STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2009
v	No. 279463 Washtenaw Circuit Court
RANDALL A. RAAR, Defendant-Appellant.	LC No. 06-001130-FC

Before: Murray, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (penetration of a person under 13 years of age), and sentenced to 30 to 60 years' imprisonment.[1] He appeals as of right and we affirm.

I. Basic Facts

The 59-year-old defendant was convicted of sexually assaulting his then five-year-old neighbor in the summer of 1989 or 1990. In April 2006, the police received information that caused them to investigate defendant and canvass his former neighborhoods. At that time, they had contact with the victim, who alleged that defendant had sexually assaulted her when she was four or five years old by digitally penetrating her vagina. At trial, the 21-year-old victim testified that defendant and his roommate, Robert Higgins, lived next door to her family's home. Defendant and Higgins encouraged the neighborhood children to come to their home and use their above-ground pool. The victim indicated that she and her neighbor, AB, were among the children who spent time at defendant's house. The victim explained that defendant and Higgins, both dressed in swimsuits, would be in the pool and catch the children as they came down an attached slide. The victim stated that defendant would "catch [them] between [their] legs and put his hands—or try to put his hands up [them]."

AB testified that she recalled the swimming pool and Higgins, and she also recalled defendant taking several photographs of them. With regard to the charged offense, the victim

[1] Defendant was acquitted of an additional count of possession of a firearm during the commission of a felony, MCL 750.227b.

recalled that on one occasion defendant and Higgins took her and AB into a back room of their house and made them sit on the bed. Higgins then locked the door, and defendant pulled out a gun from a nightstand and placed it on the nightstand.[2] Defendant threatened that he would not hurt their parents as long as they followed instructions. The victim stated that defendant approached her, pulled his pants down, put his penis "in [her] face," "then stuck his penis in [her] mouth and then pulled [her] pants down and [started] fondling [her] between [her] legs and sticking his fingers in [her]." She explained that defendant allowed them to leave after she calmed down, and recalled seeing blood on her bathing suit bottoms and throwing them away because she was afraid. The victim did not tell anyone what happened because she "believed [defendant] when he said he was gonna kill [her] parents," and she believed that he was capable of carrying out the threat. The victim's mother testified that around the time of the assault, the victim "acted out" and started "bed-wetting."

II. Other Acts Evidence

Defendant argues that his conviction should be reversed because evidence of unrelated sexual incidents involving another child, AS, were improperly admitted, contrary to MRE 404(b). We disagree.

AS, aged 37 at the time of trial, testified that when she was eight years old, defendant would give her odd jobs, pay attention to her, and reward her with candy and soda while she was at his house and in his yard. Defendant eventually began to talk to her about sex, gave her alcohol, and said he would teach her what a man wanted. During this time, he photographed her and her friend in the nude. When AS was 10 or 11 years old, defendant started rubbing AS's breasts, and, when she was 11 or 12, he rubbed her vagina. Defendant had sexual intercourse with AS when she was 13 years old. Defendant encouraged AS to use his house, and defendant subsequently told AS if she told anyone about the incidents, he would hurt her mother and grandparents.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). If there is an underlying question of law, such as whether admissibility is precluded by a rule of evidence, we review that question of law de novo. *McDaniel, supra*.

MRE 404(b) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). But other acts evidence is admissible under MRE 404(b) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444

[2] AB did not recall the incident in the back room.

Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In application, the admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *Id.* at 75.

The prosecution offered the evidence to prove a common scheme or plan in doing an act, which is a proper purpose under MRE 404(b). As our Supreme Court explained in *People v Sabin* (*After Remand*), 463 Mich 43, 63; 614 NW2d 888 (2000), "evidence of similar misconduct is logically relevant to show that the charged act occurred 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." See also *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). The *Sabin* Court noted that "[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Sabin*, *supra* at 64. "For other acts evidence to be admissible there must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan." *Hine*, *supra* at 251; see also *Sabin*, *supra* at 64-65. But "distinctive and unusual features are not required to establish the existence of a common design or plan. The evidence of uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense." *Hine*, *supra* at 252-253; *Sabin*, *supra* at 65-66.

