

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRENT ALLEN SMITH,

Defendant-Appellant.

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UNPUBLISHED

October 7, 2003

No. 238005

Oakland Circuit Court

LC No. 2001-177388-FH

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

A jury convicted defendant of three counts of criminal sexual conduct (CSC), 2d-degree, MCL 750.520c. He was sentenced to three concurrent terms of four to fifteen years' imprisonment. He appeals as of right the judgment and sentence, and we affirm.

I

Defendant was a police officer with the City of Berkley from June 1997 until approximately 2001. The instant charges arose from events in the early morning hours of December 23, 2000, when defendant, who worked the midnight shift, was on duty and patrolling. The complainant, 19 year-old Shannon Sargent, testified that at around 1:30 a.m. that morning, defendant approached the vehicle in which she and her boyfriend were "making out," which was parked behind a bar in Berkley. Sargent showed defendant a driver's license that was not her own, belonging to a woman who was of legal drinking age. Sargent testified that defendant asked her to step out of the car and get in the police car, asked if he could search her and did so, and later asked if he could do a second search while she was seated in the back seat of the patrol car, during which he felt her breast, inner thighs, vaginal area, and buttocks, while his hand was underneath her clothes. She testified she was crying and hysterical. Her boyfriend at the time, Peter Marinelli, corroborated that testimony, and said she had told him that defendant had put his finger inside her. Defendant drove Marinelli and Sargent to the local Denny's and dropped them off. The manager of Denny's testified that he saw Marinelli and Sargent and that Sargent was crying and upset. Sargent's mother and Sargent testified to the adverse effects and mental anguish the incident caused Sargent, including her seeking therapy, her subsequent inability to drive more than short distances and her fear of police officers.

The trial court permitted the prosecution to present similar acts evidence through two witnesses, Kristin Oliver and Corinne Steinbrenner, both of whom testified that defendant had

inappropriately touched them during searches following traffic stops in 1998. Oliver, a 33 year-old, testified defendant stopped her after she rolled through several Michigan turns, around 2:30 a.m. on May 3, 1998. She failed a field sobriety test. Defendant patted her down before placing her in the police car and taking her to the station. At the station, defendant told her he had to search her again and put his hands inside her bra and tried to search inside her pants. He observed her go to the bathroom through a window and said he had to search her again, moving his hand up her inner thigh, cupping her vagina, and then moving down the other thigh. Oliver pleaded guilty of driving while impaired. In May 2001, she brought a federal suit against the Berkley police department arising out of the May 1998 incident.

Corrinne Steinbrenner testified that on June 21, 1998, when she was 16 years old, defendant pulled her over at around 1:30 a.m. while she was driving a friend's car, without a license. She lied to defendant about having a license. Defendant searched her, then searched her friend and sent him home in his car. After that, he searched her again, groping her chest over her clothing. Defendant took her to the police station, under arrest. Several days later, she told her mother about the incident, and the two filed a complaint against defendant at the station.

Defense counsel vigorously cross-examined and impeached both of the similar acts witnesses.

The defense's theory was that defendant committed no wrongdoing. Defendant adamantly denied conducting a second search of Sargent, and maintained throughout trial that his investigation and search of Sargent were "routine" and permissible in scope. Defense counsel argued that the complainant and the similar acts witnesses were not credible, that there was no system, scheme or plan on his part, and that his intent was not in issue because he denied committing the acts charged.

The jury convicted defendant as charged. The trial court denied defendant's motions for new trial and for directed verdict of acquittal. This appeal ensued.

## II

Defendant asserts that the similar acts were not sufficiently similar to show a common plan, system, or scheme and the evidence was thus inadmissible under MRE 404(b).

Defendant objected below to admission of the similar acts evidence. This Court reviews the trial court's admission of similar acts evidence under MRE 404(b) for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). To be admissible under MRE 404(b), similar acts evidence 1) must be offered for a proper (i.e., non-propensity) purpose, 2) must be relevant, and 3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). If evidence of similar acts is admitted for a limited purpose, a prosecutor deprives the defendant of a fair trial if she argues that the jury should consider the evidence as substantive evidence of the defendant's guilt. *People v Quinn*, 194 Mich App 250, 253; 486 NW2d 139 (1992).

