STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2009
v	No. 286462 Allegan Circuit Court
DAVID SLOAN MCNEES, Defendant-Appellant.	LC No. 07-015493-FC

Before: Markey, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for first-degree criminal sexual conduct (CSC I), MCL 750.520b; second-degree criminal sexual conduct (CSC II), MCL 750.520c; and third-degree child abuse, MCL 750.136b(5). We affirm.

Defendant first argues that the trial court erred in admitting other-acts evidence via CG's testimony that defendant penetrated CG's vagina with sex toys and "his body parts" during the period in which she babysat for his family between the ages of 13 and 15. This issue is unpreserved because, although defendant objected that this evidence was inadmissible where he was found not guilty of the charges arising from these allegations, he did not object that the evidence was inadmissible under MCL 768.27a, MRE 404(b), or MRE 403. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

We review the trial court's decision to admit evidence for an abuse of discretion. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006). The trial court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, unpreserved nonconstitutional error, such as an evidentiary error,[1] is reviewed for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). Defendant must further demonstrate that the error seriously impacted the fairness, integrity, or public reputation of the

[1] Evidentiary error constitutes nonconstitutional error. *People v Herndon*, 246 Mich App 371, 402 n 71; 633 NW2d 376 (2001), citing *People v Lukity*, 460 Mich 484, 494-495; 596 NW2d 607 (1999).

proceedings, or resulted in his conviction despite his actual innocence. *Id.* We review de novo any preliminary questions of law involved in resolving an evidentiary issue. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Although defendant argues that CG's testimony was inadmissible under MRE 404(b), the record reflects that this testimony was admitted pursuant to MCL 768.27a, not MRE 404(b). The prosecutor specifically provided notice that it intended to admit CG's testimony under MCL 768.27a, and we conclude that the trial court did not abuse its discretion in admitting the testimony under that rule. *Johnson*, 474 Mich at 99. MCL 768.27a provides:

> (1) Notwithstanding section 27 [MCL 768.27], 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.
>
> (2) As used in this section:
>
> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.
>
> (b) "Minor" means an individual less than 18 years of age.

Defendant was charged with committing CSC I and CSC II against the victim when she was under 13 years of age; these are "listed offenses" under MCL 768.27a(2)(a). MCL 28.722(e)(x). Further, CG was 13 to 15 years of age at the time of defendant's alleged sexual misconduct with her, and therefore also a minor. MCL 768.27a(2)(b). The prosecutor provided timely notice of its intent to admit this evidence on December 12, 2007, for the April 1, 2008, trial. And, the sexual misconduct testified to by CG constitutes a "listed offense" against a minor.[2] MCL 768.27a(2)(a); MCL 28.722(e)(x). Thus, CG's other-acts testimony was admissible "for its bearing on any matter to which it is relevant." MCL 768.27a(1).

Because this evidence was admissible under MCL 768.27a, the prosecutor was not required to also establish its admissibility under MRE 404(b). *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007); see also *People v Smith*, 282 Mich App 191, 205; 722 NW2d 428 (2008). The prosecutor was also not required to demonstrate similarity, plan, scheme

[2] The actions described by CG could be classified either as CSC I, MCL 750.520b (sexual penetration with a victim who is at least 13 years of age and less than 16, while in a position of authority over the victim), or CSC III, MCL 750.520d(1) (sexual penetration with a victim who is at least 13 years of age and less than 16), both of which are "listed offenses." MCL 768.27a(2)(a); MCL 28.722(e)(x).

or motive regarding the allegations and the charged offenses. *People v Watkins*, 277 Mich App 358, 365; 745 NW2d 149 (2007). Pursuant to MCL 768.27a, the challenged evidence was admissible, even as propensity evidence, "to prove any issue, even the character of the accused." *Pattison*, 276 Mich App at 615. We further conclude that the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice in light of the similarities between the acts including the age of the victims, defendant's access to the victims, and the fact that some form of penetration occurred. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). That CG also accused another individual of sexual abuse went to the weight and credibility of her testimony, not its admissibility. And, the trial court issued an appropriate limiting instruction. The jury is presumed to follow instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Next, defendant argues that the prosecutor engaged in misconduct by admitting evidence of defendant's prior conviction for assault regarding SS, and the fact that he was initially charged with a CSC crime against SS. Defendant failed to raise this prosecutorial misconduct issue at trial, and therefore, review of his claim is precluded unless a timely objection and curative instruction could not have remedied any error, or failure to review this issue would result in a miscarriage of justice. *Unger*, 278 Mich App at 234-235. Allegations of prosecutorial misconduct are examined on a case-by-case basis, and this Court must view the prosecution's statements and conduct in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "A prosecution's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

MRE 609 generally permits introduction of prior convictions in order to impeach a witness's credibility where the "crime contained an element of dishonesty or false statement," or "the crime contained an element of theft" and met certain other requirements. MRE 609(a); *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). However, use of prior convictions is not solely controlled by MRE 609. In *People v Taylor*, 422 Mich 407, 411-412, 416; 373 NW2d 579 (1985), the Michigan Supreme Court permitted evidence of the defendant's prior conviction for assault to commit armed robbery to rebut the defendant's testimony that he became hysterical when his co-defendant pointed a gun at him. Thus, a conviction may be admissible in light of, and to rebut specifically, a defendant's trial testimony. *Id.* at 415-416. See also *People v Lukity*, 460 Mich 484, 498-499; 596 NW2d 607 (1999) (A defendant may "open the door" to certain cross-examination into an issue or specific conduct if he testifies on direct regarding that issue.).

We conclude that although defendant's assault conviction was not admissible under MRE 609, there was no error requiring reversal under the circumstances. Defendant testified after SS testified and offered evidence that defendant sexually assaulted her. Defendant denied sexually assaulting SS but admitted to pushing her. On cross-examination, defendant was asked when the incident occurred and he stated the year of the incident involving SS. When asked how he remembered the year, he stated "[y]ou usually remember the year . . . you get your first case brought up, it's not hard to remember." Defendant thus introduced the fact that there was a case. When the prosecutor asked what type of case, defendant volunteered that it "started out to be CSC." The prosecutor then sought further clarification of his testimony, and defendant revealed that he pleaded guilty to assault. The trial court did not abuse its discretion in determining that

defendant opened the door to the prosecutor's line of questioning. *Taylor*, 422 Mich at 411-413. And, the prosecutor reasonably followed up on the volunteered statement to clarify what defendant meant by "CSC." See e.g. *People v Layher*, 464 Mich 756, 757-758, 762-765; 631 NW2d 281 (2001) (permitting evidence that witness was acquitted of CSC I, where witness was defendant's private investigator and defendant was charged with CSC I, in order to show bias). Even if we were to conclude to the contrary, defendant has failed to demonstrate the existence of outcome determinative plain error. *Carines*, 460 Mich at 763-764, 774. The fact that he was only convicted of assault instead of CSC actually supported his testimony that he did not sexually assault SS and impaired SS's credibility that defendant touched her breasts. And, evidence of the alleged sexual assault of SS was squarely before the jury before the challenged testimony.

Based on the record, we find no indication that the prosecutor attempted to admit evidence of defendant's prior conviction or initial CSC charge in bad faith. Rather, the record reflects that the prosecutor pursued the line of questioning because she believed that defendant "opened the door" to such questioning when he introduced the topic of his "first case" and volunteered specifically that the case began as a "CSC," instead of merely responding that it was an assault case. On the record, defendant has failed to demonstrate bad faith, and where the challenged testimony had no affect on the outcome of trial, he has failed to demonstrate plain error requiring reversal. *Unger*, 278 Mich App at 234-235; *Dobek*, 274 Mich App at 70.

Moreover, contrary to defendant's assertion, the prosecutor never improperly argued that defendant was guilty of the charged offenses because of his propensity to commit crimes. Defense counsel brought up the assault conviction in his closing argument, and the prosecutor's arguments regarding the other-acts evidence of sexual incidents with teenage victims, such as CG, were proper given that such evidence was admissible under MCL 768.27a and the prosecutor was simply calling on the jury to evaluate all of the evidence when deciding defendant's guilt.

Lastly, defendant argues that his trial counsel rendered ineffective assistance by failing to object to SS's testimony or to timely move for a mistrial.[3] Defendant failed to preserve this issue by moving for a new trial or evidentiary hearing on this ground, and therefore, our review is limited to mistakes that are apparent on the record. *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). To prevail, defendant must demonstrate that defense counsel's performance was deficient because the errors counsel made were so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment, and that he was deprived of a fair trial as a result. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). Defendant was deprived of a fair trial if "there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Snider*, 239 Mich App at 424. There is a presumption that defense counsel's actions constituted sound trial strategy, and defendant must overcome that presumption to prevail. *Hoag*, 460 Mich at 6. In addition, defendant bears the

[3] Defense counsel did not move for a mistrial during SS's testimony, but later moved for a mistrial during the prosecution's cross-examination of defendant regarding SS's testimony.

"burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *Id.*

Defendant states in his questions presented that defense counsel was ineffective for failing to object to admission of his prior conviction, but he fails to address this claim in his argument. An appellant "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, defendant has clearly abandoned any claim related to counsel's failure to object to the prior assault conviction. Further, in his statement of the questions presented, defendant does not raise the issue whether defense counsel was ineffective for failing to object to SS's testimony regarding the other-acts evidence. Because this claim was not contained in his statement of the questions presented, it is not properly before this Court. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000); MCR 7.212(C)(5).

Nonetheless, we have reviewed the issue and find that defendant received the effective assistance of counsel at trial. SS's other-acts testimony was properly admissible pursuant to MCL 768.27a. The prosecutor timely provided notice of her proposed testimony on February 25, 2008. Defense counsel made no objection at trial to SS's testimony, and contrary to defendant's argument on appeal, there is no indication from the record that defense counsel was surprised by SS's testimony. Defendant's contention that defense counsel was deprived of time to prepare for SS's testimony because of lack of notice is not supported by the record. In fact, the record supports that defense counsel was prepared for this testimony, because he cross-examined SS about her age at the time of the incident and whether she fabricated the allegation because defendant accused her boyfriend of stealing from him. SS testified that defendant touched her breasts on several occasions at home when she and defendant lived at the same residence and that he did this when she was 15 or 16 years of age. SS was a "minor" at the time. MCL 768.27a(2)(b). Touching her breasts would constitute CSC II, MCL 750.520c, which is a "listed offense." MCL 768.27a(1); MCL 768.27a(2)(a); MCL 28.722(e)(x). Thus, this evidence was admissible and could be considered "for its bearing on any matter to which it is relevant." MCL 768.27a(1). Because this evidence was properly admissible, defense counsel did not render ineffective assistance by failing to object to its admission or by failing to move for a mistrial after it was admitted because such an objection or motion would have been meritless. Defense counsel is not required to raise a futile argument or objection. *Snider*, 239 Mich App at 425. Further, the jury was properly instructed on this evidence and jurors are presumed to follow their instructions. *Graves*, 458 Mich at 486; *Unger*, 278 Mich App at 235.

We affirm.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Christopher M. Murray