STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 5, 2008
v	No. 277762 Kent Circuit Court
ALVIN LESTER KEY, Defendant-Appellant.	LC No. 05-008312-FC

Before: Murphy, P.J., and Bandstra and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) and (b). Defendant was sentenced, as an habitual offender, third offense, MCL 769.11, to 15 to 40 years' imprisonment for each count. We affirm.

Defendant's convictions arise from improper sexual conduct with his daughter over a three-year period beginning when she was 12 or 13 years old. Defendant first argues that the trial court erred in admitting evidence as to defendant's purported acts of sexual abuse against other children pursuant to MRE 404(b). Without regard for the admissibility of the challenged evidence under MRE 404(b), we conclude that this evidence was properly admitted under MCL 768.27a.

More specifically, the prosecutor sought to introduce evidence, pursuant to MCL 768.27a and MRE 404(b), of uncharged sexual offenses by defendant against two minor females, one of whom, AK, was defendant's daughter, and the other of whom, YK, was AK's half-sister.[1] Relying on MRE 404(b), the trial court granted the prosecution's request with respect to AK, but denied the request with respect to YK. Defendant later sought reconsideration of this ruling, and the trial court again ruled that the evidence regarding defendant's conduct with AK was admissible, while the evidence regarding defendant's conduct with YK was not. Subsequently, however, the trial court ruled that *any* evidence relating to the victim's delay in reporting was admissible, which allowed the prosecutor to introduce evidence regarding defendant's conduct

[1] AK is the victim's half-sister; they have different mothers. AK and YK have the same mother, but different fathers. YK is not biologically related to defendant or the victim.

with both YK and AK for that purpose. At no time did the trial court address or refer to MCL 768.27a in issuing its rulings.

This Court reviews the admission of evidence for an abuse of discretion. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006).

> [A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. [*People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003) (citations omitted).]

This Court reviews any preliminary questions of law attending an evidentiary matter, such as whether a rule of evidence or statute permits or precludes the admission of the evidence, de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

MCL 768.27a provides:

> Notwithstanding [MCL 768.27, the statutory counterpart to MRE 404(b)(1)], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

MCL 768.27a defines a minor as "an individual less than 18 years of age," and a listed offense as "that term as defined in section 2 of the sex offender registration act," including the offenses set forth in MCL 750.520b. MCL 28.722(e)(x); MCL 768.27a(2)(a); MCL 768.27a(2)(b). YK and AK were each less than 18 years of age when defendant's uncharged acts took place. Further, defendant's uncharged acts entailed sexual penetration with another person who was a blood relative (AK) or over whom defendant was in a position of authority (YK) in violation of MCL 750.520b(1)(b)(ii) and (iii). Moreover, the prosecution's notice to defendant, by way of its motion, was provided more than 15 days before trial commenced. Thus, the prosecution complied with the requirements of MCL 768.27a.

As this Court recently explained, "[w]hen a defendant is charged with a sexual offense against a minor, MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against [other] minors without having to justify their admissibility under MRE 404(b)." *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007). We acknowledge that "[o]ur Supreme Court has exclusive rulemaking authority with respect to matters of practice and procedure for the administration of our state's courts." *People v Watkins*,

277 Mich App 358, 363; 745 NW2d 149 (2007), lv gtd 480 Mich 1167 (2008). However, "MCL 768.27a is a substantive rule of evidence, because it does not principally regulate the operation or administration of the courts." *Pattison, supra* at 619. "Generally, if a court rule conflicts with a statute, the court rule governs when the matter pertains to practice and procedure. However, to the extent that the statute, as applied, addresses an issue of substantive law, the statute prevails." *Watkins, supra.* Therefore, to the extent that, as applied, MCL 768.27a conflicts with MRE 404(b), the statute, constituting a substantive rule of evidence, prevails. *Id.*

Before admitting evidence of other uncharged sexual offenses against minors under MCL 768.27a, a trial court must "weigh the probative value of the evidence against its undue prejudicial effect in each case," *Pattison, supra* at 621. Such evidence may be admitted only if its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Fletcher*, 260 Mich App 531, 553; 679 NW2d 127 (2004). Evidence presents the danger of unfair prejudice if there is a danger that marginally probative evidence will be given undue or preemptive weight by the jury, *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001), or if it would lead the jury to decide the case on an improper basis such as emotion. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995); *People v Meadows*, 175 Mich App 355, 361; 437 NW2d 405 (1989).