A trial court may grant a new trial "on any ground that would support appellate reversal of the defendant's conviction or if the court believes that the verdict has resulted in a miscarriage of justice." *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). A trial court's

denial of a motion for new trial is reviewed for an abuse of discretion, while its factual findings are reviewed for clear error. *Id.*

A

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.

In *Sabin (After Remand)*, 463 Mich at 63-64, the Supreme Court noted:

Today, we clarify that evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. Logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot.

General similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts. [*Sabin, supra* at 63-64, citations omitted.]

The standard for admission of similar acts evidence to establish a common plan, scheme, or system was revisited in *People v Hine*, 467 Mich 242, 251-252; 650 NW2d 659 (2002). In *Hine, supra*, the defendant was charged with murder and first-degree child abuse after his girlfriend's daughter, a 2 ½ year old child that had been in his care, died of multiple blunt force injuries, and an autopsy revealed internal injuries of varying ages. Following an evidentiary hearing at which proposed similar acts witnesses testified, the trial court permitted three former girlfriends of the defendant, including the child's mother, to testify. One testified that the defendant "grabbed her arms, put his hands in her mouth, and stretched her lips," and threatened her; another former girlfriend testified that the defendant assaulted her at least once a week, head-butted her, picked her up and threw her down, and grabbed and shoved her; the mother of the deceased child testified that the defendant pinned her arms with his knees, pushed and shoved her, kneed her in the mouth once, head-butted her, and put his fingers inside her mouth and forcefully pulled. This Court reversed the defendant's convictions, concluding that the other acts evidence "made none of the facts in dispute at defendant's trial more or less probable," and that "substantial dissimilarities existed between the assaults on the other acts witnesses and the injuries sustained by the victim." The Supreme Court reversed and remanded for reconsideration in light of *People v Sabin (After Remand), supra*, 463 Mich 43. On remand, this Court again reversed the defendant's convictions, concluding that "the other acts evidence was used to prove the 'very act' that was the object of proof," that a higher degree of similarity was required, and that there

was “nothing, within the universe of violent assaults” particularly unusual or distinctive in the conduct of the defendant. *Hine, supra* at 249-250. The Supreme Court reversed, noting:

In *Sabin*, we held that evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. For other acts evidence to be admissible there must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan, *Sabin, supra* at 64-65. *Sabin* involved the use of other acts evidence to prove that the charged act occurred. We recognized that the degree of similarity between the uncharged and charged conduct required as a threshold for admissibility in such a case was higher than that needed to prove intent, but not as great as that needed to prove identity. *Id.* at 65.

In this case, the Court of Appeals imposed a standard of a high degree of similarity between the other acts and the charged acts, apparently because it believed that the evidence presented to the trial court did not demonstrate any unlawful conduct. The Court of Appeals was mistaken. The testimony and offers of proof at the evidentiary hearing suggested that Caitlan had died from multiple, nonaccidental, blunt force injuries, and that her death was a homicide.

Specifically, the evidence established that the “fish-hook” assaults on the defendant’s former girlfriends were similar to the method or system that could have caused the fingernail marks on Caitlan’s right cheek. Further, one of the other acts witnesses described the forceful and hurtful “poking” inflicted upon her by the defendant. The forensic pathologist testified that Caitlan had fifteen to twenty circular bruises on her abdomen, the largest of which measured about one inch. The expert on child abuse testified that these injuries were typical of injuries received when a child has been poked, and that accidental injuries in that area of a child’s body were completely atypical. Thus, contrary to the observations of the Court of Appeals, there were both injuries distinctive from ordinary assaults, and similarities between the other acts (uncharged conduct) and injuries to the child (charged conduct). As we stated in *Sabin*, distinctive and unusual features are not required to establish the existence of a common design or plan. The evidence of uncharged acts need only support the inference that the defendant employed the common plan in committing the charged offense. *Sabin, supra* at 65-66.

The trial court did not abuse its discretion in determining that the assaults by the defendant on his former girlfriends and the charged offenses regarding Caitlan shared sufficient common features to permit the inference of a plan, scheme, or system. The charged and uncharged acts contained common features beyond similarity as mere assaults. [*Hine, supra* at 251-253.]

## B

The prosecution's pretrial motion argued the similar acts evidence was admissible to show intent; absence of mistake or accident; common plan, scheme or system; and to rebut that complainant fabricated the incident. In support of the motion, the prosecution submitted: photographs of the complainant, Shannon Sargent, and of Kristin Oliver (formerly Goodwin), the investigative police report of the police interview of Oliver in January 2001, Oliver's signed statement to the police regarding the incident, Corinne Steinbrenner's (formerly Pokryfke) signed statement to the police dated July 19, 1998, an investigative police report dated August 5, 1998 of the incident involving Steinbrenner, the investigative police report of a taped phone interview of Steinbrenner (who lived in Pennsylvania at the time) in January 2001.

Defendant argued that his intent and absence of mistake or accident were not in issue because the complainant alleged the sexual assault occurred only during a second search and defendant denied that any second search ever occurred. Defendant argued that the similar acts evidence did not support that any scheme existed.<sup>1</sup>

The trial court concluded that the 404(b) evidence was relevant to showing a plan, scheme or system and also relevant to rebut defendant's claim of fabrication.

Defendant's motion for new trial argued there was insufficient similarity between the charged and uncharged conduct. Defendant argued that dissimilarities among the complainant and similar acts witnesses included: types of stop (traffic v suspicious person), place where the searches occurred (on scene v station house), types of searches that occurred (under clothing v over clothing), and charges filed (none v impaired driving).

Despite the dissimilarities between the charged and uncharged conduct, we conclude that under *Hine, supra*, and *Sabin (After Remand), supra*, the uncharged conduct was sufficiently similar to the charged offenses to support the inference that Smith used a common system or plan in committing the charged offenses. While on-duty and patrolling on the midnight shift, defendant detained attractive women in the early morning hours, separated them from their companions, searched each woman, and abused his authority to conduct lawful searches by subjecting them to inappropriate sexual touching under the guise of conducting a subsequent search.

The trial court did not abuse its discretion in admitting the similar acts evidence to show system, scheme or plan and did not abuse its discretion in denying defendant's motion for new trial on this basis. *Hine, supra*.

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<sup>1</sup> In the alternative, defendant argued that if the trial court admitted the 404(b) testimony, he should be permitted to introduce certain employment records to establish his good character, including that he had been voted the 1998 Berkley Officer of the Year, and had made approximately 62 OUIL arrests, 44 DWLS arrests, written 1213 violations, and investigated over 100 suspicious persons. The court admitted defendant's employment records.

C

Defendant contends that this Court should adopt the “federal test” for admission of similar acts evidence set forth in *United States v Gessa*, 971 F2d 1257 (CA 6, 1992) (en banc),<sup>2</sup> which, according to defendant, requires a court to find that the other acts occurred before the evidence may be admitted.<sup>3</sup>

We agree with the prosecution that the Michigan standard is as set forth in *People v VanderVliet*, 444 Mich 52, 68-69 n 20; 508 NW2d 114 (1993), and that the evidence met that standard in this case. *VanderVliet* states in pertinent part:

The Court [in *Huddleston v United States*, 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988),] rejected the proposition that Rule 104(a) mandated a preliminary finding by the trial judge that the other act occurred.

[I]t not only superimposes a level of judicial oversight that is nowhere apparent from the language of that provision, but it is simply inconsistent with the legislative history behind Rule 404(b). The Advisory Committee specifically declined to offer any “mechanical solution” to the admission of evidence under 404(b). Advisory Committee’s Notes on Fed Rule Evid 404(b), 28 USC App, p 691. Rather, the Committee indicated that the trial court should assess such evidence under the usual rules for admissibility: “The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability [sic] of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.” *Ibid.*; see also S Rep No. 93-1277, p 25 (1974) (“[I]t is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion or waste of time”).

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<sup>2</sup> The holding of *Gessa*, *supra*, was summarized recently in *United States v Price*, 329 F3d 903 (CA 6, 2003), petition for cert filed 7/29/03:

[Under *Gessa*] a district court must first determine whether there is sufficient evidence that the other act occurred. Next, the district court must determine whether the offering party is attempting to prove the other act for a purpose other than showing character, such as to show intent or identity. [*Gessa*,] at 1262. Finally, the district court must balance the probative value of the evidence against the danger of unfair prejudice. *Id.*

<sup>3</sup> Defendant did not raise this issue below until his motion for new trial.

[Q]uestions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b) . . . . In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the televisions were stolen—by a preponderance of the evidence.

