

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMIE ANDREW VANKLAVEREN,

Defendant-Appellant.

UNPUBLISHED

February 2, 2010

No. 286683

Kent Circuit Court

LC Nos. 06-012651-FH;

07-003353-FC;

07-003354-FC;

07-003355-FH;

07-003356-FC;

07-003366-FH;

07-004431-FH;

07-004432-FC

Before: Stephens, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

In these consolidated cases, defendant appeals as of right his 16 convictions following a jury trial. Defendant was convicted of and sentenced for several counts of criminal sexual conduct in the first (CSC-1), second (CSC-2), third (CSC-3), and fourth degrees (CSC-4),¹ after engaging in various sexual acts with eight boys over a four-year period. We affirm.

¹ In lower court docket no. 06-012651-FH, defendant was sentenced to 5 to 15 years' imprisonment for two CSC-2 convictions. In lower court docket no. 07-003353-FC, defendant was sentenced to 25 to 50 years' imprisonment for one CSC-1 conviction, and 5 to 15 years' imprisonment for one CSC-2 conviction. In lower court docket no. 07-003354-FC, defendant was sentenced to 25 to 50 years' imprisonment for two CSC-1 convictions, to be served consecutively to his CSC-1 conviction in lower court docket no. 07-003353-FC. In lower court docket no. 07-003355-FH, defendant was sentenced to 5 to 15 years' imprisonment for three CSC-3 convictions. In lower court docket no. 07-003356-FC, defendant was sentenced to 25 to 50 years' imprisonment for two CSC-1 convictions, to be served consecutively to his CSC-1 convictions in lower court docket no. 07-003354-FC. In lower court docket no. 07-003366-FH, defendant was sentenced to 5 to 15 years' imprisonment for one CSC-3 conviction, and credit for time served for one CSC-4 conviction. In lower court docket no. 07-004431-FH, defendant was sentenced to 5 to 15 years' imprisonment for one CSC-2 conviction. In lower court docket no. 07-004432-FC, defendant was sentenced to 225 months to 50 years' imprisonment for two CSC-

(continued...)

Defendant first asserts on appeal that the trial court erroneously granted the prosecutor's motion to consolidate the eight cases into one trial, thereby causing substantial prejudice to the defendant. Below, defense counsel indicated that defendant did not object to that motion, and defendant agreed in open court to try the eight cases in one trial. As such, this allegation of error is waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Nevertheless, were we to consider this issue on appeal, defendant would not be entitled to relief. Because defendant failed to preserve this issue, relief is only to be granted where the trial court committed plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

Regardless of whether the trial court granted the motion for consolidation, the prosecution would have been permitted to introduce evidence relating to each of the alleged acts of CSC that defendant has committed. Pursuant to MCL 768.27a, "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." Under this provision, the prosecution would have been permitted to introduce evidence of all of the alleged acts of CSC that defendant committed against minors. Similarly, some of the evidence in question was potentially admissible under MRE 404(b)(1), which provides that other-acts evidence may be admissible as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident. Therefore, the trial court's decision to consolidate these cases did not have any evidentiary impact. As a result, defendant is not entitled to relief because he cannot establish that the consolidation constituted a plain error that affected his substantial rights.

Defendant also argues on appeal that the prosecutor improperly referenced defendant's failure to testify during closing and rebuttal arguments, and therefore shifted the burden of proof onto defendant. Defense counsel and defendant failed to raise any objections to the prosecutor's remarks; thus, our review is limited to outcome-determinative, plain error. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Defendant first claims that the prosecutor improperly encroached on his right not to testify by stating:

Now, with all of the forms of criminal sexual conduct, the victim's testimony alone is sufficient and that's because, as you know, there things don't happen on the city street. There usually are two people who know what happened and you've heard from one of them, or many of them, actually, but for each count, one of them.

The challenged remark was an accurate statement of the law. See MCL 750.520h; *People v Lemmon*, 456 Mich 625, 632 n 6; 576 NW2d 129 (1998) (a victim's uncorroborated testimony is sufficient to convict a defendant of CSC). And, we find that the foregoing remark

(...continued)

1 convictions.

focused on the propriety of finding defendant guilty based on a given victim's testimony. In context, the prosecutor was discussing the offenses charged against defendant, what evidence would be sufficient to find defendant guilty of those offenses, and what does not constitute a defense. Even if we considered the remark as an oblique reference to defendant's failure to testify, the trial court instructed the jury that defendants do not have to testify and that defendants are presumed innocent. The trial court also explained that the prosecution had the burden of proving every element of each offense beyond a reasonable doubt. Further, the trial court instructed the jury that statements and arguments by counsel were not evidence. Thus, there could be no error where such curative instructions prevented any prejudicial effect. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). On the record, we conclude that the prosecutor did not improperly shift the burden of proof onto defendant, and that defendant did not meet the threshold for reversal based on unpreserved error. *People v Abraham*, 256 Mich App 265, 277; 662 NW2d 836 (2003).

Defendant also complains that the prosecutor improperly encroached on his right not to testify by stating:

And so when he says in the end of his closing argument, "What has the evidence shown," the evidence has shown unrefuted, unrefuted allegations of abuse. You have not heard any testimony that he didn't do it. None. He is guilty of first degree, he is guilty of third degree, he is guilty of second degree, and he is guilty of fourth degree, and I ask you to so find.

Here, we find that the prosecutor's rebuttal remark was not improper, where she essentially asserted that the evidence was uncontradicted or undisputed; such remark did not improperly shift the burden of proof onto defendant. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995). Further, in his closing argument defense counsel essentially attacked the credibility of many of the victims and their mothers, during his closing argument, argued that there was a conspiracy against defendant, and contended that the prosecutor did not carry her burden of proof in establishing all of the elements of the offenses charged against defendant. "A prosecutor may fairly respond to an issue raised by the defendant." *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). Viewed in context, the prosecutor responded to issues raised in defense counsel's argument, where the challenged latter remark was a portion of that response to defense counsel's aforementioned arguments. And, as noted previously, the trial court provided appropriate curative instructions that prevented any prejudicial effect. *Ackerman*, *supra* at 448-449. Under the circumstances, the challenged remark did not violate defendant's right not to testify. *Fields*, *supra* at 115-116.

Finally, defendant contends that defense counsel rendered ineffective assistance of counsel by failing to oppose the prosecution's motion to consolidate, and for failing to object to the two instances of prosecutorial misconduct discussed *supra*. Based on the foregoing discussion, we reject defendant's claims of ineffective assistance of counsel, where defendant ultimately has not overcome the strong presumption that defense counsel's performance constituted sound trial strategy, and he did not show that defense counsel's actions fell below an objective standard of reasonableness under prevailing professional norms. *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly