STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2007
v	No. 272160 Wayne Circuit Court
STEPHEN D. POYNTER, Defendant-Appellant.	LC No. 05-012494-01

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

A jury convicted defendant of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) and (f), and the trial court sentenced defendant to concurrent prison terms of three to seven years for each conviction. Defendant appeals his conviction and, for the reasons set forth below, we affirm.

The jury convicted defendant of sexually assaulting his cousin, "SC," when she was 12 years old. Defendant was 18 years old when the charged conduct occurred.

I. Access to Witnesses

Defendant claims the trial court should have granted him a new trial because the prosecutor actively discouraged witnesses "AR" and Rebecca Johns from talking to defense counsel or defense investigator Robert J. Blickensdorf.[1] "Witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them." *Gregory v United States*, 369 F2d 185, 188 (CA DC, 1966). However, the right extends only to access to witnesses. A

[1] This Court reviews for an abuse of discretion a trial court's decision granting or denying a defendant's motion for a new trial. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Further, this Court reviews claims of prosecutorial misconduct de novo to determine whether the prosecutor denied the defendant a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005).

defendant does not have a right to compel a witness to submit to an interview. *United States v Tipton*, 90 F3d 861, 889 (CA 4, 1996). Thus, a defendant's right of access is not violated when a witness chooses of his or her own volition not to submit to an interview. *United States v Bittner*, 728 F2d 1038, 1041 (CA 8, 1984). Further, the prosecutor should not interfere with a witness's free choice regarding whether to speak to defense counsel. *Id.* However, a defendant's right to a fair trial is not violated, if the prosecutor simply advises a witness that he or she is not required to submit to an interview. *United States v Matlock*, 491 F2d 504, 506 (CA 6, 1974).

Here, the record shows that, at most, the prosecutor permissibly advised AR and Johns that they were not obliged to talk to defense counsel and Blickensdorf. Blickensdorf admitted in his affidavit that when he appeared at AR's apartment and identified himself, AR became upset and asked him to leave. Blickensdorf also admitted that shortly after he left a message on Johns's voicemail, the prosecutor called him and told him that Johns did not wish to speak to him. This fact was confirmed during trial when Johns testified that she did not want to speak to Blickensdorf because she felt that defendant had destroyed her relationship with AR. Further, defense counsel admitted that he and the prosecutor approached Johns in the hallway during trial, that the prosecutor informed Johns that she did not have to talk to defense counsel, and that Johns responded negatively when asked if she wished to speak with defense counsel. Thereafter, when the trial court asked Johns if she wanted to speak to defense counsel, she also responded negatively. Accordingly, there is no evidence that the prosecutor interfered with Johns's or AR's decisions regarding whether to speak with Blickensdorf or defense counsel, and the trial court did not err by declining to hold an evidentiary hearing. Therefore, the trial court did not abuse its discretion by denying defendant's motion for a new trial, and the prosecutor did not commit misconduct denying defendant a fair and impartial trial.

II. Rebuttal Witness

Defendant argues that a new trial is warranted because the prosecutor called Johns as a rebuttal witness rather than in the prosecutor's case-in-chief after failing to endorse Johns as a potential witness.[2]

A "prosecutor may not divide the evidence on which the people propose to rest their case, saving some for rebuttal." *People v Losey*, 413 Mich 346; 320 NW2d 49 (1982). "Similarly, cross-examination cannot be used to revive the right to introduce evidence that could have been, but was not, introduced in the prosecutor's case-in-chief." *People v Sutherland*, 149 Mich App 161, 164; 385 NW2d 637 (1985). However, rebuttal evidence is admissible to contradict or explain evidence presented by the opposing party, which tends to weaken or impeach that evidence. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). "[T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *Id.* "As long as evidence is

[2] We review for an abuse of discretion a trial court's decision admitting rebuttal evidence. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief." *Id.*

Here, the prosecutor presented Johns's rebuttal testimony for the specific purpose of responding to defense witness Joanne Catania's testimony challenging AR's assertion that he had intimacy problems because of defendant's sexual misconduct. Catania testified that she and AR were extremely close and that he shared intimate details of his life with her after he started dating. Catania further testified that AR discussed his sexual encounters in a positive light and that from his statements she did not believe that he had problems regarding intimacy. In response to Catania's testimony, the prosecutor sought to present Johns's testimony that AR sometimes started crying while they were having sexual intercourse and attributed his behavior to a sexual encounter that he had with defendant in a bathroom. Because Johns's testimony was responsive to evidence introduced by defendant, the trial court properly admitted it regardless of whether it could have been admitted in the prosecutor's case-in-chief. *Figgures*, *supra* at 399.

Defendant also says that the prosecutor violated MCR 6.201 when she failed to include Johns's name on the prosecutor's witness list. MCR 6.201(A)(1) requires a party to provide to the other party "the names and addresses of all lay and expert witnesses whom the party may call at trial." In addition, MCR 6.201(H) states:

> If at any time a party discovers additional information or material subject to disclosure under this rule, the party, without further request, must promptly notify the other party.

Thus, defendant asserts, the prosecutor had a continuing duty to disclose the names of witnesses she *may* call to testify at trial. Defendant claims that because of this error, he was not given a reasonable opportunity to investigate Johns.

According to the prosecutor's affidavit, she had no intention of calling Johns to testify until Catania testified on Friday, May 19, 2006. Thus, at the earliest, the prosecutor was required to inform defendant on that date of the possibility that Johns would testify. Johns testified the following Monday, May 22, 2006. Before she testified, defense counsel stated that over the weekend he had contacted his investigator, Blickensdorf, who attempted to contact Johns. Defense counsel indicated that after such attempt, the prosecutor telephoned Blickensdorf and told him that Johns did not wish to talk to him. Blickensdorf's affidavit confirms defense counsel's assertions. Moreover, defense counsel attempted to talk to Johns before she testified, but Johns refused to talk to him. Thus, were we to find that a violation of MCR 6.201(H) occurred, defendant was not prejudiced because Johns refused to speak with him or Blickensdorf. Accordingly, defendant has not shown that it is more probable than not that any error was outcome determinative, and therefore, reversal is not warranted. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

III. Motion to Reopen Proofs

Defendant argues that the trial court erred when it refused to allow the surrebuttal testimony of his grandmother.[3]

When considering whether to grant a request to reopen proofs, a trial court may consider the timing of the motion and whether newly discovered and material evidence is sought to be admitted, whether surprise would result from the evidence, and whether conditions have changed or undue advantage to one party would result. *People v Moore*, 164 Mich App 378, 383; 417 NW2d 508 (1987), mod on other grounds 433 Mich 851 (1989). Also, a defendant is not entitled to present surrebuttal evidence that mirrors evidence already presented in his case-in-chief. *People v Solak*, 146 Mich App 659, 675; 382 NW2d 495 (1985). Rather, surrebuttal testimony is warranted "where (1) the government's rebuttal testimony raises a new issue, which broadens the scope of the government's case, and (2) the defense's proffered surrebuttal testimony is not tangential, but capable of discrediting the essence of the government's rebuttal testimony." *Moody, supra* at 331.

Here, defendant's proffered surrebuttal testimony was not related in any way to the prosecutor's rebuttal evidence. Rather, defendant sought to admit evidence on a different topic altogether. In addition, it is unlikely that the evidence was newly discovered. Defendant's grandmother was listed on defendant's first amended witness list, and thus could have been interviewed at any time before trial. Indeed, nothing had changed to require that her testimony be presented on surrebuttal. Accordingly, the trial court did not abuse its discretion when it declined to reopen the proofs to allow defendant to present this testimony.

IV. Psychological Records

Defendant maintains that the trial court erred by denying his motion for an in camera review of SC's psychological records.[4]

In *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), our Supreme Court balanced the competing interests of protecting the confidentiality of counseling records with a criminal defendant's constitutional rights to obtain evidence necessary to his defense. In striking this balance, our Supreme Court held that "where a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense." *Id.* at 649-650. Thus, in order to warrant an in camera inspection of psychological records, a defendant must demonstrate "a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the

[3] This Court reviews for an abuse of discretion a trial court's decision whether to reopen proofs. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 535; 560 NW2d 651 (1996). We also review a trial court's decision whether to allow surrebuttal evidence for an abuse of discretion. *United States v Moody*, 903 F2d 321, 330 (CA 5, 1990).

