

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 16, 2012

v

SAMUEL MICHAEL ROSIER,
Defendant-Appellant.

No. 301493
Wayne Circuit Court
LC No. 10-006932-FC

Before: STEPHENS, P.J., and WHITBECK and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim was under 13 years old). Defendant was sentenced to life imprisonment without the possibility of parole under MCL 750.520b(2)(c) (second conviction of criminal sexual conduct with victim under 13 years old). He appeals of right. We affirm.

On appeal, we first address defendant’s argument that the trial judge erred by admitting testimony about defendant’s prior bad acts. We disagree.

Generally, this Court reviews a trial court’s decision to admit bad acts evidence for a clear abuse of discretion. *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). However, this Court reviews preliminary questions of law de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). This Court finds an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *Id.* Additionally, this Court will not reverse the trial court for admitting bad acts evidence unless it is more probable than not that the error was outcome determinative. Similarly, the defendant must prove that it is more probable than not that a miscarriage of justice occurred. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

MCL 768.27a(1) provides, in relevant part: “[I]n a criminal case in which the defendant is accused of committing [a violation of MCL 750.520b(1)(a)], 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.” However, even when evidence is admissible pursuant to MCL 768.27a(1), the prosecution must demonstrate that the probative value of the evidence outweighs the danger of unfair prejudice, as dictated by MRE 403. *People v Pattison*, 276 Mich App 613, 621; 741 NW2d 558 (2007). Further, MCL 768.27a allows the prosecutor to introduce testimony of previous sexual offenses against minors even when the evidence is not

admissible under MRE 404(b). *People v Watkins*, 277 Mich App 358, 364; 745 NW2d 149 (2007), citing *Pattison*, 276 Mich App at 618-619.

The trial judge properly found that the evidence was admissible under MCL 768.27a. The prior victim testified about defendant's sexual assault. She was 10 years old at the time of the assault. He was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years old). MCL 786.27a allows the prosecution to present relevant propensity evidence from defendant's previous violation of MCL 750.520b(1)(a). See also MCL 28.722(k) and MCL 28.722(w)(iv).

While defendant appears to acknowledge that details regarding the first sexual assault were admissible, he argues that certain details were irrelevant and created a risk of unfair prejudice under MRE 403. This argument lacks merit. Under MRE 401, relevant evidence is evidence that has "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." "[It] is admissible if it is helpful in throwing light on any material point." *Aldrich*, 246 Mich App at 114. Defendant's behavior during, and the circumstances surrounding, the two assaults are similar enough to make the previous bad act relevant. The prior victim and the victim were young neighbor girls and they had both been over to defendant's house on previous occasions before the assaults. Defendant isolated the girls, obstructed their vision, and without force, put his penis in their mouths. The prosecution, by questioning the first victim about the nature of her relationship with defendant and the manner in which he elicited her trust, was able to show the extent of the similarities between defendant's alleged sexual assaults. Therefore, the level of detail was not excessive to the point of irrelevance.

In addition to finding the evidence in question relevant, we also conclude that the danger of unfair prejudice did not outweigh the probative value of the evidence. Defendant appears to argue that because the testimony about defendant's prior conduct became emotional, it was unfairly prejudicial. Defendant offers no authority for the proposition that otherwise admissible evidence can be rendered inadmissible if it is presented in an emotional manner or contains emotional content. Rather, the demeanor of a witness is simply one aspect of testimony that jurors may evaluate in determining a witness's credibility. See *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998).

We next address defendant's argument that the trial court erred by allowing the prosecution to show the jury the film, *The Lovely Bones* (DreamWorks Pictures 2009). While we agree that the court abused its discretion in admitting the film as evidence, we find that defendant is not entitled to relief because the error not outcome determinative.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An abuse of discretion occurs when a trial court's decision falls outside of the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Under MRE 401, relevant evidence is evidence that has "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." "[It] is admissible if it is helpful in

throwing light on any material point.” *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). However, relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence.” *People v Blackston*, 481 Mich 451, 461; 751 NW2d 408 (2008), quoting MRE 403. Unfair prejudice exists when there is a danger that the jury will give the evidence undue or preemptive weight, or when it would be inequitable to admit the evidence. *Id.* at 462.

