STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2013
v	No. 311772 Marquette Circuit Court
MICHAEL ALDEN WALLINE, Defendant-Appellant.	LC No. 11-049971-FH

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim at least 13 years old and under 16 years old). He was sentenced as a third-offense habitual offender, MCL 769.11, to 4 to 30 years. We affirm.

I. FACTUAL BACKGROUND

The police began investigating defendant because the victim's father found sexually explicit pictures on her cellular telephone. The victim was 14 years old at the time and the pictures were sent from defendant's cellular telephone. The victim subsequently disclosed that defendant had sexually assaulted her.

One incident occurred in defendant's Horseshoe Lake trailer. The victim went to the bedroom to retrieve blankets, and defendant followed her. Defendant placed his hands down the victim's pants and inserted his finger into her vagina. He then unzipped his pants and the victim touched his penis. The victim's cousin, defendant's girlfriend, then walked in and began yelling at the victim. The victim's friend, who was present in the trailer, testified that she heard the victim's cousin yelling about defendant's pants being unzipped. According to this friend, the victim was scared and crying and said that defendant had placed his hand down her pants, "he made her do that to him," and that she "was scared to do anything because she had thought he was going to do something to her."

After the Horseshoe Lake incident, defendant and the victim's cousin moved to a different residence. The victim would visit and babysit for her cousin. The victim testified that one time when she was over there, she and defendant went into his bedroom. Defendant then pulled down his pants and partially inserted his penis inside of her vagina. The victim testified

that defendant's penis would not fit inside of her and she told him that it hurt. Defendant then stopped.

It was after this incident that the victim's father discovered the sexually explicit photographs on the victim's phone, sent from defendant's phone. The victim admitted that one of the pictures she sent to herself from defendant's phone, but that he sent the remaining ones. She also testified that she had lied about who sent the photographs in the past, claiming that she sent all of them to herself, because she had been threatened. The victim's cousin and brother testified that the victim did not have a reputation for truthfulness.

At trial, the victim's cousin disavowed any knowledge about sexual behavior between the victim and defendant. She claimed that the statement she gave to the police regarding the Horseshoe Lake incident was all "lies." Defendant likewise testified that the victim was falsely accusing him. He testified that the victim was acting out of spite because she smoked marijuana and he and his girlfriend eventually told the victim that she could not "be showing up at our house like that."

Defendant was found guilty of one count of third-degree criminal sexual conduct. He was sentenced to 4 to 30 years of imprisonment. Defendant now appeals on several grounds.

II. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

Defendant first argues that there was insufficient evidence to sustain his conviction of third-degree criminal sexual conduct. "Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt." *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). We review "de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor" to ascertain "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (internal quotations and citations omitted). "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

B. Analysis

Defendant was convicted of third-degree criminal sexual conduct, which requires the prosecution to prove beyond a reasonable doubt that defendant engaged in sexual penetration with the victim when she was at least 13 years old and under 16 years old. MCL 750.520d(1)(a). Defendant first argues that reversal is required because the prosecution produced no physical evidence of the crime. However, nothing in MCL 750.520d(1)(a) requires the prosecution to produce physical evidence, and "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

Moreover, the victim testified that defendant penetrated her vagina with his finger inside the bedroom at his Horseshoe Lake trailer. She also testified that she was 14 years old at the time. Viewed in a light most favorable to the prosecution, this testimony directly satisfies the elements of the crime. Furthermore, although the victim made several inconsistent statements throughout the criminal investigation, we will not second-guess the jury's decisions regarding the weight or credibility of her testimony. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). Additionally, it was well within the jury's province to credit some of the victim's testimony and disbelieve other aspects. *Id.*[1]

III. ADMISSION OF EVIDENCE

A. Standard of Review

Defendant next argues that the trial court made several evidentiary rulings that were in error. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [a] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

B. Prior Sexual Assault

Defendant first contends that the trial court erred in admitted evidence of his sexual contact with a different 14-year-old girl in 2000, which entailed digital penetration of her vagina. Defendant contends that this evidence was improperly admitted under MRE 404(b). Assuming, *arguendo*, that defendant is correct, his claim still fails.[2] Pursuant to MCL 768.27a(1):

> Notwithstanding section 27, 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. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered. [Footnote omitted.]

Third-degree criminal sexual conduct is a "listed offense" under MCL 768.27a. See MCL 28.722(k) and (w)(*iv*). The prosecution also filed a notice of its intent to use evidence of

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[1] For the same reasons that there was sufficient evidence to sustain defendant's conviction, we find that the trial court did not err in denying defendant's motion for a directed verdict. See *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998).

[2] It is axiomatic that "when a lower court reaches the right result, even for the wrong reason, this Court will affirm." *People v Goold*, 241 Mich App 333, 342 n 3; 615 NW2d 794 (2000).

defendant's prior assault of the 14-year-old girl over three months before trial.[3] Therefore, consistent with MCL 768.27a, this evidence was admissible for any matter to which it was relevant, including defendant's propensity to commit a crime. *People v Watkins*, 491 Mich 450, 469-470; 818 NW2d 296 (2012).

Moreover, this evidence was not unfairly prejudicial. See *Watkins*, 491 Mich at 456 ("evidence admissible under MCL 768.27a remains subject to MRE 403, which provides that a court may exclude relevant evidence if the danger of unfair prejudice, among other considerations, outweighs the evidence's probative value."). Evidence that defendant sexually assaulted a 14-year-old girl in the past was directly probative of his proclivity for sexually assaulting young females. See *Watkins*, 491 Mich at 470 (quotation marks and citation omitted) ("this Court has long recognized that a defendant's character and propensity to commit the charged offense is highly relevant because an individual with a substantial criminal history is more likely to have committed a crime than is an individual free of past criminal activity.").

Furthermore, while "[a]ll relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded. Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005) (citation omitted). Considering the significant probative value of this evidence and its relatively brief recitation, it cannot be said that it "stir[red] the jurors to such passion . . . as to be swept beyond rational consideration of the defendant's guilt or innocence of the crime on trial." *People v Starr*, 457 Mich 490, 503; 577 NW2d 673 (1998) (quotation marks, citation, and brackets omitted). Thus, we find no error requiring reversal.[4]

C. Privileged Records

Defendant next contends that the trial court erred in denying his request for an in-camera review of privileged records. Defendant requested access to the victim's counseling records,

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[3] While defendant argues that any argument based on MCL 768.27a is waived, the prosecution mentioned this as a basis for admission at trial. Further, while the prosecution's pretrial notice referenced MRE 404(b), MCL 768.27a only requires the prosecution to disclose the evidence to defendant at least 15 days before trial, which the prosecution did in the instant case. The prosecution provided defendant with information of the 14-year-old girl's name, her age, and details of the assault.

[4] Defendant also contends that because this evidence was irrelevant propensity evidence and was prejudicial, "it is a violation of due process and is not fundamentally fair." Contrary to this argument, the Michigan Supreme Court has held that propensity evidence can be relevant and admissible under MCL 768.27a. *Watkins*, 491 Mich at 469-470. Further, the Court held that MCL 768.27a is subject to the balancing test of MRE 403, thereby rendering due process arguments moot. *Id.* at 456 n 2. Lastly, the Court specifically held that MCL 768.27a does not violate the separation of powers doctrine. *Id.* at 472-481.

protective services records, and police reports relating to any other allegations the victim made of sexual misconduct against other males.[5] The trial court denied defendant's request, finding that the facts alleged did not create a reasonable probability that the records requested would contain exculpatory or impeaching evidence.

Pursuant to MCR 6.201(C):

> (2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.
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> (b) If the court is satisfied, following an in camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.

