STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY JOHN BROWN,

Defendant-Appellant.

UNPUBLISHED
March 20, 1998

No. 188174
Kent Circuit Court
LC No. 94-001390-FC

Before: O'Connell, P.J., and MacKenzie and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and sentenced to a term of eight to twenty-five years' imprisonment. He appeals as of right. We affirm.

The victim in this case was defendant's former daughter.[1] The charged incident was alleged to have occurred on or about March 8, 1989, when the victim was six years old. Over defendant's objection, the victim's sister was allowed to testify regarding uncharged acts of sexual misconduct that defendant allegedly perpetrated upon her during the same time frame.

On appeal, defendant first argues that the trial court erred in admitting the sister's testimony regarding the alleged sexual abuse perpetrated upon her by defendant. We disagree. Under MRE 404(b), evidence of other crimes, wrongs, or acts may be admitted if (1) it is offered for a purpose other than to prove the defendant's character or propensity, (2) it is logically relevant under MRE 402, and (3) its probative value is not substantially outweighed by the danger of unfair prejudice, MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). The trial court's decision to admit such evidence is reviewed for an abuse of discretion. *People v McMillan*, 213 Mich App 134, 137; 539 NW2d 553 (1995).

Evidence of other acts of sexual misconduct between a defendant and the victim may be admitted to corroborate the victim's testimony when excluding the evidence would make the victim's testimony seem incredible. *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973). While this rule generally does not apply to evidence of sexual acts between a defendant and other household

members, *People v Jones*, 417 Mich 285; 335 NW2d 465 (1983); *People v Sabin*, 223 Mich App 530; 566 NW2d 677 (1997), lv pending, our Supreme Court has indicated that such evidence may by admitted under appropriate circumstances. *People v Engelman*, 434 Mich 204, 222; 453 NW2d 656 (1990); *Jones*, *supra* at 290 n 1. See also *People v Wright*, 161 Mich App 682, 688-689; 411 NW2d 826 (1987).

In this case, despite the relationship between defendant and the victim, identity was a principal issue in the case. The charged offense was alleged to have occurred more than six years before trial, when the victim was six years old. The evidence indicated that defendant did not have custody of the victim after 1989. By the time of trial, defendant's parental rights had been terminated and the victim had been adopted by another family. Throughout trial, defendant elicited evidence that the victim was sexually abused by a subsequent stepfather, who eventually was convicted of sexual abuse against the victim's sister. Defendant also elicited evidence suggesting that other individuals may have engaged in sexual acts with the victim. Defendant attempted to establish through his cross-examination of witnesses, and he argued during closing argument, that the victim was confused and that any sexual abuse perpetrated upon the victim was committed by other individuals, not himself.

Under the circumstances of this case, where defendant placed into issue the question of identity by repeatedly eliciting evidence of sexual misconduct by others towards the victim, and by arguing that any alleged sexual abuse was committed by these other perpetrators, not himself, we conclude that admission of the sister's testimony was not error because it corroborated the victim's testimony identifying defendant as the perpetrator of sexual abuse. Moreover, the trial court in the present case instructed the jury that the sister's testimony was to be considered only for the purpose of evaluating the "believability" of the victim's testimony regarding the acts for which the defendant was on trial, not to show that the defendant was a bad person or was likely to commit crimes. In this context, the testimony was not admitted to establish defendant's character or propensity to sexually abuse his daughters in order to show action in conformity therewith, as prohibited by MRE 404(b). Furthermore, the probative value of the testimony was not "substantially outweighed" by the danger of unfair prejudice. As our Supreme Court noted in *VanderVliet*, *supra* at 64, when analyzing the admissibility of evidence under MRE 404(b), the question is not whether the evidence falls within an exception to a supposed rule of exclusion, but rather whether the evidence is relevant to a fact in issue other than the defendant's propensity to commit the charged offense. "Put simply, [MRE 404(b)] is *inclusionary* rather than exclusionary." *Id.* Therefore, the trial court did not abuse its discretion in admitting the testimony.

Defendant next argues that numerous hearsay reports were improperly admitted at trial and numerous witnesses were allowed to give inadmissible hearsay testimony or testify as to other inadmissible matters. We reject this argument for several reasons.

First, while defendant separately discusses the testimony of thirteen different witnesses, in most instances he merely describes their testimony without indicating why the testimony allegedly is improper. An appellant may not simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Second, most of the contested evidentiary matters were not preserved with an appropriate objection at trial, and manifest injustice will not result from our failure to review the unpreserved issues. *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987).