Defendant asserts that the probative value of the challenged evidence was substantially outweighed by the danger of unfair prejudice. We disagree. The challenged evidence was highly relevant because it showed a pattern of defendant engaging in sexual acts with juvenile females to whom he had ready access and of discouraging the reporting of sexual abuse through coercion by defendant, AK and YK's mother, and defendant's wife. This evidence also corroborated testimony by the victim, the victim's brother, and the victim's biological mother. The record does not suggest that marginally probative evidence was given undue weight by the jury or that it confused or misled the jury. Therefore, we conclude that the evidence was admissible under MCL 768.27a, and that there was no basis for excluding it under MRE 403. Reversal is not warranted. See *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005) (a decision of a trial court which reached the correct result will be affirmed on appeal).[2]

[2] We need not consider whether the challenged evidence was admissible under MRE 404(b); because the requirements of MCL 768.27a were met, the evidence of defendant's sexual misconduct with other minors was properly admitted under that authority. Were we to do so, however, we would also conclude that the evidence of defendant's sexual misconduct with both AK and YK was admissible under MRE 404(b). The other acts evidence of defendant's conduct with AK and YK was offered for a proper purpose, was relevant and, as noted above, its probative value was not substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Defendant's conduct with both AK and YK shared more than a mere general similarity with the instance offenses. In each case, defendant committed sexual offenses against juvenile females to whom he had ready access and over whom he had some authority, by way of a similar scheme. And, in each case defendant, and the girls' respective mothers discouraged the girls from reporting the offenses. Moreover, the trial court provided an appropriate instruction regarding the evidence of defendant's other acts.

Next, defendant argues that the trial court erroneously admitted out-of-court statements made by his wife. We agree. However, we conclude that reversal is not required because this error was not outcome determinative.

This Court reviews a trial court's ruling to admit evidence under a hearsay exception for an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). In order to necessitate reversal, however, this Court must conclude that, absent the evidentiary error, it is more probable than not that the outcome of the case would have been different. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Hearsay is a statement, other than the one made by the declarant while testifying, offered to prove the truth of the matter asserted. MRE 801(c). Here, the prosecution asserted, and the trial court ruled, that out-of-court statements made by defendant's wife and offered through the testimony of her cousin and police officer Michelle Clark, although hearsay, were admissible pursuant to MRE 801(d)(1)(A). That rule provides that, where "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition," the statement is not hearsay. However, the out-of-court statements by defendant's wife were not admissible pursuant to MRE 801(d)(1)(A), because those out-of-court statements were not given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Therefore, the trial court erred in admitting them.

Nevertheless, reversal is not warranted. An evidentiary error does not merit reversal unless a substantial right is involved and, examining the case as a whole, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Lukity, supra*. On the record as a whole, defendant has not demonstrated that "it is more probable than not that the alleged error affected the outcome of the trial in light of the weight of the properly admitted evidence." *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003). The instant case presented a credibility contest with defense counsel advancing the theory that defendant was essentially the victim of repeated false allegations of sexual abuse against him. To convict defendant, the jury necessarily believed the victim's testimony. Determining the credibility of witnesses is within the province of the jury. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). And, the trier of fact could convict based on the credibility of the victim's testimony without further corroboration. MCL 750.520h; see also, *People v Jones*, 193 Mich App 551, 554; 484 NW2d 688 (1992), rev'd on other grounds, 443 Mich 88 (1992); *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). Further, the trial court provided a jury instruction regarding purported inconsistent statements, and the purpose for which such statements may be used. Jurors are presumed to follow the trial court's instructions, and such instructions are presumed to cure most errors. *Bauder, supra* at 195.