Assessing probative value against prejudicial effect requires a balancing of factors, including the time necessary to present the evidence and the potential for delay, whether the evidence is cumulative, how directly the evidence tends to prove the fact in support of which it is offered, how important the fact sought to be proved is, the potential for confusion or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. [*Id.* at 462.]

The proponent of the evidence has the burden of establishing its admissibility. *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006). The prejudicial effect of evidence is best determined by the trial court’s “contemporaneous assessment of the presentation, credibility and effect of the testimony.” *People v Vandervliet*, 444 Mich 52, 81; 508 NW2d 114 (1993). For this Court to reverse on the basis of an evidentiary error, it must be more probable than not that the error was outcome-determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

We conclude that the trial judge did not abuse his discretion in concluding that the film was relevant and therefore admissible under MRE 401. The victim’s mother, during cross-examination by defendant’s attorney, stated that she was watching a movie with the victim when she first heard of the sexual assault. In response, defense counsel specifically asked for the name of the film. The victim’s mother then stated that they were watching *The Lovely Bones*. When the jury became aware of the identity of the film that the victim was watching when she related her story to her mother, the film became relevant because the jurors may have believed that the content of the film caused the victim to fabricate her account. Our conclusion regarding relevancy is certainly influenced by the young age of the victim in this case. Because it is may be considered unusual for a child as young as this victim to be aware of oral sex, the content of the film was relevant to demonstrate that the victim’s awareness of oral sex was not merely the product of her watching the film.

Although we conclude that the evidence was relevant, we nonetheless conclude that, pursuant to MRE 403, the evidence was improperly admitted where the danger of unfair prejudice substantially outweighed any probative value of the film. Although the film was relevant under MRE 401, it was only slightly probative of whether the victim fabricated the story after seeing the film. Defendant did not explicitly argue that the victim fabricated the story after seeing the film. Further, testimonial evidence demonstrated that the victim told other children about the alleged sex act before she viewed the film.

While the probative value of the evidence in question was minimal, the danger of unfair prejudice was not. The film is primarily about a man who preys on children in his neighborhood

and about parents coping with the murder of their young daughter at his hands. Although it is never expressly stated that the daughter was sexually assaulted prior to her murder, it is implied. Further, one of the many murder victims of the man in the film was a six year old girl, which was similar to the age of the victim defendant was accused of assaulting. The film is emotional and suspenseful, and includes scenes in which children are shown in grave peril.

The jurors in this case were aware that defendant had previously sexually assaulted a girl in his neighborhood prior to the accusations in the present case. Considering the film's themes relating to repeated predatory behavior toward neighborhood children, there was a danger that the jurors would have felt unfairly motivated to convict defendant in order to protect other children from future harm. Furthermore, there was a less prejudicial method available to demonstrate that the film did not depict the acts defendant allegedly committed. The prosecution could have simply asked the victim's mother whether the film depicted oral sex, which it does not. As a result, the trial court abused its discretion in admitting the film as evidence and permitting the jurors to watch the film prior to deliberating.

Despite our finding that the evidence was improperly admitted, defendant is not entitled to relief because the trial court's error was not outcome-determinative. There is no reason to believe that the jury's verdict was the product of prejudice created by viewing the film. Rather, considering all of the evidence in the case, it is certain that the jury concluded that the victim's testimony was credible and that she was truthfully describing actions that defendant committed. This evidence included testimony from the victim's brother and from a previous victim. The brother's testimony that the victim reported the assault immediately after it occurred bolstered her credibility. More compelling, however, was the testimony from defendant's previous victim, which, for reasons discussed above, was properly admitted. In this case, the record was replete with defendant's trust building or grooming behavior toward the victim prior to her assault. The similarities between these two victims who had no relationship with each other were overwhelming. Consequently, we cannot conclude that the result of this trial would have been any different had the film been excluded.

Next, defendant contends that the prosecutor committed various acts of misconduct during the course of the trial. We disagree.

Defendant failed to object to each of the alleged instances of prosecutorial misconduct. This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

"[T]he test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A defendant's fair trial is endangered "when the prosecutor interjects issues broader than the guilt or innocence of the accused." *Id.* A prosecutor's statements must be read as a whole. *Brown*, 279 Mich App at 135. The statements should be evaluated in light of the evidence presented at trial. *Id.* Improper statements made by the prosecutor may not be error requiring reversal if the statements address issues raised by the defense. A prosecutor may argue the evidence and all reasonable inferences arising from the evidence but may not make any statements of fact to the jury that are unsupported by the evidence. *People v Unger*, 278 Mich App 210, 236, 241; 749 NW2d 272

(2008). A prosecutor may argue from the facts in evidence that a witness is worthy or not of belief. *Dobek*, 274 Mich App at 67.

First, defendant argues that a portion of the prosecutor's opening statement was improper. The prosecutor stated:

'Mom, Sam put his private in my mouth.' That's the words that [the victim's mother] heard on the early morning of June the 19th of this year. It was her five year old daughter, [the victim], reporting that to her; 'Mom, Sam put his private in my mouth.'

Defendant asserts that the prosecutor improperly included inadmissible hearsay in its opening statement. While the victim's statement may have been inadmissible hearsay, it was eventually introduced to the jury when defense counsel was cross-examining the victim's mother. Consequently, we cannot conclude that the prosecutor's conduct prevented defendant from receiving a fair trial where that statement would have eventually been introduced. Further, the jury was instructed that the statements of the attorneys were not to be considered as evidence. It is presumed that the jurors followed their instructions and that the instructions cured any error. *People v Abraham*, 256, Mich App 265, 279; 662 NW2d 836 (2003).

Second, the prosecutor did not commit misconduct when, during his opening statement, he mentioned that the victim told her mother about the assault after watching a film. The prosecutor did not describe the film in any detail and did not even mention its name. That the trial judge was deciding whether the film was admissible did not preclude the prosecutor from mentioning that the victim watched a film before she told her mother about the assault.

Third, the prosecution did not deny defendant a fair trial when, in its opening statement, it described defendant's prior sexual misconduct in a manner that was slightly inaccurate. This Court will not reverse a conviction simply because the prosecutor makes unsubstantiated statements in his opening statement. The prosecutor must also have acted in bad faith or his statements must have prejudiced the defendant. *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997), quoting *People v Davis*, 343 Mich 348, 357; 72 NW2d 269 (1955). Defendant does not allege, nor is there any indication, that the prosecutor acted in bad faith. Furthermore, the differences between the prosecutor's description of the testimony and the actual testimony were minor and the prosecutor's description of the proposed testimony was not prejudicial.

Fourth, defendant argues that the prosecutor vouched for his witnesses and told the jury he believed defendant was guilty. The prosecutor may not vouch for the credibility of a witness by implying that he has some special knowledge, *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009), but he may argue that a witness is worthy or not worthy of belief, *Dobek*, 274 Mich App at 67. Here, the prosecutor pointed out that the victim's testimony was inconsistent but still trustworthy because the inconsistencies were to be expected from a young victim. He also stated that it would be unusual for a child to fabricate a story about fellatio and that there was no reason to believe that an adult planted the story with the victim. Similarly, he indicated that the prior victim was worthy of belief because she was much older at the time that defendant assaulted her and the assault was an event that would have remained memorable, even after the

passage of time. In neither instance did the prosecutor indicate that he had special knowledge that the witnesses were credible. Rather, he simply pointed to the facts as presented to the jurors and noted that those facts did not render the witnesses unworthy of the jurors' belief. The prosecutor's statements amounted to a proper commentary on the admitted evidence.

Finally, defendant argues that the prosecutor's statements that defendant "sees kids differently than the rest of us do" and that "[he] has sexual urges towards children that he chooses not to control," were improper. Defendant states that the prosecutor is not allowed to "assert his personal opinions as to . . . the guilt or innocence of an accused." *People v Whalen*, 390 Mich 672, 687; 213 NW2d 116 (1973). Further, a prosecutor should refrain from "denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). While the prosecutor did not imply that he had special knowledge of defendant's guilt, his comments did arguably rise to the level of intemperate. However, when viewed in context, the comments do not mandate reversal. As stated above, the jury was instructed to not consider the statements of the attorneys as evidence. Further, there was significant evidence presented to establish defendant's guilt beyond a reasonable doubt. As a result, the comments regarding defendant and his view of children, while improper, were not outcome determinative.

Next defendant argues that his trial counsel was ineffective because he failed to object to the prosecutor's opening statement and closing arguments, failed to ask for a limiting instruction and elicited hearsay testimony from the victim's mother. We disagree.

Ineffective assistance of counsel claims are mixed questions of law and fact. This Court reviews a trial court's findings of fact, if any, for clear error, and reviews the ultimate constitutional issue arising from the ineffective assistance of counsel claim de novo. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). However, because there has not been an evidentiary hearing to further develop defendant's claim of ineffective assistance of counsel, our review is limited to mistakes apparent on the record. *People v Davis*, 248 Mich App 655, 666; 649 NW2d 94 (2002).

To prove a claim of ineffective assistance of counsel, a defendant must establish (1) that counsel's performance fell below objective standards of reasonableness, (2) but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different, *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), , and (3) the resultant proceedings were fundamentally unfair or unreliable, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Effective assistance of counsel is presumed and the defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant's trial counsel was not ineffective where he elicited otherwise inadmissible hearsay from the victim's mother. While cross-examining the victim's mother, defense counsel asked her what the victim specifically said to her while they were watching the film together. She then testified that the victim stated "Sam put his private in my mouth." As the prosecution correctly points out, the decision to elicit this testimony amounts to a matter of trial strategy. Defense counsel was attempting to prove that after the victim's mother heard that inflammatory statement, she was so enraged that she failed to reasonably investigate the claim and the resulting

charges were unreliable. Defense counsel is granted broad discretion in choosing the proper trial strategy to follow. *Odom*, 276 Mich App at 415. We cannot conclude that it was unreasonable to elicit the testimony in question, particularly where the statement merely reiterated an accusation that the jury would hear from several other sources.

Defendant also asserts that defense counsel was ineffective in failing to object to several instances of prosecutorial misconduct. As described above, we largely disagree with defendant's characterization of the prosecutor's conduct as improper. Counsel is not required to argue a meritless position or raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). While we did conclude that the prosecutor improperly commented on defendant's sexual attraction to children, we also concluded that the comment did not prejudice defendant. Because that comment was not prejudicial, it follows that counsel's failure to object to the comment did not impact the outcome of the trial.

Finally, defendant argues that counsel was ineffective for failing to request a limiting instruction regarding the testimony of the victim of defendant's prior conduct. As described above, the prior victim's testimony was proper and did not exceed the scope of relevancy. Further, the evidence was admissible pursuant to MCL 768.27a and could be "considered for its bearing on any matter to which it is relevant." In light of the broad language of MCL 768.27a, defendant fails to explain the manner in which the consideration of the testimony should have been limited. As a result, defendant has not shown that counsel's performance fell below an objective standard of reasonableness. Further, defendant has made no argument that counsel's alleged error was outcome determinative. Therefore, he is not entitled to relief on this basis.

Next, defendant alleges that he was denied a fair trial because of the cumulative effect of these alleged errors. We disagree.

"This Court reviews [cumulative error issues] to determine if the combination of alleged errors denied defendant a fair trial." *Knapp*, 244 Mich App at 387. The cumulative effect of several minor instances of misconduct can warrant reversal although the individual errors would not. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). The errors must be seriously prejudicial in order to find defendant was denied a fair trial. *Knapp*, 244 Mich App at 387-388. Due process does not require perfect trials but it does require fair trials. *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987).

As described in detail above, we have rejected the majority of defendant's claims of error. While we have concluded that the trial court erred in admitting the film as evidence and that the prosecutor made one improper statement during his closing argument, we cannot conclude that defendant is entitled to relief as a result of the cumulative effect of those two errors. The evidence of defendant's guilt was substantial. The errors, even considered together, were not seriously prejudicial and did not deny defendant a fair trial.

Finally, defendant contends that his sentence is unconstitutional cruel or unusual punishment. We disagree.

We review unpreserved claims of sentencing error for clear error affecting substantial rights. *People v Kimble*, 470 Mich 305, 311-312; 684 NW2d 669 (2004). Under the Michigan

Constitution, cruel or unusual punishment protects against a “grossly disproportionate” sentence. *People v Bullock*, 440 Mich 15, 32; 485 NW2d 866 (1992). If punishment “passes muster under the state constitution, then it necessarily passes muster under the federal constitution.” *People v Nunez*, 242 Mich App 610, 618; 619 NW2d 550 (2000).

As this Court has explained:

In determining whether a sentence is cruel or unusual [this court] look[s] to the gravity of the offense and the harshness of the penalty, comparing the penalty to those imposed for other crimes in this state as well as the penalty imposed for the same offense by other states and considering the goal of rehabilitation. [*People v Poole*, 218 Mich App 702, 715; 555 NW2d 485 (1996).]

We will address each of the appropriate factors in turn. First, defendant’s sentence is not cruel or unusual given the gravity of the offense. Defendant mistakenly relies on the absence of any violence, other than the sexual assault accomplished by trickery and deceit, to claim that life imprisonment without the possibility of parole is cruel or unusual. He sexually assaulted a five-year-old girl. He first blindfolded her. He betrayed her trust. She was emotionally traumatized by the incident. She has nightmares, wets herself and exhibits oral sexual behavior. Defendant did not have to physically hurt the victim or use physical force in order to do permanent psychological damage.

Defendant’s sentence is not disproportionate compared to the penalty imposed for other crimes in this state. Michigan mandates a sentence of life imprisonment without the possibility of parole for various violent crimes resulting in death or with the intent to kill another person. See MCL 791.234(6). However, the Michigan legislature has determined that first-degree criminal sexual conduct is a grave offense and first-degree criminal sexual conduct against a minor is even graver. MCL 750.520b(2)(a) allows a judge to sentence a defendant up to life in prison for his first first-degree criminal sexual conduct offense. MCL 750.520b(2)(b), allows a judge to sentence a defendant up to life in prison with a minimum of 25 years imprisonment for his first first-degree criminal sexual conduct offense committed against a minor. Therefore, life imprisonment without the possibility of parole for a recidivist criminal sexual conduct offender who targets minors is consistent with the sentencing scheme.

Defendant’s sentence is not disproportionate when compared to the punishment of first-degree criminal sexual conduct in other jurisdictions. In Georgia, Oklahoma, South Carolina, Texas and Montana, *second offense* intercourse with a child under the age of 13 can be punished by death. *Kennedy v Louisiana*, 554 US 407, 423; 128 S Ct 2641; 171 L Ed 2d 525 (2008). In Louisiana, *first offense* intercourse with a child under the age of 13 can be punished by death. *Id.* However, a death sentence for a defendant who raped but did not kill the victim and who did not intend to assist another in killing the victim is unconstitutional. *Id.* at 421. Similarly, two other states, Iowa and New Mexico, mandate life imprisonment without the possibility of parole for a second offense, sexual assault committed on a minor. See Iowa Code § 709.3, Iowa Code § 702.11 and 205 Iowa Admin Code 8.4. See also NM Stat Ann § 30-9-11 and NM Stat Ann § 31-18-25. Defendant’s sentence is similar to the sentences imposed in other jurisdictions.

Rehabilitation is a legitimate consideration in sentencing. We agree that, defendant's life sentence will not give him an opportunity to reform his behavior unless he is granted a pardon or commutation by the Governor. However, there is no indication that he is a good candidate for rehabilitation. He has now been convicted twice of criminal sexual conduct with a minor. He was incarcerated for the first conviction. After his release he committed a very similar act with an even younger victim. His behavior, rather than demonstrating rehabilitation, is evidence of escalation. While this sentence effectively precludes defendant from rehabilitating and reentering society, the opportunity for rehabilitation is but one of the factors that we are to consider in evaluating the constitutionality of defendant's sentence. In light of the seriousness of this offense and defendant's status as a multiple offender, we cannot conclude that defendant's sentence is cruel or unusual.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ William C. Whitbeck

/s/ Jane M. Beckering