

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALLEN ROWE, II,

Defendant-Appellant.

UNPUBLISHED

June 17, 2008

No. 276504

Allegan Circuit Court

LC No. 06-014843-FH

Before: Bandstra, PJ, and Talbot and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for third-degree criminal sexual conduct, MCL 750.520d(1)(a). Defendant was sentenced as a habitual offender, third offense, MCL 769.11, to 108 to 360 months' imprisonment. We affirm.

Defendant argues that the trial court abused its discretion by admitting other acts evidence against him pursuant to MRE 404(b). The challenged evidence included allegations that defendant engaged in sexual conduct with the victim and another complainant who babysat for defendant's child on occasions other than that forming the basis of the charges. We review a trial court's decision to admit evidence of a defendant's prior bad acts for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "An abuse of discretion occurs when . . . the trial court chooses an outcome falling outside th[e] range principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "[A] trial court's decision on a close evidentiary question cannot be considered an abuse of discretion." *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

To be admissible under MRE 404(b), other crimes evidence generally must conform to three requirements: (1) the evidence must be offered for a proper purpose, (2) the evidence must be relevant, and (3) the probative value of the evidence must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). In addition, the trial court, if requested by the defendant, may provide a limiting instruction to the jury, consistent with MRE 105. *Id.* MRE 404(b) is treated as a rule of inclusion, and a defendant's prior bad acts are only excluded from evidence if admitted for the improper purpose of proving a defendant's bad character, and propensity to act in conformity therewith. *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). It is insufficient for the prosecution to simply set forth one of the allowable purposes articulated in MRE 404(b) "without explaining how the evidence relates to the recited purpose[s]." *Crawford*,

supra at 387. The prosecution must also demonstrate that the evidence is relevant. *Id.* The proffered evidence must not only be related to a fact that is of consequence, but it also “truly must be probative of something *other* than the defendant’s propensity to commit the crime.” *Id.* at 390 (emphasis in original).

The prosecutor presented evidence of defendant’s previous acts as part of a “scheme, plan, or system in doing an act,” which constitutes a proper purpose. MRE 404(b). In *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000), the Supreme Court held that “evidence 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.” The Court also noted that “[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts.” *Id.* at 64. For other acts evidence to be admissible to show a common plan or scheme, there must be “such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.” *Id.* at 64-65. Distinctive and unusual features are not necessary to show the existence of a common design or plan. The evidence of uncharged acts need only support the inference that the defendant executed a common plan in committing the charged offenses. *Hine, supra* at 251.

The other-acts evidence presented at trial indicated that, in each of the incidents, defendant engaged or attempted to engage in sexual conduct with girls between 13 years of age and 15 years of age, who were ostensibly in defendant’s presence to spend time with defendant’s minor child. The conduct took place in the same room of a trailer where defendant stayed. We find a sufficient concurrence of common features to establish the existence of a common design or plan.

Relevant evidence of a defendant’s prior bad acts may nevertheless “be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403; *Sabin, supra* at 58. Unfair prejudice does not mean, “damaging,” because all relevant evidence is damaging to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Evidence is considered unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). The assessment of the prejudicial effect of evidence is “‘best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony’ by the trial judge.” *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995). Based on our review of the record, we do not find that the probative value of this evidence, specifically used to rebut the defense’s assertion of fabrication by the witnesses, was outweighed by the danger of unfair prejudice. In addition, the trial court also provided a limiting instruction concerning the proper use of this evidence. This limiting instruction alleviated the potential for unfair prejudice because juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that the admission of the other-acts evidence pursuant to MCL 768.27a¹ was improper. Defendant argues that MCL 768.27a, which permits admission of evidence that defendant committed other offenses against a minor, conflicts with MRE 404(b) and thus, infringes on the Supreme Court's powers to establish, modify, amend, and simplify criminal procedure. Because the challenged evidence was admissible under MRE 404(b), it is irrelevant whether it was also properly admissible under MCL 768.27a. Nevertheless, we note that defendant's argument was recently rejected by this Court. *People v Pattison*, 276 Mich App 613, 615-620; 741 NW2d 558 (2007).

Defendant next argues that his Sixth Amendment right to confront the witnesses against him was violated by the trial court's denial of his motion to admit evidence that he was acquitted of charges against one of the witnesses who testified about defendant's prior bad acts. Generally, a defendant's claim that evidence violated his right to confront the witnesses against him is reviewed de novo on appeal. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004). We review a trial court's decision to admit evidence for an abuse of discretion. *Crawford, supra* at 383.

The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. The Michigan Constitution guarantees the same right. Const 1963, art 1, § 20. The Confrontation Clause, however, does not confer an unlimited right to admit all evidence a defendant requests. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). A defendant must still comply with established rules of evidence and procedure, allowing the trial court to exclude irrelevant evidence. *Id.* Thus, the right to present a defense does not include the right to cross-examine witnesses on irrelevant issues. *People v Hackett*, 421 Mich 338, 344; 365 NW2d 120 (1984).