The evidence was not offered to show that defendant had a bad character. Rather, we hold that the commonality of the circumstances of the other acts evidence and the charged crimes are sufficiently similar to establish a scheme, plan, or system in doing an act. In both the acts involving AS and the charged crime, there was a concurrence of common features that defendant utilized against the young girls. Defendant befriended and socialized with the young girls, created an enticing environment that gave him access to them, provided treats or use of his pool, photographed them, and threatened their families to ensure that the young girls would not disclose the acts. The commonality of the circumstances of the other acts evidence and the charged crime are sufficiently similar that the jury could infer that defendant had a system that involved taking advantage of his relationship with young girls to perpetrate sexual abuse.

Furthermore, defendant has not demonstrated that the evidence was unfairly prejudicial under MRE 403. While the acts described were serious and incriminating, such characteristics are inherent in the underlying crimes for which defendant was accused. The danger that MRE 403 seeks to avoid is that of *unfair* prejudice, because, presumably, all evidence presented by the prosecution is prejudicial to the defendant to some degree. *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994). Moreover, in its final instructions, the trial court gave a cautionary instruction to the jury concerning the proper use of the other acts evidence, thereby limiting the potential for unfair prejudice. Accordingly, the probative value of the evidence was not substantially outweighed by its prejudicial effect.[3]

[3] We agree with plaintiff that the propriety of admitting the evidence could also be analyzed under MCL 768.27a. But because the prosecution's notice of intent was filed pursuant to MRE 404(b), and the trial court properly ruled that the evidence was admissible under MRE 404(b), (continued…)

III. Court-Appointed Expert

Defendant further argues that the trial court abused its discretion when it denied his motion for the appointment of an expert at public expense. We disagree. A trial court's decision to grant or deny an indigent criminal defendant's motion for appointment of an expert witness at public expense is reviewed for an abuse of discretion. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003).

Defendant requested an expert in clinical psychology to investigate the defense that the victim had suffered from repressed memory, given that she waited several years before reporting the alleged sexual assault. The prosecution opposed defendant's request because the victim's memory was not repressed and "the facts were never out of her conscious control," but rather, she chose not to disclose the acts because of defendant's threats to harm her parents. The trial court found that defendant did not make a sufficient showing of the need for an expert and denied his request without prejudice, allowing him the opportunity to produce an affidavit or other offer of proof of what an expert could offer, but that was not done. At a subsequent pretrial hearing, the trial court ruled that there had been no showing that this is "a repressed memory case."

An indigent criminal defendant does not have an automatic right to a court-appointed expert. *Id.* at 442-443. Instead, a defendant must persuade the trial court to exercise its discretion by demonstrating a "nexus between the facts of the case and need for an expert." *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995) (quotation and citation omitted). The defendant is required to show more than a possibility that the expert would assist the defendant. *Id.* A defendant may not predicate error on the denial of a motion for the appointment of an expert witness in the absence of "an indication that expert testimony would likely benefit the defense." *Tanner*, *supra* at 442-443. Moreover, a defendant must convince the trial court that without the witness, the defendant would be unable to safely proceed to trial. MCL 775.15; *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

The trial court did not abuse its discretion when it concluded that defendant had not demonstrated a sufficient nexus between the facts of the case and the need for an expert to investigate a claim of "repressed memory." The victim testified that she did not disclose defendant's sexual abuse until years later because she feared that defendant would harm her parents, and consistently testified that her memories of what defendant had done were not repressed, have always been with her, and that she "always knew what defendant did to [her]. It never went away." Additionally, the record supports the victim's claims that she feared defendant. The victim's grandmother testified that she recalled visiting the family when the victim was approximately five years old, and the victim ranting that she "hated" defendant because he was "going to kill her mother." Also, while the victim was in counseling in 1991 to 1993, related to her molestation by a babysitter, she repeatedly told the psychotherapist that she was afraid of defendant because he wanted to hurt her mother. The psychotherapist explained that it was common for children not to disclose abuse because of threats.