Third, defendant mischaracterizes or misunderstands the evidence and the facts in his arguments. In particular, defendant's claim that the trial court improperly admitted the *reports* of various protective service workers, social workers, mental health workers, and police officers is inaccurate. Although reports were sometimes used to refresh a witness' memory, see MRE 612, the prosecution did not introduce a single report into evidence. The only reports actually received into evidence were introduced by defense counsel. Also, defendant's reliance on a series of pre-1991 cases in support of his contention that "prior consistent statements" are inadmissible is misplaced. The Michigan Rules of Evidence were amended in 1991 to expressly provide for the admission of prior consistent statements under prescribed circumstances. MRE 801(d)(1)(b). In any event, only a few of the contested statements in question were admitted as "prior consistent statements" at trial. Regarding those few statements, because defendant does not discuss the applicability of MRE 801(d)(1)(b) on appeal, he has failed to show that admission of the statements was error.

Finally, as to the few evidentiary matters that did receive an appropriate objection at trial, we find no error. The record reveals that the challenged portion of the testimony of Martha Flanagan, a foster care worker, was not offered to prove the truth of the matter asserted and, therefore, was not hearsay. MRE 801(c). Flanagan testified that "she had received allegations of sex abuse of the children and read a report prepared by the children." She did not testify concerning either the content or the source of the allegations but only to determine whether she was aware of allegations of sexual abuse before the children were returned to their home. Likewise, the trial court instructed the jury that the challenged portion of Detective Karpowicz's testimony was being offered for the limited, nonhearsay purpose of explaining why she proceeded the way she did in her investigation (i.e., why she did not immediately begin a criminal investigation of defendant), not to prove the truth of the matter asserted. Also, Thomas Cottrell, an expert witness on the dynamics of child sexual abuse, testified regarding particular behaviors that are characteristic of child sexual abuse victims generally but did not offer an opinion on whether abuse had in fact occurred in this case. This was in accordance with our Supreme Court's holding in *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990). Accordingly, we find no error in the admission of the above testimony.

Next, defendant argues that evidence of physical abuse constituted inadmissible character evidence and, therefore, should have been excluded under MRE 404(b). Although defendant lodged a relevancy objection to a prosecutorial question concerning past physical abuse, he did not argue that the evidence was inadmissible under MRE 404(b). An objection based upon one ground is insufficient to preserve an appellate attack based on a different ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996), lv pending. Therefore, appellate review of this issue is precluded absent manifest injustice. *Furman*, *supra*. The record reveals that defense counsel announced before trial his intention to present evidence of physical abuse and then later mentioned in his opening statement that evidence of physical abuse would be presented at trial. Defense counsel subsequently explored the issue of physical abuse during his cross-examination of the victim, attempting to show that the victim was

mad at defendant for past physical abuse, thus providing a possible alternative explanation for the allegations of sexual abuse. Under these circumstances, the testimony did not result in manifest injustice.

Defendant next argues that the issue of penalty was improperly injected into the proceedings when a police witness testified that another individual who had been convicted of criminal sexual conduct perpetrated on the victim's sister was not punished for crimes allegedly committed against the victim. This argument is without merit. The record reveals that defendant's own attorney purposefully elicited the testimony in question in an apparent effort to persuade the jury that the decision to prosecute defendant was motivated by a perceived lack of justice with respect to crimes committed by another person against the victim. By intentionally injecting the issue, defendant has waived review of this issue on appeal. *People v King*, 158 Mich App 672, 677; 405 NW2d 116 (1987).

Next, defendant argues that the prosecutor violated the holding of *People v Buckey*, 424 Mich 1; 378 NW2d 432 (1985), by "intentionally structur[ing] the testimony so that the witnesses bolstered the testimony of each other." However, *Buckey* merely states that "it is improper for a prosecution witness to *comment or provide an opinion* on the credibility of another witness." *Id.* at 17. Defendant does not identify a single instance where the prosecutor asked a witness to "comment or provide an opinion" on the credibility of another witness. Therefore, defendant's argument is without merit.

Finally, we reject defendant's claim that reversal is required because of prosecutorial misconduct. First, while defendant asserts that the prosecutor made improper appeals for sympathy by "repeatedly" eliciting from "the social workers and others" testimony that the victim was now safe because of defendant's prosecution, he does not identify any specific testimony in his brief, nor does he indicate where such testimony may be found in the record. Other than mentioning Renee Jankowski,[2] he does not identify any particular witness whose testimony is objectionable. We conclude that defendant has failed to adequately brief this issue and, accordingly, deem it abandoned. *Mitcham*, *supra*. Defendant also argues that the prosecutor improperly elicited sympathy for the victim during closing argument. However, defendant did not preserve this issue by objecting to the remarks at trial. Because a curative instruction could have eliminated any prejudice stemming from the remarks in question, appellate review of this issue is precluded. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Affirmed.

/s/ Peter D. O'Connell
/s/ Barbara B. MacKenzie
/s/ Hilda R. Gage

[1] Defendant's and his former wife's parental rights to the victim and her sister were terminated in 1992.

[2] Defendant asserts in his brief that Renee Jankowski testified that the children were now safe, but, again, does not indicate where this alleged testimony may be found.