STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD LEE TOMAC,

Defendant-Appellant.

UNPUBLISHED
October 29, 1999

No. 212139
Delta Circuit Court
LC No. 97-006208 FC

Before: Griffin, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Applying a second-offense habitual offender enhancement under MCL 769.10; MSA 28.1082, the trial court sentenced him to twelve to twenty-five years in prison. We affirm.

I

Defendant first argues that the trial court erred by disallowing evidence that the victim had a motive to falsely accuse defendant of sexual abuse because her mother, Dawn Tomac, was angry about allegations that her boyfriend, Dan Brown, had physically abused one of her children. Defendant claims that testimony about his sister's call to the Department of Social Services regarding the alleged physical abuse by Brown should have been admitted at trial to prove that the victim manufactured the allegations against defendant as a way for Dawn Tomac to retaliate against defendant and his sister. We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling at issue. *Id.*

As the trial court noted, defendant's retaliation theory would make sense to the jurors only if they heard that Dawn Tomac *knew about* the allegations and subsequently convinced the victim to manufacture the sexual assault allegations against defendant. The only evidence in defendant's offer of proof indicating that Dawn Tomac knew about the social services complaint was testimony by

defendant's sister that defendant had telephoned her and told her that Dawn knew about the complaint. This testimony by defendant's sister constituted inadmissible hearsay. Therefore, even if the court had allowed defendant to present evidence of the social services complaint, the jurors would have heard no evidence that Dawn Tomac knew about the complaint. Nor would the jurors have heard evidence that Dawn convinced the victim to falsely accuse defendant of rape, since defendant presented no evidence in this regard during his offer of proof. Accordingly, the trial court did not abuse its discretion in excluding evidence of the complaint, since it would not have been relevant under MRE 401 and would likely have merely confused the jury. See also MRE 403 (relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury").

II

Next, defendant argues that the victim's former baby-sitter, Sonja Chrisman, should have been allowed to testify concerning an alleged sexual assault against her by Dan Brown. Again, we disagree. Defendant had no evidence that Brown, as opposed to defendant, committed the assault against the victim.[1] Therefore, Chrisman's testimony regarding a sexual assault by Brown would have been either irrelevant under MRE 401 or misleading and confusing to the jury under MRE 403, and the trial court did not abuse its discretion by excluding it. Nor, contrary to defendant's implicit argument, did the trial court err by excluding evidence that Dawn Tomac had allegedly threatened Chrisman in an attempt to keep her from testifying, since defendant did not request that this evidence be allowed.

III

Next, defendant argues that the trial court erred by allowing the physician who examined the victim to testify that the victim's decreased gag reflex could have been caused by repeated instances of oral sex. We agree that the trial court abused its discretion by admitting this evidence, since MRE 404(b)(1) prohibits the introduction of uncharged acts "to prove the character of a person in order to show action in conformity therewith." Because the victim herself did not state that defendant had orally penetrated her prior to the charged assault, the evidence did not fit into the MRE 404(b) exception carved by *People v DerMartzex*, 390 Mich 410, 413-415; 213 NW2d 97 (1973), in which our Supreme Court stated that limiting a rape victim's testimony to the specific act charged and not allowing her to mention acts leading up to the assault would seriously undermine her credibility in the eyes of the jury. Nevertheless, we conclude that the improper admission of the statement was harmless, given the fleeting nature of the statement and the strong, untainted evidence of defendant's guilt. See *People v Crawford*, 458 Mich 376, 399-400; 582 NW2d 785 (1998) (the prejudice inquiry focuses on the nature of the error and assesses its effect in light of the weight and sufficiency of the untainted evidence.).

IV

Defendant also argues that the prosecutor committed error requiring reversal by improperly presenting evidence that (1) defendant had been served with a search warrant unrelated to the instant case, (2) defendant had been subject to unspecified weapons charges, and (3) defendant was in jail.

We review alleged prosecutorial misconduct to determine whether the defendant was denied a fair trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). We review each case on its own particular facts, analyzing allegedly improper remarks in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

First, we conclude that the brief reference by Michigan State Police Trooper Dave Cowen to a search warrant for an unrelated charge did not deny defendant a fair trial. By mentioning the warrant, the prosecutor was making a good-faith attempt to show why the chemical analysis of the bedding from defendant's house did not contain semen stains. The prosecutor was trying to show that defendant had time to eliminate incriminating evidence from the bedding because defendant viewed this warrant, which mentioned sexual assault allegations, before the seizure of his bedding. Given the good-faith nature of the argument, and the fleeting nature of the reference to the search warrant, it did not deny defendant a fair trial and does not warrant the reversal of defendant's conviction. See, e.g., *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988), in which this Court held that a prosecution witness' fleeting reference to other crimes allegedly committed by defendant were not grounds for a mistrial when the references were not emphasized to the jury.

Second, we conclude that the statement by a prosecution witness that she thought defendant had been arrested "on a gun related charge" did not deny defendant a fair trial. The statement was unresponsive to the prosecutor's question, and the witness was not in a position to know that her answer was inappropriate. Accordingly, the statement does not require reversal. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Third, the prosecutor's introduction of evidence that defendant was in jail did not deny him a fair trial. The prosecutor brought up that defendant was in jail in order to show that he called a friend and asked her to do his laundry. This was a proper argument in the context of the case, see *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992) given that the prosecutor was trying to show that defendant removed semen stains from his bedding.

V

Finally, defendant argues that the prosecutor committed misconduct requiring reversal by giving prejudicial and inappropriate closing arguments. Defendant did not object at trial to the statements he now claims were erroneous. Therefore, this Court will not review the allegations unless the prejudicial effect could not have been cured by a jury instruction or failure to consider the issue would result in manifest injustice. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). We conclude that our failure to review this issue will not result in manifest injustice. Prosecutors are given wide latitude regarding the content of their closing arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Furthermore, the prosecutor was making valid comments and inferences based on the evidence introduced at trial. *People v Messenger*, 221 Mich App 171, 180-181; 561 NW2d 463 (1997).

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Michael R. Smolenski

[1] Although Chrisman testified that the victim told her that "her father was getting in trouble for something that he didn't do," she did *not* testify that the victim told her that defendant was getting in trouble for something that *Brown* did.