Finally, defendant contends that he was deprived of a fair trial by several instances of prosecutorial misconduct. We disagree. This Court reviews preserved claims of prosecutorial misconduct de novo, *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005), on a case by case basis, *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002); *People v Kelly*, 231 Mich App 627, 637; 588 NW2d 480 (1988), "examin[ing] the record and evaluat[ing] the alleged improper remarks in context," to determine "whether defendant was denied a fair and impartial trial." *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Not all of

defendant's allegations of prosecutorial misconduct are preserved for appeal; unpreserved claims are reviewed for plain error affecting his substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

First, defendant argues that the prosecutor's uncivil behavior amounted to prosecutorial misconduct; defendant cites two specific instances, neither of which was objected to at trial. The first instance was outside the presence of the jury, and involved a collateral matter. The record does not reflect how the second, cited instance of alleged misconduct even rises to the level of prosecutorial misconduct. Defendant has not articulated how either of the challenged actions affected the outcome of his trial. "Error warranting reversal does not occur where a defendant fails to articulate how he was harmed." *Ackerman*, *supra* at 450. Defendant has failed to establish plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Second, defendant asserts that the prosecutor improperly refreshed witnesses' recollections. During direct examination of AK and YK's mother, GK, the prosecutor asked a series of questions regarding how cooperative GK was with the police while the police investigated the allegations of sexual abuse by defendant against AK. GK denied that she lost custody of her children because she refused to cooperate with the police investigation. When the prosecutor attempted to show GK "the YWCA report from the fall of [2001]," defense counsel interrupted and requested a bench conference, which was held off the record. After the bench conference, GK read the YWCA report to herself, and she once again denied that she sabotaged the police investigation. Additionally, during the redirect examination of YK, the prosecutor asked how long YK had been in foster care when she made an audiorecording, recanting her allegations of sexual abuse by defendant in a previous case. YK could not recall, and she essentially denied that she ever received counseling or any medical examinations. A sheriff's report was used to attempt to refresh her recollection.

We conclude that the stated allegation of prosecutorial misconduct, that the prosecutor failed to follow the proper procedure to refresh witness recollections, lacks merit. In both cases, the prosecutor's effort to refresh the memories of GK and YK was not a bad-faith effort to admit evidence, as the evidence was arguably admissible. See MRE 612; MRE 613; see also *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007) (The prosecutor's good-faith effort to admit evidence does not amount to prosecutorial misconduct). The trial court appears to have sanctioned the method ultimately used by the prosecutor, and defendant does not explain or rationalize the claimed error with the ultimate procedure. Moreover, "[e]rror warranting reversal does not occur where a defendant fails to articulate how he was harmed." *Ackerman*, *supra* at 450. Defendant has failed to articulate how the challenged conduct deprived him of a fair and impartial trial. *Ackerman*, *supra*; *Paquette*, *supra*.

Third, defendant contends that the prosecutor "interrogated witnesses with whom she disagreed by making statements, rather than posing questions, thereby effectively offering her own recollection of events as the evidence that the jury should consider." Defendant cites two such instances. Defense counsel objected on both occasions. The first instance occurred during a contentious exchange between the prosecution and GK over audiorecordings of YK's recantation. The second instance occurred during redirect examination, when the prosecutor questioned GK about a recorded telephone conversation between GK and defendant, where the prosecutor sought to establish that defendant and GK conspired to coerce YK to recant her

allegations of sexual abuse by defendant. We conclude that, while the prosecutor made two "testimonial" statements in this very lengthy trial, during the heat of cross-examining a difficult witness, both instances were met with objections and cured on the record. With respect to the first instance, the trial court informed the prosecutor that she was testifying. The prosecutor subsequently obtained the same information from the witness. With respect to the second instance, the trial court sustained defendant's objection. And, the trial court instructed the jury that the statements and arguments of the attorneys were not evidence. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Fourth, defendant argues that the prosecutor attempted to coerce defense counsel into stipulating to the admission of inadmissible evidence. Defendant specifically asserts that the prosecutor "repeatedly tried to bait defense counsel into consenting to the admission of plainly inadmissible evidence, thereby creating the impression that the defense was trying to hide valuable information from the jury." We disagree. The record does not demonstrate that the prosecutor baited defense counsel or gratuitously offered to admit all police interview recordings. Moreover, the trial court instructed counsel to move on after defendant's complaint that the prosecutor's request to defendant in front of the jury, to admit tapes into evidence, was improper. The record reflects that there was a brief reference to the recordings, and that the prosecutor followed the trial court's instruction to move on to other matters. In ruling, we note that the September 18, 2003, interview of AK would have been admissible, because AK provided sworn testimony at that proceeding. See MRE 801(d)(1)(A). The tape of a meeting between AK and the victim would most likely have been inadmissible hearsay. Nevertheless, defendant has failed to address how the prosecutor's request to defense counsel deprived him of a fair and impartial trial. *Ackerman*, *supra*; *Paquette*, *supra*.