(…continued)

we decline to address whether it was also admissible under MCL 768.27a.

Because there is no evidence that the victim suffered from repressed memory, the trial court did not abuse its discretion when it denied defendant's motion for appointment of an expert.

IV. Evidence

Defendant next argues that the trial court denied him his right to present a defense by precluding evidence that the victim did not report defendant's sexual abuse to a police officer when reporting the sexual abuse by her babysitter. We disagree.

In 1991, the victim was brought to a police station to be interviewed concerning an allegation that her babysitter had molested her. Defendant sought to present evidence that, in her statement, the victim did not report the sexual assault involving defendant. The trial court held that the evidence was irrelevant, because the interview was specific to the babysitter and the victim knew she was there because of complaints involving the babysitter.

We agree that the proffered evidence was not relevant.[4] Evidence that the then five-year-old victim did not volunteer that defendant had molested her during a police investigation concerning her babysitter did not have a tendency to make it more or less likely that defendant sexually abused the victim. The victim was aware that the purpose of the interview was a specific allegation of molestation by a different person, and did not purport to discover any other abuse. The police report stated that the victim indicated that she knew she was at the police station because "her babysitter had done bad things to her." Furthermore, the jury was aware that the victim did not report defendant's acts until several years later and, after disclosing the abuse, the victim did not waiver on her claim that defendant molested her. In sum, defendant failed to demonstrate how the evidence was relevant to his own culpability; the inference defendant was attempting to draw between the victim's failure to volunteer his name during an unrelated investigation and his own culpability was too tenuous.

We also reject defendant's general claim that the trial court's denial of his request deprived him of his constitutional right to present a defense. Although a defendant has a constitutional right to present a defense, US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), he must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). Here, the trial court's ruling was not an exclusion of all evidence challenging the victim's credibility. Indeed, defense counsel cross-examined the victim at length, and consistently highlighted the victim's delay in coming forward. Moreover, contrary to defendant's implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Consequently, reversal is not warranted on this basis.

[4] Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388-389; 582 NW2d 785 (1998).

V. Prosecutorial Misconduct

We reject defendant's contention that he is entitled to a new trial because the prosecutor argued improper character evidence and impermissibly appealed to the jurors' civic duty. Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Here, however, defendant failed to object to the prosecutor's remarks concerning his "bad character." We review that unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (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." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

A. Arguing "Bad Character"

Defendant argues that the prosecutor impermissibly referred to his "bad character" during opening statement when he made the following remarks:

> And, the facts in this case will show that this Defendant has a powerful attraction to and lust for children.
>
> * * *
>
> And, you will hear testimony that both of these [men] molested children.

Viewed in context, the prosecutor was indicating what he intended to prove during trial. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976), aff'd 405 Mich 38 (1979) ("The purpose of an opening statement is to tell the jury what the advocate proposes to show."). During trial, the prosecutor presented evidence that defendant engaged in sexual acts with the victim and AS, both of whom were children at the time. As discussed in section II, evidence of defendant's uncharged sexual acts with AS was admissible under MRE 404(b). Additionally, two inmates testified that defendant told them that he has an penchant for children, that he did "sexual things" to young children, that he had sexual intercourse with AS, and that he molested the victim. Thus, the prosecutor's statements were substantiated by the evidence and defendant has failed to show a plain error affecting his substantial rights.

B. Arguing Civic Duty

Defendant further argues that, in the following excerpt from closing argument, the prosecutor made an improper civic duty argument to the jury and, although defense counsel objected, the trial court did not rule:

> *The prosecutor*: I'm asking you not to fail [the victim] now. And, by extension, the community.
>
> *Defense counsel:* Objection. Civic duty argument.

The prosecutor: I'm not making that argument. I'm stating here that there - - that you represent the community, you represent the people. We can't [sic] everybody in here to decide a case, so you come in as representative to do that and to uphold the law in the case. And, so I'm asking you do [sic] that in this case and that you find this Defendant guilty as charged on both of theses counts and, hopefully, then justice will prevail in this case.