\* \* \*

We emphasize that in assessing the sufficiency of the evidence under Rule 104(b), the trial court must consider all evidence presented to the jury. “[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation, prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.” *Bourjaily v United States*, 483 US 171, 179-180 [107 S Ct 2775; 97 L Ed 2d 144] (1987). [*Huddleston, supra* at 688-691.]

[*VanderVliet*, 444 Mich at 68-69 n 20.]

Defendant’s reply brief argues that if *VanderVliet, supra*, applies, this Court must hold that the trial court erred by ruling the evidence admissible without (1) holding a hearing to hear the evidence and (2) making a finding that the acts had occurred. We disagree.

Defendant cites no authority to support that an evidentiary hearing *must* be held before a court may admit MRE 404(b) evidence. As summarized above, the prosecution submitted extensive documentary evidence in support of its 404(b) motion as to both of the similar acts witnesses’ encounters with defendant, much of it consisting of police reports and interviews. From this evidence, the trial court could conclude that a reasonable jury could find the similar acts occurred by a preponderance of the evidence. *VanderVliet, supra*. Defendant’s claim that a trial court *must* make a preliminary finding that the other acts occurred was rejected in *VanderVliet* in favor of the standard that the trial court examine all the evidence and decide whether the jury could reasonably find the conditional fact occurred by a preponderance of the evidence.

## D

Defendant also argues that the prosecutor used the similar acts evidence to argue propensity—a forbidden purpose under MRE 404(b). Defendant challenges remarks the prosecutor elicited from one similar acts witness that, in an out-of-court statement, she called defendant a “pervert” who should be taken off the road, and from the other similar acts witness that defendant “did it again.” Defendant also challenges the prosecutor’s remarks in closing argument that: “He’s done it before—He started off with Kristin,” that Kristin filed a lawsuit when she found out “other women had to go through what she went through,” and that if Kristin had complained about defendant when she was arrested, then Shannon would not have had to go

through this trial. Defendant further challenges the prosecutor's rebuttal argument that the Berkley Police Department now wished it had done something after the first complaint regarding defendant "after three girls" were attacked by defendant, and that the complainant "hit the lottery" when she accused defendant, and "just happened to pick the right guy," emphasizing that there were no complaints against other Berkley police officers.

The test of prosecutorial misconduct is whether the defendant was deprived of a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Claims of prosecutorial misconduct are decided on a case-by-case basis, and the reviewing court must examine the pertinent parts of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A prosecutor may not make a statement of fact that is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), but is free to argue the evidence and all reasonable inferences arising therefrom as they relate to the prosecution's theory of the case. *Schutte, supra*. The prosecution need not use the least prejudicial evidence available to establish a fact or state the inferences in the blandest possible terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). Otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003).

Appellate review of prosecutorial misconduct claims is precluded absent a timely and specific objection below, unless an objection would not have cured the error, or if failure to review the issue would result in a miscarriage of justice. *Stanaway, supra* at 687; *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). A miscarriage of justice will not be found if a timely instruction could have cured the prejudicial effect of the prosecutorial remarks. *Watson, supra* at 586.

Defendant did not object to any of the remarks he maintains constituted improper propensity argument, thus appellate review is foreclosed unless the prejudicial effect was so great that it could not have been cured by an appropriate instruction, or if failure to review the issue would result in a miscarriage of justice. *Stanaway, supra* at 687.

Under the circumstances that the trial court read the limiting similar acts instruction, both counsel referred at trial several times to the limited (proper) use to which the jury could put the similar acts testimony, and that the jury was instructed that counsel's remarks were not evidence, we conclude that failure to further review this issue will not result in a miscarriage of justice.

Defendant relatedly argues that his trial counsel's failure to object to the prosecutor's propensity remarks constituted ineffective assistance of counsel. However, defendant has failed to overcome the strong presumption that trial counsel's tactics constituted sound trial strategy, *Rodgers, supra*, 248 Mich App 702, and we find it unlikely that the verdict was the result of improper argument.

## E

Defendant contends that the similar acts limiting instruction allowed the jury to consider the similar acts evidence for three purposes other than the court had allowed pre-trial: that defendant had a reason to commit the crime, that defendant meant to touch the complainant, and that defendant had acted purposely, not by accident or mistake. Defendant maintains that all three were improper uses of similar acts testimony in a case charging CSC, 2d.

