

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL ROBERT DRYER,

Defendant-Appellant.

UNPUBLISHED

April 10, 2008

No. 275342

Midland Circuit Court

LC No. 05-002479-FC

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age). Defendant was sentenced to 120 to 180 months' imprisonment. We affirm.

This matter arises from a complaint by the daughter of defendant's former girlfriend. The victim asserted that defendant sexually molested her in 1998, at which time the victim was ten years old. During the six-months when her mother and defendant were involved, the victim and her sister would stay at defendant's home several nights a week, sleeping in a spare bedroom. During this time, the victim's mother was babysitting the children of one of defendant's friends. Her routine was to leave in the mornings to pick the children up and bring them back to defendant's home, leaving the victim and her sister at defendant's home for the 10 to 15 minutes it usually took. The victim testified that while her mother was gone, defendant would wake her up by "French" kissing her, that he would rub her chest and arms, and that on several occasions he put his fingers inside her vagina. She also testified at the preliminary examination as to one incident of molestation that took place at her grandmother's house in the Upper Peninsula around the time of her grandfather's death. At trial, the court overruled an objection by defendant and permitted the victim to testify regarding other uncharged acts of sexual misconduct. The trial court also limited testimony by certain of defendant's witnesses.

Defendant first argues on appeal that the trial court erred in failing to amend the information to set the date of the offense to the period of May 22, 1998 to June 12, 1998. Under MCL 767.76, a trial court has the discretion to amend an information before, during, or after a trial so long as the amendment does not unduly prejudice the defendant. *People v Goecke*, 457 Mich 442, 459-460; 579 NW2d 868 (1998). A defendant is unduly prejudiced by an amendment to an information if it unfairly surprises the defendant, causes the defendant to have insufficient notice of the charges, or deprives defendant of a sufficient opportunity to present a defense.

People v Hunt, 442 Mich 359, 364; 501 NW2d 151 (1993). In this case, because the trial court denied defendant's request to amend, the issue is whether the lack of an amendment unfairly prejudiced defendant. We conclude that it did not.

An information must contain the "time of the offense as near as may be," but "[n]o variance as to time shall be fatal unless time is of the essence of the offense." MCL 767.45(1)(b). We have consistently held that "[t]ime is not of the essence, nor is it a material element, in criminal sexual conduct cases involving a child victim." *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). Therefore, a difference in the time period on the information and the crime charged is not problematic so long as the event took place before the victim turned 13.

Further, the testimony at the preliminary examination put defendant on notice that the relevant time was the six months in 1998 that defendant and the victim's mother were involved in a relationship. The testimony was clear that the relationship ended around the time of the victim's grandfather's death in July 1998 and that the children did not meet defendant until the end of winter or early spring of 1998. We have also held that a range of several months on an information does not prevent a defendant from being able to present a defense. *People v Miller*, 165 Mich App 32, 46-47; 418 NW2d 668 (1987). Therefore, it was not error for the trial court to deny defendant's request to amend the dates on the information. *Hunt, supra* at 364-365.

We also reject defendant's argument that the information was a de facto amendment of the information, resulting in his being tried and convicted of a charge for which he did not receive a preliminary examination. This argument is based, in part, on the trial court's reference to "these crimes" during its final jury instructions. It is clear from the record, however, that the court's misstatement was inadvertent. Moreover, the court immediately corrected the misstatement by reiterating that defendant was charged with a single count. Juries are presumed to understand and follow the instructions of the trial court. *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001).

Defendant also cites the victim's testimony regarding the incident that allegedly occurred at the victim's grandmother's house in the Upper Peninsula. The victim testified as to the incident at the preliminary examination. However, neither the victim nor the prosecution brought it up at trial. Rather, it was defense counsel who brought the incident up while attempting to impeach the victim with her preliminary examination testimony. Given the context and the limited nature of the testimony, we cannot conclude that the jury was confused and convicted defendant of that allegation, particularly in light of the following limiting instruction given by the court:

This is one criminal charge, but you have heard evidence that was introduced to show that the Defendant has engaged in improper sexual conduct for which he is not on trial. And you'll recall the evidence presented by [the victim] in this regard regarding other times that there had been sexual conduct. If you believe this evidence, you must be very careful to consider it for only one limited purpose, and that is to help you judge the believability of the testimony

regarding the act for which the Defendant is now on trial. And you can take that “S” out of there, because he’s only on trial for one sexual act.¹

Additionally, even if there were any confusion, it was solely the result of defense counsel’s bringing the incident up. A defendant is not “allowed to assign error on appeal to something his own counsel deemed proper at trial.” *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

Defendant also argues that the trial court improperly permitted testimony regarding other uncharged acts of sexual conduct between the victim and defendant. Defendant argues that the evidence was not admissible and that he was not provided the advance notice required under MRE 404(b)(2). “In general, this Court reviews a trial court’s decision regarding the admissibility of other-acts evidence for an abuse of discretion. ‘However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g. whether a rule of evidence or statute precludes admissibility of the evidence.’” *Dobek, supra* at 84-85, quoting *People v Lukity*, 460 Mich 464, 488; 596 NW2d 607 (1999). This Court reviews questions of law de novo. *Lukity, supra* at 488. Because defendant’s procedural argument was not raised below, we review it for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Turning to the procedural argument first, it is clear that based on the testimony adduced at the preliminary examination, defendant was aware of the claim that there were 20 to 50 alleged incidents of molestation occurring over the relevant six-month period. Moreover, the record does not establish that defendant was actually innocent or that by allowing the evidence the integrity of the proceedings was brought into question. Under these circumstances, so long as the evidence is substantively admissible and there is no evidence that defendant would have proceeded differently had he received actual notice, reversal is not warranted. *Dobek, supra* at 87-88.

As for the issue of admissibility, *People v DerMartzex*, 390 Mich 410, 414-415; 213 NW2d 97 (1973), explains that other acts evidence is admissible to explain and give context to the charged offense to show familiarity or a relationship between defendant and the victim and support her credibility.

[S]uch previous facts are not only admissible and relevant, but they constitute a necessary part of such principal transaction—a link in the chain of testimony, without which it would be impossible for the jury properly to appreciate the testimony in reference to such principal transaction. [*People v Jenness*, 5 Mich 305, 323-324 (1858) (emphasis omitted).]

Additionally, the trial court gave the jury the previously quoted limiting instruction regarding the other acts evidence. Thus, no error has been shown.

¹ The last sentence is referring to deleting the plural “s” from the word “act” in the second to last sentence of the written jury instructions.

Defendant also argues that he was denied the opportunity to present a defense because certain of his witnesses had their testimony improperly limited. Specifically, defendant argues that his character witnesses were improperly limited because the prosecution was allowed to present other acts evidence to show his propensity for committing sexual misconduct and he was not permitted to rebut that evidence. Under MRE 405, questions on direct examination about specific instances of conduct are not permissible unless defendant's character is an essential element of the charge, claim, or defense. Defendant was charged with CSC I, and his defense was that he did not do it, neither of which make character an essential element. See *People v Williams*, 134 Mich App 639, 642; 351 NW2d 878 (1984). Contrary to defendant's assertion, the other acts evidence was not used to show that defendant had a propensity to commit acts of sexual misconduct, but was used to establish a context for the charged offense and the relationship between the victim and defendant. Because defendant's character was not in issue, the trial court properly restricted the testimony to reputation or opinion evidence under MRE 405(a).

Defendant's argument that this restriction on his testimony denied him the opportunity to present a defense is also without merit. Defendant's defense was that he did not commit the crime charged. He chose to testify and was therefore able to present this defense. Moreover, defendant's witnesses were able to tell the jury exactly what defense counsel said they would in opening argument, i.e., that defendant never had that type of allegation made against him before and that the jury would hear from previous girlfriends and their daughters. That these witnesses could not testify as to any specific instance did not prevent the jury from hearing the information defense counsel said he would provide. Because defendant was able to provide a defense, he was not prejudiced by the proper limitation of the testimony.

Defendant's final argument relates to claims of prosecutorial misconduct. Only one of these claims was properly preserved below. "Questions of misconduct by the prosecutor are decided case by case. On review, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial." *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Defendant's unpreserved arguments are reviewed for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Two of defendant's unpreserved claims are mere assertions without reference to the record or legal citation.² An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. Therefore, defendant has abandoned these claims. *People v Huffman*, 266 Mich App 354, 371; 702 NW2d 621 (2005).

Defendant also argues that the prosecutor improperly shifted the burden of proof to the defense. This blanket statement contains no citation to the record, but we read the argument to

² Specifically, defendant has not developed his assertion that the prosecutor improperly bolstered the testimony of a witness from her case-in-chief and that the prosecutor improperly lead the victim.

be premised upon an assertion that the prosecutor improperly vouched for the victim. During closing arguments, the prosecutor made several references regarding the lack of evidence that the victim lied or had incentive to lie. While the prosecution may not vouch for the credibility of its witnesses, it may argue the credibility of a witness based on the facts and evidence of the case. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). It is clear from the context that this is all the prosecution did here, particularly during rebuttal closing arguments when the prosecutor clearly responded to defense counsel's assertions that the victim was lying. Based on the record, we find no improper vouching. Accordingly, defendant fails to establish plain error with respect to his burden shifting argument.

Defendant finally asserts that the prosecutor made an improper community conscience argument to the jury during closing arguments when she argued the following:

Now I know that your job is a hard job. And your job is to determine whether there has been enough evidence to prove beyond a reasonable doubt that Daniel Dryer, the Defendant, committed this crime.

And if he did, it's your job to say that he did and hold him accountable, to find him guilty of this crime. Anyone who's a parent knows it's sometimes hard to hold somebody accountable for their actions, but it needs to be done. It needs to be done for the protection of that child or maybe the protection of the community, for them to learn right from wrong.

Prosecutors may not urge a jury to find a defendant guilty as part of their civic duty because such arguments may result in a jury debating broader issues than the defendant's guilt or innocence. *McGhee*, *supra* at 636. However, the prosecutor here made no such argument. The first paragraph is a proper declaration of the jury's obligation and role in a trial. The second statement approaches the line between proper and improper argument, but we agree with the trial court that this line was not breached. The prosecutor's analogy is not drawn to persuade the jury it must convict out of a sense of duty to one's children. Rather, the prosecutor was simply comparing the difficulty a parent feels when holding a child accountable for its actions with the feelings the jury may experience in wrestling with holding defendant accountable if they determine he committed the alleged crime. Accordingly, we find no misconduct. Moreover, the trial court instructed the jury that it may not convict unless the prosecution proved every element of the crime beyond a reasonable doubt, that the statements and arguments of counsel were not evidence, and that if counsel said something different about the law, the jury was to follow the trial court's statement. Juries are presumed to follow the instructions of the trial court. *Dennis*, *supra* at 581. Therefore, reversal is not required.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto