

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY FREDRICK HOLCOMB,

Defendant-Appellant.

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UNPUBLISHED

April 15, 2010

No. 291540

Midland Circuit Court

LC No. 08-003930-FH

Before: DAVIS, P.J., and DONOFRIO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim over 13 years of age and under 16 years of age). Defendant was sentenced, as a second habitual offender, MCL 769.10, to 12 to 22 ½ years' imprisonment. We affirm.

Defendant first contends that he was denied a fair trial as the result of several acts of prosecutorial misconduct. We disagree. In reviewing a claim of prosecutorial misconduct, this Court analyzes the context of the prosecutor's comments to ascertain whether the defendant was denied a fair and impartial trial. *People v Truong*, 218 Mich App 325, 336; 553 NW2d 692 (1996).

Defendant alleges that the prosecutor denied him a fair trial by improperly attempting to elicit hearsay testimony from Detective Robert Brzak. The prosecutor asked Brzak several questions relating to conversations that he had with the victim and Amanda Coldwell during his investigation. Defense counsel objected to three separate questions, alleging that each question would result in the introduction of hearsay. Each objection was placed prior to the witness providing an answer. Therefore, even if defendant can establish that the prosecutor was improperly attempting to elicit hearsay, he cannot establish that the prosecutor's conduct denied him a fair trial because defense counsel successfully prevented the jury from being exposed to the evidence. To the extent that defendant implies that the questions themselves exposed the jury to improper evidence, the trial court instructed the jury that the questions of the attorney's could not be considered as evidence. A jury is presumed to follow its instructions and instructions are presumed to cure most errors. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Furthermore, even if the witness had been permitted to answer the questions at issue, his responses would not have qualified as hearsay. The prosecution's line of questioning was intended to merely explain the investigation process that resulted in the arrest and prosecution of

defendant. Therefore, the statements would not have been offered for the truth of the matter asserted. “[A] statement offered to show why police officers acted as they did is not hearsay.” *People v Chambers*, 277 Mich App. 1, 11; 742 NW2d 610 (2007). Consequently, defendant is not entitled to relief as a result of the questions posed to Brzak.

Defendant next asserts that the prosecutor, during closing arguments, made improper reference to defendant's previous conviction for criminal sexual conduct. Specifically, the prosecutor stated:

He prior [sic] had been in trouble for having sex with a 15 year old girl. You have that there. You know he’s been in trouble for it. And at that time, that was eight years ago. It was in the year 2000.

He’s now eight years older, eight years wiser, and yet he’s still hanging around with 14 and 15 year old kids.

Defendant did not object to the prosecutor’s argument. When not properly preserved, this Court reviews claims of alleged prosecutorial misconduct for plain error affecting the substantial rights of the defendant. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In general, a prosecutor is granted great latitude in his closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). He “is free to argue the evidence and all reasonable inferences from the evidence as it relates to his theory of the case.” *People v Gonzalez*, 178 Mich App 526, 535, 444 NW2d 228 (1989). As explained below, the evidence of defendant's previous conviction was properly admitted at trial pursuant to MCL 768.27a. Consequently, the prosecution was free to reference that evidence during its closing argument. The prosecution’s argument was not inaccurate or inconsistent with the properly admitted evidence. Furthermore, even if the prosecutor’s closing argument was devoid of reference to the prior conviction, the jury was already informed of the circumstances surrounding that crime. Therefore, defendant cannot show that the prosecutor’s closing argument denied him a fair trial where that argument merely reiterated the evidence with which the jury was already familiar.

Next, defendant contends that the trial court improperly admitted evidence of a previous sexual encounter with a 15-year-old female pursuant to MCL 768.27a. Defendant contends that the evidence should not have been admitted because MCL 768.27a is unconstitutional and because the evidence is otherwise inadmissible pursuant to the Michigan Rules of Evidence. We disagree. This Court conducts a de novo review when addressing a challenge to a statute’s constitutionality. *People v Hrlic*, 277 Mich App. 260, 262; 744 NW2d 221 (2007). Furthermore, the trial court’s decision to admit the evidence of defendant's prior offense is reviewed for an abuse of discretion. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). The abuse of discretion standard recognizes that in certain circumstances there are multiple reasonable and principled outcomes and, so long as the trial court selects one of these outcomes, its ruling will not be disturbed. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MCL 768.27a provides: “in a criminal case in which the defendant is accused of committing a listed offense against a minor [as provided under MCL 28.722], 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.”<sup>1</sup> Defendant argues that MRE 404(b) controls the introduction of a defendant's prior unlawful conduct and that the legislature does not have the authority to modify that analytical scheme. This Court has already addressed that issue in a published opinion. In *People v Watkins*, 277 Mich App 358; 745 NW2d 149 (2007), the defendant was charged with third-degree criminal sexual conduct. It was alleged that the defendant had sexual intercourse several times with they 12-year-old girl who babysat his children. *Id.* at 360. The prosecution, pursuant to MCL 768.27a, sought to introduce evidence that defendant had previously had sexual intercourse with a 15-year old girl who babysat the defendant's children. *Id.* at 361. The prosecution argued that MCL 768.27a controlled, despite conflicting with MRE 404(b). *Id.* at 362. This Court agreed and explained, “to the extent that the statute, as applied, addresses an issue of substantive law, the statute prevails. This Court recently held that ‘MCL 768.27a is a substantive rule of evidence because it does not principally regulate the operation or administration of the courts.’” *Id.* at 364 (quoting *People v Pattison*, 276 Mich App. 613, 619; 741 NW2d 558 (2007)). Therefore, because the statute in question does not represent an attempt by the legislature to regulate the operation of the courts, it follows that the legislature was operating within its constitutionally granted powers. We note that defendant's reliance on Justice Cavanagh's dissent in *People v Watkins*, 482 Mich 1114; 758 NW2d 267 (2008), is misplaced as it is well-established that a dissenting opinion is not binding authority. *Rohde v Ann Arbor Pub Schools*, 265 Mich App 702, 707; 698 NW2d 402 (2005).

Because the evidence of defendant's prior conduct was admissible pursuant to MCL 768.27a, the trial court was correct to not analyze the admissibility of that evidence under MRE 404(b). However, the court incorrectly concluded that MRE 403 was also inapplicable to a proper analysis. Despite the prosecution's assertions to the contrary, this Court has established that when evidence is submitted pursuant to MCL 768.27a, it is still subject to the relevancy requirements of MRE 403. *Pattison*, 276 Mich App at 621. We find that the prosecution failed to demonstrate that the evidence of defendant's prior conduct was relevant to the charged offense. The evidence merely established that defendant, as an 18-year-old, had consensual sexual intercourse with a 15-year-old girl. The evidence did not demonstrate that defendant ever denied his conduct. In the present case, defendant was charged with having sexual intercourse with a 15-year old girl when he was 26 years of age. Defendant denied that any sexual penetration ever occurred in the present case. The prosecution failed to establish that defendant's prior offense bore any value when determining his guilt of the charged offense. The evidence of defendant's prior offense was never contextualized for the jury. Consequently, that evidence was of little value to the proceedings. However, as explained below, defendant is not entitled to relief where the trial court's error was not outcome determinative.

When determining whether an error was outcome determinative, the error's effect “is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error.” *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Had the evidence of defendant's prior offense been omitted pursuant to MRE 403, it is still highly probable that defendant would have been convicted. The prosecution presented substantial evidence in support of the charged

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<sup>1</sup> Defendant does not contend that his prior offense was not a listed offense.

offense, including the testimony of the victim, along with the testimony of Coldwell, Jessica Dean and Aron Strait. Even if the jury had questioned the victim's credibility, several other witnesses corroborated her account of her relationship with defendant. Particularly persuasive was Dean's testimony, which established that she was in the bedroom while defendant and the victim first had sexual intercourse. Defendant cannot establish that the evidence of his previous conduct was a significant factor in his conviction.

Affirmed.

/s/ Alton T. Davis  
/s/ Pat M. Donofrio  
/s/ Cynthia Diane Stephens