[4] We review for an abuse of discretion a trial court's decision denying a request for an in camera review of privileged records. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996).

defense." *Id.* at 677. Following its decision in *Stanaway*, our Supreme Court amended MCR 6.201(C) to comport with its decision. *People v Fink*, 456 Mich 449, 455 n 7; 574 NW2d 28 (1998). MCR 6.201(C)(2) provides:

> If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.

Here, the trial court did not abuse its discretion by declining to conduct an in camera review of SC's psychological records because defendant failed to make the requisite showing of "necessity" and "probability". Indeed, when asked what evidence defense counsel anticipated to obtain from these records, instead of articulating the necessary predicate to an in camera inspection, counsel merely responded that it was significant that SC did not come forward with her allegations for 12 or 13 years. Counsel also claimed that the police report indicated that she is treating with a therapist and had only recently been able to discuss the incidents and recall details. Counsel further argued that studies show that a victim's initial disclosure of abuse is the most accurate and credible. Of course, the mere fact that SC was silent about the abuse for many years before disclosing defendant's conduct after treating with a therapist did not satisfy defendant's initial burden of demonstrating a good-faith belief that the records likely contained information necessary to his defense. Moreover, the studies that defendant relied on pertained to children who disclose abuse, which was not the circumstance in this case. In *Stanaway, supra* at 650, our Supreme Court recognized that a generalized assertion of a need to attack an accuser's credibility does not establish the threshold showing of a reasonable probability that records contain information material to the defense. Similarly, defendant's speculation that the records may contain prior inconsistent statements fails to satisfy the threshold showing. Also, although the prosecutor apparently stipulated to an in camera review of the records, the trial court nevertheless had discretion whether to conduct such a review. The trial court did err by exercising its discretion.

Defendant likens this case to *People v Adamski*, 198 Mich App 133, 134; 497 NW2d 546 (1993), in which the defendant was charged with first-degree criminal sexual conduct involving his daughter. Like the instant case, *Adamski* involved a credibility contest between the complainant and the defendant. *Id.* at 140. The defendant sought to impeach the complainant with statements that she made to her therapist that were inconsistent with her trial testimony, including her statement that she feared that the defendant would act in manner that was sexually inappropriate, although he had never done so. *Id.* at 136. This Court held that the complainant's psychologist-patient privilege must yield to the defendant's Sixth Amendment constitutional right to confrontation. *Id.* at 137-140.

Adamski is factually distinguishable from the instant case. In *Adamski*, the defendant knew the contents of the complainant's psychological records and sought to admit certain portions of those records. Here, on the other hand, defendant sought an in camera review of the records to determine whether they contained any information necessary to his defense. Defendant did not identify certain information in the records that he argued was necessary. Thus, the rule in *Stanaway* applies and *Adamski* is inapposite.

Further, contrary to defendant's argument, the trial court did not improperly "tie in" the notion of defendant taking a polygraph examination with its decision on defendant's motion. Rather, the court recognized that the criminal sexual conduct statute allows a defendant to take a polygraph examination and asked whether defendant had taken such an examination. The court explained that an examination would serve as "something else" that may suggest that SC's character or psychological problems may be the reason why she made the allegations against defendant. Thus, the court was using a polygraph examination merely as an example of a means by which defendant could have cast doubt on SC's credibility and strengthened his argument under MCR 6.201(C)(2). The court also indicated at the conclusion of the hearing that a polygraph examination could serve as a "bargaining chip" with the prosecutor. The trial court did not condition a favorable ruling on defendant's motion on his agreement to take a polygraph examination. Accordingly, a remand for a hearing before a different judge is not warranted.

V. Other Acts Evidence

Finally, defendant argues that the trial court erred by admitting other acts evidence involving defendant's sexual assaults of AR.[5]

Whether other acts evidence is admissible under MRE 404(b)(1)[6] depends on four factors. First, the evidence must be offered for a permissible purpose, i.e., one other than showing character or a propensity to commit the charged crime. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Second, the evidence must be relevant under MRE 402. *Id*. Third, unfair prejudice must not substantially outweigh the probative value of the evidence under MRE 403. *Id*. Fourth, the trial court, if requested, may provide a limiting instruction to the jury under MRE 105. *Id*.

Defendant contends that the prosecutor's notice of intent to introduce other acts evidence lacked specificity regarding the purpose for which the proffered evidence was admissible. He further argues that the prosecutor employed a "shotgun approach" and merely recited the grounds for which other acts evidence is admissible generally rather than providing a clear and cogent ground for the admission of the testimony.

