

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD MARTIN,

Defendant-Appellant.

UNPUBLISHED

July 20, 2004

No. 247712

Wayne Circuit Court

LC No. 02-009140-01

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and second-degree criminal sexual conduct (CSC II), MCL 750.520(c)(1)(a). The trial court sentenced defendant to serve concurrent prison terms of fourteen to forty years on the CSC I conviction, and ten to fifteen years on the CSC II conviction. We affirm.

I

Defendant alleges several instances of prosecutorial misconduct during closing and rebuttal arguments. Because no objections were ever lodged to the challenged comments, review is limited to plain error that affected defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

Prosecutorial misconduct issues are decided case by case, . . . and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. . . . Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. . . . 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. . . .

. . . Otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel. . . . No error requiring reversal will be found if the prejudicial effect of the prosecutor's

comments could have been cured by a timely instruction. [*Schutte, supra* at 721, citations omitted.]

See also *Thomas, supra* at 454-456; *People v Aldrich*, 246 Mich App 101, 110-112; 631 NW2d 67 (2001).

Defendant first argues that the prosecutor improperly asserted facts not in evidence and vouched for prosecution witnesses during his rebuttal closing argument when he stated:

Defense counsel, I think, is saying that the girls got together to create this story. Well you heard that initially, right after it happened to [the victim], she did tell her friends

But you heard them saying, we haven't seen each other in years. And that they were both in this court building yesterday, they said we have not seen each other in this building today.

And I submit to you that that's no coincidence. We purposely kept those girls apart so that no one could say they got together to put this story together.

Defendant complains that there is no evidence in the record that the prosecution purposely kept these witnesses separated in order to prevent them from fabricating a story about the crime. Although a review of the record indicates that no one from the prosecutor's office was called to testify that the girls were kept apart prior to trial to preclude collusion, there was testimony that the victim told defendant's two nieces about the sexual assault the day after it happened, and testimony was adduced at trial that the victim was kept away from these girls while at the court building. Orders of sequestration are not unusual in criminal proceedings. Thus, it was reasonable for the prosecution to comment on the fact that the witnesses were purposely kept apart to avoid any attempt at collusion. Moreover, the comment in question was responsive to the defense argument that the girls got together to create this story. *People v Knowles*, 256 Mich App 53, 61; 662 NW2d 824 (2003); *Schutte, supra*. We therefore find no impropriety in the prosecutor's comments. We likewise find no merit in defendant's vague assertion that the prosecutor's remarks improperly bolstered the credibility of these prosecution witnesses.

Defendant next argues that, during closing argument, the prosecutor improperly argued that other-acts evidence of defendant's sexual misconduct with other females was "corroboration" of the victim's credibility. Defendant cites the following portion of the prosecutor's argument:

And I submit to you that this child [the victim] has no reason to lie. She was very clear, smart enough to articulate to you what happened to her. And I think the evidence shows you should believe her beyond a reasonable doubt.

But in this case we were able to produce some other testimony, some other witnesses that should assist you in determining if you can believe [the victim].

You heard testimony from Marian Akra, she told you that she is the niece of the defendant. She said she was abused from the ages of five to fifteen. Now the defense would have you to believe that he didn't have access to her from maybe ages five to ten.

Defendant maintains that the above argument “was nothing more than an invitation to the jury to make the impermissible inference that if the defendant ‘did it before he probably did it again.’” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998), quoting *People v Johnson*, 27 F3d 1186, 1193 (CA 6, 1994).

However, when reviewed in context, we conclude that the prosecutor did not use or comment on the MRE 404(b) evidence for any improper purpose. The trial transcript reveals that shortly after giving the disputed argument, the prosecutor recapped the substance of the other-acts testimony for the jury and explained that:

You can not use it to say well if he did it before he probably did it again.

And you can't use it to say you know he's just a bad guy, I should convict him now. But what you can use it [for] is to determine, did he have some sort of a scheme or a plan or commonality between the assault on all three of these people.

* * *

So the reason I'm putting this out there for you is you can determine whether the defendant had a common scheme, plan, or the way he went about doing these things in helping you determine whether [the victim] is credible when she tells you what she told you yesterday.

Viewing the prosecutorial comments as a whole, we conclude that no plain error affecting defendant's substantial rights occurred, particularly where the prosecutor specifically informed the jury that the other-acts evidence could be used only to determine if defendant had a plan or scheme, and where the jury received a limiting instruction regarding MRE 404(b) evidence both prior to the presentation of such evidence and during its final charge. *Schutte, supra* at 721.

Next, defendant assigns error to comments made by the prosecution during closing argument to the effect that the victim's mother, who testified for the defense, had been “coached.” However, the prosecution need not use the blandest possible terms, *Aldrich, supra* at 112. Here, the remark was not only based on the testimony of this witness at trial, and the reasonable inferences therefrom, but was also responsive to a similar argument made by the defense at the start of the trial. Moreover, the jury was instructed by the trial court on the propriety of interviewing a witness in advance of litigation. Under these circumstances, there is no error, plain or otherwise.

Lastly, defendant complains that the prosecutor improperly injected issues beyond guilt or innocence when he appealed to the jury to consider the overall sexual abuse of children in Detroit and to have sympathy for the police. However, we cannot conclude that this alleged error affects his substantial rights or warrants reversal of defendant's convictions. A review of the record indicates that the contested argument, in which the prosecutor offered reasons why the

crime related to an other-acts witness was never prosecuted, was made in response to the cross-examination of the prosecution's other-acts witness, during which the defense elicited that a prosecution never resulted from the sexual assault that occurred between defendant and the witness. Because the challenged statements were responsive to the questioning by defense counsel and constituted proper comment on the evidence, defendant's claim is without merit. *Schutte, supra*.

II

Defendant next argues that he was denied due process of law because the prosecution failed to establish within a reasonable certainty the time of the offense. Defendant contends that the complainant simply claimed the offense occurred in "the summer" of 2001. Defendant maintains he established that he had been gravely injured in a motorcycle accident in the spring of 2001 and had a prolonged recovery period stretching into the summer. Defendant states that he was hospitalized until at least June or July of 2001, and thereafter was living at home, getting around only with difficulty, using a walker. He claims he was virtually bedridden, except for the times when he left for outpatient medical treatment, and that the defense's attempt to prove that defendant's serious medical issues made it impossible, or at least unlikely, that he could have committed the offenses was prejudicially frustrated by the prosecution's failure to provide a reasonably specific date.

This Court reviews for an abuse of discretion a trial court's determination regarding when and to what extent specificity of the time frame of the charged crime will be required within an information. *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986). The trial court "may on motion require the prosecution to state the time or identify the occasion [of the offense] as nearly as the circumstances will permit, to enable the accused to meet the charge." MCL 767.51. Where, as here, defendant neither objected nor otherwise moved to amend the information, we review the issue for plain error affecting substantial rights. *Carines, supra; cf. People v McGill*, 131 Mich App 465, 477; 346 NW2d 572 (1984).

An information need only state the time of an offense "as near as may be." MCL 767.45(1)(b). "No variance as to time shall be fatal unless time is of the essence of the offense." *Id.* In *Naugle, supra* at 233-234, this Court identified certain factors to be considered in determining whether, and to what extent, specificity of the time of the offense will be required: (1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense. Generally, time is not of the essence, or a material element, in a criminal sexual conduct case, particularly where, as here, the victim is a child. *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987); *Naugle, supra* at 234 n 1. Moreover, "[w]here the facts demonstrate that the prosecutor has stated the date and time of the offense to the best of his or her knowledge after undertaking a reasonably thorough investigation, we would be disinclined to hold that an information or bill of particulars was deficient for failure to pinpoint a specific date." *Id.* at 234.

Here, our review of the record indicates that the sexual acts occurred during June or July of 2001. The defense acknowledged this time frame in the course of its opening argument. The victim could not recall the specific dates on which the assaults occurred. However, there was both testimony and a stipulation that the victim was examined by doctors at Children's Hospital in Detroit on July 6, 2001. Defendant's medical records, which were admitted into evidence,

disclosed that he was discharged from the hospital on May 25, 2001, well in advance of the time frame within which defendant sexually assaulted this victim. As established by the cross-examination of the prosecution witnesses and those witnesses presented by the defense, defendant had sufficient notice to adequately defend against the charges and did so. Under these circumstances, defendant's argument is without merit.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White