Unpreserved claims of instructional error are forfeited unless relief is necessary to avoid manifest injustice. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999); MCL 768.29. Nonconstitutional unpreserved claims are reviewed for plain error. *Carines*, *supra* at 774. A defendant must show a plain error that affected substantial rights; a reviewing court should reverse “only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

Defendant is correct that the Court in *Sabin (After Remand)*, concluded that the similar acts evidence was not relevant to show absence of mistake or motive and intent, see 463 Mich at 68-69; however, the Court held that the evidence was properly admitted to show defendant’s scheme, plan or system. See also *People v Pesquera*, 244 Mich App 305, 318-321; 625 NW2d 407 (2001), in which this Court did not reverse the defendant’s conviction where the jury was instructed on both a proper purpose as well as an improper purpose.

Assuming the jury instruction was erroneous in part, reversal is not warranted where the jury was also instructed on a proper purpose for use of the similar acts evidence. *Sabin (After Remand)*, *supra*; *Pesquera*, *supra*, and it is unlikely that the jury considered the evidence with respect to the other purposes, because the evidence did not bear on those issues, or the issues were immaterial.

## III

Defendant next argues that the prosecutor’s remarks appealing to civic duty, her statements of personal belief of defendant’s guilt, her testifying, and her impeachment of defendant with his silence deprived defendant of a fair trial, due process, and his right to remain silent. We find no reversible error.

A prosecutor may not urge the jury to convict the defendant as part of its civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may not comment on a defendant’s silence when accused by police, but may argue that certain evidence is uncontradicted, and may contest evidence the defendant presents. *Callon*, *supra* at 331; *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecution may not vouch for a witness’ credibility to the effect that he has some special knowledge that the witness is testifying truthfully, *Bahoda*, *supra* at 276, but may argue from the facts that the defendant or another witness is not worthy of belief.

Since defendant did not object to the remarks challenged here, our review is for plain error that affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal is warranted only when a plain error resulted in the conviction of an actually

innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Schutte, supra* at 720.

As to the prosecutor's remark in her closing rebuttal that "This is not about going after a person who's not guilty. That would be every prosecutor's worst nightmare. . . ," we conclude that a timely objection and resulting instruction could have cured any prejudicial effect.

The prosecutor also stated that, although the complainant initially reported that defendant had penetrated her vagina with his finger, she later blocked it out, adding that "it's common in sexual assault victims to repress the most significant thing that happened," and "use your common sense about why she's not saying penetration. Let me tell you something. If she said this word 'penetration' under oath each time, we would believe her. . . ."

Defense counsel argued in closing argument that the complainant's "forgetting" of the alleged penetration was not believable and supported the defense theory that she fabricated the entire incident. As such, the prosecutor's remarks were in response to defense argument, and any prejudicial effect could have been cured by an appropriate instruction.

The comments defendant challenges as improper prosecutorial comment on his silence are not. Defendant maintained that, until the instant trial, he had not had opportunity to defend himself against the charges. On cross-examination, the prosecutor asked defendant about the impression he created that he had not been able to present his side of the Sargent incident, and asked whether defendant had been aware that Sgt. Miller was investigating the Sargent incident. Defendant admitted that he was aware, and testified that he did not contact Miller or provide a written report. This did not constitute an impermissible use of defendant's silence. See *People v Allen*, 201 Mich App 98, 102-104; 505 NW2d 869 (1993) (where defendant did not claim to have told police same version of his exculpatory story on arrest, but rather, claimed that trial was his first opportunity to tell his version of the events, the case falls under exception permitting impeachment of a defendant's version of postarrest behavior.)

We agree with defendant that several of the challenged prosecutorial remarks were improper. For example, the prosecutor ended her rebuttal closing argument with:

You all took an oath to return a fair and just verdict. Coming back with a not guilty, you'd have to look at Shannon Sargent and say, "I don't believe you." And Kristin Oliver, "I don't believe you." And Corrinne, "I don't believe you." You have to tell the Sheriff's Department, the Oakland County Sheriff's Department, "You know what? I'd be okay with having my daughter stopped by him at three in the morning."

I ask that you return the right verdict, and that's guilty as charged on all three counts.

This was an improper appeal to civic duty and, arguably, was an improper request that the jury sympathize with the victim/complainant. Further, the remarks were made in rebuttal, to which defense counsel did not have opportunity to respond. We conclude, however, that any prejudicial effect could have been cured by an appropriate instruction, *Watson, supra*, and we are satisfied that the jury did not convict based on the improper argument.

Defendant argues the prosecutor invaded the province of the jury and violated his Sixth Amendment rights by eliciting an affirmative response from Officer Miller and defendant to the question whether they believed that criminal sexual conduct had occurred if Sargent's testimony were true. We disagree.

On re-direct examination the prosecutor asked Miller general questions about the scope of searches and pat-downs. He was not asked directly whether, if Sargent's testimony were true, it would establish criminal sexual conduct, although he expressed this opinion. As to defendant, he denied Sargent's story was true, but agreed that if it were, there would have been criminal sexual conduct. The trial court at this point intervened, however:

*Q.* Would you agree with me that Shannon's inner thighs, bare inner thighs being touched, her vagina being touched, bare breasts, bottom, that's criminal sexual conduct?

*A.* Absolutely.

THE COURT: I have a problem. I'm going to be very blunt. The jury will be instructed as to the elements of what constitutes criminal sexual conduct. Mere touching does not necessarily constitute. Okay? Now, that's very precise.

The trial court's intervention made it clear that the court would instruct the jury regarding the elements the prosecutor had to prove to establish second-degree CSC, and that mere touching did not of necessity constitute CSC. We conclude the trial court's admonition cured any prejudicial effect Miller's or defendant's remarks may have had.

The remaining remarks defendant challenges were unobjected to and would not warrant reversal, including the prosecutor's references to the complainant and similar acts witnesses having cried on the stand (which was supported by the record).

#### IV

Defendant next asserts that the prosecution, the complainant, and the complainant's family misled the jury when they testified that they had not hired attorney Brian Kutinsky and that they had no plans to file a civil lawsuit, that the prosecutor reinforced this denial of the existence of a civil claim and the simultaneous denial of any interest in the outcome of the trial when she argued in closing that the complainant had no motive to lie, and that a new trial should have been granted when, two days after defendant was sentenced, Kutinsky filed suit in federal court on complainant's behalf.

Defendant produced no evidence to support that complainant, her attorney, and the prosecutor conspired to prevent her being lawfully impeached. Further, defendant vigorously cross-examined the complainant regarding her potential filing of a civil suit. As the prosecution notes, defendant can pursue his theory of collusion in the civil suit, which the complainant filed after defendant had been sentenced in the instant case.

Defendant argues in a reply brief that he would have produced evidence of such collusion had he been granted the evidentiary hearing he requested in his motion for new trial, and that the record's failure to support his claim is thus not his fault, but the trial court's. Defendant neither cites supporting authority nor does he articulate what evidence he would have produced at such a hearing. Under these circumstances, we conclude that the trial court did not abuse its discretion in denying defendant's motion for new trial on this basis. MCR 2.611(A)(1).

V

Defendant argues he was denied a fair trial by the admission of improper, prejudicial hearsay testimony, rebuttal evidence and opinion evidence. We disagree.

A

Defense counsel objected on hearsay grounds to the testimony of complainant's then-boyfriend, Peter Marinelli, that complainant was crying hysterically and very upset when she told him she had been searched and that defendant had stuck his finger inside her. However, defense counsel withdrew the objection after the prosecutor invoked the excited utterance exception and the court admitted the testimony. Defense counsel objected to complainant's mother's testimony that on arriving home, Shannon ran into her room, she ran after her and asked her what had happened, and Shannon said she had been searched under her clothes. The objection was overruled. Defendant did not object to the complainant's testimony that she told Marinelli defendant had searched her several times and stuck his finger inside her.

MRE 803(2) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The two primary requirements for excited utterances is that there be a startling event, and that the resulting statement be made while under the excitement caused by the event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). However, "[t]he trial court's determination whether the declarant was still under the stress of the event is given wide discretion," *id.*, at 552, citing McCormick, *Evidence* (3d ed), § 297, p 857, and the trial court may consider all the circumstances bearing on spontaneity and lack of deliberation. *Id.* at 551-552.

We conclude that as in *Smith, supra*, it was within the trial court's discretion to conclude that the testimony fell under the excited utterance exception, given the testimony regarding the complainant's physical condition immediately after the incident. The statements arose out of a startling occasion, and witnesses that saw the complainant immediately or soon after the incident involving defendant, including Marinelli, the manager at the Denny's restaurant that defendant drove Marinelli and complainant to after the incident, and complainant's mother, testified she

was very upset, shaken, and crying. *Smith, supra*. Further, complainant's mother's testimony, even if admitted in error, was cumulative to complainant's testimony that she told her mother defendant had searched her under her clothes, and the error was thus harmless.

## B

Defendant challenges the prosecutor's elicitation of testimony about a crying secretary in the prosecutor's office as improperly buttressing Oliver's testimony. Defendant also argues that the prosecutor improperly used the testimony regarding the crying secretary to buttress Oliver's testimony. The trial court denied defendant's motion for new trial on this basis, concluding that although nonverbal conduct can be hearsay under MRE 801(a)(2), the testimony about the crying secretary was not offered to prove the truth of the matter asserted, but rather, to show what officer Anger did as a result. It appears from the record that the testimony was so limited at the time of its admission.

We conclude that, read in context, the prosecutor's rebuttal argument was largely proper commentary on the evidence and reasonable inferences arising therefrom, *Schutte, supra*, and any improper argument would not have affected the outcome of the trial.

## C

Defendant also argues the prosecution was improperly permitted to call the Berkley Police Chief, Bruce Henderlight, to rebut defendant's testimony that he (defendant) was not disciplined for the Steinbrenner incident. We disagree. The Chief's testimony was responsive to evidence introduced by defendant, and rebutted defendant's testimony on direct examination; thus it was properly admitted as rebuttal. *People v Figgures*, 451 Mich 390, 398-399; 547 NW2d 673 (1996) ("Rebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'")

## VI

Defendant asserts that the voir dire was legally and constitutionally inadequate because the trial court and defendant's trial counsel conducted a superficial voir dire, asking only if jurors had been exposed to publicity and, if so, had they formed an opinion. \

Whether the trial court conducted a sufficiently probing voir dire to uncover potential juror bias is reviewed for an abuse of discretion. *People v Tyburski*, 445 Mich 606, 609; 518 NW2d 441 (1994). "[W]here the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised." *Id.*, at 619, citing *Fedorinchik v Stewart*, 289 Mich 436, 438-439; 286 NW 673 (1939).

Defendant's arguments are unsupported by the record. Defense counsel asked the court before trial whether the jurors could be asked in private if they read the September 5, 2001 article in The Oakland Press, and requested that anyone who had read the article be removed for cause because the article discussed the results of a polygraph test. The trial court asked the potential jurors whether they knew anything of this case, as it had been in the paper and other media. Several potential jurors stated they had read about it in the paper, heard it on the news, and all

were then asked whether they had formed an opinion such that they could not be fair and impartial. In addition, the trial court asked specifically about the September 5<sup>th</sup> Oakland Press article, contrary to defendant's argument. Defense counsel also questioned potential jurors regarding exposure to publicity

As the trial court's opinion and order denying defendant's motion for new trial states, of the five pool members who had read the article, all were eventually dismissed. Defense counsel was allowed to participate in the voir dire, and both parties were able to dismiss members who had read the article. We conclude that the trial court conducted a sufficiently probing voir dire as required by *Tyburnski, supra*, and did not abuse its discretion by denying defendant's motion for new trial in this regard.

## VII

Defendant argues that although he denied searching the complainant in the way that she testified he did, if the jury believed her description of the search, the jury decided whether the search was criminal sexual conduct without any guidance from the court as to a police officer's right to detain, search, and the permissible scope of a search. He contends that the absence of jury instructions framing a defendant's defense constitutes a denial of due process and a fair trial.

The charges against defendant arose from defendant's second search of the complainant. No wrongdoing was alleged in connection with defendant's first search. Regarding the second search, the complainant testified that before starting it, defendant asked her whether she wanted a female officer present, and she declined, saying that he should "just get it over with." The complainant also testified that as he was conducting the second search, defendant would say what he was going to do next. However, the complainant did not testify, nor was there any testimony to support, that she agreed to a second search that included defendant placing his hands underneath her clothes and touching her inner thighs, breast, vaginal area and buttocks. Rather, the complainant testified that she believed she could not say no to a police officer; and both she and her boyfriend testified that she was extremely upset and crying immediately after the second "search." Under the circumstances that defendant had not established consent to the alleged search, and that consent was not the defense, it was not error for the court to fail to instruct on consent.

