STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2008
v	No. 280703 Wayne Circuit Court
MICHELLE MARIE PERRUZZI, Defendant-Appellant.	LC No. 07-004737-01

Before: Servitto, P.J. and Donofrio and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right he jury trial convictions of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a). Because the trial court's decision to admit the contested evidence was neither an abuse of discretion, nor, outcome determinative, and the prosecutor's characterization of defendant was a fair comment on the whole record, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The victim, DZ, a friend of defendant's son, often spent the night at defendant's house. DZ testified that on one night, defendant came to him while he was sleeping on a couch and performed fellatio. On another night, defendant took him into her bedroom and they had intercourse. Defendant denied the allegations. She testified that on one occasion, DZ came into her bedroom uninvited, jumped on top of her, and forcibly penetrated her vagina with his penis.

Defendant first argues that the trial court erred in admitting certain testimony offered by Robin O'Kane. As it relates to evidence to which defendant objected at trial on the same ground raised on appeal, this issue is preserved, *People v Aldrich,* 246 Mich App 101, 113; 631 NW2d 67 (2001); *People v Metzler,* 193 Mich App 541, 548; 484 NW2d 695 (1992), and the trial court's decision to admit the evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion occurs when the court selects an outcome that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). As it relates to evidence to which defendant failed to object, the issue has not been preserved and is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Houston,* 261 Mich App 463, 466; 683 NW2d 192 (2004), aff'd 473 Mich 399 (2005).

To be admissible, evidence must be relevant to the case. MRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Where evidence of other acts is relevant only because it tends to show that defendant acted in conformity with her character, it is not admissible except as otherwise provided by MCL 768.27a. MRE 404(b)(1); MCL 768.27; *People v Pattison*, 276 Mich App 613; 741 NW2d 558 (2007). Where evidence of other acts is offered for another purpose, such as proving motive, identity, intent, etc., it is admissible if the purpose for which it is offered is material to the case. MRE 404(b)(1); MCL 768.27.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. Evidence is unfairly prejudicial if there is a danger that marginally probative evidence will be given undue weight by the jury or cause the jury to decide the case on an improper basis such as emotion. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2002); *People v Meadows*, 175 Mich App 355, 361; 437 NW2d 405 (1989).

Defendant first takes issue with O'Kane's testimony that defendant told her that she knew that DZ "was having sex and that she was providing him with rubbers." This issue has not been preserved. The evidence that was offered consists of defendant's statement, not evidence of a prior act observed by O'Kane. Therefore, an other-acts analysis is simply unnecessary in determining the admissibility of the statement. *People v Goddard*, 429 Mich 505, 523; 418 NW2d 881 (1988) (Riley, C.J., concurring). This evidence was relevant because it showed that defendant was familiar with DZ's sex life and thus permitted an inference that she may be involved in his sex life. Such evidence was probative of whether defendant engaged in sexual relations with DZ and thus was not more prejudicial than probative. Therefore, defendant has not shown a plain error.

Defendant next takes issue with O'Kane's testimony that she believed that defendant was not appropriately dressed for a sports banquet for young teens and told her so. This issue was preserved with an appropriate objection at trial. We agree that how defendant was dressed was not relevant to any fact in issue. A preserved nonconstitutional error is presumed to be harmless. The error justifies reversal if it is more probable than not that it determined the outcome of the case. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). We cannot conclude that this bit of information could have determined the outcome of the case where it was apparent that O'Kane was simply expressing her personal opinion on a matter of style and the clothing that defendant was wearing was not shown to the jury. Therefore, defendant has failed to establish a right to relief.

Defendant next takes issue with O'Kane's testimony that defendant kissed DZ's cheek and that DZ called her his new "mommy." Defendant has mischaracterized O'Kane's testimony. She testified that it was DZ who kissed defendant's cheek, not the other way around. DZ's conduct in kissing defendant in public was relevant to show that they had an unusually close relationship, which lent credence to his testimony that they engaged in sexual relations. Such evidence was relevant to the determination whether defendant engaged in sexual relations with DZ and was not more prejudicial than probative. DZ's characterization of defendant as his new mommy was not particularly relevant, but it was not so damaging as to have affected the outcome of the case because it implied that any relationship between defendant and DZ was that

of a mother to a son, rather than a child predator to a victim. Therefore, defendant has failed to establish a right to relief.

Defendant next takes issue with O'Kane's testimony that she saw defendant play-wrestling with DZ in the yard. This evidence was relevant because it corroborated DZ's testimony that defendant was physically able to straddle him while engaging in intercourse, which was a matter contested by defendant. The fact that defendant asked DZ if he liked what he saw was again a statement rather than a prior act. It was relevant because it was sexually flirtatious and thus permitted an inference that the relationship between the parties had a sexual component. This evidence was highly relevant to the determination whether defendant engaged in sexual relations with DZ and thus was not more prejudicial than probative. Therefore, defendant has failed to show a plain error.

Defendant next argues that she was denied a fair trial when the prosecutor presented a theory of the case that defendant was the female equivalent of a sugar daddy and elicited evidence to support it. Defendant failed to object to the prosecutor's remarks during her opening statement or to the witnesses' testimony that supported it and thus the issue has not been preserved. Therefore, review is precluded unless defendant establishes plain error that affected his substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The reviewing court must examine the prosecutor's remarks in context on a case-by-case basis. *Id*. at 272-273. "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

The purpose of opening statement is to state the facts to be proved at trial. When a prosecutor states that evidence will be submitted to the jury, which subsequently is not presented, reversal is not warranted if the prosecutor acted in good faith. *People v Wolverton*, 227 Mich App 72, 75-76; 574 NW2d 703 (1997); *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). As with closing argument, the prosecutor may comment on the evidence to be presented and the reasonable inferences to be drawn therefrom if the comments are a fair introduction to the evidence. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976) (Kelly, J., concurring), aff'd sub nom *People v Tilley*, 405 Mich 38 (1979).

The prosecutor indicated in her opening statement that defendant assumed a motherly role toward DZ but it was that of "a sugar mama" who "would buy him things . . . take him places [and] . . . spend money on him." During her case in chief, the prosecutor elicited testimony to show that defendant did all of those things. She bought him a $70 pair of shoes and a $100 outfit, she took him out for meals with her sons, she took him out to see a Christmas light display, and she gave him a ride to Cedar Point. It was reasonable to infer that a woman who does such things for a young man with whom she has sexual relations is the female equivalent of a sugar daddy. Defendant has not shown that the evidence was inadmissible or that the inference drawn therefrom was unreasonable or was not a fair introduction to the evidence. Rather, she contends that the prosecutor's characterization of defendant's relationship with DZ was untenable in light of defendant's evidence showing that there was a legitimate explanation for her actions. The fact that defendant attempted to rebut properly-admitted evidence with evidence

to show that she was kind and generous to a financially-disadvantaged boy who had befriended her son does not establish misconduct by the prosecutor. Rather, it presented an alternative characterization of defendant's actions and it was up to the jury to decide which view was more accurate. Therefore, defendant has not shown plain error.

Affirmed.

/s/ Deborah A. Servitto
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood