STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 19, 2009
v	No. 281764 Shiawassee Circuit Court
DAVID GADDIS STUCKEY, Defendant-Appellant.	LC No. 07-005024-FC

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (engaging in sexual penetration with a person under the age of thirteen) (CSC I), and second-degree criminal sexual conduct, MCL 750.520c(1)(a) (engaging in sexual contact with a person under the age of thirteen) (CSC II). The trial court sentenced defendant to 5 to 20 years in prison for his CSC I conviction, and to 5 to 15 years in prison for his CSC II conviction. Because we conclude that there were no errors warranting relief, we affirm.

Defendant first argues that the prosecutor committed misconduct when she suggested that defendant and his wife were bad parents during her closing argument. These comments, defendant contends, deprived him of a fair trial. Because defendant's trial counsel did not object to these comments, the claim of error is unpreserved. See *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

The test of prosecutorial misconduct is whether, when examining the prosecutor's remarks in context, the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Although a prosecutor is not allowed to argue facts not in evidence, *Watson*, 245 Mich App at 588, prosecutors are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case, *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008).

During closing argument, the prosecutor commented on defendant's testimony, and that of defendant's wife, Annette, and his daughter, Heather:

> It's a classic example of when all else fails just deny. They have formed a circle around the family unit and they're gonna' stick together – deny, deny, deny. "I don't remember a storm in 1998, and this child never, ever spent the night." Now how credible, ladies and gentlemen, is that? These children are good friends, have been friends for years, and now all of a sudden the Stuckeys say, "This child never, ever spent the night at our house." Does that make sense to you? Remember, [the victim] described what that basement looked like. It's not the kind of basement kids are going to go down and play in. It's a place you can go when there's a tornado or severe storm, and that's what she remembers.

After commenting generally on the credibility of these witnesses, the prosecutor turned to the relationship between defendant's wife and defendant's daughter.

> Annette Stuckey has never really connected with her own child. Heather Stuckey had to plan her own birthday party because the parents never threw one for her when she was a kid. She wanted one, had asked for one. She told you that. Mom and dad always said no. So this little girl at ten years old is gonna' plan her own birthday party because her folks aren't really connected with her. And who does [Annette] go to for help? She goes to [the victim's mother]. "Will you help me with this party."
>
> Heather Stuckey. Look at this young woman and you ask yourself this question? Why did she move out of that house two months after graduation and marry? And what did she tell you? My dad never, ever even tickled or touched one of my friends. Never did that. [The victim] never spent the night, and none of this ever happened. He never did anything inappropriate. Well, we know that she made a statement back in 1999 to [Lieutenant Michael Ash] saying that, "Yah, dad was tickling my friends. Yah, it did make them uncomfortable. Yah, it made me uncomfortable, too, and now that had stopped." That was her statement back in 1999, not the statement that we heard here yesterday.

Defendant argues that these comments denied him of his right to a fair and impartial trial by arguing facts not in evidence in an effort to convince the jury to convict defendant based on the fact that he and his wife were bad parents.

We first note that the record establishes that: (1) defendant, Annette and Heather all testified that the victim had never spent the night at the Stuckey residence; (2) Heather planned a surprise birthday party for herself because she had never had a birthday party before; (3) Heather did not tell her parents about the party so Annette had to call the victim's mom for some last minute help with the party; (4) Heather got married right after she graduated from high school and moved to Oklahoma; and (5) Heather's testimony that she never saw defendant tickle her friends was inconsistent with her 1999 statement to Lieutenant Ash. It follows that the prosecutor's comments were based on facts in evidence.

In addition, when viewed in context, it is evident that the prosecutor's comments were not made in an effort to convince the jury to convict defendant based on his parenting; rather, the remarks were clearly made to highlight the inconsistencies between the Stuckeys' testimony and other testimony and evidence. The prosecutor noted that, not only was Heather a friend of the victim, but their mothers were also friends. Hence, the Stuckeys' testimony that the victim was never allowed to spend the night at the Stuckey residence appeared inconsistent with this level of friendship. The comments also highlighted the discrepancy between Heather's testimony that she never saw defendant tickle any of her friends and her prior statement to Lieutenant Ash that she saw defendant tickle her friends. Finally, the prosecutor's comments concerning Heather's decision to marry and move to Oklahoma were also not improper. In the context of all the evidence, the comments permissibly suggest that Heather's trial testimony is inconsistent with both her prior statements and her past actions. The prosecutor's comments were proper. *Watson*, 245 Mich App at 588. Hence, there was no plain error. For this reason, we must also reject defendant's alternative contention that his trial counsel was ineffective for failing to object to these comments; defendant's trial counsel cannot be faulted for failing to make a futile objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant next argues that the trial court abused its discretion when it allowed two witnesses to present other acts testimony in violation of MRE 404(b). We review a trial court's decision to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Evidence that a defendant committed other crimes, wrongs or acts is generally not admissible to show that the defendant acted in conformity with his bad character. See MRE 404(b)(1); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, with the enactment of MCL 768.27a, our Legislature has determined that a prosecutor may "introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b)." *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007). This statute provides: "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. . . ." MCL 768.27a(1).