Fifth, defendant contends that the prosecutor improperly introduced evidence regarding YK and AK, as well as "irrelevant, prejudicial evidence about all aspects of the life of [defendant's] family." The prosecutor "may not intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice." *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995). Here, however, the prosecutor did not interject inflammatory evidence or arguments into the case merely to evoke prejudice. As previously discussed, the evidence of defendant's uncharged sexual offenses were admissible pursuant to MCL 768.27a. That evidence was relevant, because it showed defendant's pattern of engaging in sexual acts with juvenile females to whom he had ready access, established a pattern of discouraging the reporting of sexual abuse, and corroborated the testimony of the victim, the victim's brother, and the victim's mother. Further, the fact that YK had two abortions was relevant, because there was conflicting testimony as to whether she had sexual relations with anyone other than defendant and there was testimony that defendant actually paid for those procedures. The prosecutor's questions regarding defendant's volatile relationship with the victim's mother and the allegations of physical abuse against defendant's stepson were relevant to refute the defense's theory that defendant was an upstanding member of the community who was unfairly and falsely accused of sexual abuse. "Otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel." *Dobek*, *supra* at 64. The alleged improper comments were in response to issues raised by the defense. *Id*. There was no prosecutorial misconduct.

Additionally, defendant challenges references to the participation of the prosecutor and defense counsel in certain stages of the investigation of defendant's conduct. It was clear that the prosecutor here was involved in previous investigations involving YK and AK. Further, two witnesses for the prosecutor testified to defense counsel's role in delivering the audiorecordings of YK's recantation in the prior case to the police. At trial, however, the trial court issued an appropriate instruction regarding the role of the prosecutor and defense counsel, and their relationships to the witnesses. Thus, any prejudice caused by the testimony was cured. *Bauder*, *supra* at 195.

Finally, defendant argues that that the prosecutor argued facts that were not in evidence during her closing argument. Defendant cites three examples of prosecutorial misconduct during the prosecutor's rebuttal argument: that the prosecutor improperly referenced reports that were not admitted into evidence; that the prosecutor improperly shifted the burden of proof to defendant by asking about YK's journal; and that the prosecutor improperly referenced a past conviction of defendant.

Evaluating the prosecutor's argument in the context of defense counsel's arguments and the evidence admitted at trial, we reject defendant's claims of prosecutorial misconduct as to the prosecutor's rebuttal argument. Defense counsel raised the issues of reports not admitted at trial and the purportedly missing journal; thus, the prosecutor's responsive rebuttal comments were not improper. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003); *Dobek*, *supra*.

Further, there was no misconduct related to defendant's past conviction. At trial, defendant called Brad Osborn as a character witness. Osborn testified that he had known defendant and his family for approximately four years. He testified that defendant was "very mild mannered," and "an easygoing guy." During cross-examination, the prosecutor asked Osborn if he was aware that "[defendant] put someone in a coma, he was convicted of that recently?" Osborn responded in the negative. Defendant did not object to that exchange. And, we note that evidence of defendant's conduct was likely admissible. MRE 404(a)(1) ("Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under subdivision (a)(2), evidence of a trait of character for aggression of the accused offered by the prosecution."). Nevertheless, evidence of defendant's past action was not admitted.

During rebuttal, the prosecutor argued:

> [Defense counsel] says that I'm here trying to prove that [defendant] is a bad person. I want you to understand—and please, please, please believe this—I am not here to say that [defendant] is a bad person; I'm here to say he is guilty of molesting [the victim]. And I do note that, when they did put on a defense, however, the one character witness they could find for his behalf is really a statement in itself. If the best character evidence you have to support your good character is your real estate agent from three years ago who doesn't even know that you were convicted of beating a man into a coma during the time you knew him . . .

Defense counsel correctly objected, arguing that there was no testimony regarding that allegation. The trial court ordered the jury "to disregard that." Any prejudice was alleviated by the trial court's immediate instruction, and its later instruction informing the jury that the attorneys' arguments and statements were not evidence. *Matuszak, supra.*

Defendant has failed to demonstrate that he was deprived of a fair and impartial trial by the prosecutor's closing argument. *Paquette, supra* at 342.

We affirm.

/s/ William B. Murphy
/s/ Richard A. Bandstra
/s/ Jane M. Beckering