

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MITCHELL JAMES CLAPPER,

Defendant-Appellant.

UNPUBLISHED

October 15, 2009

No. 285287

Huron Circuit Court

LC No. 07-004595-FC

Before: Saad, C.J., and O’Connell, and Zahra, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (person under 13 years of age), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (person under 13 years of age). He was sentenced to concurrent prison terms of 10 to 20 years for the CSC I conviction, and 4 to 15 years for the CSC II conviction. We affirm defendant’s convictions, but remand for resentencing.

I. Motion for Continuance

Defendant argues that the trial court abused its discretion when it denied his motion for a continuance. Specifically, defendant asserts that this violated his rights to due process and the effective assistance of counsel because it interfered with defense counsel’s ability to present a defense.¹

¹ A trial court’s ruling on a motion for a continuance is reviewed for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002); *People v Steele*, 283 Mich App 472, 486; 769 NW2d 256 (2009). “An abuse of discretion occurs when a trial court’s decision falls outside the range of reasonable and principled outcomes.” *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under MCR 2.503(B)(1), a motion for a continuance must be based on good cause. “Good cause factors include ‘whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.’” *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003), quoting *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). If good cause is found, a trial court’s denial of a motion for continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. *People v* (continued...)

We hold that the trial court did not abuse its discretion when it denied defendant's request for a continuance. While defendant was asserting his constitutional rights to the effective assistance of counsel and to present a defense, see *People v Suchy*, 143 Mich App 136, 142; 371 NW2d 502 (1985), it appears that his request for a continuance was based more on his desire to review the allegations himself rather than his attorney's level of preparedness. But even if there was "good cause" for a continuance, defendant has failed to show any prejudice. The record reflects that defense counsel mounted a zealous defense and vigorously cross-examined the witnesses at trial. Accordingly, defendant was afforded an adequate defense.

II. Other Acts Evidence

Defendant claims that he is entitled to a new trial because the prosecutor introduced impermissible other bad acts evidence. Specifically, defendant contends that the testimony of the victim's mother, his daughter, and his daughter's mother was improper because it implied that he molested his daughter.²

Arguably, the proffered testimony does not fall under the prohibitions set forth in MRE 404(b) because the witnesses never testified that defendant committed any acts or wrongs. However, to the extent the record suggests that defendant engaged in prior misconduct, the testimony is admissible under MCL 768.27a,³ which permits the admission of other acts

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Snider, 239 Mich App 421, 421-422; 608 NW2d 502 (2000).

² Generally, we review the admissibility of 404(b) evidence for a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, because defendant failed to preserve this issue, he must demonstrate plain error affecting substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Reversal is warranted only if the error resulted in the conviction of an innocent defendant or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

MRE 404(b)(1) states as follows:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, 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.

Evidence is not subject to analysis under MRE 404(b) merely because it suggests another bad act; bad acts can be relevant as substantive evidence and admissible under MRE 401, without regard to MRE 404. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), amended by 445 Mich 1205 (1994); *People v Houston*, 261 Mich App 463, 468-469; 683 NW2d 192 (2004). In addition, the list of exceptions in MRE 404(b) is not exclusive. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000).

³ The statute provides, in pertinent part, as follows:

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evidence in cases involving sexual abuse of minors “to demonstrate the likelihood of a defendant’s criminal sexual behavior toward other minors” without having to justify its admission under MRE 404(b).⁴ *People v Pattison*, 276 Mich App 613, 618-621; 741 NW2d 558 (2007).

Defendant also argues that the evidence was nonetheless inadmissible under MRE 403 because its probative value was outweighed by unfair prejudice.⁵ Here, the testimony was probative to demonstrate the events that led the victim to tell her mother about defendant’s molestation. Further, by implication, the evidence showed defendant’s pattern of sexual contact with young, female family members, lending credibility to the victim’s testimony. Moreover, any possible unfair prejudice was minimal because no one testified that defendant sexually assaulted his daughter.

Defendant also argues that it was misconduct for the prosecutor to introduce the evidence regarding his daughter when he had assured defense counsel and the trial court that he would not do so. However, defendant failed to identify this issue in his statement of the issues presented. MCR 7.212(C)(5). Therefore, this issue is not properly presented to this Court. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).⁶

III. Trooper Ruth Osborne’s Testimony

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[I]n 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 768.27(a).]

⁴ We are aware that the prosecutor failed to give the required 15-day notice in this case. However, defendant has not provided any authority to support his assertion that the lack of notice would affect the admissibility of the evidence. Further, defendant cannot show that the outcome of the trial would have been different had the prosecution provided the required notice. See *People v Hawkins*, 245 Mich App 439, 453-457; 628 NW2d 105 (2001).

⁵ MRE 403 states, in pertinent part, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” 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).

⁶ Defendant’s constitutional challenge to the promulgation of MCL 768.27a was predicated on our Supreme Court’s grant of leave to appeal in *People v Watkins*, 480 Mich 1167; 747 NW2d 226 (2008). However, the Court subsequently vacated its prior order and denied leave to appeal. *People v Watkins*, 482 Mich 1114; 758 NW2d 267 (2008).

Defendant challenges the admissibility of portions of testimony given by the investigating officer, Michigan State Police Trooper Ruth Osborne.⁷

Defendant argues that Osborne's testimony regarding defendant's demeanor during her interview of him was inadmissible under MRE 702 and 703.⁸ Osborne's testimony was not expert opinion testimony regarding defendant's veracity. Indeed, Osborne did not offer any opinion as to defendant's truthfulness. Rather, she merely testified about what she observed during the interview. Because Osborne's testimony was the product of her personal observation and did not involve any specialized knowledge or methods, it was lay testimony, *People v Yost*, 278 Mich App 341, 392; 749 NW2d 753 (2008), and a lay witness may offer an opinion that is rationally based on her perceptions. MRE 701.