Here, defendant was accused of committing "a listed offense" (CSC I and II) against a minor, and the questioned testimony alleged that defendant committed "another listed offense" (CSC II) upon the two witnesses when they were minors. See 768.27a(2); MCL 28.722(e)(*x*). Hence, under MCL 768.27a(1), the witnesses' testimony was admissible so long as it was relevant.

The first witness testified that each time she went to the Stuckey residence defendant would tickle her on her inner thigh and "bottom." The second witness testified that on the only occasion that she went to the Stuckey residence, defendant tickled her, attempted to kiss her, and even stuck his hand up her shirt and touched her breast. This testimony has a tendency to show that defendant had a habit of tickling his daughter's friends in inappropriate places and attempting to kiss them, and therefore, that the victim's testimony that defendant tickled and touched her in inappropriate ways and even kissed her on one occasion, was credible. See MRE

401; MRE 402. The trial court did not abuse its discretion when it allowed the prosecution to introduce the testimony.

Defendant next argues that the trial court erred when it failed to dismiss the charges against defendant based on the terms of an alleged plea agreement. We review a trial court's findings regarding the existence of a plea agreement for clear error. *People v Hannold*, 217 Mich App 382, 389; 551 NW2d 710 (1996).

Defendant cites *People v Reagan*, 395 Mich 306; 235 NW2d 581 (1975), for the proposition that, because he passed a privately administered polygraph examination, the charges against him should have been dismissed under an alleged agreement with the prosecution that it would dismiss defendant's charges if he passed a polygraph examination. Here, in contrast to the situation in *Reagan*, there is no factual basis in the record for concluding that the parties had actually entered into such a plea agreement. In fact, defendant has not even offered an affidavit stating that the alleged plea agreement existed. Although the prosecution admits that it set up two state administered polygraph examinations at defendant's request, which defendant failed to attend, the prosecution vehemently denies the existence of a plea agreement that would result in the dismissal of the charges against defendant if he passed an examination. Given this record, we cannot conclude that the trial court clearly erred when it found that there was no agreement. Hence, there was no error warranting relief.

Defendant next argues that the trial court erred when it permitted three witnesses to testify concerning statements that the victim made to them. Defendant's trial counsel did not object to the alleged hearsay, therefore our review is for plain error. *Thomas,* 260 Mich App at 453-454.

Hearsay is defined as a statement, other than one made by the declarant while testifying at a trial or hearing, which is offered to prove the truth of the matter asserted. MRE 801(c). Under MRE 801(d)(1)(B), a prior statement of a witness is not hearsay when the witness testifies at the proceeding, is subject to cross-examination concerning the statement, the statement is consistent with his testimony and the statement is offered to rebut a charge of express or implied recent fabrication, improper influence or motive. *People v Fisher*, 220 Mich App 133, 154; 559 NW2d 318 (1996). To be admissible as rebuttal to a suggestion of recent fabrication, a prior consistent statement must have been made before the motive to fabricate arose. *People v Jones*, 240 Mich App 704, 708-709; 613 NW2d 411 (2000).

Here, it is undisputed that the victim testified at trial, was subject to cross-examination, and that her statements to her friends were consistent with her trial testimony. Further, defendant does not argue that the victim's prior statements to her friends were made after her motive to fabricate arose, but rather, argues that the statements are not admissible under MRE 801(d)(1)(B) because defendant never implied that the victim was fabricating her testimony. We do not agree that defendant never challenged the veracity of the victim's testimony. Defendant's trial counsel impliedly challenged the victim's accusations (1) through questions on cross-examination, (2) by asking the victim's doctor whether the victim was projecting her feelings toward her father onto defendant, (3) by eliciting expert testimony that truthfulness is an issue for the victim because she suffers from borderline personality disorder and that the victim might make things up in order to get attention, and (4) by eliciting testimony that directly contradicted the victim's testimony. We therefore conclude that the questioned testimony relating statements that the

victim had previously made to her friends was not hearsay. MRE 801(d)(1)(B). Consequently, there was no plain error. Likewise, for that reason, defendant's trial counsel was not ineffective for failing to object to the questioned testimony. *Ackerman,* 257 Mich App at 455.

Finally, defendant argues that the trial court erred when it denied his request for a state administered polygraph examination. When reviewing a trial court's denial of a defendant's timely request for a polygraph examination under MCL 776.21(5), this Court "must examine the nature of the error and assess its effect in light of the weight and strength of the untainted evidence" to determine whether "after an examination of the entire cause, that it is more probable than not that the error was outcome determinative." *People v Phillips*, 469 Mich 390, 396-397; 666 NW2d 657 (2003) (internal quotes and citations omitted). Because we conclude that any error in this regard was not outcome determinative, it does not warrant relief. *Id.*

There were no errors warranting relief.

Affirmed.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Kelly