Defendant maintained pretrial and throughout the trial that he was innocent of any wrongdoing, i.e., that his investigation of the complainant and her boyfriend was, in all respects, routine, and that he performed only one permissible, limited search for weapons. Defense counsel's pursuit of the defense that the second search never occurred and defendant committed no wrongdoing, as opposed to a defense of consent, was a matter of trial strategy that defendant has not shown was not sound and that this Court should be reluctant to second-guess. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Strong*, 143 Mich App 442, 449; 372 NW2d 335 (1985). That defense counsel's strategy failed does not in itself render his assistance ineffective. *Strong, supra*. Defense counsel's failure to request jury instructions on the parameters of a legal search or consent does not, under these circumstances, constitute ineffective assistance of counsel where consent was not pursued as a defense and defendant denied that any impermissible search occurred. We conclude that defendant has not shown ineffective assistance of counsel and the trial court did not abuse its discretion in denying defendant's motion for new trial in this regard.

Defendant also maintains that trial counsel should have objected to all the objectionable testimony, to the prosecutor's conduct and argument, and should have requested that the jury be instructed on the principles of the officer's right to detain and search, including his right to request a consent to search, and be correctly instructed on the use of similar-acts evidence. Defendant argues that none of counsel's errors could conceivably be considered reasonable trial strategy.

Defense counsel's strategy was to pursue a theory of defense that, if believed, would have resulted in defendant's acquittal on all three CSC counts. This was not below an objective standard of reasonableness. To the extent counsel failed to make valid objections, we conclude that the outcome would not have been affected had the objections been made.

### VIII

We also reject defendant's argument that the cumulative errors clearly affected defendant's substantial rights and the fairness and integrity of the proceedings. The cumulative effect of individually harmless errors can warrant reversal if the effect was so seriously prejudicial as to merit a finding that the defendant was denied a fair trial. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). However, we find that very few of defendant's claims of error have merit, and the ones that have merit do not, separately or cumulatively, warrant reversal.

### IX

Defendant next asserts that his convictions were based on insufficient evidence and were against the great weight of the evidence. He reasons that, even if Sargent is believed, he engaged in a *consent* search that was not a strip search or a body cavity search, and he therefore cannot be convicted of CSC. Defendant argues "appellant can find no reported case where a police officer was convicted of a crime because the scope of a *consent search* allegedly exceeded proper bounds."

This Court reviews *de novo* a claim of insufficient evidence, and reviews for an abuse of discretion a trial court's ruling on a motion for new trial based on a great weight of the evidence claim. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "When reviewing a challenge to the sufficiency of the evidence, appellate courts examine the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

Defendant's claim is founded on the inaccurate premise that the record unequivocally supports that Sargent consented to the second search. As discussed above, Sargent's testimony did not support that she consented to the search defendant actually executed, nor did defendant

pursue consent as a defense below. We thus reject defendant's argument that because there was consent, there cannot be CSC, although the search may have exceeded proper bounds.<sup>4</sup>

X

Finally defendant asserts, relying on *People v Khoury*, 437 Mich 954; 467 NW2d 810 (1991), that because he was required to carry a gun as a police officer, he cannot be convicted of CSC under the armed with a weapon theory.

The *Khoury* Court concluded, based on the Legislature's then-recent clarification of the meaning of MCL 750.227b, that the Legislature did not intend that on-duty police officers in the performance of their duties be subject to *felony-firearm* charges. However, *Khoury* is based on a statutory exemption contained in the felony-firearm statute, and there is no such exemption for on-duty police officers under the CSC statutes. Defendant argues that an on-duty "police officer, who is required to carry a weapon, should not face enhanced criminal penalties for carrying that weapon where it is mandatory and where the weapon is not in any way used in the offense." The Legislature is free to enact such a provision, as it did in the felony-firearm context, but it has not done so. Further, under the circumstance that the *Khoury* Court initially denied Khoury's application, and granted reconsideration only after the Legislature enacted the statutory exemption, it would be inappropriate for this Court to create a common-law exemption of the sort urged by defendant.

Affirmed.

/s/ Richard A. Bandstra

/s/ Helene N. White

/s/ Pat M. Donofrio

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<sup>4</sup> The trial court found that there was sufficient evidence of force and coercion under the circumstances that defendant separated the complainant from her male companion and put her in the back seat of the patrol car, performed an improper search that violated departmental policy and was unreasonable under the Fourth Amendment and, at the time of the search had the power to determine whether charges would be brought against the complainant.