STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 5, 2000
v	No. 216304 Van Buren Circuit Court
BRIAN LEE EMERY, Defendant-Appellant.	LC No. 98-010831-FH

Before: White, P.J., and Talbot and R. J. Danhof *, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and sentenced to ten to forty years' imprisonment. He appeals as of right. We affirm.

Defendant was convicted of sexually assaulting his five-year-old daughter on February 6, 1998. The complainant testified that after her mother left the house, defendant woke her up, told her to take off her clothes, placed a towel on the bedroom floor, and instructed her to lay on her stomach on the towel. She stated that defendant then pulled down his underwear, put lotion on his "coo-coo,"[1] put his "coo-coo" between her legs (right by her "coo-coo") and "started to do the push-ups." The complainant testified that she felt lotion on her "coo-coo" and saw "soap" come out of the "hole" in defendant's "coo-coo" and go on the towel. She later stated that the "soap" went on her buttocks and that defendant wiped it off with the towel. Defendant told her not to tell anyone what happened.

Defendant first argues on appeal that he was denied his right to a fair trial when the prosecutor was permitted to introduce evidence of prior acts of alleged sexual abuse. We disagree. The decision whether to admit other-acts evidence is within the trial court's discretion and will be reversed only where there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582

[1] "Coo-coo" was a generic term that the complainant used to refer to private parts.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

NW2d 785 (1998). This Court will find an abuse of discretion when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Hoffman*, 225 Mich App 103, 105; 570 NW2d 146 (1997).

The trial court did not abuse its discretion when it determined that defendant was not "surprised" by the introduction of the other-acts evidence. The discovery materials, including the reports of the social worker and psychotherapist which defendant concedes referred to prior instances of sexual abuse, were sufficient to provide defendant with "reasonable notice" under MRE 404(b)(2). In any event, the challenged evidence was relevant for the purpose of corroborating the complainant's testimony. See *People v DerMartzex*, 390 Mich 410, 414-415; 213 NW2d 97 (1973).[2] The trial court gave a limiting instruction, and the testimony revealed only the general, undetailed fact of prior sexual encounters when complainant's mother was not home. We therefore conclude that the probative value of the contested evidence was not substantially outweighed by the risk of unfair prejudice. MRE 403; *People v Sabin*, ___ Mich ___; ___ NW2d ___ (Docket No. 114953, issued 7/27/00), slip op p 11, citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994).

Defendant next contends that the trial court abused its discretion in allowing the complainant's mother, a police officer, a social worker and a psychotherapist to testify regarding hearsay statements made to them by the complainant. Because defendant did not object to the challenged testimony at trial, appellate relief is precluded absent a showing of plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence. *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Here, the record indicates that defendant sought to use the various statements elicited by the witnesses to support his theory that the complainant's mother fabricated the instant allegations. Despite the prosecutor's concern that the testimony would constitute hearsay, the trial court granted defendant's pretrial motion to endorse the psychotherapist and social worker. Defense counsel argued that the witnesses were "very critical" to his case because they would expose the "glaring inconsistencies" between complainant's versions of the incident. Further, in his opening statement, defense counsel informed the jury of the statements he believed the witnesses would attribute to complainant, and then,

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[2] We reject defendant's contention that *DerMartzex* is inapplicable because it involved an inchoate crime. While the Court observed that allowing evidence of other sexual acts is "especially justified where an inchoate offense is charged against a member of the victim's household," it did not preclude admission of other sexual acts where the charged crime was not an inchoate offense. *Id.* See also *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995); *People v Puroll*, 195 Mich App 170, 171; 489 NW2d 159 (1992); *People v Skinner*, 153 Mich App 815, 823; 396 NW2d 548 (1986). Further, on this record we cannot conclude that the instant case did not implicate the concerns of the *DerMartzex* Court because the complainant's credibility "would not be undermined by limiting the testimony to the specific acts charged."

during closing argument, argued that complainant's varying statements to different people demonstrated that she was not credible and had been coached by her mother. We therefore agree with the prosecutor that defendant's failure to object to the challenged testimony constituted trial strategy. A defendant may not waive objection to an issue before the trial court and then raise it as an error before this Court. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). To hold otherwise would allow defendant to harbor error as an appellate parachute. *Id*. Accordingly, defendant has failed to demonstrate that the introduction of the challenged testimony constituted plain error that affected his substantial rights. *Carines, supra* at 763-764.

Defendant next argues that he was denied his right to a fair trial because the police failed to retrieve the white towel that was observed in the complainant's bedroom. However, defendant failed to preserve this issue because he did not raise it below. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Consequently, our review is limited to determining whether defendant has demonstrated plain error that affected his substantial rights. *Carines*, *supra* at 763-764.

Contrary to defendant's assertion, this claim does not involve a failure to disclose evidence. See *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998), citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Rather, it involves an alleged failure to investigate and preserve evidence. It is well settled, however, that the police are not required to seek and find exculpatory evidence. *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997); *People v Miller (After Remand)*, 211 Mich App 30, 43; 535 NW2d 518 (1995). This case is factually distinguishable from both *People v Bland*, 52 Mich App 649, 657; 218 NW2d 56 (1974), and *People v Jordan*, 23 Mich App 375; 178 NW2d 659 (1970). Apart from mere allegations, defendant has not demonstrated bad faith or any deliberate effort to ignore evidence that might prove to be exculpatory. *People v Marks*, 155 Mich App 203, 219; 399 NW2d 469 (1986); *People v Eddington*, 53 Mich App 200, 205-207; 218 NW2d 831 (1974). Further, at trial, defendant both denied that the towel existed and used the fact that the police had not seized the towel to discredit the prosecution and attack the credibility of the police. Under these circumstances, defendant has failed to establish that he is entitled to appellate relief. See *Fetterley*, *supra*, at 520; *Carines*, *supra* at 763-764.

Finally, defendant claims that the prosecutor's remarks during rebuttal denied him a fair trial. Again, because defendant did not object at trial to the alleged misconduct, our review is limited to determining whether defendant has demonstrated a plain error that affected his substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *Carines*, *supra* at 763-764. Prosecutorial misconduct issues are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *Schutte*, *supra* at 720.

After reviewing the alleged instances of prosecutorial misconduct in context, we conclude that each was either proper argument, compare *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999); *People v Pauli*, 138 Mich App 530, 543; 361 NW2d 359 (1984); *People v Mitchell*, 131 Mich App 69, 72-73; 345 NW2d 611 (1983), or proper response to defendant's closing argument. *Schutte*, *supra* at 721 ("[o]therwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel"). Moreover, any unfair

prejudice produced by the challenged comments could have been cured by a timely objection and instruction. *Id.*, citing *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Defendant is therefore not entitled to relief with respect to this issue.

Affirmed.

/s/ Helene N. White
/s/ Michael J. Talbot
/s/ Robert J. Danhof