

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

THOMAS RAY FLETCHER,

Defendant-Appellant.

UNPUBLISHED

June 15, 2004

No. 246442

Allegan Circuit Court

LC No. 02-012470-FH

Before: Sawyer, P.J., and Gage and Owens, JJ.

MEMORANDUM.

Defendant appeals as of right his jury conviction on three counts of second-degree criminal sexual conduct, MCL 750.520c. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The convictions were based on allegations by defendant's sixteen-year-old daughter. The victim testified that her father assaulted her on three different occasions by placing the victim's hand on his penis, and touching the victim's breasts and vagina. In addition to the testimony of these- three separate criminal acts, evidence was introduced that defendant, in the same time frame, but in a separate incident, had engaged in an act of masturbation leading to ejaculation on or near the victim's body.

On appeal, defendant asserts that evidence of his masturbation near the victim was improperly admitted bad acts evidence, and that the prosecutor presented improper rebuttal testimony. Defendant failed to object; thus, this Court will review these issues for plain error. *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999). To avoid forfeiture of the issues, defendant must demonstrate error that affected his substantial rights. *Id.*, 763-764. To establish plain error, defendant must show that he was actually innocent or the error seriously affected the fairness, integrity or public reputation of the judicial proceedings. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Had defendant objected to the bad acts testimony, it is likely that the evidence would have been found to be admissible. Evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged conduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). The prosecution was required to prove that the touching was for a sexual purpose. Evidence that

defendant masturbated near the victim was relevant to establish defendant's intent. However, even if the evidence was improperly admitted, it did not affect the outcome of the case because the victim testified about the three charged incidents, and the uncharged incident did not give inordinate weight to her other testimony.

Admission of rebuttal evidence is within the discretion of the trial judge and will not be disturbed absent a clear abuse of discretion. *People v Figures*, 451 Mich 390, 398; 547 NW2d 673 (1996). The test to determine if rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. *Id.* at 399.

Defendant attacked the victim's credibility. He denied her accusations, and presented evidence regarding his own reputation for honesty. Had defendant objected to the rebuttal testimony, the trial court could have found that the evidence was properly responsive to defendant's case, and admissible in rebuttal. There is no showing of plain error affecting the outcome of the case.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Donald S. Owens