STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK THOMAS,

Defendant-Appellant.

UNPUBLISHED
May 28, 2002

No. 231250
Wayne Circuit Court
LC No. 99-007609

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(g) (sexual penetration of another person causing personal injury); 750.520b(1)(c) (sexual penetration occurring during the commission of a felony), and one count of first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent terms of fifteen to thirty years' imprisonment. We affirm.

At trial, the complainant testified that on the date of the offenses in question, July 17, 1999, she was thirteen years old and living with her mother and two brothers in a two-family flat in the city of Detroit. The complainant recounted the events leading to defendant's convictions. She testified that during the evening of July 17, 1999, she was doing laundry in preparation for the family's planned vacation to Indiana the next day. As the complainant entered the laundry room in the house's basement, defendant followed her into the basement and started to hug and kiss her. Defendant then proceeded to penetrate the complainant orally, and then forced her onto the washing machine where he penetrated her with his penis.

According to the complainant's trial testimony, her cousin came downstairs to tell her that someone had called on the telephone for her and to hand her the telephone. Defendant apparently hid while the complainant's cousin was in the basement. After her cousin went back upstairs, defendant proceeded to kiss the complainant and "feel[ ]" her on her "butt . . . [and] on [her] chest." After the complainant told her friend about the assault, her mother was informed, and the police were called that evening.

Defendant was an acquaintance of the complainant's family, and had developed a friendship with one of the complainant's brothers. Although it is unclear from the record what relationship defendant had with the family that lived below the complainant's family in the two-

family flat, it appears from the record that the complainant and her family encountered defendant frequently on the porch that the two families shared.

The prosecutor also presented the testimony of Investigator Andrew Simms from the Detroit Police Department who interviewed defendant on March 29, 2000. Simms testified that after he advised defendant of his *Miranda*[1] rights, defendant initially denied the complainant's allegations. However, defendant later recanted, and told Simms that the complainant was being truthful when she told the police that defendant performed oral sex on her and touched her breasts on July 17, 1999.

Defendant did not testify on his own behalf during the three-day jury trial. However, defendant, thirty-six years of age at the time of these offenses, presented the testimony of city of Detroit Police Investigator Audrey Thomas, who testified that defendant turned himself in to the police voluntarily on July 20, 1999. Jeffrey Rowland, an assistant forensic serologist with the Detroit Police Department, also testified on defendant's behalf. Specifically, he indicated that he was unable to test the rape kit and other items collected at the scene of the offenses for DNA because the items initially tested negative for acid phosphates, which is found in high concentrations in semen. However, during the prosecutor's cross-examination, Rowland indicated that a "partial profile" for DNA taken from the sweatband of a hat collected from the complainant on July 22, 1999, that she retrieved from the laundry room, indicated that three DNA loci matched defendant. Rowland also stated that the likelihood of the hat belonging to defendant was 1 in 700 in the Caucasian population, 1 in 17,000 in the African American population, and 1 in 2,700 in the Hispanic population.

On appeal, defendant first argues that the trial court erred in admitting evidence of defendant's prior bad acts where the prosecutor failed to comply with the notice provisions of MRE 404(b)(2). Defendant properly preserved this issue for our review by raising a timely and specific objection to the use of the evidence in the lower court. We generally review a trial court's decision concerning the admission of prior bad acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, where the trial court's decision hinges on a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of evidence, we review de novo the trial court's determination. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

MRE 404(b)(2) provides:

> The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in [MRE 404](b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of a defense, limited only by the defendant's privilege against self-incrimination.

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

During the August 3, 1999, preliminary examination in this matter, the complainant testified that she was afraid of defendant on the date of the offenses giving rise to this appeal because of a previous incident that occurred a "couple months before." Specifically, the complainant testified that on the earlier occasion she was sitting on the house's front porch when defendant "grabbed [her] and started kissing on [her.]" The complainant further recounted that defendant placed his hand down her panties and digitally penetrated her. However, the complainant testified that she had not told anyone but her best friend about this incident. After the court recessed briefly to allow the complainant to compose herself, the prosecutor made the following comments on the record.

> Judge, earlier the Defense had asked me whether the Prosecutor would be seeking to add charges here today, and at that time I indicated to them not to my knowledge.
>
> It appears based on the [complainant's] testimony that there should be other charges added. However, at this time, I will tell the Defense that I am going to request the officer in charge to investigate the other matter reported by the complaining witness here today.
>
> * * *
>
> I am not seeking to add charges at this proceeding. But the defendant it appears, based on this testimony, would be liable for other crimes on other dates. But I want that investigation to occur before any charges are issued here. So I will put the Defense on notice [that] likely [there] will be a second case growing out of this circumstance. But I am not seeking the addition of any charges presently.

For reasons not discernable from the present record, defendant was not charged with any offense arising out of the prior incident the complainant testified about during the preliminary examination. However, after the jury was impaneled and before opening arguments in defendant's trial on August 28, 2000, defense counsel raised the issue of the prior bad acts evidence. Specifically, defense counsel argued that written notice of the prosecutor's intention to offer MRE 404(b)(1) evidence was not filed. In response, the prosecutor contended that defendant was properly notified of the prosecutor's intention to seek admission of this evidence at the preliminary examination. The prosecutor also argued that the evidence was relevant to defendant's intent and his interest in the complainant, and was evidence of defendant's "fantasy relationship" with the complainant. The prosecutor went on to note that she did not oppose adjourning trial to allow defense counsel to "get his thoughts together" regarding the issue.

After the court and the parties conducted a short discussion off of the record, defense counsel stated the following when the proceeding continued to be recorded:

> Your Honor, it's my understanding that your ruling regarding that last issue was that testimony would be excluded regarding prior incidents of – alleged incidents of penetration by way of fingers in the complainant's vagina. However, you will allow the kissing aspect or prior kissing acts allegedly of my client with respect to the complainant. That's my understanding.

The trial court agreed with this statement, ruling from the bench that the evidence was relevant to the complainant's state of mind because it tended to prove that she was afraid of defendant. Apparently excusing the prosecutor's failure to tender pretrial notice of its intent to introduce the evidence, the trial court also observed that "sometimes it's not – sometimes [the parties] don't really know . . . until . . . actually in trial what [evidence they want to present], whether it would be appropriate." The complainant subsequently testified before the jury that two to three months before the incident on July 17, 1999, defendant approached her on the porch and kissed her and hugged her, and that she told him to stop.

The thrust of defendant's argument on appeal is that the preliminary examination did not provide defendant with notice that the prosecutor would present the evidence at trial. In other words, defendant maintains that the preliminary examination did not provide him with sufficient notice under MRE 404(b)(2) because the prosecutor did not articulate its rationale for admitting the evidence. In response, the prosecutor argues that defendant was provided with reasonable notice of its intention to introduce the prior bad acts evidence, and that the "spirit and letter of the notice requirement" were served under the circumstances of this case where defendant was made aware of the prosecutor's intention to introduce the evidence before trial commenced in earnest, and where the prosecutor articulated her rationale for admitting the evidence before its admission. The prosecutor also asserts that the evidence was properly admitted to establish defendant's scheme, plan, and system in developing a fantasy relationship with the complainant and sexually assaulting her, and that the evidence also bolstered the complainant's credibility. See *People v DerMartzex*, 390 Mich 410, 414-415; 213 NW2d 97 (1973); *People v Sabin (After Remand)*, 463 Mich 43, 69-70; 614 NW2d 888 (2000).

In *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001), this Court recently held that MRE 404(b)(2) "unambiguously requires notice to the defense at some time *before* the prosecutor introduces the prior bad acts evidence." [Emphasis in original.] Following our Supreme Court's decision in *Sabin (After Remand)*, the *Hawkins* Court went on to highlight the purposes underlying MRE 404(b)(2)'s notice provision.

> According to the majority in [*Sabin (After Remand)*, *supra*], the Supreme Court amended MRE 404(b) to include the notice requirement in subsection 2 following the [*People v*] *VanderVliet* [, 444 Mich 52; 508 NW2d 114 (1993) amended 445 Mich 1205 (1994)] decision 'to assist the trial court in its evidentiary ruling' and 'to ensure that the defendant is aware of the evidence.' At its best, the hearing and argument that ordinarily ensues once a prosecutor gives notice 'provide an enlightened basis for the trial court's determination of relevance and decision whether to exclude the evidence under MRE 403.' Although he was one of the two dissenting justices in *Sabin (After Remand)*, Justice Cavanagh explained that one of the goals of this procedural safeguard is to ensure that a prosecutor articulates the proper purpose behind admitting the prior bad acts evidence. This advance notice gives the trial court and the defense an opportunity to test the genuine value of the evidence and limits a prosecutor's ability to articulate the relevant grounds for admission listed in MRE 404(b)(1) in an effort to obscure the improper purposes truly underlying the evidence. In summary, while phrased differently, the dissent and majority in *Sabin (After Remand)* appear to agree that the essential value and underlying aims of MRE

> 404(b)(2) are (1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record. [*Hawkins, supra* at 454-455 (footnotes omitted), quoting *Sabin (After Remand)*.]

Under the circumstances of this case, we are not persuaded that the trial court abused its discretion in admitting the prior bad acts evidence where a thorough review of the record demonstrates that the "essential value[s] and underlying aims" of MRE 404(b)(2) highlighted by the *Hawkins* Court were served. For instance, after defense counsel raised an objection to the introduction of this evidence before the prosecutor's opening argument, the prosecutor explained her reasoning for seeking admission of the evidence. Although somewhat inartfully phrased, the record reflects that the prosecutor clearly sought admission of the evidence to demonstrate defendant's intent and state of mind at the time of the offenses.[2] Consequently, the evidence was properly offered for "something other than a character to conduct or propensity theory." *Sabin (After Remand), supra* at 55; *VanderVliet, supra* at 65. Moreover, we share the learned trial court's opinion that the evidence was properly admitted under a permissible theory of logical relevance because it tended to bolster the complainant's credibility, which was a material issue hotly disputed at trial. Further, we do not believe that any danger of unfair prejudice to defendant inuring from this evidence substantially outweighed its probative value. MRE 403; *Sabin (After Remand), supra* at 70-71. In this regard, it is noteworthy that the trial court strictly confined the scope of the evidence's admissibility, preventing the prosecutor from offering the evidence of digital penetration that allegedly occurred in the earlier uncharged incident.

Moreover, we are satisfied that defendant was presented with a meaningful opportunity to object to and defend against the introduction of this evidence on August 28, 2000. Likewise, it is clear that the trial court's decision was the product of a thoughtful and thorough consideration of the issue on the basis of an adequate record. Under the circumstances, where defendant was aware of the nature of the evidence before its admission, and the trial court was afforded "an enlightened basis" for its determination of relevance, as well as an opportunity to engage in the balancing analysis required by MRE 403, we are not persuaded that the court abused its discretion in admitting the evidence.

Defendant next argues that reversal is warranted on the basis of a single instance of prosecutorial misconduct. This Court reviews claims of prosecutorial misconduct case by case, examining the challenged conduct in context, to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). As

[2] We acknowledge that in *Sabin (After Remand), supra* at 68-69, our Supreme Court held that other acts evidence is not admissible to demonstrate the defendant's intent where charged with CSC I because it is a general intent crime. However, the *Sabin (After Remand)* Court also clearly articulated that MRE 404(b)(1) should not be interpreted as "suggesting that the prosecutor's failure to identify at trial the purpose that supports admissibility requires reversal. . . ." Rather, our Supreme Court unequivocally ruled that "[t]he prosecution's recitation of purposes at trial does not restrict appellate courts in reviewing a trial court's decision to admit the evidence." *Sabin (After Remand), supra* at 59, n 6.

defendant concedes in his brief on appeal, this issue is being raised for the first time in this Court. Thus, we review for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.* at 721.

In the instant case, defendant argues that reversal is warranted on the basis of a "speaking objection" raised by the prosecutor during defense counsel's cross-examination of the complainant. During cross-examination, defense counsel vigorously questioned the complainant regarding her recollection of when she pulled her panties up after she was sexually assaulted. During direct examination, the complainant indicated that she pulled up her panties after her cousin came down to the laundry room to hand her the telephone. Later, during cross-examination, when defense counsel pressed her on this issue, the complainant indicated that when her cousin came downstairs to hand her the telephone, she had pulled up her panties. Consequently, as a result of this inconsistency defense counsel attempted to impeach her with her testimony given at the preliminary examination. At one point during the cross-examination, the prosecutor objected, arguing that defense counsel was attempting to "manipulate[ ]" the evidence.

We have carefully reviewed the challenged comment, and the context in which it was made. As this Court recently observed in *Watson*, *supra* at 592-593, a prosecutor's comments must be reviewed against the backdrop of defense counsel's conduct. A review of the pertinent portion of the transcript in context reflects that there was some confusion between defense counsel and the prosecutor regarding the exact scope of defense counsel's questioning of the complainant during cross-examination. Specifically, it appears defense counsel was attempting to impeach the complainant with her prior preliminary examination testimony in which she testified that she pulled up her panties after "he" left. However, it was unclear who the complaint was referring to by "he." The prosecutor objected to this manner of impeachment, arguing that it was unclear in the preliminary examination transcript who the complainant was referring to by use of the word "he."

We recognize the well established principle that a prosecutor may not argue during trial that defense counsel is intentionally attempting to mislead the jury. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). However, under the present circumstances, where the prosecutor's comment appeared to stem from confusion about the exact scope of defense counsel's cross-examination, we are not persuaded that reversal is warranted. The present case is thus distinguishable from *Dalessandro, supra*, where the prosecutor argued that the evidence presented by the defense was a "sham, " a "fabrication of evidence," and consisted of "damnable lies." *Id.* at 579. This Court found reversal warranted on the basis of the particularly egregious prosecutorial misconduct where the prosecutor "chastis[ed] defense counsel and defendant's entire defense." *Id.* at 580. The present case is also distinguishable from *People v Hunt*, 68 Mich App 145, 148; 242 NW2d 45 (1976), another case defendant cites in his brief on appeal. Specifically, we are not persuaded that the prosecutor's isolated comment in the instant case was part of "a deliberate course of conduct" *id.* at 149, aimed at denigrating defense counsel. Finally, the present case does not present the heightened level of "cumulative error" arising from prosecutorial misconduct that this Court concluded warranted reversal in *People v Bairefoot*, 117 Mich App 225, 232; 323 NW2d 302 (1982). Under the circumstances, where defendant failed to

raise a timely objection, we are satisfied that the trial court's instruction to the jury that the arguments of the attorneys are not evidence dispelled the minimal prejudice that may have arisen from this isolated comment. *Schutte, supra* at 721-722.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Patrick M. Meter