Prosecutors should not resort to civic duty arguments that appeal to the prejudices of jurors. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Viewed in context, the prosecutor's comments did not improperly suggest that the jury should convict defendant on the basis of civic duty. The comments were made during closing argument and occurred after a lengthy and detailed discussion of the evidence. Furthermore, in its final instructions, the trial court instructed the jurors that they should not be influenced by prejudice, that the case should be decided on the basis of the evidence, and that they were to follow the court's instructions. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Consequently, this argument does not warrant reversal.[5]

VI. Motion to Withdraw

We reject defendant's claim that the trial court abused its discretion by failing to order defense counsel to return defendant's retainer as a condition of withdrawal. Defendant retained his original trial counsel to represent him in this case and another pending case in Wayne County. Finding that there was a breakdown in the attorney-client relationship between defendant and defense counsel, the trial court permitted counsel to withdraw from the case:

The court: Do you have . . . sufficient funds or cash or resources for which you can hire your own private lawyer?

Defendant: I do not.

The court: All right. The court will appoint the Public Defendant . . . .

I would ask [defense counsel] to cooperate with the Public Defendant's office and provide any discover to them . . . .

Defense counsel: I will - - I will do my - - my utmost, your Honor.

Defendant: If - - your Honor, can I get a refund. I gave him $15,000 for this case.

[5] We also reject defendant's related argument that he was denied the effective assistance of counsel because defense counsel failed to object to the prosecutor's remarks. Because the trial court's instructions adequately protected defendant's rights, defendant cannot demonstrate a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

The court: Well, that's not before me.

Defendant has not offered any support for his claim that the trial court was required to order defense counsel to return the retainer as a condition of withdrawal. That matter was not before the court and defendant had not previously raised the issue, but merely made the request at the conclusion of the hearing. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Accordingly, we reject this claim of error.

VII. Sentence

A. Challenge to Accuracy of the Presentence Report

We disagree with defendant's claim that resentencing is warranted because the trial court failed to delete inaccurate information from his presentence report. At sentencing, either party may challenge the accuracy or relevancy of any information contained in the presentence report. MCR 6.425(E)(1)(b); *People v Hoyt*, 185 Mich App 531, 533-534; 462 NW2d 793 (1990). The information is presumed to be accurate, but when presented with a challenge to the factual accuracy of information, a court has a duty to resolve the challenge. *People v Uphaus* (*On Remand*), 278 Mich App 174, 182; 748 NW2d 899 (2008). If the challenged information did not affect the sentencing decision, resentencing is not required. *People v Thompson*, 189 Mich App 85, 88; 472 NW2d 11 (1991).

The Agent's Description of the Offense section includes statements from BB, who told investigators that he observed video cameras linked to a computer in defendant's house that showed sexual acts involving children with defendant and Higgins:

> The investigation of the defendant continued and other contacts and interviews were made. Investigators talked to [BB], who states when he was a child he would routinely go over to the defendant's home. On one particular day, he remembers that the house was full of video cameras that were linked to a computer in the kitchen. [BB] told investigators that he came into the kitchen area and [defendant] showed him a video of Robert Higgins having fellatio performed by an approximate 10-year-old female. [BB] further stated that another video showed the defendant sodomizing an individual who looked to be 12 years of age.

Defense counsel requested that this information "be deleted, *because it really has nothing to do with this case*." After noting the request, the trial ruled that the information was relevant and explained that "just because . . . it was not used as evidence in this case doesn't mean it can't be used in the presentence report." Defendant now claims that the information is inaccurate and that the trial court failed to verify the information. However, defendant did not challenge the information as inaccurate at sentencing. The proper time to raise a challenge to the accuracy of information in the presentence report is at the time of sentencing. *People v Sharp*, 192 Mich App 501, 504; 481 NW2d 773 (1992); MCL 771.14(6); MCR 6.425(E)(2). Because defendant's 30-year minimum sentence is within the sentencing guidelines range of 180 to 360 months, and because defendant failed to challenge the accuracy of this information at or before sentencing, or

as soon as the inaccuracy could have been discovered, he may not now do so for the first time on appeal.[6] MCR 6.429(C); MCL 769.34(10).

B. Scoring of the Sentencing Guidelines[7]

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted).

1. PRV 7

Defendant was scored 20 points for prior record variable (PRV) 7. Under the judicial sentencing guidelines, 20 points should be scored for PRV 7 if "[t]he offender has 2 or more subsequent or concurrent convictions." Michigan Sentencing Guidelines (2d ed, 1988), p 43. The guidelines instruct a score "when the offender is convicted of multiple felony counts or is convicted of a felony subsequent to the commission of the instant offense." Defendant was convicted of several different child Internet pornography crimes on February 27, 2007. Because those convictions occurred subsequent to the commission of the instant offense, which occurred in 1989 or 1990, the trial court did not abuse its discretion in scoring 20 points for PRV 7.

2. OV 1

Five points are to be scored for offense variable (OV) 1 if a "firearm displayed, implied, or possessed." Michigan Sentencing Guidelines (2d ed, 1988), p 44. The trial court relied on the victim's unequivocal testimony that defendant displayed a firearm during the incident. Defendant challenges the score of the basis that he was acquitted of felony-firearm. However, because a different burden of proof applies to the establishment of a minimum sentence, "the scoring of the guidelines need not be consistent with the jury verdict . . . ." *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), aff'd in part and vacated in part on other grounds 469 Mich 415 (2003). "[S]ituations may arise wherein although the fact finder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing." *Id.* at 713. Because the victim's testimony was sufficient to support a finding that a firearm was displayed, OV 1 was properly scored at 25 points.

3. OV 2

Twenty-five points are to be scored for OV 2 if the victim suffered "bodily injury" or was subjected to "terrorism." Michigan Sentencing Guidelines (2d ed, 1988), p 44. The victim

[6] We note that the trial court noted that defendant was a "chronic pedophile" when imposing sentence, and there was substantial unchallenged information to support this finding.

[7] Because the offenses for which defendant was convicted occurred before January 1, 1999, the former judicial sentencing guidelines apply to this case. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).

testified that after defendant digitally penetrated her vagina, she saw blood on her bathing suit. Also, the victim's impact statement indicates that defendant's acts "caused [the victim] to bleed," and that "she was physically injured." Because this evidence shows that defendant's actions caused the victim to suffer bodily injury, the trial court did not abuse its discretion in scoring 25 points for OV 2.

4. OV 12

OV 12 addressed "penetrations involving the offender arising out of the same criminal transaction." Twenty-five points should be scored for "1 criminal penetration"; a trial court may not count the sexual penetration that formed the basis for the conviction when that offense is itself "the conviction offense." Michigan Sentencing Guidelines (2d ed, 1988), p 45. The Information charged defendant with first-degree CSC on the basis of digital penetration of the victim's vagina. Only one sexual penetration was required to form the basis of the first-degree CSC conviction, but the victim testified that during the incident defendant also inserted his penis in her mouth. This evidence supports the trial court's score of 25 points for OV 12.

5. OV 13

Five points are to be scored for OV 13 if there is "[s]erious psychological injury to a victim or victim's family necessitating professional treatment." Michigan Sentencing Guidelines (2d ed, 1988), p 45; *People v Elliott,* 215 Mich App 259, 261-262; 544 NW2d 748 (1996). Defendant argues that OV 13 should not have been scored because the victim attended counseling as a result of molestation by her babysitter. But according to the victim's impact statement, the victim stated that she "was in counseling for *this* incident." Also, the victim's psychotherapist testified that when she counseled the victim in 1991 to 1993, the victim repeatedly expressed her fear of defendant. This evidence is sufficient to support the trial court's score of five points for OV 13.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Alton T. Davis