

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVE C. STEPHENS, SR.,

Defendant-Appellant.

UNPUBLISHED

December 23, 1997

No. 175666

Kent Circuit Court

LC No. 93-062132-FC

Before: Wahls, P.J., and Young and J.H. Fisher*, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first- and second-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (person under thirteen years of age) and MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (person under thirteen years of age), respectively. Defendant was sentenced to a term of fifteen to thirty years' imprisonment for the first-degree CSC conviction, and to a concurrent term of ten to fifteen years' imprisonment for the second-degree CSC conviction. We affirm.

The crux of defendant's first claim on appeal appears to be that he was denied a fair trial because the prosecutor continually and deliberately elicited irrelevant and highly prejudicial evidence concerning defendant's character, including his use of drugs and alcohol, even after being admonished several times by the trial court and specifically instructed to steer clear of that subject matter. We conclude that any error in this respect was harmless and does not require reversal.

Prosecutorial misconduct issues are decided on a case-by-case basis, and this Court must examine the relevant portion of the record and evaluate the prosecutor's remarks or conduct in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial as the result of the prosecutor's conduct. *People v Biggs*, 202 Mich App 450, 455; 509 NW2d 803 (1993). Moreover, where a prosecutor's conduct was improper, we must determine whether the error was harmless. *People v Mezy*, 453 Mich 269, 285-286; 551 NW2d 389 (1996).

In *People v VanderVliet*, 444 Mich 52, 62; 508 NW2d 114 (1993), our Supreme Court noted that MRE 404 limits only one category of logically relevant evidence. Quoting *People v Engelman*, 434 Mich 204, 212-213; 453 NW2d 656 (1990), the Court stated the following:

“[o]nly one series of evidential hypotheses is forbidden in criminal cases by Rule 404: a man who commits a crime probably has a defect of character; a man with such a defect of character is more likely . . . to have committed the act in question.” [*VanderVliet*, *supra* at 63.]

The Court further explained, “[i]f the only theory of relevance is that the other act shows defendant’s inclination to wrongdoing in general to prove that the defendant committed the conduct in question, the evidence is not admissible.” *Id.*

Defendant objected repeatedly to testimony regarding defendant’s purported drug and alcohol use, and in almost every instance the trial court sustained those objections. However, we note that many of defendant’s other claims of error are not preserved for appellate review. *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992). For example, defendant failed to object to testimony concerning the condition of the children’s home life, and also failed to object to the testimony of an expert witness that drug and alcohol abuse were common characteristics of sexual molesters.

The defense strategy at trial was to attack the credibility of the victims and other prosecution witnesses by suggesting that each had a strong motivation to lie and were joined in a conspiracy to convict defendant on false charges of child sexual molestation. With respect to defendant’s daughter, defense counsel suggested in his opening statement and during trial that her motivation to fabricate her CSC allegations arose from her unhappiness with defendant’s relationship with another woman while her mother was hospitalized and dying of cancer. Regarding the son, the defense alleged that he came “out of the woodwork,” “liked to make up stories,” was jealous of the attention his sister received, and that he left home to live with his aunt “not because of dad,” but “because of mom.” Finally, regarding the children’s aunt and uncle who testified for the prosecution, the defense argued that their motivation for testifying was to gain custody of the children in order to secure the proceeds of their deceased mother’s life insurance policy.

In essence, the defense actively sought to establish the existence of a conspiracy involving the alleged victims, the police, protective services, and the children’s aunt and uncle to “get rid” of defendant by convicting him of the crimes alleged. According to the defense, defendant was a mere “scapegoat.” It was against this defense strategy and credibility attacks that testimony concerning defendant’s parenting skills, substance abuse and other behaviors was introduced to rebut that strategy, or at least provide an alternate view of the entire context in which these children existed and their motivations for testifying as they did. See *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Under these circumstances, we do not believe that the prosecutor’s conduct prejudiced defendant’s right to a fair trial. *People v Bahoda*, 448 Mich 261, 272; 531 NW2d 659 (1995).

We also reject defendant’s claim that the trial court erred in allowing the prosecution to comment and introduce evidence about a prior juvenile court hearing after which the children’s aunt and

uncle were awarded custody. Defendant claims that the jury was left with the impression that a judge had already determined that the children's allegations were credible. However, defense counsel also elicited testimony concerning the custody hearing in support of defense claims, and, having done so, defendant may not now claim on appeal that the prosecution acted improperly in eliciting such testimony. See *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991).

Defendant also maintains that the trial court erred in permitting the prosecutor to elicit testimony relating to prior consistent statements made by defendant's daughter at the custody hearing and at the preliminary examination. Defendant failed to object when the prosecutor asked defendant's daughter whether her trial testimony was the same as her testimony at the custody hearing, so that issue has not been preserved for appellate review. *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). Defendant also takes issue with Detective Gerrit Roelofs' testimony that he was present at the preliminary examination when the complainants testified about their molestation by defendant. We conclude that any error in the admission of this testimony was harmless because the complainants testified about the sexual abuse at trial, and Roelofs' mention of the testimony the complainants gave at the preliminary examination merely reiterated the essence of the abuse allegations and was therefore cumulative. *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

We have reviewed the remainder of defendant's claims of prosecutorial misconduct at trial, including his assertion that the prosecutor personally vouched for the credibility of the prosecution witnesses, referred in his opening statement to the fact that defendant's daughter testified under oath at the preliminary examination and that defendant was thereafter bound over for trial, made comments that improperly shifted the burden of proof to defendant, disparaged both defendant and defense counsel, appealed to the sympathy of the jury, and improperly commented on defendant's failure to come forward and make a statement during the course of the police investigation. As defendant candidly acknowledges, most of these instances of alleged misconduct were not objected to, and defendant has therefore waived appellate review of those issues. *Sardy, supra* at 115. In any event, we find most of defendant's remaining claims of misconduct, many of which involve remarks that were responsive to defense strategies, to be without merit. We conclude that the prosecutor's comments and conduct at trial, even if improper in some respects, did not rise to the level of having denied defendant a fair trial. *Bahoda, supra*.¹

Finally, we find as dispositive the fact that the claimed errors, even considered in the aggregate, were harmless in light of the fact that the jury, having been exposed to the conduct and evidence complained of, convicted defendant only of the charges related to his daughter. In rejecting the CSC charges made on behalf of defendant's son, the jury was unquestionably not

moved by such evidence to the extent that it was unable to determine which witnesses, among the several who testified, were credible. Based upon this fact alone, we find that the assigned errors were harmless. See *Mezy, supra* at 285-286.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ James H. Fisher

¹ Defendant briefly contends that he was denied the effective assistance of counsel at trial because counsel did not object to several of the purported instances of prosecutorial misconduct. We decline to address this issue because it was not set forth in defendant's statement of the questions presented. MCR 7.212(C)(5); *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990).