

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 18, 2013

v

MARCO DEMARIO MARTIN,

Defendant-Appellant.

No. 310635
Wayne Circuit Court
LC No. 11-012737-FC

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of six counts of criminal sexual conduct, first degree, MCL 750.520b. He was sentenced to 15 to 60 years' imprisonment on each count, the sentences to run concurrently. Defendant appeals by right. We affirm.

Defendant was accused of molesting the complainant, a 13-year-old boy and the son of his girlfriend, by engaging in sexual relations with him over a period of almost two years. The complainant testified that his mother and defendant had a violent relationship and that he was fearful of telling his mother what was occurring because defendant might cause additional harm to him or his mother. Defendant testified on his own behalf and denied the sexual abuse. Rather, he alleged that a male relative of the complainant committed any abuse. The jury convicted defendant as charged. Defendant argues that prosecutorial misconduct, the trial court's error in admitting testimony regarding violent activities between the complainant's mother and defendant, and ineffective assistance of counsel warrant reversal. We disagree.

On appeal, defendant alleges several instances of misconduct by the prosecutor occurred during trial. We disagree. Defense counsel did not preserve a challenge to any of these occurrences "by making a timely, contemporaneous objection and request for a curative instruction." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Therefore, our review is for plain error that affected defendant's substantial rights. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010). "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

Defendant challenges three statements made by the prosecutor during trial. First, the prosecutor elicited testimony that the complainant's mother was working and was the

household's sole source of income, and her absence allowed defendant unsupervised access to her son, the complainant. Second, the prosecutor stated that if the jurors wanted to find defendant not guilty, they could "concoct a reason to do that. But that will not be true to the facts and circumstances of this case." Finally, in closing argument, defense counsel stated that the complainant had a duality in his feelings about defendant, feeling both love and hate, which is "difficult for some adults to manage in their own personal relationships. But somebody that's 13" In a rebuttal argument, the prosecutor stated that it was human nature to hate someone but still have attachments to them, noting the example of battered children who will say that they love their parents.

None of these instances amount to plain error that affected defendant's substantial rights. *Fyda*, 288 Mich App at 460-461. "A prosecutor is afforded great latitude regarding his or her arguments and conduct at trial." *Id.* at 461. The prosecutor is free to argue from the evidence and its reasonable inferences in support of a witness's credibility. *People v Bennett*, 290 Mich App 465, 478; 802 NW2d 627 (2010).

Contrary to defendant's argument on appeal, the prosecutor did not in any way imply that defendant was unemployed and poor, and therefore, had the propensity to commit crimes. Rather, she argued that, because the complainant's mother was at work, defendant had access to the complainant when she was not present. This argument was derived from the testimony of the complainant and his mother. When the prosecutor argued that, to find the defendant not guilty, the jurors would have to "concoct a reason" because the evidence did not support a finding of not guilty, the prosecutor did not shift the burden of proof to defendant, but asked the jurors to carefully view the evidence. Finally, the prosecutor made a comment about duality of feelings only in response to the defense counsel's comment that it was questionable whether a 13 year old could recognize that. The prosecutor did not argue that she had special knowledge, but argued that such duality was common, and as an extreme example stated that children who were beaten by their parents still had this duality of feelings toward their parents. The prosecutor's comments were consistent with her right to argue from the evidence and its reasonable inferences. *Bennett*, 290 Mich App at 478. This challenge does not entitle defendant to appellate relief.

Defendant did not object to the introduction of testimony regarding his violent behavior with respect to the complainant's mother. We review unpreserved evidentiary issues for plain error affecting defendant's substantial rights. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002). Reversal is warranted only where the error resulted in the conviction of an innocent defendant or substantially affected the fairness, integrity, or reputation of judicial proceedings. *Id.*

The law is clear that, except as provided in MRE 404(b)(1), other bad acts evidence is inadmissible to show the defendant's character or to show action in conformity with a bad character. Prior bad acts evidence is inadmissible to prevent the danger of a conviction premised on a defendant's past misbehavior. *People v Magyar*, 250 Mich App 408, 413; 648 NW2d 215 (2002).

Four factors must be present for prior bad acts evidence to be admissible. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

First, the prosecutor must offer the prior bad acts evidence under something other than a character or propensity theory. Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b)[.] Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004) (citation and quotations omitted.)]

The evidence of the violent relationship between defendant and the complainant's mother was clearly relevant, it was not admitted to prove the character of defendant, and the probative value of the evidence was not substantially outweighed by unfair prejudice. It was clear that the evidence of defendant's violent actions in the home of the complainant was presented to show the atmosphere in which the criminal sexual conduct occurred and that the complainant was fearful that defendant would harm him or his mother if he told his mother about the sexual assaults. Furthermore, evidence of other uncharged criminal events is admissible to explain the circumstances of the charged offenses because the jury is entitled to know about the full transaction. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Defendant has not shown that his substantial rights were affected by the admission of this testimony.

Next, defendant argues that he received ineffective assistance of counsel because his lawyer failed to object to the prosecutor's repeated instances of misconduct and to the admission of prior bad acts evidence. We review an unpreserved claim of constitutional error for plain error that affected substantial rights. *People v Borgne*, 483 Mich 178, 196; 768 NW2d 290 (2009). Where claims of ineffective assistance of counsel have not been preserved, this Court's review is limited to errors apparent on the record. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012).

To prove a claim of ineffective assistance of counsel, a defendant must establish that (1) 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), such that 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 Rockety*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Decisions to decline to object to procedures, evidence, or an argument may fall within sound trial strategy. *People v Unger*, 278 Mich App 210, 242, 253; 749 NW2d 272 (2008).

We conclude that defendant was not denied the effective assistance of counsel based on the failure to object to the alleged prosecutorial misconduct or the failure to object to the admission of evidence at trial. As previously addressed, defendant has not shown that the prosecutor committed misconduct or that evidence was wrongfully admitted. Therefore, defense counsel was not ineffective for failing to make futile objections. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Finally, defendant argues that the cumulative effect of the errors warrant a new trial. The cumulative effect of errors may establish sufficient prejudice to require reversal when the prejudice of any one error, standing alone, would not. *People v Eisen*, 296 Mich App 326, 335;

820 NW2d 229 (2012). We have found no errors to accumulate into any prejudicial effect, and therefore this argument fails.

Affirmed.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause