

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTYN G. BLAISDELL,

Defendant-Appellant.

UNPUBLISHED

November 21, 1997

No. 196330

Oakland Circuit Court

LC Nos. 95-140028-FH;

95-140128-FH;

95-140129-FH

Before: Saad, P.J., and Holbrook, Jr., and Doctoroff, JJ.

PER CURIAM.

Defendant was charged with second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3) for touching the penis and testicles of the minor victim on three occasions. Defendant denied the conduct and argued that the victim had fabricated the incidents. Defendant appeals as of right from his jury conviction of three counts of criminal sexual conduct, second or subsequent offense, MCL 750.520f; MSA 28.788(6), and his subsequent conviction of being an habitual offender, third offense, MCL 769.11; MSA 28.1083. We affirm.

I

Defendant first contends that the trial court abused its discretion by admitting testimony of another minor who claimed that defendant had engaged in similar acts with him at a previous time. We find no error in the admission of this evidence.

Defendant's prior victim testified that when defendant lived with him and his mother, defendant forcibly placed the victim's hands on defendant's genitals and rubbed them over his penis. MRE 404(b) provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, *intent*, preparation, *scheme, plan, or system in doing an act*, knowledge, identity, or absence

of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [Emphasis added.]

In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114, amended 520 NW2d 338 (1993), the Court reiterated that, to admit evidence of other crimes or wrongs, such evidence must be relevant to an issue other than propensity under rule 404(b); it must be relevant under MRE 402; and it must not be more prejudicial than probative under MRE 403. *Id.* at 74-75. In addition, the trial court, upon request, may provide a limiting instruction. *Id.* at 75.

On appeal, defendant does not contest that the evidence was relevant to an issue other than propensity. Rather, defendant argues that the evidence was more prejudicial than probative. However, we find that it was highly probative on the element of sexual gratification and there has been no showing that the danger of unfair prejudice outweighed the probative value. The testimony was not inflammatory. Compare *People v Starr*, 217 Mich App 646; 553 NW2d 25 (1996). The evidence was properly admitted under MRE 404(b).

II

Defendant next argues that the prosecutor's rebuttal argument, which utilized the testimony of defendant's prior victim, was improper and that her comments amounted to prosecutorial misconduct requiring reversal. Because defendant did not object to the prosecutor's rebuttal argument, our review is limited to determining whether failure to review those comments would result in a miscarriage of justice. *People v Graham*, 219 Mich App 707, 712; 558 NW2d 2 (1996). We hold that our failure to review the comment that was allegedly improper would not be a miscarriage of justice. The prosecutor simply argued, in response to defendant's argument that the victim was not truthful, that the evidence and all reasonable inferences from it, including the prior victim's testimony, lent credence to the victim's testimony in this case. It appears from the record that the prosecutor was arguing that the other victim's testimony demonstrated that defendant had an intent to use children for his own sexual gratification and if that was his intent, the victim's testimony appeared more credible. The argument was not improper given the circumstances.

III

Defendant next argues that the trial court failed to give a proper limiting instruction with regard to the use of the prior victim's testimony. However, defendant never requested a limiting instruction and thus, the issue is not preserved for appeal. *People v Puroll*, 195 Mich App 170, 171; 489 NW2d 159 (1992). If defendant wanted a limiting instruction, defendant was required to request one. *VanderVliet*, *supra* at 74; *People v Wackerle*, 156 Mich App 717, 722-723; 402 NW2d 81 (1986); MRE 105.

In the same vein, defendant also argues that trial court's use of CJI2d 20.28 (limiting use of evidence of other acts of sexual contact) was improper. Defendant claims that the instruction was confusing and that it invited the jury to conclude that because he engaged in sexual misconduct before,

he must have done so in this case. Again, this issue is not preserved for appeal because defendant did not object to the use of CJI2d 20.28. *People v Ullah*, 216 Mich App 669, 676-677; 550 NW2d 568 (1996). Where a defendant does not object to an instruction, appellate review is foreclosed absent manifest injustice.¹ *Id.* No manifest injustice will result by our failure to review the issue raised. There is no evidence that the jury was confused by the instruction or that the instruction “otherwise obfuscate[d] the questions which they were to decide.” See *People v Jackson*, 100 Mich App 146, 156; 298 NW2d 694 (1980). The instructions read and considered as a whole demonstrate that there was no error requiring reversal.

IV

Defendant next argues that he was denied effective assistance of counsel where his counsel did not object to the prosecutor’s closing argument and where he failed to request a limiting instruction with regard to the other victim’s testimony. This Court reviews a claim of ineffective assistance of counsel to determine if counsel’s performance was below an “objective standard of reasonableness under prevailing professional norms” and to determine if the result of the proceeding would have been different had counsel not made the complained of errors. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Where, as here, the errors complained of do not require reversal and where there has been no showing that the outcome of the trial would have been altered had defendant objected or requested a limiting instruction, we hold that defendant was not denied effective assistance of counsel.

V

Defendant next contends that he was denied a fair trial because the prosecutor improperly injected evidence of defendant’s sexuality with the victim’s mother into trial and thus, injected an issue that was broader than the guilt or innocence of defendant. Because defendant failed to object to the testimony at trial, the propriety of its admission is not preserved for appeal. *People v Gilbert*, 183 Mich App 741, 746-747; 455 NW2d 731 (1990). We therefore only review to determine if manifest injustice would result if we failed to review the alleged error. *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). We hold that manifest injustice would not result if we failed to review the alleged error because the testimony elicited by the prosecutor about defendant’s sexual fantasies regarding children was directly related to the issue of whether defendant touched the victim for sexual gratification.

VI

Defendant next argues that the prosecutor improperly vouched for her witnesses. Defendant did not object to any comments by the prosecutor which may be construed as vouching for a witness and thus, the issue of the prosecutor’s misconduct is not preserved. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Moreover, on appeal defendant fails to point to (and we are unable to locate) any specific statements or comments of the prosecutor that may be construed as improperly vouching for a witness. This issue is without merit.

VII

Finally, defendant argues that the cumulative effect of the multiple errors in this case warrants reversal. Because no errors requiring reversal have been found, we hold that defendant was not deprived of a fair trial. See *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Henry William Saad

/s/ Donald E. Holbrook, Jr.

/s/ Martin M. Doctoroff

¹ We note that defendant not only failed to object to the use of this jury instruction at trial, but he specifically informed the trial court that the use of CJI2d 20.28 was satisfactory to the defense and that the defense believed it was the proper instruction.