

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD KEITH ROUNDS,

Defendant-Appellant.

UNPUBLISHED

August 26, 2004

No. 249132

Kent Circuit Court

LC No. 02-000895-FH

Before: Whitbeck, C.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of third-degree criminal sexual conduct, MCL 750.520d(1)(a). Defendant's conviction stems from an incident that occurred while a friend of defendant's daughter spent the night at the family's home. We affirm.

I. FACTS

Evidence was introduced at trial that defendant had learned massage techniques and rather freely shared his skills. The victim had hurt her leg while playing outside and asked the defendant to rub her knee that evening while the victim, the victim's sister and defendant's daughter were watching a movie. The victim testified that she dozed off, but woke up when she felt defendant's hand creeping up her leg, followed by digital penetration of her vagina.

The defense theory of the case was that one of defendant's daughters had put her friends up to making allegations against defendant because she wanted to move in with her mother, defendant's ex-wife, and back to the town where defendant and his daughters from that marriage had been living until shortly before the incident. The defense introduced a substantial amount of evidence that defendant's daughter had made statements regarding her intentions to move back to her hometown, and that she did not care who she hurt in the process. To rebut the defense theory of fabrication, and to demonstrate a lack of mistake on defendant's part, the prosecution offered evidence that defendant had committed similar acts against his former sister-in-law when she was fifteen years old, and against another of his daughter's friends when that friend was spending the night.

II. MRE 404(b)

Defendant contends on appeal that the trial court erred in admitting the evidence of defendant's other acts of sexual misconduct admitted under MRE 404(b). We conclude that the trial court properly applied the test set forth in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993).

A. Standard of Review

This Court reviews the trial court's factual findings regarding the admissibility of evidence for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60, 67; 614 NW2d 888 (2000).

B. Analysis

The use of the MRE 404(b) evidence in this instance was analogous to the use of MRE 404(b) evidence in *People v Starr*, 457 Mich 490; 577 NW2d 673 (1998). In *Starr*, testimony of the defendant's half sister, that she had been repeatedly subjected to sexual misconduct by the defendant, was admitted under MRE 404(b) for the purpose of rebutting the defendant's claims that the criminal sexual conduct against his daughter for which he was convicted was really just a fabrication on the part of his ex-wife to prevent the defendant from seeking visitation with their daughter. *Id.* at 491-494, 500. Similarly, here, the MRE 404(b) evidence was admissible to rebut defendant's claims that the charges against him were fabricated by either his daughter or his ex-wife.

III. PROSECUTORIAL CONDUCT

Next, defendant argues that the prosecutor committed misconduct by questioning the investigating officer in the case, Detective Karl Holzhueter, regarding statements that defendant made during an informal interview at defendant's home. Defendant further argues that the prosecutor committed misconduct by asking similar questions of former Michigan State Police Trooper Roy Bolin, who investigated the claims leveled against defendant by his former sister-in-law; those claims resulted in a plea bargain and conviction. Defendant asserts that the prosecutor committed misconduct by not introducing the entirety of defendant's statements in a format that was not subject to Holzhueter's and Bolin's subjective impressions.

A. Standard of Review

This Court reviews defendant's unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130, reh den 461 Mich 1205 (1999)

B. Analysis

Initially, we note that the defense was given, and exercised, ample opportunity to cross-examine both Holzhueter and Bolin, and that the officers testified regarding defendant's statements made during non-custodial interviews. Defendant does not establish a meritorious claim on this issue, and the only authority defendant provides purportedly supporting his claim of prosecutorial misconduct relates to the presentation of formal or custodial statements, issues not implicated in this instance. Defendant "may not merely announce his position and leave it to

this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.” *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, defendant’s argument fails.

Defendant also argues that the prosecutor committed misconduct resulting in error requiring reversal by introducing into the proceedings evidence that was irrelevant and unfairly prejudicial. We disagree. Defendant alleges myriad instances of misconduct, none of which were preserved before the trial court, and only one merits discussion. The prosecutor seemingly exceeded the scope of the trial court’s pretrial order allowing the admission of evidence under MRE 404(b) by calling a witness who was not included in the prosecutor’s pretrial motion or the trial court’s pretrial order allowing admission of the evidence.

However, defendant did not object to this testimony, and, based on the facts of the case and the fact that the additional witness was mentioned in the prosecutor’s opening argument, he cannot plausibly claim prejudice on the basis of unfair surprise. The trial court, in the best position to determine if its own order had been violated, did not prevent the testimony of the additional witness, who corroborated the story of defendant’s daughter’s other friend by testifying that the other friend had told her the day after that incident about what defendant had done. Because defendant did not object, and because the trial court apparently did not find the testimony in violation of its pretrial order and worthy of sua sponte preclusion, defendant cannot establish that the prosecutor was not eliciting the testimony in good faith. It is not misconduct for a prosecutor to make good-faith efforts to introduce evidence. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

Finally, defendant argues that the prosecutor committed misconduct during her closing argument. All but the prosecutor’s final comments during her rebuttal argument were responsive to defendant’s theory of the case, as expressed in defendant’s opening statement and closing argument. Thus, the prosecutor’s arguments in response to defendant’s statement and argument did not constitute prosecutorial misconduct. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated on other grounds *Crawford v Washington*, ___ US ___; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

However, in her final remarks during rebuttal argument the prosecutor also argued:

[The victim] told you the truth. He [defendant] really did molest her. He really did molest the other girls. Please, she’s waited a year since this report. Please don’t make her wait any longer. Please find the defendant guilty as charged.

At the outset, we note that, contrary to defendant’s assertion, these final remarks are not analyzed differently or considered more prejudicial simply because they were made during the course of rebuttal argument. *People v Abraham*, 256 Mich App 265, 277-278; 662 NW2d 836 (2003). The trial court instructed the jury that it was the sole trier of fact and credibility and further instructed the jury that the arguments, statements and questions of the attorneys were not evidence. Defendant had no objections to the instructions and also did not object to the prosecutor’s rebuttal argument on this point.

We view the prosecutor's final remarks as isolated which did not deny defendant a fair and equitable trial. *Abraham, supra* at 274-279. Prosecutorial comments are not misconduct unless intended to put the force and prestige of the prosecutor's office behind the statements. See *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973).

Affirmed.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Bill Schuette