In *People v Crawford*, 458 Mich 376, 387-388; 582 NW2d 785 (1998), our Supreme Court stated:

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[5] We review the admission of other acts evidence for an abuse of discretion. *People v Johnigan*, 265 Mich App 463, 466-467; 696 NW2d 724 (2005). Generally, a decision on a close evidentiary question cannot be an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

[6] The prosecutor argues that if the other acts evidence was improperly admitted under MRE 404(b), MCL 768.27a rather than MRE 404 governed the admission of the evidence in this case because defendant's trial occurred after the effective date of 2005 PA 135. Because the prosecutor in the trial court did not seek to admit the other acts evidence under MCL 768.27a, but rather sought to admit the evidence only pursuant to MRE 404(b), we do not consider MCL 768.27a. In any event, we hold that the other acts evidence was properly admitted under MRE 404(b).

> [A] common pitfall in MRE 404(b) cases is the trial courts' tendency to admit the prior misconduct evidence merely because it has been "offered" for one of the rule's enumerated proper purposes. Mechanical recitation of "knowledge, intent, absence of mistake, etc.," without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b). If it were, the prosecutor could routinely admit character evidence by simply calling it something else. Relevance is not an inherent characteristic, nor are prior bad acts intrinsically relevant to "motive, opportunity, intent, preparation, plan," etc. Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. In order to ensure the defendant's right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else. The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized. [Internal citations and footnote omitted.]

Here, the prosecutor sought to admit the evidence of defendant's conduct involving AR to show defendant's common scheme, plan, or system regarding his younger cousins. The prosecutor explained in her brief in support of her notice of intent to admit other acts evidence that SC and AR were the same age when the abuse occurred, both had the same familial relationship with defendant, that defendant first initiated contact with them by engaging in horseplay or wrestling, and that defendant used physical force when he assaulted both victims. Thus, though the prosecutor's initial notice of intent to admit the evidence did not elaborate why the evidence was admissible, the prosecutor's supplemental brief provided this explanation.

Defendant also argues that the sexual acts alleged to have been perpetrated on SC and AR were not sufficiently similar to show a common scheme or plan and thus were not relevant. "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). "'To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . [I]t need only exist to support the inference that the defendant employed that plan in committing the charged offense.'" *Id.* at 65-66, quoting *People v Ewoldt*, 7 Cal 4th 380, 403; 867 P2d 757 (1994). Further, in order to be admissible, there need not exist an impermissibly high level of similarity between proffered other acts evidence and the charged acts as long as the evidence is probative of something other than the defendant's character or propensity to commit the charged offense. *Knox, supra* at 511.

Here, the trial court recognized that MRE 404(b) does not require "an exact mirror or reflection of the alleged acts" in order for other acts evidence to be admissible. Rather, the court focused on whether defendant's alleged conduct regarding both SC and AR showed a common plan or scheme and concluded that it did. The court noted that both SC and AR were younger family members of defendant to whom he had access because of the family relationship. The court recognized defendant's scheme or plan in taking advantage of his close relationship with his younger family members for his sexual purposes. The court further recognized that

defendant's conduct with both SC and AR began with horseplay or wrestling and seemed innocent before defendant's conduct progressed, resulting in his forcible sexual attacks. This pattern, which the trial court relied on, reveals the type of similarity that makes this evidence admissible and thus, the trial court did not abuse its discretion in ruling that defendant's conduct evidenced a common scheme or plan.

Defendant further asserts that the evidence was more prejudicial than probative. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford, supra* at 398. "The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself." *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). Here, the other acts evidence is highly probative because it shows defendant's plan or scheme and rebuts his claim that the victim lied. *Sabin, supra* at 71; *People v Layher*, 238 Mich App 573, 586; 607 NW2d 91 (1999). Accordingly, the evidence is not merely marginally probative, but is especially probative of the ultimate issue, i.e., whether defendant committed the offenses alleged. See *Sabin, supra* at 71. Further, the trial court gave multiple limiting instructions that directed the jury not to consider the evidence as propensity evidence. Such an instruction is presumed to protect a defendant's right to a fair trial. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Accordingly, the trial court did not abuse its discretion by admitting the other acts evidence under MRE 404(b). *Johnigan, supra* at 466-467.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane M. Beckering