

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT RICHARD ALLGAIER,

Defendant-Appellant.

UNPUBLISHED

June 6, 1997

No. 182682

Kalamazoo Circuit Court

LC No. 94-000923-FC

Before: Bandstra, P.J., and Hoekstra and J.M. Batzer*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC-1st), MCL 750.349; MSA 28.581, and kidnapping, MCL 750.349; MSA 28.581 for acts committed against a woman with whom he had previously been romantically involved. Defendant was convicted by the court of being an habitual offender, third offense, MCL 769.11; MSA 28.1083, and was sentenced to twenty to thirty years' imprisonment for the CSC-1st conviction, and ten to twenty years' imprisonment for the kidnapping conviction. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court abused its discretion in allowing the prosecution to present expert testimony on Battered Woman Syndrome (BWS). We disagree. Expert testimony on BWS is generally admissible where the syndrome evidence is relevant and helpful to the case being tried. *People v Christel*, 449 Mich 578, 592; 537 NW2d 194 (1995). Here, we find no abuse of discretion in the trial court's decision to admit evidence of BWS. Testimony regarding BWS was relevant and helpful in this case because defendant cross-examined the victim regarding her failure to immediately report the rape and kidnapping to the police, and focused on the victim's unconventional behavior. Absent testimony regarding BWS, the jury may not have been able to properly evaluate the significance of the victim's behavior. We find defendant's attempts to factually align his case with *Christel* to be unconvincing. The instant case is factually distinguishable from *Christel*, and contains much more compelling facts for concluding that the evidence of BWS was admissible.

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

Defendant next argues that the trial court abused its discretion in allowing the prosecution to introduce evidence of other bad acts committed by defendant against the victim. Because this evidence was relevant to the victim's state of mind following the rape and kidnapping and explained her delay in reporting the crimes, and the probative value was not outweighed by the danger of unfair prejudice, *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994), we find no abuse of discretion in the trial court's decision. See *People v Yarger*, 193 Mich App 532, 538-539; 485 NW2d 119 (1992).

Defendant next argues that the trial court abused its discretion in allowing three witnesses to testify regarding statements made to them by the victim concerning the rape and kidnapping which were consistent with the victim's testimony. Although we agree that testimony from two of the witnesses should not have been admitted because the statements made to them were made after the alleged motive to fabricate arose, we find any error in this regard to be harmless. MRE 801(d)(1)(B) states, in pertinent part, that a statement is not hearsay if it is consistent with a testifying declarant's testimony and is offered to rebut a charge of recent fabrication. Here, one of the witnesses, the victim's sister, was told of the rape before the alleged motive to fabricate arose, and her testimony was properly admitted. *People v Rodriguez (On Remand)*, 216 Mich App 329; 549 NW2d 359 (1996). Because the testimony of the other two witnesses was merely cumulative of the sister's testimony and the victim's testimony, we find any error in the admission of the testimony to be harmless. *Id.*

Finally, defendant argues that he was denied a fair trial because of numerous instances of prosecutorial misconduct involving the scope of expert testimony, the alleged misuse of other bad acts evidence, improper arguments before the jury, and improper impeachment of a defense witness, none of which were objected to below. Consideration of unpreserved challenges to alleged instances of misconduct is limited to whether our failure to review would result in a miscarriage of justice. *People v Graham*, 219 Mich App 707, 712; 558 NW2d 2 (1996). Here, our failure to review these claims will not result in a miscarriage of justice because either the alleged improper conduct was not improper, or any possible prejudice could have been cured by a timely instruction. *Id.*

Affirmed.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ James M. Batzer