STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE RAY MCKEE,

Defendant-Appellant.

UNPUBLISHED
December 6, 1996

No. 182575
LC No. 94-0592-FH

Before: Wahls, P.J., and Wahls and J.H. Fisher,* JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2). Defendant was subsequently tried on October 17, 1994 and convicted as an habitual offender, fourth offense, MCL 769.12; MSA 28.1082. He was sentenced to concurrent terms of imprisonment for 17-1/2 to 35 years for each of the two CSC I convictions. He appeals as of right. We affirm.

We first consider defendant's allegations that he was denied a fair trial due to the cumulative effect of four specific instances of prosecutorial misconduct. In reviewing claims of prosecutorial misconduct, this Court must examine the alleged acts of the prosecutor in their proper context to determine whether they denied the defendant a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). Prosecutors are generally accorded great latitude regarding their arguments and conduct. *Bahoda*, *supra*, 448 Mich at 282. They have the freedom to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Id*.

The first instance of prosecutorial misconduct defendant cites was the prosecutor's delay in dismissing CSC I charges relating to allegations of the victim's sister, Sheri. The charges were dismissed on May 24, 1993, because the prosecutor discovered that Sheri had previously made a false

* Circuit judge, sitting on the Court of Appeals by assignment.

accusation of sexual misconduct against her teacher. During voir dire on May 23, the prosecutor told the potential jurors that the case involved allegations that defendant engaged in some type of sexual contact with the child victim, and that there may be another witness "of a similar kind similarly young." Defendant argues that the prosecutor's reference to Sheri was prejudicial because it implied that defendant sexually abused more than one child. Defense counsel did not object to the prosecutor's statement during voir dire, so review by this Court is limited to whether failure to review this issue would result in a miscarriage of justice.

No information was presented in the record regarding when the prosecutor discovered Sheri's false allegation of sexual abuse against her teacher. However, the CSC I charges relating to Sheri were never read to the jury, nor was the jury ever informed that any additional CSC I charge was filed against defendant and subsequently dismissed. Furthermore, twice during his testimony defendant made unsolicited references to the fact that more than one girl had made allegations of sexual abuse against him. Defendant's voluntary references to Sheri created the precise impression of defendant as a multiple child molester that he accuses the prosecutor of creating during voir dire. Any prejudice created by the prosecutor's statement during voir dire was outweighed by defendant's own comments at trial. Therefore, this Court believes that the prosecutor's statement during voir dire did not result in a miscarriage of justice.

The second allegation of prosecutorial misconduct relates to an improper comment made by the prosecutor during her cross-examination of defendant concerning his relationship with his ex-wife. When asked by the prosecutor how much defendant "felt" for his ex-wife, defendant offered the admission that he had lied for her in court proceedings. The prosecutor responded, "You have lied for a lot of people haven't you?" Defendant offered his admission of perjury before the alleged improper remark was made by the prosecution. If the jurors questioned the veracity of defendant following this exchange, their suspicions were founded predominantly on defendant's own admission of a past perjury, not on the comment of the prosecutor. Although the prosecutor's comment was inappropriate, this Court does not believe that defendant was denied a fair trial on that basis.

Third, defendant contends that the prosecutor made an unwarranted attack on defense counsel's character. A prosecutor may not engage in arguments which attack defense counsel because such arguments undermine the defendant's presumption of innocence and unfairly shift the jury's attention from the evidence to defense counsel's personality. *People v Moore*, 189 Mich App 315, 322; 472 NW2d 1 (1991). At one point during the trial, defense counsel objected to the prosecutor's question on redirect examination on the ground that she was "testifying" for the witness. In response to the objection, the prosecutor commented, "Perhaps a little of [defense counsel] is rubbing off on me. I will rephrase." Even assuming that the comment was meant to disparage defense counsel, this Court does not believe that the comment compromised the fairness of defendant's trial.

Finally, defendant argues that the prosecutor improperly appealed to the emotions and civic duty of the jurors by stating that a failure to convict defendant would be a "fatal mistake." Defense counsel did not object to the prosecutor's closing statement, so review by this Court is limited to preventing a miscarriage of justice. A prosecutor may not play on the fears of the jurors or urge the

jurors to convict a defendant as part of their civic duty. *Bahoda*, *supra*, 448 Mich at 282. Such arguments are condemned because they inject issues into the trial which are broader than the defendant's guilt or innocence and because they encourage the jurors to suspend their own powers of judgment. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). This Court does not believe that the prosecutor's statement was an appeal to the jurors' civic duty. Based on defendant's own admission of past perjury, the prosecutor was making a permissible inference that it would be a mistake to believe defendant's testimony in this trial. *Bahoda*, *supra*, 448 Mich at 282. Nor were the words "fatal mistake" so emotionally charged that they would impair the jurors' decision making ability.

Defendant also claims on appeal that there were three instances in which evidence was improperly admitted at trial. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). Evidentiary rulings are further subject to a harmless-error analysis. *People v Price*, 214 Mich App 538, 546; 543 NW2d 49 (1995). Error is deemed harmless and will not warrant reversal when it does not affect a substantial right of a defendant and does not result in a miscarriage of justice. *Id*., MRE 103(a); MCL 769.26; MSA 28.1096.

Defendant first argues that he was unfairly prejudiced by the statement of Detective Alexander that she did not believe that the victim's testimony was "coached or rehearsed in any way," even though the statement was subsequently struck by the trial court. However, it was defense counsel who first raised the issue in his opening argument when he accused the victim's mother of fabricating the allegations of sexual abuse and coaching the victim. The decision to admit rebuttal evidence rests within the discretion of the trial court. *People v Winchell*, 171 Mich App 662, 665; 430 NW2d 812 (1988). Once the character of a child victim of sexual abuse is attacked by the defendant, character evidence regarding the victim's truthfulness may be properly admitted. *Id*. at 666; MRE 608(a)(2). See also *People v Sylvester Smith*, 90 Mich App 20, 25; 282 NW2d 227 (1979). This Court believes that Alexander's statement was properly admitted as rebuttal evidence.

Defendant also asserts that the court should not have permitted the prosecution to cross-examine defendant regarding his use of multiple social security numbers. The prosecutor appeared to be attacking defendant's character for truthfulness by implying that defendant had used multiple social security numbers for some dishonest purpose. Under MRE 608(b), at the discretion of the court, specific instances of the witness' conduct may be inquired into on cross-examination provided that no extrinsic evidence is presented and provided that it is limited to demonstrating the witness' character for truthfulness or untruthfulness. Here, the prosecutor's line of questioning was within the permissible parameters of MRE 608(b). Given that defendant had already admitted to perjury, this Court does not believe that the probative value of this evidence was outweighed by the danger of unfair prejudice. MRE 403. The court did not abuse its discretion by allowing the prosecutor's inquiry.

Finally, defendant argues that the court should not have permitted the testimony of the expert witness, Dr. Mason, because it was outside the permissible scope for an expert testifying in connection with a child who has alleged sexual abuse. Defendant failed to object to the admissibility of the expert's testimony; therefore, this issue will be reviewed only for manifest injustice. *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995). Generally, MRE 702 gives expert witnesses broad authority to testify in the form of opinion. However, our Supreme Court has recognized that trial courts must limit the testimony of experts in order to maintain an equitable balance in the "credibility contests" that often arise in cases of child sexual abuse. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). Therefore, an expert may not (1) testify that the sexual abuse occurred, (2) vouch for the veracity of the victim, (3) testify whether the defendant is guilty, or (4) testify that the particular child victim's behavior is consistent with that of the typical sexually abused child, unless the defendant raises the issue of the particular child victim's post-incident behavior or attacks the credibility of the child. *Id*. at 352, 373-374.

Defendant first argues that Mason should not have been permitted to testify regarding what the victim had told her during the sexual history portion of the medical history because it served only to corroborate and legitimize the victim's version of the facts. This testimony is hearsay, but may be admitted under MRE 803(4), the hearsay exception for "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history . . . ." The statements of the victim were made as part of the medical history upon which Mason made her diagnosis and recommendations for treatment. The medical treatment exception is founded on the rationale that an individual has the self-interested motivation to tell the truth to a treating physician in order to receive the proper diagnosis and treatment, and the reasonable necessity of the statement to the diagnosis and treatment. *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992). The trustworthiness of a child's statement can be sufficiently established to support the application of the medical treatment exception in child sexual abuse cases. *Id*.

Defendant also argues that Mason's statement on redirect examination that the victim did not have a "rehearsed or coached quality" was inadmissible because it vouched for the credibility of the victim. However, defense counsel raised the issue of whether the victim's story was coached during his opening statement and during his cross-examination of Mason. As discussed above, once defendant suggested that the victim's story was "rehearsed," he cannot complain when the prosecution offers evidence to show that the victim was truthful. *Winchell, supra*, 171 Mich App at 666.

Defendant further argues that Mason improperly testified that she believed that sexual abuse occurred. Mason never testified on direct examination that she had reached a diagnosis of sexual abuse. However, defense counsel's strategy on cross-examination was to emphasize the fact that Mason's diagnosis relied only on "subjective" factors contained in the medical history, rather than "objective" physical evidence. The mere phrasing of defense counsel's questions implied that Mason had concluded that sexual abuse had occurred. Furthermore, once the defense questioned the validity of the diagnosis of abuse based on the victim's "subjective" medical history rather than on the physical evidence, the trial court properly permitted Mason to rebut defense counsel's attack on the "subjective" basis of her diagnosis by testifying that in approximately eighty percent of documented sexual abuse

cases, there is a normal physical examination, and that "physical examination is not considered to be nearly as important or conclusive as history." *Winchell, supra,* 171 Mich App at 665.

The rules limiting the type of expert testimony that may be heard in child sex abuse cases is intended to protect defendant in the "credibility contest." *Peterson, supra,* 450 Mich at 352. In this case, the defense elected not to use those protections by pursuing a strategy that involved attacking both the veracity of the victim and the basis of the expert's conclusion of abuse. The defense's strategy is further demonstrated by the fact that defense counsel did not object at trial to any of the testimony that defendant now claims was improper. Therefore, the admission of Dr. Mason's expert testimony was not manifestly unjust.

Affirmed.

/s/ Myron H. Wahls
/s/ Robert P. Young, Jr.
James H. Fisher