

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 13, 2012

v

MARK COLIN JENNINGS II,

Defendant-Appellant.

No. 302403
Saginaw Circuit Court
LC No. 08-031116-FC

Before: STEPHENS, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of criminal sexual conduct, first degree (CSC I), MCL 750.520b(1)(b) (victim a relative between 13 and 16 years old). The trial court sentenced defendant as a habitual offender second, MCL 769.11, to serve 30 to 50 years in prison. We affirm.

Defendant's first issue on appeal is that MCL 768.27a, which allows evidence of past acts of sexual abuse against minors to be admitted and was utilized for the testimony of five witnesses in this case, is unconstitutional because it contravenes a judicially created rule of evidence, which impinges on the constitutional authority of the Supreme Court to establish the procedures of the court system. Const 1963, art 6, § 5. We disagree. The constitutionality of a statute is a question of law which the Court reviews de novo. *McDougall v Schanz*, 461 Mich 15, 23; 597 NW2d 148 (1999).

While considering the identical issue, the Court in *People v Pattison*, 276 Mich App 613, 619-621; 741 NW2d 558 (2007) held that there was not a constitutional separation of powers violation because MCL 768.27a was a substantive rule of evidence in that it does not principally regulate the operation or administration of the courts. This Court's decision in *Pattison* is binding on this panel pursuant to MCR 7.215J(1). Consequently, defendant is not entitled to relief on the basis of this argument.

Defendant further argues that MCL 768.27a alters the burden of proof required for conviction and violates due process rights because MCL 768.27a allows for the admission of character evidence to prove propensity to commit the charged crime. We disagree. In *Pattison*, 276 Mich App at 619, the Court found that the evidentiary standard did not lower the quantum of proof or value of the evidence needed to convict a defendant. While evidence may be allowed that previously would have been inadmissible under MRE 404(b), the standard for obtaining a

conviction has not changed. *People v Wilcox*, 280 Mich App 53, 55-56; 761 NW2d 466 (2008), reversed on other grounds by *People v Wilcox*, 486 Mich 60; 781 NW2d 784 (2010). Therefore, as with the argument addressed above, defendant is not entitled to relief in light of this Court's holding in *Pattison*.

Defendant next argues that he is entitled to a new trial based on allegedly improper comments and questioning by the prosecutor, who referenced defendant's lifestyle regarding his romantic relationships. We disagree. Unpreserved issues may be reviewed for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). 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.*

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, in the context of the issues raised at trial, to determine whether a defendant was denied a fair and impartial trial resulting in prejudice to defendant. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). The prosecutor deprives the defendant of a fair trial when arguing that the jury should consider the evidence of a defendant's other wrongful acts as substantive evidence of the defendant's guilt. *People v Quinn*, 194 Mich App 250, 253-254; 486 NW2d 139 (1992), citing *People v Haines*, 105 Mich App 213, 218; 306 NW2d 455 (1981).

Defendant references the prosecutor's closing argument where he commented, as follows:

You understand how he thinks and how he actually might believe with some splendid success to show for it in his life that he could get away with just about anything sexually with any girl or woman. You know that from hearing him testify.

The prosecutor's argument was in reference to testimony provided by defendant on cross-examination regarding several romantic relationships, both marital and non-marital, that defendant had been involved in, some producing children, and some of the relationships overlapping and some recurring. The prosecutor also questioned defendant regarding his attempts to move out of the area when events became chaotic. The prosecutor cross-examined defendant's mother regarding defendant's marital affairs and resulting children, and whether she spoke to defendant regarding birth control. Defendant did not object to this evidence and does not argue against its admissibility. In fact, defendant presented extensive testimony detailing his history of romantic relationships, living arrangements, and children produced in the relationships.

It was improper for the prosecutor to suggest that defendant's romantic relationship history showed that "he had learned that he could get away with just about anything sexually with any girl or woman." See *Quinn*, 194 Mich App at 253-254. However, the prosecutor did not persist in this line of argument and made no other similar arguments. The prosecutor did argue that defendant's history in romantic relationships was abnormal, but did not suggest to the jury that this was evidence that he committed the charged crimes. Evidence of defendant's history of romantic relationships was relevant to the complicated relationships between the

defendant and several witnesses and the living circumstances under which the sexual abuse was described to have occurred. Most significantly, defendant has not demonstrated how any evidence or argument about his history of relationships prejudiced him. The jury was able to convict defendant based on its credibility determination of the one witness against whom he was charged with committing a CSC I. Moreover, the court properly instructed the jury that it alone was charged with deciding the facts of the case, that it should take the law as the court instructs, and that the “lawyers’ statements and arguments are not evidence.” “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next argues that the trial court erred in allowing the testimony of his sister as a rebuttal character witness. We disagree. This Court reviews a trial court’s decision to admit or exclude evidence for an abuse of discretion. Where the admission of evidence involves a preliminary question of law, that question is subject to de novo review. *People v Mann*, 288 Mich App 114, 117; 792 NW2d 53 (2010). The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A criminal defendant has an absolute right to introduce evidence of his character to prove that he could not have committed the crime, and the prosecutor may rebut this evidence. MRE 404(a)(1); *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995). A party’s ability to present evidence of a person’s character is limited to witnesses offering testimony concerning their personal opinion of that person’s character or to testify about that person’s reputation. MRE 405(a); *People v Roper*, 286 Mich App 77, 97; 777 NW2d 483 (2009). Inquiries regarding relevant specific instances of conduct is limited to cross-examination. MRE 405(a); *Roper*, 286 Mich App at 97. As this Court has previously explained

a prosecutor may present rebuttal evidence concerning specific instances of conduct . . . when all the following are true: (1) the defendant places his or her character at issue through testimony on direct examination; (2) the prosecution cross-examines the defendant about specific instances of conduct tending to show that the defendant did not have the character trait he or she asserted on direct examination; (3) the defendant denies the specific instances raised by the prosecution in whole or in part during the cross-examination; and (4) the prosecution's rebuttal testimony is limited to contradicting the defendant's testimony on cross-examination. [*People v Roper*, 286 Mich App 77, 105; 777 NW2d 483, 500-01 (2009).]

We conclude that the prosecution properly introduced the testimony of defendant's sister to rebut character evidence introduced by defendant and his mother. During direct examination of defendant, he testified that he had never touched a child in an inappropriate manner. On cross-examination, defendant specifically testified that he did not have a sexual attraction toward his sister and again testified that he had not inappropriately touched a child. Similarly, defendant's mother testified during direct examination that she had no evidence that defendant had ever inappropriately touched a child and that if she had any such evidence that she would have reported defendant. In response, the prosecution presented the testimony of defendant's sister, who testified that defendant had touched her inappropriately from the time she was five

years old until she was twelve. She further testified that she told her and defendant's mother about the improper conduct and was told by her mother to never speak of it again.

The testimony of defendant's sister was offered to rebut defendant's specific testimony regarding his lack of attraction to his sister and his claim that he had never inappropriately touched a child. We hold that, pursuant to *Roper*, the trial court did not abuse its discretion in admitting the evidence. We further note that even if the evidence was not proper rebuttal evidence, defendant would not be entitled to relief in light of the overwhelming evidence of his guilt that was properly admitted.

Defendant next argues that he was denied a fair trial due to the admission of hearsay evidence. Specifically, defendant argues that an investigating officer, Cindy Luberda, provided testimony consisting of hearsay. We disagree. Because defendant failed to object to the admission of some of this evidence at trial, we review for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763. To the extent that defendant did object on the basis of hearsay, we review the admission of evidence for an abuse of discretion.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). Hearsay is generally not admissible unless it meets the requirements of one of the hearsay exceptions set forth in the Michigan Rules of Evidence. MRE 802; *Stamper*, 480 Mich at 3. We have considered Luberda's testimony and will address the instances of alleged hearsay in turn.

Defendant first asserts that Luberda's testimony regarding specific statement made to her when she was interviewing K, who was a friend of the complainant, constituted improper hearsay testimony. Prior to Luberda's testimony, K testified at trial in detail, describing specific sexual encounters that she had with defendant and the complainant. Luberda then testified that K informed Luberda that she had sexual intercourse with defendant on numerous occasions. Defendant objected to that portion of Luberda's testimony on the basis that it was improper hearsay testimony.

We agree with defendant that the trial court abused its discretion in allowing Luberda to testify regarding K's specific statements during her interview. The prosecution asserts on appeal that K's statements were not offered to show the truth of the matters that were asserted. According to the prosecution, when defense counsel cross-examined K, he implied that she failed to report the details of one of the specific sexual encounters to Luberda. Therefore, the questioning of Luberda was simply to demonstrate that K did, in fact, report the sexual encounters in a manner consistent with her testimony. Upon reviewing the record, however, we cannot find any instance in which defense counsel implied that K did not describe the encounter at issue to Luberda. Consequently, we cannot determine that Luberda's testimony regarding K served any non-hearsay purpose. Despite that conclusion, defendant is not entitled to relief. When defense counsel cross-examined K, he asked her to describe her discussion with Luberda in great detail and read portions of Luberda's report to K and the jury. The jury was, therefore, already aware of the contents of K's discussion with Luberda. The hearsay testimony that was improperly admitted was repetitive and did not serve to bolster K's credibility. Defendant cannot show that the outcome of the trial was impacted by the evidentiary error.

Next defendant asserts that Luberda was improperly permitted to testify about the contents of an interview between Barbara Andrews and S. Defendant did not object to the testimony at issue. Luberda had listened to Andrews interview S and wrote a report regarding the interview. When S testified at trial, she described an occasion where she fled from defendant and locked herself in a closet. When she was cross-examined, defense counsel implied that S had never told anyone that she locked herself in a closet. Defense counsel's conclusion was apparently based on Luberda's report, which contained no reference to a closet. When Luberda testified, however, she explained that Andrews also completed a report regarding the interview with S and that report did reference the closet. We conclude that Luberda's testimony regarding the interview did not contain hearsay, as her descriptions of the interview were not offered to prove the truth of the matters, but were intended to demonstrate that S had previously described locking herself in a closet. Therefore, no error occurred in admitting that testimony.

Defendant next argues that Luberda improperly testified about a telephone conversation she had with the complainant in which the complainant described the events that occurred between defendant and S. Luberda testified that the complaint told her that one day when S was sitting at a computer, defendant walked by her and ran his hand up her thigh. She further told Luberda that S became upset and began yelling. We agree with defendant that the trial court erred in admitting that testimony, as we cannot see any purpose of the testimony beyond demonstrating that defendant did touch S inappropriately. However, we conclude that the error did not affect the proceedings. As described above, S testified at trial regarding her encounter with defendant. Defense counsel had the opportunity to cross-examine her. Luberda's testimony regarding the complainant's description of the event was cumulative of the evidence properly admitted to the jurors. Further, the testimony did not bolster S's credibility, as it actually slightly differed from S's description of the event. Finally, it is highly unlikely that the jury's determination regarding defendant's guilt was impacted by the testimony in question, as opposed to the overwhelming evidence of defendant's guilt that was properly admitted.

Lastly, defendant asserts that Luberda improperly testified about the contents of a DVD she viewed, which depicted a forensic interview of the complainant that occurred in Oklahoma. Luberda testified that, during the interview, the complainant appeared nervous and upset. She further testified that the complainant stated that defendant physically abused her with a hammer and that he had been spending time with her friend, K. The complainant stated that K wrote her a note indicating that her relationship with defendant was sexual. Finally, Luberda testified in very general terms that the complainant indicated that she had some type of sexual contact with defendant.

We conclude that Luberda's testimony regarding the content of the DVD does not generally constitute hearsay. Luberda's testimony served several proper purposes. First, the testimony demonstrated that the complainant was nervous during the interview, which allowed the prosecution to explain why the complainant's account during the interview was not as detailed as it would later become. Further, the testimony also helped to contextualize the investigation for the jurors, as it explained the manner in which investigators became aware of K's relationship with defendant. Although we conclude that the testimony regarding defendant's alleged physical abuse with a hammer may have been improper hearsay testimony, we also note that the evidence did not affect defendant's substantial rights where he was not charged with any

such conduct and where the references were fleeting and inconsequential in light of the overwhelming evidence.

The following issues have been raised by defendant in his Standard 4 brief.

Defendant argues that he should be released from custody because the circuit court did not have jurisdiction over his case due to an inadequate felony complaint and no felony warrant. According to MCR 6.101 the requirements for a criminal complaint are, in pertinent part:

(A) A complaint is a written accusation that a named or described person has committed a specified criminal offense. The complaint must include the substance of the accusation against the accused and the name and statutory citation of the offense.

(B) The complaint must be signed and sworn to before a judicial officer or court clerk.

Here, there was a felony complaint issued on June 11, 2008 that detailed that defendant was charged with CSC I due to sexual penetration with the complainant. The complaint was signed and dated by a judge/magistrate and the complaining witness. Also on June 11, 2008, the magistrate signed a felony warrant detailing the charges against defendant. Thus, the felony complaint and warrant were not defective.

Subsequently, the district court held a preliminary examination where witnesses were presented and cross-examined. The district court then bound defendant over to the circuit court, and an information felony was filed in the circuit court. Thus, there was no evident jurisdictional defect depriving the circuit court of jurisdiction over the case.

Defendant also argues that there was no return document to the circuit court after the district court bound defendant over. Michigan Court Rules require that the district court provide certain documents to the court to which the case was bound over. MCR 6.110(G) provides:

Immediately on concluding the examination, the court must certify and transmit to the court before which the defendant is bound to appear the prosecutor's authorization for a warrant application, the complaint, a copy of the register of actions, the examination return, and any recognizances received.

Here, the circuit court record contains the complaint, warrant authorization, register of district court actions, and the form referencing MCR 6.110 that certified the transmittal of bind over after examination. There was no error evident in the procedure of binding the case over to the circuit court.

Next, defendant argues that the prosecutor failed to ensure that the police provided defendant with his absolute statutory right to submit to a polygraph examination. A person charged with CSC "shall be given a polygraph examination or lie detector test if the defendant requests it." MCL 776.21(5); see also *People v Phillips*, 469 Mich 390, 393; 666 NW2d 657 (2003). However, here, defendant did not request a polygraph examination. There is no authority stating that defendant must be offered a polygraph examination without a request.

Next, defendant argues that he was denied a fair trial because he was denied a hearing to determine whether he was competent to stand trial. Defendant argues that he did not have a competency hearing. However, there were two hearings, brief as they were, to address defendant's competency. Additionally, defendant had two evaluations that both concluded he was competent to stand trial. Defendant also testified that he did not believe that he was insane. This alleged error fails because it is not in accord with the facts of record.

Finally, defendant argues that he was denied a fair trial due to his trial counsel's lack of involvement in pretrial proceedings. Specifically, defendant argues that he was abandoned by his trial counsel during the pretrial period because defense counsel should have argued against the circuit court having proper jurisdiction over the case, and should have sought a polygraph examination and competency hearing for defendant. However, the record demonstrates that defendant's trial counsel was present at the pretrial hearings where circuit court jurisdiction was established and competency was discussed. Defendant's trial counsel ensured that defendant had two competency examinations prior to trial. Defendant's trial counsel did not object to the procedural issues that defendant raises, and did not request a polygraph examination. However, as discussed above, there were no jurisdictional defects in this case. Counsel is not ineffective for failing to make a futile objection. *In re Archer*, 277 Mich App 71, 84; 744 NW2d 1 (2007). Likewise there is nothing of record indicating that counsel did not abide by defendant's decision regarding whether to have a polygraph examination. Therefore, defendant has not demonstrated that his trial counsel's performance was deficient.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Mark J. Cavanagh

/s/ Henry William Saad