Were we to agree that the trial court erred when it admitted Osborne's testimony regarding defendant's sex life, his job loss, and his marital infidelity, any error in admission of the testimony was harmless because defendant has failed to show that, absent the evidence, the outcome of his trial would have been different. *People v Young*, 472 Mich 130, 141-142; 693 NW2d 801 (2005).

⁷ One part of defendant's arguments—that Osborne improperly offered her opinion about the victim's credibility—cannot constitute reversible error because the opinion was actually elicited by defendant during cross-examination of the officer. *People v Witherspoon (After Remand)*, 257 Mich App 329, 333; 670 NW2d 434 (2003). The remaining arguments that were properly preserved we review for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

⁸ MRE 702 governs the admissibility of expert testimony as follows:

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.

MRE 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

Further, MRE 104 requires trial courts to determine preliminary questions concerning the qualification of a person to be a witness. Based on the language of MRE 702 and MRE 104, "trial courts have an obligation to exercise their discretion as a gatekeeper and ensure that any expert testimony admitted at trial is reliable." *People v Yost*, 278 Mich App 341, 394; 749 NW2d 753 (2008), citing *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004).

IV. Prosecutorial Misconduct

Defendant maintains that he is entitled to a new trial based on prosecutorial misconduct. He refers to remarks made by the prosecutor in closing argument, which defendant suggests appeal to the sympathy of the jury by asking them to step into the victim's shoes.⁹

It is improper for a prosecutor to appeal to the jury's sympathy for a victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However, isolated remarks and appeals that are not blatant will not rise to level of prosecutorial misconduct. *Id.* Here, the prosecutor's challenged remarks were isolated and, in context, do not appear to be an improper appeal to the jury's sympathy. They were also made during closing argument and the trial court properly instructed the jury that the lawyers' statements and arguments are not evidence that may be considered during deliberations. The court further instructed that the jurors must not let sympathy or prejudice influence their decision. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, the instructions cured any potential prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

V. Effective Assistance of Counsel

Defendant claims that he was denied his right to the effective assistance of counsel.¹⁰ Specifically, defendant argues that defense counsel was ineffective when he failed to object to the admission of the improper bad acts evidence, i.e., the testimony alluding to sexual abuse of his daughter. However, because we have concluded that the evidence was admissible, any objection by counsel would have been futile, and counsel cannot be faulted for failing to make a futile or meritless objection. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).¹¹

⁹ We review claims of prosecutorial misconduct de novo. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

¹⁰ To establish a claim of ineffective assistance of counsel, defendant bears the burden of showing that trial counsel's performance fell below an objective standard of reasonableness and that trial counsel's representation was so prejudicial that defendant was denied a fair trial. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). To meet the second part of the test, defendant must show that a reasonable probability exists that the outcome of his trial would have been different but for trial counsel's error. *Id.* at 6. "[D]efendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003). Further, a reviewing court will not assess trial counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

¹¹ Defendant also claims that defense counsel was ineffective when he failed to object to Trooper
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Defendant further argues that defense counsel was ineffective when he elicited Osborne's testimony that the victim was truthful. More specifically, defendant contends that no reasonable trial strategy justified eliciting such inadmissible testimony and that the mistake was fatal because this was a credibility contest between defendant and victim. This Court does not second-guess matters of trial strategy, even if that strategy might have failed. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). Here, defense counsel was trying to discredit the victim by asking Osborne if the officer believed the victim was an "absolute truth teller." Given that the victim had previously testified that she had lied to her mother and brother to be with her boyfriend, defense counsel probably presumed that Osborne would have to concede that the victim was not always truthful. So attacking the victim's credibility was a reasonable strategy for defense counsel. *Id.*

VI. Sentence

We agree with defendant that his attorney was ineffective for failing to object at sentencing to the 50 points scored under OV 13. Defendant was scored 50 points under OV 13 for a continuing pattern of criminal behavior. OV 13 provides for a score of 50 points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age." MCL 777.43(1)(a). Further, when determining the appropriate points under OV 13, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a).

At sentencing, the trial court made clear that it would not consider other charges pending against defendant at the time of sentencing. However, without considering those charges,¹² there were not three offenses involving sexual penetration to support the scoring of 50 points. While the presentence investigation report describes three offenses involving defendant and the victim, only the sentencing offense involved penetration. Further, it is not clear that the offenses occurred within a five-year period as required by the statute. Accordingly, defense counsel should have objected to the scoring of OV 13 at 50 points.

Further, defense counsel's error was prejudicial because without the 50 points scored under OV 13, defendant's recommended minimum guidelines range would have been 51 to 85 months instead of 108 to 180 months. Accordingly, defendant is entitled to resentencing. However, our discussion here should not be interpreted as foreshadowing a proper resolution of the issue. That is left to the court's discretion.

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Osborne's irrelevant testimony. However, defense counsel did object to the testimony. Therefore, defendant's argument is meritless.

¹² The trial court could have considered the charges pending against defendant at the time of sentencing for purposes of scoring OV 13. *People v Wilkens*, 267 Mich App 728, 743-744; 705 NW2d 728 (2005). However, because it specifically stated it would not do so, defendant had no reason to challenge those charges at sentencing; nor were the charges substantiated by a preponderance of the evidence. *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007).

We affirm defendant's convictions, but we vacate his sentence and remand this matter for resentencing. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Peter D. O'Connell

/s/ Brian K. Zahra