

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FIDEL LOPEZ ROJAS,

Defendant-Appellant.

UNPUBLISHED

October 21, 2003

No. 240232

Mason Circuit Court

LC No. 01-016876-FC

Before: Donofrio, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct. MCL 750.520b. The trial court sentenced him to imprisonment for 6 to 15 years. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion for a mistrial based on the victim’s voluntary and unresponsive response to a question posed by defense counsel. This Court reviews a trial court’s grant or denial of a mistrial for an abuse of discretion. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000).

Before trial, the prosecution filed notice of intent to introduce evidence of defendant’s “other crimes, wrongs, or acts.” MRE 404(b)(2). Specifically, the prosecution sought to introduce evidence tending to show that defendant may have sexually molested his biological daughter when she was three years old. Defendant objected to the admission of the evidence, and the trial court held a hearing on the motion and ruled that evidence of defendant’s “other crimes, wrongs, or acts” involving defendant’s daughter were inadmissible in the prosecution’s case in chief, but that if defendant “open[ed] the door,” then such evidence might be admissible.

At trial, the victim testified about becoming upset when defendant came into a Taco Bell where she was working. During re-cross examination, the following exchange occurred between the victim and defense counsel:

Q. So about this incident, you didn’t tell your boss that this alleged sex happened; you just said that your mom and stepdad were having some problems?

A. Yes.

Q. Okay. Is that what you told her, that your mom and stepdad were having problems?

A. I told her something, something to the nature of that they were divorcing and that –

Q. It was uncomfortable?

A. Yeah.

Q. Okay. You didn't tell her anything about the sexual advances or the –

A. No. Actually, I think I told her that he had molested my sister. I believe that is what I told her.

Defense counsel moved for a mistrial based on the victim's testimony that she had told her boss that defendant had molested her sister. The trial court denied the motion, ruling that the victim was not offering the statement as a true statement, but as a way of explaining to her boss why she did not want to wait on defendant.

A motion for mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and which impairs the defendant's ability to get a fair trial. *People v Griffis*, 218 Mich App 95, 100; 553 NW2d 642 (1996). In this case, the trial court specifically instructed the jury that it could only consider defendant's other bad acts for the limited purposes outlined in MRE 404(b)(1). The trial court also instructed the jury that it "must not convict the Defendant here because you think he is guilty of other bad conduct." In light of the trial court's instructions, defendant has not showed how he was prejudiced by the victim's testimony. Moreover, we note that testimony was elicited not during the prosecutor's examination of the victim, but during defense counsel's re-cross examination of the victim, and defense counsel admitted on the record that the prosecutor had instructed the victim "not to bring up this whole incident with [her younger sister.]" The victim's response was volunteered and was not responsive to defense counsel's question. An unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant's motion for mistrial.

Defendant next argues that the trial court should have granted a mistrial based on Doris Lopez's and Detective Susan Randall's testimony and the following statements from the prosecutor's closing argument:

I think the testimony of Mrs. Lopez is very, very, very important
[U]pon knowing or upon believing that something might be happening to her younger sister that [the victim] freaked out, I think were the words that Mrs. Lopez used. "Don't let her go with him. Don't let him have her."

The testimony and the prosecutor's comments were made after defendant moved for a mistrial, and defendant did not renew his motion for mistrial after any of the allegedly improper testimony or the prosecutor's closing argument statements. We reject defendant's argument that the trial

court abused its discretion in failing to grant a mistrial when defendant never moved for a mistrial based on Lopez's and Randall's testimony or the prosecutor's statements during closing argument. There can be no abuse of discretion when the trial court's discretion has not been invoked in the first place. *People v Rice (On Remand)*, 235 Mich App 429, 438-439; 597 NW2d 843 (1999).

Defendant next contends that the trial court abused its discretion in admitting, under MRE 404(b), evidence that defendant physically assaulted Doris Lopez after he learned that she had been at a church meeting where his conduct toward the victim and other young girls had been discussed. While defendant objected to the Lopez's testimony on relevancy and MRE 403 grounds, defendant did not object to Lopez's testimony based on MRE 404(b). Accordingly, defendant has not preserved this issue for review. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). We therefore review this issue under the plain error rule. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice" *Pesquera, supra*, 316, quoting *Carines, supra*, 763. A defendant has been prejudiced if the plain error affected the outcome of the lower court proceedings. *Carines, supra*, 763.

We conclude that even if the trial court's admission of the evidence was plain error, defendant was not prejudiced. The only evidence regarding defendant forcibly penetrating the victim was the victim's testimony. However, the testimony of the victim alone can constitute sufficient evidence to establish a defendant's guilt beyond a reasonable doubt. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). Further, in addition to the victim's testimony, the victim's friends testified that defendant purchased alcohol for them, spoke to the victim in a sexual manner, and touched the victim's breasts and buttocks. The victim's friends' testimony was properly admitted under MRE 404(b)(1) to show defendant's intent, scheme, plan, or system in doing an act. We believe that the victim's testimony, coupled with the testimony of her friends, was sufficient to establish defendant's guilt beyond a reasonable doubt without the erroneously admitted "other crimes, wrongs, or acts" evidence. Moreover, we note that the trial court specifically instructed the jury that it could not convict defendant based on evidence of his other bad conduct. Because defendant cannot establish the requisite prejudice, he has forfeited the issue. *Pesquera, supra*, 316.

Defendant next argues that the trial court abused its discretion in allowing Rodney Knapp, a lay minister at defendant's church, to testify that defendant had apologized for providing alcohol to the victim and her friends and for using improper sexual language in the presence of the victim and her friends. According to defendant, Knapp's testimony should have been excluded based on a clergy privilege. Defendant cites no case law or statutory authority to support his argument that his statements to Knapp were protected by a clergy privilege. We therefore decline to address this issue based on defendant's failure to cite any authority to support his claim. *Winiemko v Valenti*, 203 Mich App 411, 415; 513 NW2d 181 (1994). A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, unravel and elaborate for him his arguments, and search for authority to sustain or reject his position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Yee v*

Shiawassee Co Bd of Comm'rs, 251 Mich App 379, 406; 651 NW2d 756 (2002). Defendant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Yee, supra*, 406.

Defendant next argues that the trial court abused its discretion in admitting (1) Rachelle Knapp's testimony that defendant exposed himself to her and the victim and that he told her that he could help her get rid of acne by masturbating, (2) Heather Stever's testimony that defendant had purchased alcohol for the victim five or ten times, made sexual comments to the victim, and intentionally touched the victim's breasts and buttocks, and (3) numerous portions of Doris Lopez's testimony. We find that the trial court did not abuse its discretion in admitting Knapp's, Stever's, and Lopez's testimony because such testimony was relevant to defendant's intent, scheme, or plan in perpetrating the crime against the victim. MRE 404(b)(1). In addition, the evidence was not unfairly prejudicial under MRE 403. In the alternative, we believe that the testimony was admissible as part of the *res gestae* of the offense irrespective of MRE 404(b). *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). The *res gestae* exception to MRE 404(b) allows evidence of other criminal acts when those acts are "so blended or connected with the [charged offense] that proof of one incidentally involves the other or explains the circumstances of the crime." *Id.*, quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). We believe that defendant's conduct with the victim and her friends and his pattern of buying them alcohol and touching them and talking to them inappropriately helps to explain the circumstances of the crime. Accordingly, we conclude that the trial court did not abuse its discretion in admitting Knapp's, Stever's and Lopez's testimony.

According to defendant, Lopez made certain statements regarding defendant's alleged sexual abuse of his three-year-old daughter in violation of the trial court's order that the prosecution was not to admit such evidence. However, defendant failed to object to Lopez's testimony, and reversal is required only if defendant can show a plain error that affected his substantial rights. *Carines, supra*, 763-764; *Schutte, supra*, 720. A plain error affects a defendant's substantial rights if the defendant was prejudiced by the error in that it affected the outcome of the lower court proceedings. *Carines, supra*, 763. In this case, the victim's testimony, coupled with her friends' testimony, was sufficient to establish defendant's guilt beyond a reasonable doubt without the erroneously admitted evidence. *Taylor, supra*, 8. Moreover, the trial court specifically instructed the jury that evidence of defendant's "other crimes, wrongs, or acts" was admissible only for a limited purpose and that it could not convict defendant based on his other bad conduct. Accordingly, we conclude that any error in admitting Lopez's testimony referring to defendant's alleged sexual abuse of his daughter did not affect the outcome of the lower court proceedings.

Defendant next argues that numerous instances of prosecutorial misconduct denied him a fair trial. We disagree. Issues of prosecutorial misconduct are decided on a case by case basis. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1993). The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.* Prosecutorial 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. *Schutte, supra*, 721. The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *Noble, supra*, 660.

Defendant first argues that the prosecutor failed to provide advance notice of his intent to use “other acts” evidence as required by MRE 404(b)(2).¹ Defendant did not object to the other acts evidence based on the prosecutor’s failure to comply with the notice requirement of MRE 404(b)(2). Accordingly, the issue was not properly preserved for appeal, and our review is limited to whether there was plain error affecting defendant’s substantial rights. *Carines, supra*, 763-764. We conclude that there was not.

The “other crimes, wrongs, or acts” evidence that defendant claims the prosecutor failed to provide proper notice of include evidence that defendant furnished alcohol to the victim and her friends, evidence that defendant made sexual remarks to the victim and her friends, evidence that defendant touched the victim inappropriately, and evidence that defendant exposed himself to the victim and one of her friends. The underlying aims of the notice requirement in MRE 404(b)(2) are (1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record. *People v Hawkins*, 245 Mich App 439, 454-455; 628 NW2d 105 (2001).

In this case, there was no error requiring reversal because the underlying aims of the notice requirement in MRE 404(b)(2) were satisfied. First, the “other crimes, wrongs, or acts” evidence was relevant to defendant’s opportunity, intent, preparation, scheme, plan, or system in perpetrating the crime against the victim. MRE 401; MRE 404(b)(1). Second, defendant was aware of the evidence because he objected to it in a written pretrial motion in limine and on the record after the jury was empanelled but before trial. Finally, the trial court ruled on the record that the evidence was not precluded under MRE 404(b). Accordingly, because the underlying aims of the notice requirement in MRE 404(b) were satisfied notwithstanding the prosecutor’s failure to provide notice, defendant’s was not prejudiced by the lack of notice, and reversal is not required on this basis.

Defendant next argues that the prosecutor improperly elicited, in violation of the trial court’s order barring evidence about defendant’s alleged sexual abuse of his daughter, testimony from the victim that she went to California because there “were some things going on with my sister” and her mother wanted her to “come forward.” Defendant failed to object to this testimony. Appellate review is therefore precluded unless defendant can show a plain error affecting his substantial rights. *Carines, supra*, 763; *Schutte, supra*, 720. We conclude that no error affecting defendant’s substantial rights occurred because the prosecutor’s question did not specifically call for an answer that would have been improper under the trial court’s ruling excluding evidence of defendant’s alleged sexual abuse of his daughter, the prosecutor stated on

¹ Before trial, the prosecutor filed a notice of intent to offer evidence of defendant’s “other crimes, wrongs, or acts” as required by MRE 404(b)(2), but this notice was limited to acts relating to defendant allegedly sexually abusing his daughter.

the record that he had instructed his witnesses not to refer to defendant's alleged sexual abuse of his daughter, and the trial court instructed the jury that it could not convict defendant because it believed he was guilty of other bad conduct. For the same reasons, we reject defendant's argument that the prosecutor improperly elicited testimony from Doris Lopez regarding defendant's alleged sexual abuse of his daughter.

Defendant next contends that the prosecutor was responsible for the victim's response to defense counsel's question on re-cross examination in which the victim stated that she told her boss at Taco Bell that defendant had molested her little sister. We reject defendant's contention that prosecutorial misconduct caused the victim's testimony because the testimony was elicited by defense counsel, not the prosecutor, and because the prosecutor had instructed the witnesses not to refer to defendant's alleged sexual abuse of his daughter.

Defendant finally argues that the prosecutor made improper statements during closing argument and rebuttal closing argument. Specifically, defendant contends that the following statements made by the prosecutor were improper:

I think the testimony of Mrs. Lopez is very, very, very important for you to consider as well. There are a couple of things that I think stand out in Mrs. Lopez's testimony besides those that I shared with you today.

Those are upon knowing or upon believing that something might be happening to her younger sister that [the victim] freaked out, I think were the words that Mrs. Lopez used. 'Don't let her go with him. Don't let him have her', those types of things.

Defendant did not object to the prosecutor's statement during rebuttal closing argument and did not object to the underlying testimony regarding the victim "freaking out" about her younger sister going someplace with defendant. Accordingly, appellate review is precluded unless defendant can show a plain error affecting his substantial rights. *Carines, supra*, 763; *Pesquera, supra*, 316. The prosecutor's comments arguably violated the trial court's order regarding references to defendant's "other crimes, wrongs, or acts" with his biological daughter. However, even if the prosecutor's comments were plain error, the plain error did not affect the outcome of the lower court proceedings because, as we previously observed, the victim's testimony, along with the testimony of her friends, was sufficient to establish defendant's guilt beyond a reasonable doubt without the erroneously admitted "other crimes, wrongs, or acts" evidence that the prosecutor referred to in rebuttal closing argument. *Taylor, supra*, 8. Moreover, we will not find error requiring reversal if the prejudicial effect of a prosecutor's comment could have been cured by a timely instruction. *Schutte, supra*, 721. In this case, if defendant had objected to the prosecutor's comments, a timely instruction would have cured any prejudice. Accordingly, we conclude that the prosecutor's statements during closing argument did not affect the outcome of the lower court proceedings.

We also conclude that the following statements made by the prosecutor during rebuttal closing argument did not deny defendant a fair trial:

Alcohol, sex talk, talking about sex dreams, grabbing boobs, grabbing butts, conducting yourself in a way that is offensive to people even in your own

church requiring church meetings, having other kids ask your daughter, “How do you tolerate that?”, having other kids go to their parents and say, “Look what this guy is doing”, is all incredibly relevant and it’s incredibly probative of whether or not this Defendant engaged in the type of sexual activity that is alleged. It’s your duty to consider that evidence.

Because defendant failed to object to the prosecutor’s remarks in rebuttal closing argument, he must show a plain error affecting his substantial rights. *Carines, supra*, 763; *Schutte, supra*, 720. The prosecutor’s statements related to evidence that was properly admitted for the limited purposes outlined in MRE 404(b)(1) or under the res gestae exception to MRE 404(b). A prosecutor is free to argue the evidence and all reasonable inferences therefrom as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Accordingly, the prosecutor’s comments during rebuttal closing argument were not plain error and reversal is not required on this basis.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Peter D. O’Connell