

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN EDWARD RIDER,

Defendant-Appellant.

UNPUBLISHED

March 17, 2009

No. 281525

Allegan Circuit Court

LC No. 07-015114-FH

Before: Jansen, P.J., and Borrello and Stephens, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b), and corresponding sentence of 14 months to 15 years' imprisonment. For the reasons set forth in this opinion, we affirm the conviction and sentence of defendant.

The victim in this case lived with her adoptive parents, defendant and his spouse, Susan Rider along with seven adopted siblings. Defendant and his wife had been foster parents for 20 years, adopted eight special needs children, and were awarded for their service as foster parents of the in year in 2001. The victim was adopted at the age of three and was fifteen by the time of trial. According to the victim, while she was living with her adoptive parents, incidents of touching by defendant occurred in her bedroom and near the dining room table beginning when she was 12 and continuing until she was removed from the home at the age of 13. One of her sisters¹ who suffered from a serious heart condition, often shared a bedroom with the victim. While the sister was on a trip in Peru, she made statements to friends that she "had been hurt" by defendant but did not give specific allegations at that time. Following the accusations made by her sister in Peru, the victim was brought in for an interview at Safe Harbor, and defendant was taken in to interview with police officers. The victim was initially reluctant to state that any improper touching had occurred. Toward the end of the interview, the victim referred to a "bad touch" by stating: "I think it did happen once." At trial, the victim testified that defendant made her touch his penis, she testified about an incident that occurred in the dining room where defendant allegedly laid next to her on the floor near the dining room table and touched her

¹ The record reflects that the sister had a heart transplant but died prior to this trial.

vaginal area, as well as incidents that occurred in her bedroom where defendant touched her breasts.

Defendant denied that any improper touching had occurred. However, Detective Morgan Sullivan testified that during the interview, defendant made statements that led the detective to believe that he needed to protect the children from defendant. Sullivan also testified that when he confronted defendant that someone was lying, defendant indicated that he [defendant] was lying. Defendant denied ever making such statements, but did concede that if statements were made regarding protection of his family, those statements were made in an attempt to “protect my children from being interrogated and the family being ripped apart by [Department of Human Services].” Defendant denied as false all accusations of sexual misconduct.

After making the allegations of sexual misconduct, the victim then recanted them on several instances and in many forms. She wrote four letters specifically recanting her allegations, and several of defendant’s friends from church testified that the victim told them she was lying when she made the allegations about defendant. The jury convicted defendant of second-degree criminal sexual conduct, MCL 750520c(1)(b) and was sentenced to 14 months to 15 years’ imprisonment.

Defendant’s first argument on appeal is that the trial court abused its discretion in excluding testimony of defendant’s expert, Cory Volpi, on Reactive Attachment Disorder (RAD).² We review the trial court’s decision for an abuse of discretion. *People v Unger*, 278 Mich App 210; 216; 749 NW2d 272 (2008). The trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A preserved nonconstitutional error, such as an evidentiary error,³ does not require reversal ““unless after an examination of the entire

² RAD is described as follows:

The essential feature of [RAD] is markedly disturbed and developmentally inappropriate social relatedness in most contexts that begin before age 5 years and is associated with grossly pathological case (Criterion A). There are two types of presentations. In the Inhibited Type, the child persistently fails to initiate and to respond to most social interactions in a developmentally appropriate way. The child shows a pattern of excessively inhibited, hypervigilant, or highly ambivalent responses (e.g., frozen watchfulness, resistant to comfort, or a mixture of approach and avoidance) (Criterion A1). In the Disinhibited Type, there is a pattern of diffuse attachments. The child exhibits indiscriminate sociability or a lack of selectivity in the choice of attachment figures (Criterion A2). The disturbance is not accounted for solely by developmental delay (e.g., as in Mental Retardation) and does not meet criteria for Pervasive Developmental Disorder (Criterion B). [American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (Washington, D.C.: American Psychiatric Association, Fourth Edition, 1994), § 313.89, 116.]

