

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN EDWARD PRICE, JR.,

Defendant-Appellant.

UNPUBLISHED

October 13, 2009

No. 284713

St. Clair Circuit Court

LC No. 07-001387-FH

Before: O’Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a jury trial of criminal sexual conduct, third degree (CSC III), MCL 750.520d (multiple variables); criminal sexual conduct, fourth degree (CSC IV), MCL 750.520e (multiple variables); two counts of distribution of sexually explicit matter to minors, MCL 722.675; criminal sexual conduct, first degree (CSC I), MCL 750.520b(1)(a) (victim under age 13); CSC I (multiple variables); criminal sexual conduct, second degree (CSC II), MCL 750.520c(1)(a) (victim under age 13); and CSC II (multiple variables). Defendant was found not guilty of one charge of CSC III. Defendant was sentenced to serve concurrent prison terms of 7 to 15 years for the CSC III conviction, 35 days for the CSC IV conviction, 1 to 2 years for the distribution of obscene materials to minors conviction, 15 to 40 years for each CSC I conviction, and 5 to 15 years for each CSC II conviction. The complainants are one of defendant’s sisters and his stepdaughter. Because several of defendant’s sisters were involved in this case, we will refer to the victimized sister as “TR.” We affirm.

Defendant first argues on appeal that the trial court erred in admitting testimony that his and TR’s family had shunned and mistreated her after she made allegations against defendant. Unpreserved evidentiary issues may be reviewed for plain error that affected defendant’s substantial rights. *People v Jones*, 468 Mich 345, 355, 662 NW2d 376 (2003). Reversal is warranted only if the plain error resulted in the conviction of an innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of defendant’s innocence. *Id.*

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. Under this broad definition,

evidence that is useful in shedding light on any material point is admissible. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

Defendant cites numerous instances of testimony regarding the negative treatment of TR by her family that he argues were irrelevant because he did not direct the actions. We disagree. Throughout the trial, defendant asserted that TR was not a credible witness because there were inconsistencies in her testimony, and suggested that others encouraged her to make up the accusations. In this context, evidence of the treatment she received from her family after raising the allegations was relevant to demonstrate her credibility. See *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995). The level of isolation and maltreatment she endured underscored her determination to go forward and bolstered her credibility. Defendant further argues that the above evidence, even if relevant, was inadmissible because of its danger of unfair prejudice. MRE 403; *Waknin v Chamberlain*, 467 Mich 329, 334; 653 NW2d 176 (2002). He asserts that evidence of misconduct by others not done at the behest of the accused has been found by this Court to be substantially more prejudicial than probative. In support he cites *People v Smith*, 85 Mich App 404, 415; 271 NW2d 252 (1978), rev'd on other grounds 406 Mich 945 (1979). The statute interpreted in *Smith*, MCL 768.27 is not at issue here. More importantly, the evidentiary issue in *Smith* regarded the use of the criminal actions of others at property owned by the accused to prove criminal activity on the part of the accused. *Id.* at 407-408, 414. In that context the Court required that the judge analyze the proffered evidence to determine “whether any probative value is outweighed by potential prejudice,” *id.* at 415, quoting *People v Bledsoe*, 46 Mich App 558, 560; 208 NW2d 545 (1976), and made the determination that the trial court abused its discretion in admitting the proffered evidence. *Id.* Under the circumstances of this case, it cannot be said that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

Defendant also argues that evidence of TR being shunned was bound to provoke a sympathetic response by the jury, and further “sullied” defendant’s character. It is generally improper for a prosecutor to appeal to the jury to sympathize with a victim because such an appeal encourages the jury to decide the case on a matter other than the evidence. See *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However, relevant evidence is not deemed unfairly prejudicial simply because it might arouse sympathy for a victim. Additionally, the jury was specifically instructed not to “let sympathy or prejudice influence [its] decision.” “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that he is entitled to a new trial because his trial counsel was ineffective for failing to object to the admission of the above evidence. Because counsel cannot be deemed ineffective for failing to make a futile objection, *In re Archer*, 277 Mich App 71, 84; 744 NW2d 1 (2007), we reject this argument as meritless.

Defendant next argues that he was precluded from presenting a defense because the trial court limited the admission of certain evidence. The decision whether to admit or exclude evidence is reviewed for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). Whether a defendant was denied the constitutional right to present a defense is reviewed de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

Defendant argues that the trial court erred in refusing to allow certain questions about why TR moved away from home after she raised the accusations of abuse. We agree. The trial court did not allow defendant's mother to testify about an incident that apparently occurred just prior to TR's leaving home, stating that it was a collateral concern. Defense counsel explained that he was trying to elicit testimony that TR left for reasons other than "because her family didn't believe her."

In *People v Steele*, 283 Mich App 472, 487-489; 769 NW2d 256 (2009), this Court examined in depth what constitutes a "collateral matter":

Michigan common law does not define the scope of "collateral matters," nor do our rules of evidence. Therefore, we repair to a dictionary definition. Because "collateral matter" is a legal term of art, we use a legal dictionary. Black's Law Dictionary (8th ed) defines collateral matter as "[a]ny matter on which evidence could not have been introduced for a relevant purpose." Under this definition, the proposed impeachment of the victims' mother, by the later testimony of defendant's sister, was not on a collateral matter because it was an issue in the case whether the victims' mother had induced her daughters to perjure themselves by falsely accusing defendant.

Extrinsic evidence tending to prove his theory is not evidence on a collateral matter. Accordingly, this extrinsic evidence was admissible as a matter of law, and the trial court abused its discretion by excluding it.

In the case at hand, evidence regarding the incident was not on a collateral matter because it went to defendant's theory of the case, which was that TR was not credible and that her family responded not to her accusations but to other bad behavior on her part. Defendant vigorously pursued his credibility defense throughout the course of trial, introducing evidence of testimonial inconsistencies, motivations for fabrications and bad blood between the witnesses and defendant. Accordingly, no error requiring reversal has been shown.

Defendant also argues that evidence of a subsequent incident at another relative's house, which resulted in TR having to leave that home, was improperly excluded as inadmissible hearsay. We disagree. Defendant was again trying to establish that TR's alienation from the family was due to reasons other than the accusations she made against defendant. Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted. MRE 801(c); *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). Defendant's mother, when asked about the incident, confessed that she had no first hand knowledge regarding why her daughter left the home. This statement was offered to prove the truth of why TR left that home and the trial court's ruling to exclude this evidence was not an abuse of discretion.

One of TR's sisters was also asked on direct examination about this occurrence and was incorrectly precluded from giving testimony in this regard. She, however, had first-hand knowledge of the incident. Again, under *Steele*, this was not on a collateral matter because it went to defendant's theory of the case. Similarly, evidence on why defendant's cousin had a

restraining order in place against her sister was also not collateral. However, given the vigorous nature of the defense, exclusion of this evidence did not amount to a denial of defendant's right to present a defense.

Defendant also argued that he was not able to present evidence of his ex-wife's motives to fabricate and her bias against him, thus negatively impacting his right to challenge her credibility. Defendant was asked on direct examination about the circumstances of his divorce and its relationship to the accusations made against him by his stepdaughter. Defendant was allowed to testify that prior to any accusation being made by his stepdaughter, he observed his wife in the bedroom with another woman in a compromising position and that his wife then threatened him. Defendant was not allowed to state specifically what the threat was because the trial court deemed that particular information irrelevant. He also claims error in the court's preclusion of testimony about his ex-wife's alleged financial grudge against him. In neither case does he proffer an explanation of what the testimony would not have been nor does he indicate how the evidence was relevant to these proceedings. We will not speculate on the nature of the alleged threat or financial grudge. *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007) ("A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim."). Accordingly, no error requiring reversal has been shown.

Defendant next argues that the prosecutor denied him a fair trial when she made numerous remarks in closing that disparaged defendant's constitutional right to confront his accusers, provide a defense, and inappropriately evoked sympathy for the complainants. Where, as here, there was no objection and request for a curative instruction, review of claims of prosecutorial misconduct is limited to determining whether there was plain error that affected substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Id.* at 63-64. Prosecutors are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Unger, supra* at 236. Moreover, prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Brown, supra* at 135; see also *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Defendant argued that numerous remarks made by the prosecutor during closing argument were designed to evoke sympathy for the complainants. For the most part, considered in context of the theory of defense advanced, the prosecutor's comments can be understood as explaining and normalizing inconsistencies in testimony, as well as arguing that the complainants should be believed because they would not have endured what they did if the accusations were false. Arguably, the prosecutor's statement that questioning the complainants about inconsistencies exploited them "all over again" was an improper attempt to gain sympathy for them. See *Unger, supra* at 237. However, this statement was not so egregious that any resulting prejudice could not have been obviated by a curative instruction. And again, the jury was specifically instructed not to "let sympathy or prejudice influence [its] decision." See *Graves, supra* at 486.

Defendant also argued that the prosecutor accused defendant of presenting a parade of distractions meant to fool the jury and make the jury forget the complainants. A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *Unger, supra* at 236. This prohibition is based on the negative impact such an argument has on the presumption of innocence:

When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant's presumption of innocence. Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality. [*People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984).]

The prosecutor's remarks do not imply that defense counsel does not believe in his client, and do not shift the jury's attention to the personality of defense counsel. The fact that the prosecutor employed colorful rhetoric does not make the response to defendant's argument disproportionate. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003). Moreover, the court instructed the jury that "[l]awyer's statements and arguments are not evidence." The court explained that the lawyers' statements "are only meant to help you understand the evidence and each side's legal theories," and that the jury should "only accept things that the lawyers say that are supported by the evidence or by your own common sense and general knowledge." These instructions were sufficient to eliminate any potential taint.

Defendant also argued that the above remarks disparaged the exercise of defendant's constitutional rights to a trial, to confront witnesses, and to present a defense.¹ A prosecutor may not disparage the defendant's exercise of his constitutional rights. See *People v Sterling*, 154 Mich App 223, 232; 397 NW2d 182 (1986). However, in the instant case there is no evidence to suggest that the prosecutor did not believe that defendant should not cross-examine the witnesses or present a defense. The prosecutor's remarks were directed to the issues of the case, mainly the credibility of the witnesses. Defendant was able to fully utilize his constitutional rights without interference from the prosecutor and was even found not guilty on one count.

Defendant also argues that he is entitled to a new trial because his trial counsel was ineffective in failing to object to the prosecutor's statements. However, with the exception of the comment about re-victimization, it is likely that that any objection to the prosecutor's closing remarks would have been overruled. Counsel is not ineffective for failing to make a futile objection. *Unger, supra* at 253. As for the statement about re-victimization, it is not reasonable to believe that this error affected the outcome of the case.

¹ US Const, Am VI.

Affirmed.

/s/ Peter D. O'Connell

/s/ Michael J. Talbot

/s/ Cynthia Diane Stephens