The trial court properly denied defendant's request to admit evidence of his prior acquittal because the evidence was irrelevant. Defendant was charged and tried with respect to allegations made by a similar-acts witness. The evidence that a previous jury acquitted defendant of those charges did not make it more or less likely that defendant engaged in third-degree criminal sexual conduct with this victim. MRE 401. See *People v Bolden*, 98 Mich App 452, 459-460; 296 NW2d 613 (1980). Defendant did not have the right to introduce irrelevant evidence and, thus, was not deprived of his rights under the Confrontation Clause.

Defendant next argues that his due process right to a fair trial was denied by prosecutorial misconduct, and, alternatively, that he was denied the effective assistance of counsel by his trial counsel's failure to object to the prosecutor's alleged misconduct. Defendant failed to preserve the issues of prosecutorial misconduct by making "a contemporaneous objection and a request for a curative instruction." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). The trial court did not conduct a *Ginther*² hearing, so review of whether defendant was denied the effective assistance of counsel is limited to errors apparent on the record. *People v Knapp*,

¹ The trial court admitted the challenged evidence under both MRE 404(b) and MCL 768.27a.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

244 Mich App 361, 385; 624 NW2d 227 (2001). Generally, we review claims of prosecutorial misconduct de novo, on a case-by-case basis, examining the prosecutor's remarks in context to determine whether defendant received a fair and impartial trial. *Bahoda, supra* at 276. However, because the alleged error was not preserved, our review is for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Error requiring reversal will not be found where a curative instruction could have prevented any prejudicial effect. *Id.*; *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Defendant was not denied his due process right to a fair trial by prosecutorial misconduct. Defendant introduced the evidence pertaining to his prior convictions. Defendant's strategy for introducing this evidence was an attempt to imply his innocence of the charged conduct by suggesting that when actually guilty of wrongdoing he would acknowledge responsibility for his behavior and accept the consequences. However, on cross-examination defendant acknowledged that even if the current accusations were true that he would not have voluntarily said anything to the police because he was a "multiple felony time loser" and feared returning to prison for an extended time period. The context of the challenged closing remarks indicates that the prosecutor merely quoted defendant in an attempt to explain the discrepancies between defendant's initial statement to the police and his subsequent testimony. A prosecutor may argue the evidence and all reasonable inferences, *Bahoda, supra* at 282. The prosecutor's statements regarding the evidence and its reasonable, accompanying inference that defendant was not credible, did not constitute misconduct.

In addition, the trial court instructed the jury that the lawyers' statements and arguments did not constitute evidence, but were only meant to help the jury understand the evidence and each side's legal theories. Specifically, the trial court instructed the jury:

There is evidence that the defendant has been convicted of the crimes of Unlawful Driving Away of an Automobile and Breaking and Entering in the past. You may consider this evidence only in deciding whether you believe the defendant is a truthful witness. You may not use it for any other purpose. A past conviction is not evidence that the defendant committed the alleged crime in this case.

"[J]urors are presumed to follow their instructions." *Graves, supra* at 486.

Defendant next contends that the prosecutor engaged in misconduct when, during her closing argument, she used the MRE 404(b) testimony to bolster the credibility of the victim. Reviewing the statements in context, we find the prosecutor's comments were proper attempts to support the credibility of the both the victim and the MRE 404(b) witness by arguing that they lacked a motive to prevaricate, and by showing the similarities between the victim's case and the witness's case. While a prosecutor is not allowed to vouch for the credibility of a witness by asserting special knowledge that the witness is testifying truthfully, *Bahoda, supra* at 276, a prosecutor is allowed to comment on her own witnesses' credibility. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Moreover, a prosecutor is permitted to argue the evidence and all reasonable inferences arising from it as they pertain to the prosecutor's theory of the case. *Bahoda, supra* at 282.

No plain error requiring reversal exists with respect to the prosecutor's closing argument. Moreover, because there was no prosecutorial misconduct, defendant's claim of ineffective assistance of counsel necessarily fails. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

Finally, relying on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant contends that he was denied his Sixth Amendment right to a jury trial because the trial court scored two offense variables based on facts not found by a jury beyond a reasonable doubt. However, it has been repeatedly determined by our Supreme Court that Michigan's sentencing scheme is not affected by the ruling in *Blakely* because Michigan uses an indeterminate sentencing scheme in which a trial court sets a minimum sentence but can never exceed the statutory maximum sentence. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Therefore, "[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.* Further, it is recognized that a defendant's prior record may be used by a sentencing judge, without submitting the issue of prior convictions to a jury, without violating of the Fifth, Sixth or Fourteenth Amendments. *Almendarez-Torres v United States*, 523 US 224, 230; 118 S Ct 1219; 140 L Ed 2d 350 (1998). Defendant does not assert that the referenced offense variables, OV 4 and OV 10, were improperly scored based on factual information within the record. As a result, defendant's assertion that his sentence was improperly enhanced is without merit.

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Bill Schuette