³ Evidentiary error constitutes nonconstitutional error. *People v Herndon*, 246 Mich App 371, (continued...)

cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.” *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001), lv den 465 Mich 934 (2001), quoting *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). “[I]f [the] inquiry requires interpretation of the Michigan Rules of Evidence, an issue of law is presented, which this Court reviews de novo.” *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007), lv den 480 Mich 897 (2007). The admissibility of expert testimony is governed by MRE 702, which provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Volpi testified that symptoms of RAD include hoarding and stealing food, crazy lying, indiscriminate bonding with strangers, poor eye contact, destructiveness, a high tolerance to pain, a lack of empathy or remorse, lying, distrust of one’s caregiver, and a tendency to sabotage a relationship in order to avoid feeling vulnerable. After performing a psychological evaluation on the victim, including reviewing her records and administering the Milan Adolescent Personality Inventory (MAPI) test and the Adolescent Psychopathology Scale (APS) test, Volpi concluded that the victim had RAD. According to Volpi, the victim exhibited poor eye contact, detached emotional disposition, low self-esteem, dependency, emotional vacillations, an inability to regulate her emotional controls, and indiscriminate bonding. Defendant argued that Volpi’s testimony was admissible because it would help the jury assess the victim’s credibility in that she was diagnosed with RAD and symptoms of the disorder include lying and deceptiveness. The trial court excluded the testimony, finding that although Volpi was qualified as an expert, the testimony would not assist the jury to understand the evidence or determine a fact in issue and would confuse or mislead the jury. The court also found that any probative value of Volpi’s opinion testimony was outweighed by the danger of unfair prejudice. Finally, the court found that Volpi’s opinion testimony would “usurp” the jury’s role of assessing witness credibility.

“Expert testimony is relevant and therefore admissible if it “assist[s] the trier of fact to understand the evidence or to determine a fact in issue” *People v Beckley*, 434 Mich 691, 713-714; 456 NW2d 391 (1990); MRE 401. Even if the trial court determines that the expert’s testimony is properly admissible under MRE 702, the trial court may nonetheless exclude the testimony if it determines that the testimony would not assist the jury in understanding the evidence or determining a fact in issue. *Dobek, supra* at 96. The trial court may exclude the testimony if it finds that the testimony would confuse or mislead the jury or its probative value would be substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Peterson*, 450 Mich 349, 375; 537 NW2d 857 (1995), mod 450 Mich 1212 (1995); *Dobek, supra* at 96-97. Defendant, as the proponent of the evidence, bears the burden in establishing

(...continued)

402 n 71; 633 NW2d 376 (2001), lv den 465 Mich 970 (2002).

admissibility under MRE 702. *Gilbert v DailmerChrysler Corp*, 470 Mich 749, 789; 685 NW2d 391 (2004). Expert testimony is unhelpful where it is unreliable or irrelevant. *Id.* at 790.

Although defendant argues that Volpi's testimony was necessary to provide "the whole picture" and was relevant to the victim's credibility, we conclude that Volpi's testimony "comes dangerously close to constituting testimony" opining that the victim was a liar. *Dobek, supra* at 100. Our thorough review of the proffered expert testimony leads us to the conclusion that the basis of Volpi's testimony would be to assert at trial that the victim was medically diagnosed as a liar based on her diagnosis with RAD and its associated symptomatology. The record supports this conclusion when examining defendant's proffered reason for admission of Volpi's testimony:

[I]t appears that [the victim] has some concept of comfort or she feels that she's most at home with that conflict, and she can create that conflict so that she doesn't have to become attached to the individuals. In this case I would submit that the statements were made because of that condition. Now certainly no one can testify to that, that's for the trier of fact to decide. . . . The only thing that he can testify to is that after following [sic] the proper techniques and tests, he diagnosed her with Reactive Attachment Disorder and some of the symptoms that are consistent in that disorder are the lying and the deceptiveness

Thus defendant was providing Volpi's testimony to argue that the victim was medically diagnosed as a liar. Contrary to defendant's assertions that issues of credibility are left to the jury, we concur with the trial court's conclusions that Volpi's testimony came dangerously close to commenting on the victim's veracity. In *Dobek* this Court prohibited such evidence when we stated: "It is generally improper for a witness to comment or provide an opinion on the credibility of another witness because credibility matters are to be determined by the jury. An expert may not vouch for the veracity of a victim." *Id.* at 71. (internal citations omitted). Based on our finding that Volpi's testimony was offered to prove that the victim testified in conformity with her diagnosed psychological illness, a major symptom of which is lying, we concur with the trial court's findings that the proffered testimony should have been omitted. Accordingly, we cannot conclude that the trial court abused its discretion by striking the proffered testimony from trial.

We also reject defendant's argument that Volpi's proffered testimony is similar to expert testimony in sexual abuse cases regarding the common behavior of victims of sexual abuse. In *Peterson, supra* at 352-353, our Supreme Court ruled that:

(1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility.

Here, the record reflects that, while Volpi's test results and some of the victim's behavior indicated that she had RAD, Volpi's testimony would not merely compare the victim's known behavior to the behavior of other children with RAD (i.e., making false accusations). Rather,

Volpi's testimony would focus on the victim's test results. Moreover, there was no evidence that the victim exhibited symptoms of RAD or lying before the allegations involved in this case arose or throughout her childhood. Further, defendant also fails to establish how the victim's indiscriminate bonding, poor eye contact, low self esteem, lack of remorse, or detached emotional condition are relevant to the determination of the victim's credibility regarding her allegations on whether defendant touched the victim in a sexual manner. *Gilbert, supra* at 789. On this record, Volpi's proffered testimony was of little value in assisting the jury. The trial court did not abuse its discretion in finding that the evidence ran the risk of confusing or misleading the jury, or that any probative value of the evidence was substantially outweighed by the danger of unfair prejudice. MRE 403; *Dobek, supra* at 96-97.

We further reject defendant's assertion that the trial court's exclusion of Volpi's testimony violated defendant's rights under the Confrontation Clause, as well as defendant's reliance on *Boggs v Collins*, 226 F3d 728 (CA 6, 2000), to support his position. Even where a defendant asserts that credibility issues are crucial to his case, the Confrontation Clause does not require that all evidence on credibility must be admitted. *Id.* at 740. Rather, "the Sixth Amendment only compels cross-examination if that examination aims to reveal the motive, bias or prejudice of a witness/accuser." *Id.* Volpi could not explain why the victim would need to make a false accusation in order to feel safe, or why she would wait until she was a teenager to engage in this type of distancing tactic despite the fact that she had lived with defendant and his family since she was seven months old. Further, Volpi had no knowledge whether the victim made false accusations in the past. Our review of the record reveals that his testimony discloses no indication that the victim had a motive, bias or prejudice against defendant as a result of RAD. *Id.* at 740. Under these circumstances, defendant's Confrontation Clause rights were not violated by the exclusion of Volpi's proffered testimony. *Id.* at 736-838.

Next, defendant argues that the trial court abused its discretion in admitting other-acts evidence pertaining to both the victim and her sister. We review the trial court's decision to admit evidence pursuant to MRE 404(b) for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Pursuant to MRE 404(b)(1), evidence of prior bad acts is inadmissible to prove a defendant's bad character. However, it may be admissible for other purposes, such as

proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

Bad-acts evidence is admissible pursuant to MRE 404(b) where it is (1) offered for a proper purpose; (2) relevant, and (3) the probative value is not substantially outweighed by the potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

The trial court did not abuse its discretion when it admitted evidence of other acts of sexual contact between the victim and defendant. The court correctly concluded that the evidence was admissible where defendant and the victim lived in the same household and where, without the evidence, the victim's testimony would have seemed incredible. *People v*

DerMartzex, 390 Mich 410, 413-414; 213 NW2d 97 (1973); *People v Sabin*, 223 Mich App 530, 533; 566 NW2d 677 (1997), rev'd on other gds 463 Mich 43 (2000).

In addition, other-acts evidence and the charged act bore sufficient similarities to justify admission to establish a common scheme or plan and intent. “[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, 63-64; 614 NW2d 888 (2000). The charged conduct consists of defendant entering the victim’s bedroom while she slept, reaching under her pajama top and fondling her breasts. There are two uncharged other acts. The first act consists of defendant approaching the victim while she slept and then making her touch his penis. The second uncharged act consists of defendant approaching the victim while she slept, reaching under her clothing, and fondling her breast and vagina. All three acts share the commonality of defendant approaching the victim while she slept and awakening the victim to engage in sexual touchings. These commonalities establish sufficient similarity between the charged act and the other acts to demonstrate that the charged offense occurred because the uncharged acts were “sufficiently similar to support an inference that they are manifestations of a common plan, scheme or system.” *Sabin (After Remand)*, *supra* at 63-64. In other words, the other-acts evidence circumstantially shows that defendant committed the charged act in the same manner as the other acts. In addition, because there was sufficient similarity to demonstrate common scheme or plan, there was sufficient similarity to demonstrate intent. *Id.* at 65-66. Admitting the other-acts evidence indicating that defendant touched the victim intentionally on her intimate parts on prior occasions was relevant to demonstrating that the charged offense also involved an intentional touching that could reasonably be construed as having a sexual purpose. For this reason, the trial court did not abuse its discretion when it admitted the other-acts evidence.

With respect to admission of the other-acts evidence relating to the victim’s sister, the record reflects that the prosecutor and defendant stipulated to the admission of this evidence during the May 16, 2007 motion hearing in exchange for the prosecution’s stipulation to the admission of several recantation letters. Defendant may not waive objection to an issue before the trial court and then raise it as an error on appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *People v Fetterley*, 229 Mich App 511, 518-519; 583 NW2d 199 (1998).

Defendant also argues the prosecution presented no evidence from which the jury could find beyond a reasonable doubt that defendant intentionally touched the victim’s breast for a sexual purpose.

We view the evidence in the light most favorable to the prosecution, to determine whether any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). “Sexual contact” is defined as “the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose” MCL 750.520a(q).

Viewing the evidence in the light most favorable to the prosecution, the evidence demonstrates that defendant not only touched the victim's breasts underneath her pajama top, but also that he "felt around," and later asked her whether she minded that defendant got "fresh" with her; this indicates that the touch was not merely an accident, and that a touch done in this manner was for an inappropriate sexual purpose. In addition, other-acts evidence demonstrated that defendant engaged in similar behavior on prior occasions with the victim and her sister. This other-acts evidence constitutes further evidence of the intentional and sexual nature of the touching at issue. On this record, we conclude that there was sufficient evidence presented to enable the jury to find, beyond a reasonable doubt, that defendant intentionally touched the victim, and that this touching was done for a sexual purpose. *People v Piper*, 2236 Mich App 642, 647; 567 NW2d 483 (1997). To the extent that defendant focuses on inconsistencies and conflicts in the testimony, we note that the determination regarding which witnesses were more credible and how much weight to give their testimony is the responsibility of the jury, *Wolfe*, *supra* at 514-516, and we decline defendant's invitation to reassess these weight and credibility determinations.

Defendant further claims that the trial court impermissibly considered his refusal to admit guilt when the court fashioned defendant's sentence. The record refutes defendant's assertion.

In determining whether the trial court improperly considered defendant's failure to admit guilt, we must focus on the following factors: "(1) the defendant's maintenance of innocence after conviction, (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe." *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987). "[I]f there is an indication of the three factors, then the sentence was likely to have been improperly influenced by the defendant's persistence in his innocence. If, however, the record shows that the court did no more than address the factor of remorsefulness as it bore upon defendant's rehabilitation, then the court's reference to a defendant's persistent claim of innocence will not amount to error requiring reversal." *Id.*

Although defendant continued to maintain his innocence after his conviction, our review of the record reveals that the trial court did not ask defendant to admit guilt or indicate that defendant would receive a lighter punishment if he admitted guilt. Further, there was also no implied suggestion by the court that defendant would receive a lighter sentence if he admitted guilt, unlike in *People v Conley*, 270 Mich App 301, 314-315; 715 NW2d 377 (2006). The trial court's concern related to defendant's rehabilitative potential and was supported by defendant's lack of remorse and failure to take any responsibility for his actions, as reflected by his decision to shift blame to the prosecution, the Department of Human Services, and the victim. On this record, the trial court did not impermissibly consider defendant's failure to admit guilt in fashioning his sentence.

Lastly, defendant raises several claims of unpreserved prosecutorial misconduct. We review defendant's unpreserved claims for plain error that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). A defendant is entitled to a new trial where prosecutorial misconduct deprives the defendant of a fair trial. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

First, defendant claims that the prosecutor violated discovery by failing to provide copies of the statements made by defendant's other children during interviews conducted by Safe Harbor. Our review of the record fails to disclose that these other children were in fact interviewed at Safe Harbor, or that defense counsel made a request for any statements of these children. Further, none of the children testified at trial and, therefore, any statements they may have made were not subject to the parties' stipulated discovery order. Under these circumstances, defendant has failed to show that the actions of the prosecutor deprived him of a fair trial. *Goodin, supra* at 432.

Second, defendant further argues that Officer Sullivan gave perjured testimony and the prosecutor failed to correct his testimony, even though the prosecutor knew it was false. A prosecutor may not knowingly present false testimony to the jury, and a new trial is warranted where there is a reasonable probability that false testimony affected the jury's verdict. *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992).

There is no support in the record that would lead us to conclude that Sullivan testified falsely regarding content of the DVD recording of his interview with defendant. The record reflects that the DVD only contained the first 1-1/2 hours of the three-hour interview because of a technical error with the recording equipment. The equipment was new, and Sullivan was both unfamiliar with its operation, and unaware that the last 1-1/2 hours of the interview was not being recorded because the DVD had reached its capacity. Further, there is absolutely no record evidence to support defendant's contention that Sullivan tampered with the DVD.

In addition, after thoroughly reviewing Sullivan's and defendant's testimony, we find no record support for the conclusion that Sullivan testified falsely regarding the contents of the interview with defendant. At most, the record reflects that Sullivan's recollection and interpretation of defendant's answers and behavior during the interview differed from defendant's own recollection and interpretation. Such honest differences do not sustain defendant's argument.

In light of the foregoing, because defendant failed to demonstrate that Sullivan gave false testimony, he has failed to establish the factual predicate for his claim of prosecutorial misconduct.

Third, defendant also claims the prosecutor advanced improper arguments regarding Sullivan's qualifications and testimony.

We find that the prosecutor did not mislead the jury by describing Sullivan as trained in interrogation techniques, because Sullivan so testified. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Further, the prosecution's argument merely asserted that Sullivan's testimony was credible based on his training as an interrogator, and that defendant's testimony was not credible in light of Sullivan's testimony concerning statements defendant made during his interview by Sullivan. The prosecution is free to argue that a witness is worthy or unworthy of belief based on the evidence. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). The prosecution's arguments that the jury would have to assess both defendant's and Sullivan's testimony in light of Sullivan's training in interrogation was properly based on the evidence and did not amount to misconduct. *Id.* In addition, the trial court instructed the jury

that the attorney's statements were not evidence, which was sufficient to cure any error. *People v Taylor*, 275 Mich App 177, 185; 737 NW2d 790 (2007).

Because defendant's claims of prosecutorial misconduct fail, we deny his request for a remand pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Affirmed.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens