

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND BERNARD ALMOND,

Defendant-Appellant.

UNPUBLISHED

June 18, 2002

No. 228027

Wayne Circuit Court

LC No. 99-009134

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(b), involving his daughter and a niece. He was sentenced to concurrent prison terms of three to fifteen years for each conviction. He appeals as of right. We affirm in part and remand for modification of the judgment of sentence.

Defendant argues that the trial court improperly admitted evidence of other alleged acts of sexual misconduct with two young girls even though he had been acquitted of those charges. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000). All of the four alleged victims, past and present, testified that defendant fondled them at his house when they were between eleven and thirteen years of age. MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence of similar misconduct is admissible “where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.” *Sabin (After Remand)*, *supra* at 63. “The logical relevance of the evidence is based on the system, as shown through the similarities between the charged and uncharged acts, rather than on defendant’s character, as shown by the uncharged act.” *Id.* at 64 n 10. “The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems

only from the abhorrent nature of the crime itself.” *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). Here the charged and uncharged acts “shared sufficient common features to infer a plan, scheme, or system to do the acts.” *Sabin (After Remand)*, *supra* at 66. Notably, there was a striking similarity between the victims’ ages, relationship to defendant, and living arrangements. *Id.* Thus, we find no abuse of discretion.

Defendant also argues that he was denied the effective assistance of counsel. The trial court denied defendant’s motion for a new trial on this issue following a *Ginther*¹ hearing. To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel’s conduct was reasonable. *Id.* Furthermore, this Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999), nor will it assess counsel’s competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

In this case, trial counsel explained the tactical reasons for not pursuing a motion under the 180-day rule, as defendant wanted. Based on counsel’s explanation, defendant has not overcome the presumption that counsel’s decision was sound trial strategy. *Id.* at 444. Also, the record does not support defendant’s claim that his relationship with counsel broke down or that counsel failed to communicate with defendant. Defendant himself testified that counsel visited him at least four or five times in jail and that they talked every time defendant came to court.

Nor does the record support defendant’s claim that counsel failed to advise him of the amended sentencing information report. Defense counsel testified that he discussed the change in scoring with defendant, the guidelines scoring was discussed on the record, and defense counsel advocated for defendant’s position. Thus, defendant has not demonstrated that counsel’s conduct was deficient. Accordingly, defendant has failed to establish that he was denied the effective assistance of counsel.

As for defendant’s claim regarding the erroneous computation of sentence credit, the prosecution concedes that defendant was entitled to 245 days of sentence credit rather than the 189 days that he received. We therefore remand for correction of defendant’s judgment of sentence to reflect 245 days credit for time served.

Defendant challenges the scoring of offense variable (OV) 10, which he claims improperly enhanced his sentence. The statutory sentencing guidelines apply in this case because the instant offenses were committed on or after January 1, 1999. MCL 769.34(1) and (2). Contrary to defendant’s claim that OV 10 should not have been scored, the statute requires that OV 10 be scored in “all crimes against a person.” MCL 777.22. Under OV 10, ten points are to be scored when the offender exploited a victim’s youth, or a domestic relationship, or

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

abused his authority status. MCL 777.40. In this case, OV 10 was properly scored at ten points as the victims were children staying in defendant's household.

Finally, defendant argues that he was denied a fair trial because of prosecutorial misconduct. Prosecutorial misconduct issues are decided case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court considers the alleged misconduct in context to determine whether it denied the defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

Defendant contends that the prosecutor improperly shifted the burden of proof by suggesting in closing argument that defendant was required to corroborate testimony. Defense counsel objected to the prosecutor's remarks about production of evidence and his objection was sustained. Indeed, when the prosecutor attempted to make the argument again the trial court interrupted and instructed the jury that defendant did not have "to prove anything" and that it was the prosecutor's job to present evidence. The trial court's instruction was sufficient to cure any prejudice. See *Schutte*, *supra*.

Defendant did not object to the remaining challenged remarks. Therefore, we review those remarks for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Generally, prosecutors are afforded great latitude in closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Moreover, once a defendant advances evidence or a theory, argument on the validity and inferences created does not shift the burden of proof. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). We have reviewed defendant's remaining challenged remarks and find them to be proper comments based on the evidence presented at trial and inferences drawn therefrom. *Bahoda*, *supra*. Because the prosecutor's remarks were proper, plain error has not been shown. *Carines*, *supra*.

Defendant's convictions are affirmed, but the case is remanded for modification of the judgment of sentence to reflect 245 days of sentence credit. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray