mich 1212 (1995). The credibility of witnesses is also a material issue and evidence that shows bias or prejudice of a witness is always relevant. *Mills, supra* at 72.

The evidence that defendant had a common scheme, plan, or system is relevant to show that defendant used his position as a family friend to choose and approach the victim and the victim's aunt. The victim's credibility had been called into question during defendant's opening statement because it was raised that the victim had not mentioned defendant when she accused her stepfather of impregnating her, and the evidence explained why the victim should be found to be credible.

The testimony offered by the victim's aunt has probative value that is not substantially outweighed by its unfair prejudicial effect. Even if relevant, evidence may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Sabin (After Remand), supra* at 58. "Unfair prejudice" does not mean "damaging." *Mills, supra* at 75. Any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Mills, supra* at 75-76; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). Assessing probative value against prejudicial effect requires a balancing of factors, including the time necessary to present the evidence and the potential for delay, whether the evidence is cumulative, how directly the evidence tends to prove the fact in support of which it is offered, how important the fact sought to be proved is, the potential for confusion, and whether the fact can be proved another way with fewer harmful collateral effects. *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976).

In this case, the evidence presented, regarding defendant using his position as a family friend to choose and approach the victim's aunt, corroborated the statement that defendant used the same common scheme, plan, or system to choose and approach the victim, which reflected directly on the credibility of the victim's testimony. The evidence presented regarding defendant's prior relations with the victim's aunt was the most effective and efficient way that the victim could prove the credibility of her testimony, which the defense had called into question. Because the evidence brought forth in the testimony of the victim's aunt was offered for a proper purpose, was relevant, and its prejudicial effect was outweighed by its probative value, it was properly within the trial court's discretion to find the evidence was admissible under MRE 404(b)(1).[1]

Defendant next argues that offense variable four (OV 4) and offense variable ten (OV 10) were inaccurately scored. We disagree. MCL 769.34(10) provides limited grounds, including an error in scoring of the guidelines or reliance on erroneous information, for appealing a sentence within the statutory guidelines, and requires a defendant to raise grounds for objection either at the time of sentencing or in a motion for resentencing. MCL 769.34(10); *People v McLaughlin*, 258 Mich App 635, 669-670; 672 NW2d 860 (2003); *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001). MCR 6.429(C) states that for a scoring issue to be preserved on appeal, defendant must have raised the issue at or before sentencing or demonstrate that the issue was raised as soon as the inaccuracy could reasonably have been discovered.[2] Defendant did not

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[1] Defendant also argues that his trial counsel was ineffective for failing to object to the MRE 404(b) evidence introduced at trial. To establish a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). As discussed, hereinbefore, the challenged evidence was properly admitted. Counsel does not need to make a meritless objection to act effectively. *People v Hawkins*, 245 Mich App 439, 454-455; 628 NW2d 105 (2001). Therefore, defense counsel's failure to object to the challenged testimony does not constitute ineffective assistance of counsel.

[2] MCR 6.429(C) prevails over the conflicting statutory provision, MCL 769.34(10). *McGuffey, supra* at 165-166.

raise this specific issue at or before sentencing, nor did he indicate that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. Therefore, the issue is not preserved.

We apply plain error review to an unpreserved sentencing issue. *People v McDaniel,* 256 Mich App 165, 171; 662 NW2d 101 (2003), leave held in abeyance *People v McDaniel*, unpublished order of the Supreme Court, entered September 11, 2003 (Docket No. 123437), citing *People v Carines*, 460 Mich 750, 764-766; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, defendant must establish that: (1) error occurred, (2) the error was clear and obvious, and (3) the plain error affected his substantial rights, in that the error affected the outcome of the lower-court proceedings." *McDaniel, supra* at 171, citing *Carines, supra* at 765.

Defendant argues that the trial court failed to properly score OV 4, psychological injury to a victim. MCL 777.34. MCL 777.34 allots ten points if, "[s]erious psychological injury requiring professional treatment occurred to a victim" or if "the serious psychological injury may require professional treatment." The trial court scored defendant at ten points because the victim's serious psychological injury may require professional treatment. While the record does not conclusively indicate that the victim received psychological treatment for this trauma, MCL 777.34(2) specifically provides that "the fact that treatment has not been sought is not conclusive" for scoring OV 4. The trial court relied on record evidence of the significant emotional trauma the victim endured at the time of the incident and her fears about telling people that more than one person had sexually assaulted her and that she would be considered "a slut." Further, the record does indicate that the victim had counseling through school, though it does not specify the content of the counseling. "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). The trial court's assessment of ten points for OV 4 did not constitute plain error affecting defendant's substantial rights.

Defendant also argues that OV 10, exploitation of a vulnerable victim, MCL 777.40, was improperly scored. MCL 777.40 allots ten points if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." The trial court scored defendant ten points under OV 10 for exploitation of the victim's youth. Defendant challenges the trial court's determination that the victim's youth could be considered a factor in scoring OV 10 when her youth is inherently part of the crime of which defendant was convicted.

Defendant's argument is without merit because the sentencing guidelines permit a factor that is an element of the crime charged to also be considered when computing an offense variable score. *People v Gibson*, 219 Mich App 530, 535; 557 NW2d 141 (1996). Further, there is no double jeopardy violation. This Court recognized that the Double Jeopardy Clauses of the United States and Michigan Constitutions protect against multiple punishment for the same offense, but concluded that the score a defendant receives on an offense variable is not a form of punishment. *Gibson, supra* at 535. Therefore, the scoring of the guidelines does not implicate double jeopardy issues. *Id.* The Sentencing Information Report properly reflected the appropriate scores for OV 4 and OV 10.

Defendant next argues that the prosecutor improperly injected non-record evidence into the case. We disagree. To preserve the issue for appellate review, defendant must timely and specifically object to the prosecutor's improper conduct. *McLaughlin, supra* at 644-645. Here, defendant failed to preserve his claim for review on appeal because he failed to object to the prosecutor's statements at the trial court level.

Appellate review of an unpreserved claim of prosecutorial misconduct is for plain error affecting substantial rights. *Carines, supra* at 764-766. Reversal is only warranted when a plain error resulted in the conviction of a truly innocent defendant or seriously affected the fairness, integrity, or public reputation of a judicial proceeding independent of the defendant's innocence. *Id.* Thus, if a curative instruction could have alleviated any prejudicial effect, the appellate court will not find error requiring reversal. *People v Ackerman,* 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

During the prosecution's rebuttal closing argument, the prosecutor brought up a letter that a witness had written to the prosecutor's office and was promptly halted by the trial court as follows:

> *PROSECUTOR*: [The witness] wrote this letter to me. I gave this letter to the defense attorney. What am I trying to hide by giving it to the defense attorney [?]
>
> *THE COURT:* That is not evidence. A couple of times already you have gone beyond and stated matters that are not in evidence. You have to state what is in evidence here. You can't go beyond that in your argument.

Defendant argues that it was improper for the prosecutor to mention a letter that was not admitted as evidence. Defendant further argues that by misstating the evidence, the prosecutor attempted to give the impression that she was being completely honest with the jury.

A prosecutor may not make a statement of fact to the jury which is not supported by the evidence. *People v Stanaway,* 446 Mich 643, 686; 521 NW2d 557 (1994). A prosecutor is free to dispute the evidence and all reasonable inferences occurring from it as they relate to the theory of the case. *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995). But a prosecutor need not state the inferences in the blandest possible terms. *People v Fisher,* 449 Mich 441, 452; 537 NW2d 577 (1995); *Aldrich, supra* at 112.

The comments in the prosecutor's closing argument regarding the letter were only a brief part of the entire case that the prosecutor presented. See *People v Mayhew,* 236 Mich App 112, 123; 600 NW2d 370 (1999). Further, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, but are only there to help the jury understand the legal theories. And, the trial court instructed that the jurors should only accept things that lawyers say that are supported by evidence or by their own common sense or general knowledge. Under these circumstances, even if improper, defendant was not prejudiced by the prosecutor's comments, and reversal is not required. *People v Watson,* 245 Mich App 572, 591-592; 629 NW2d 411 (2001).

Moreover, otherwise improper prosecutorial remarks might not necessitate reversal if they address issues raised by defense counsel. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003); *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). To determine whether an invited response merits reversal, this Court should review the remarks that prompted the prosecutorial response and the proportionality of that response. *Jones, supra* at 353.

In this case, the prosecutor, by acknowledging the letter in her rebuttal argument, was responding to a statement that defense counsel made in closing argument that implied that the witness' letter to the prosecutor may have been inappropriate. If this remark was improper it would not merit reversal because the prosecutor was responding to defense counsel's statement.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Jessica R. Cooper