Therefore, the threshold finding is that the requested records are likely to contain material information necessary for the defense. *People v Stanaway*, 446 Mich 643, 649; 521 NW2d 557 (1994). If that burden is satisfied, the trial court then conducts an in-camera inspection to determine whether the records contain reasonably necessary information to the defense. *Id.* at 649-650.

Here, the lower court correctly found that an in-camera inspection of the requested records was not warranted under MCR 6.201(C)(2). In his motion to obtain privileged records, defendant claimed that "defense witnesses"[6] indicated that the victim had made false sexual allegations in the past and that the victim's changing story made it "highly possible that [her]

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[5] On appeal, defendant states that police reports that did not involve him were not privileged records. Not only is this contrary to defendant's motion titled "Motion to Obtain Privileged Records of Victim," he also fails to explain or support this cursory conclusion. See *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009) (quotation marks and citation omitted) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

[6] Defendant failed to specify who these witnesses were. Likewise at the motion hearing, defendant again referenced that he had "information from witnesses that [the victim] may have reported false allegations against other men," but failed to identify clearly these alleged witnesses.

counseling records could contain a different version" of the crime. Yet, this is nothing "more than a generalized assertion that the [records] may contain evidence useful for impeachment on cross-examination." *Stanaway*, 446 Mich at 681. Instead of offering "any specific articulable fact that would indicate that the requested confidential communications were necessary to a preparation of his defense[,]" defendant merely requested these records in hopes of finding some impeachment information. *Id.* "Without a more specific request, defendant is fishing." *Stanaway*, 446 Mich at 681. We also find that defendant has failed to adequately explain or support his argument on appeal, as he offers mere conclusory statements to the effect that he presented articulable facts and had a good faith belief, without specifying further.[7]

D. Cross-Examination

Defendant also argues that the court erred in limiting his attempt to cross-examine witnesses regarding the allegations of false reporting. "The right of cross-examination is not without limit; neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject. The right of cross-examination does not include a right to cross-examine on irrelevant issues" and it "may bow to accommodate other legitimate interests of the trial process or of society. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993) (citations omitted). Further, "it has long been the law of this state that a cross-examining attorney must accept the answer given by a witness regarding a collateral matter." *People v LeBlanc*, 465 Mich 575, 590; 640 NW2d 246 (2002). "As a general rule . . . a witness may not be contradicted regarding collateral, irrelevant, or immaterial matters." *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995).

Defendant argues that the trial court erroneously limited his cross-examination twice during trial. First, defendant argues that the trial court improperly sustained an objection to his question of whether the victim's father was "aware of anything where a Mr. Jutila was accused of something?" Defendant also argues that the trial court improperly sustained an objection to his question to the victim whether "ten days prior to being interviewed for this case" she had talked to the police "regarding another man?"

However, what defendant fails to acknowledge is that he was permitted to question both the victim and her father on the desired topic of prior allegations of sexual conduct. Defendant asked the victim's father whether he was aware of the victim making accusations of criminal sexual conduct against anyone else, to which the victim's father replied in the negative.

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[7] Defendant also failed to explain or justify his statement that he was denied his constitutional right to present a defense. See generally *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.").

Defendant also specifically asked the victim whether she had made any sexual allegations against other men, to which the victim replied in the negative. Thus, defendant was not precluded from placing before the jury facts from which the jury could draw negative conclusions about the victim's credibility. *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998).

Moreover, without acknowledging the above testimony, defendant on appeal broadly claims that the trial court's rulings limiting cross-examination constituted a due process violation. Yet, he fails to explain why this was a due process violation, especially in light of the fact that the right to cross-examination has limits. See *Adamski*, 198 Mich App at 138. Defendant cites no rules of evidence or specific case law to support his conclusory statements. Rather, he simply contends that the mere fact that cross-examination was limited is a due process error. Because defendant failed to explain or support his arguments, we decline to find error requiring reversal. *See People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.") (quotation marks and citation omitted).

IV. PROSECUTORIAL MISCONDUCT

A. Standard of Review

Lastly, defendant argues that the prosecutor made several statements in closing argument that were prejudicial, that constituted a civic duty argument, that were based on facts not in evidence, that were a personal opinion, and that denigrated defendant and defense witnesses. Because defendant failed to raise a timely objection below, our review is limited to plain error affecting substantial rights. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

B. Analysis

"Generally, prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quotation marks, citation, and brackets omitted). "To determine if a prosecutor's comments were improper, we evaluate the prosecutor's remarks in context, in light of defense counsel's arguments and the relationship of these comments to the admitted evidence." *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). If "a timely objection and curative instruction could have alleviated any prejudicial effect of the improper prosecutorial statement, we cannot conclude that the error denied defendant a fair trial or that it affected the outcome of the proceedings." *Unger*, 278 Mich App at 237.

The prosecution may use emotional language and is not limited to "the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Prosecutors also "are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Bahoda*, 448 Mich at 282 (quotation marks, citation, and brackets omitted). Furthermore, while comments may seem improper, they may be acceptable when made in response to defense counsel's arguments. *People v Dobek*, 274 Mich App 58, 67; 732

NW2d 546 (2007). However, the prosecution may not resort to civic duty arguments, express personal opinions on defendant's guilt, or denigrate a defendant with intemperate and prejudicial remarks. *Bahoda*, 448 Mich at 282-283; *Ullah*, 216 Mich App at 678.

In the instant case, none of the prosecutor's comments were improper. While the prosecutor referred to defendant's possession of pornography on his phone and that he was previously accused of sexually assaulting a 14-year-old girl, both of those facts were in evidence. Likewise, the prosecution's argument that defendant and his wife lacked credibility was proper because it was an argument derived from the evidence. Further, the prosecutor's statements that the case was a tragedy, that he discussed the case with his wife and colleague, and that the witnesses remembered the events do not constitute error requiring reversal. The prosecution did not request that the jury decide the case on anything other than the evidence presented, and did not assert personal knowledge about defendant's guilt. Moreover, none of the prosecutor's comments constituted civic duty arguments that "inject[ed] issues broader than guilt or innocence or encourage[ed] jurors to suspend their powers of judgment." *People v Thomas*, 260 Mich App 450, 455-456; 678 NW2d 631 (2004).

The prosecution also referenced that children do not report sexual molestation and continue to associate with their molesters, and alluded to why defendant was charged. Yet, these arguments were invited by defendant's closing argument, and are therefore proper. See *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003) ("otherwise improper remarks by the prosecutor might not require reversal if they respond to issues raised by the defense."). Defendant specifically mentioned in his closing argument that the victim continued to associate with defendant, which belied her testimony. Defendant also commented on the way the investigation enfolded, prompting the prosecution to respond. Thus, in context, the prosecution's comments were in response to defendant's closing argument, and were therefore proper. *Dobek*, 274 Mich App at 67.

Moreover, while defendant cites other minor comments that the prosecutor made, the trial court specifically instructed the jury that the case was to be decided on the evidence and that the attorneys' arguments and questions were not evidence. Because jurors are presumed to follow their instructions, defendant has failed to demonstrate any error requiring reversal. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).[8]

V. CONCLUSION

There was sufficient evidence to sustain defendant's third-degree criminal sexual conduct conviction. Furthermore, there were no errors requiring reversal in the trial court's evidentiary

[8] Defendant also argues that the prosecution's questions regarding the investigation and the officer's perception that the victim was truthful were improper. However, defendant's cursory treatment of these issues is tantamount to abandoning them. See *Kevorkian*, 248 Mich App at 389.

rulings or in the alleged instances of prosecutorial misconduct. We have reviewed any remaining arguments in defendant's brief and found them to be without merit. We affirm.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly