

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS GORDON THORP,

Defendant-Appellant.

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UNPUBLISHED

July 14, 2005

No. 255579

Charlevoix Circuit Court

LC No. 03-086109-FC

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of five counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a). The trial court sentenced defendant to life in prison. Because defendant was not denied his constitutional rights to a fair trial and to the effective assistance of counsel, and because he is not entitled to resentencing, we affirm.

Defendant first argues that the introduction of evidence of physical violence at trial was prejudicial. Defendant did not object to the introduction of the evidence at trial. Hence, this issue is not preserved for our review. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). We review unpreserved claims of error for plain error affecting substantial rights, and reversal is only warranted if the “error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

MRE 404(b) excludes evidence of other acts to prove character and show action in conformity therewith. To be admissible under MRE 404(b), evidence of other acts must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502; 509; 674 NW2d 366 (2004). The requirement that the prosecution “offer” the evidence for a proper purpose does not mean that “the prosecution’s failure to identify at trial the purpose that supports admissibility” necessarily mandates reversal. *People v Sabin (After Remand)*, 463 Mich 43, 59 n 6; 614 NW2d 888, on second remand 242 Mich App 656 (2000). Rather, MRE 404(b)(2) requires that the prosecution provide notice in advance of trial “of the general nature of any such evidence it intends to introduce.” MRE 404(b)(2). If the prosecution did not provide such notice, the facts of the case must be reviewed to determine whether the lack of notice had a

significant effect on the proceeding. *People v Hawkins*, 245 Mich App 439, 453-456; 628 NW2d 105 (2001).

Evidence is relevant if it makes “the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. In this case, the prosecutor presented evidence that defendant used threats of physical violence as part of a plan, scheme, or system to sexually abuse the children. Defendant argued that the children’s delayed reporting of the sexual abuse substantiated his assertion of recent fabrication. However, if defendant’s children witnessed him using physical violence, then it would be more probable that the children would have believed defendant when he threatened to commit additional acts of violence if they reported the abuse. Accordingly, the evidence of physical violence could reasonably be viewed as tending to rebut defendant’s theory of fabrication because it provides an alternative reason for the delayed reporting. The evidence is relevant because it has a tendency to make a fact of consequence - that the abuse occurred - more probable than not.

Record evidence established that defendant had committed some violent acts in front of the children. This evidence was substantially probative as it related to why the children delayed reporting the sexual abuse because they testified that defendant threatened further violence if they reported the abuse. Certainly, the evidence that defendant had once beaten his stepson and had pushed one of his stepdaughters down a flight of stairs was prejudicial, but the question is whether it was unfairly prejudicial. Physical violence was not a dominant theme at the trial. In fact, at trial, the prosecutor presented evidence specifically describing only two episodes of physical violence. Moreover, the jury heard contrasting evidence because the complainant testified that she did not remember ever seeing defendant hit her brother or sister. Evidence is unfairly prejudicial if it is marginally probative but there is a danger that it will be given undue or preemptive weight by the jury. *Taylor, supra* at 521-522. We conclude that there was relatively little danger that the jury gave undue or preemptive weight to the evidence of physical violence, and, the evidence was substantially probative, not only marginally probative. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

The same reasoning that supports the conclusion that the evidence was relevant also supports the conclusion that admission of the evidence served a proper purpose. As explained above, the evidence rebutted defendant’s claim of recent fabrication. This is a proper, non-character, purpose supporting the admissibility of this evidence. *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998). Although this purpose was not “offered” by the prosecution in support of the admissibility of the evidence of physical violence, “the prosecution’s failure to identify at trial the purpose that supports admissibility” does not necessarily mandate reversal. *Sabin (After Remand), supra* at 59-60 n 6.

Defendant argues that because he did not have proper notice that the prosecutor planned to introduce evidence of physical violence, and that the question becomes whether the alleged lack of the required notice mandates reversal. *Hawkins, supra* at 453-456. Defendant’s argument fails because clearly defendant had notice that evidence of threats of violence and even that evidence of violence itself would be presented at trial based on the prosecutor’s offer of proof supporting the admission of the testimony concerning the sexual abuse defendant perpetrated against his other children and stepchildren. Even if we were to conclude that notice

was lacking, it did not have any effect on the proceeding because defendant has not indicated that his trial strategy would have been any different had he had more particularized notice of this evidence. *Hawkins, supra* at 455-456.

Moreover, the trial court instructed the jury that defendant was not on trial for any other bad acts that he may have committed and that it had to find that defendant committed the charged crimes in order to find him guilty. Jurors are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). And, a review of the record reveals substantial evidence supporting the jury's finding of guilt including the complaint's testimony about the abusive events and testimony from three of defendant's other children that defendant sexually abused them using the same scheme, plan, or system. Therefore if any question at all exists regarding the status of the notice, it certainly was not an error that resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Reversal is not warranted. *Taylor, supra* at 523.

Defendant further argues that his trial counsel was ineffective for failing to object to the introduction of this evidence. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, that there is a reasonable probability that but for counsel's error the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant's argument fails. The prosecutor presented substantial evidence of defendant's guilt and there is no reasonable probability that the outcome of the trial would have been different if the evidence of physical violence had been excluded. Defendant has failed to meet his burden on this issue. *Rodgers, supra* at 714.

Defendant next asserts that the admission of opinion testimony by lay witnesses was plain error affecting substantial rights. Defendant failed to object in the trial court to the admission of the challenged testimony. Therefore, defendant did not preserve this issue for our review. *Jones, supra*, at 355. We review unpreserved claims of error for plain error affecting substantial rights and reversal is only warranted if the "error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Taylor, supra* at 523.

MRE 701 states that when a witness "is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." "Recent panels have liberally applied MRE 701 in order to help develop a clearer understanding of facts for the trier of facts." *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), modified on other grounds 433 Mich 862 (1989). Thus, lay witnesses may testify to their opinions on matters that are not "overly dependant upon scientific, technical, or other specialized knowledge." *Id.*, quoting *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich App 622, 629-630; 415 NW2d 224 (1987); see also *People v McLaughlin*, 258 Mich App 635, 657-659; 672 NW2d 860 (2003).

First, defendant challenges Michigan State Police Lieutenant Michael Tilley's statements that, based on his experience, forcing someone who has disclosed sexual abuse to confront the

person she is accusing would not promote full disclosure of the abuse, especially if the accused holds a position of authority in the accuser's life. This statement came in response to prosecution questions concerning what effect it would have on the complainant's disclosure of abuse in 1991 that she was forced to directly confront defendant with her allegations from the prior evening. Tilley had already indicated that he investigated sexual assault crimes from 1990 to 1993 and that he had further dealt with such crimes throughout his sixteen years as an investigative trooper. We conclude that the challenged statement was rationally based on Tilley's perceptions garnered during his years of investigating sexual abuse crimes. The testimony was neither scientific nor technical, nor was it based on overly specialized knowledge. Rather, it is common sense to infer that someone who has made an allegation of sexual abuse would be intimidated if then forced to confront the person she accused, especially if that person was in a position of authority her. Therefore, this testimony did not go beyond that permitted under MRE 701. *McLaughlin, supra* at 658.

Defendant next challenges Tilley's testimony that based on his experience he believed that minors initially found it embarrassing and traumatic to fully disclose the extent of the sexual abuse they suffered. Again, we conclude that this statement was rationally based on Tilley's perceptions during his years of investigating sexual abuse crimes. The testimony was neither scientific nor technical, nor was it based on overly specialized knowledge. Rather, this opinion is based largely on common sense. Therefore, this testimony did not go beyond that permitted under MRE 701. *McLaughlin, supra* at 658.

Defendant also challenges several statements made by Mike Welch, a former Michigan State Police trooper who handled sexual assault cases from 1991 to 1995. Defendant challenges Welch's testimony that it was unusual for a sexual abuse suspect to completely refuse to meet with him. After reviewing the testimony, we conclude that this was permissible non-opinion lay witness testimony rationally based on Welch's perceptions as a trooper. MRE 701.

Defendant also challenges Welch's testimony that only a portion of the complaints that he investigated resulted in arrests, and that in Welch's mind this did not necessarily mean that abuse did not occur in cases where police ultimately made no arrest. His testimony that all of the complaints that he investigated did not result in arrests was rationally based on his perceptions during his years of investigating sexual abuse crimes. His opinion that the lack of an arrest did not necessarily indicate that no crime had been committed was neither scientific nor technical, nor was it based on overly specialized knowledge. Rather, this opinion is based on the common sense conclusion that often a crime will not be prosecuted for a multitude of reasons including a lack of available evidence. Therefore, this testimony did not go beyond that permitted under MRE 701. *McLaughlin, supra* at 658.

Next, defendant challenges Welch's testimony that based on his experience child victims of abuse often do not immediately disclose what happened to them and may not recall the specific dates when the abuse occurred. Again, we conclude that this testimony was rationally based on Welch's perceptions during his years of investigating sexual abuse crimes. These opinions were neither scientific nor technical. However, we conclude that this information was at least arguably based on specialized knowledge that would not necessarily comport with common sense. See *People v Beckley*, 434 Mich 691, 715-717; 456 NW2d 391 (1990). Nevertheless, we conclude that it is overwhelmingly probable that this testimony was not a deciding factor in the outcome of this case because even without this statement there was

overwhelming evidence supporting defendant's guilt. Thus, any error in admitting this evidence did not affect defendant's substantial rights. *Taylor, supra* at 523.

Defendant next alleges that the trial court erred in permitting Robarge to testify that based on his experience defendant's demeanor and the fact that he was unable to interview defendant's biological daughter in a neutral setting rendered the environment less than ideal for getting a statement. Defendant also asserts that it was error to permit Robarge to testify that based on his experience a child may not fully disclose sexual abuse during a first interview and may need a lot of time to say something if she has been threatened. Robarge testified that he had worked as a children's protective services worker for nine years and that he had brought dozens of cases of child sexual abuse to court. While we conclude that Robarge's testimony was rationally based on his perceptions, we further conclude that Robarge's testimony concerning the best environment for obtaining a statement was based on specialized knowledge. Nevertheless, this testimony cannot be said to have been a deciding factor in the outcome of this case because of the strength of the evidence supporting defendant's guilt. Thus, any error in admitting this testimony did not affect defendant's substantial rights. *Taylor, supra* at 523.

Defendant also asserts that it was error for the trial court to admit Charlevoix County Sheriff's Department detective sergeant Mike Wheat's testimony that it was not unusual for child victims of sexual abuse to disclose the details of the abuse over time. Wheat testified that he had probably handled hundreds of sexual assault cases. We conclude that Wheat's testimony was based on his experience and perceptions, however, this information was based on specialized knowledge that would not necessarily comport with common sense. Nevertheless, we again conclude that it is overwhelmingly probable that this testimony was not a deciding factor in the outcome of this case because even without this statement there was strong evidence of defendant's guilt. *Taylor, supra* at 523.

Defendant also asserts that it was error to permit Wheat to testify to his opinion that the victims offered consistent stories over time. Defendant asserts that the error with this opinion is that it touches on a question for the jury. However, defendant cites no authority rendering this testimony impermissible. See *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987) (a claim of error is abandoned on appeal if it is not supported by citation to proper authority). Further, MRE 704 expressly permits opinion testimony that "embraces an ultimate issue to be decided by the trier of fact" as long as the testimony is otherwise permissible.

Defendant argues that his trial counsel was ineffective for failing to object to the introduction of the lay witness opinion evidence. Defendant's argument fails. Defendant has not established that a reasonable probability exists that the outcome of this case would have been different if the trial court had excluded the testimony because there was substantial other evidence supporting defendant's conviction. *Rodgers, supra* at 714.

Defendant next asserts that the trial court erred in admitting photographs depicting the victims as they looked when the charged abuse occurred. Defendant timely objected to the admission of the photographs. Therefore, defendant has preserved this issue for our review. *Knox, supra* at 508. "The decision to admit evidence is within a trial court's discretion." *People v Katt*, 468 Mich 272, 278; 662 NW2d 376 (2003). This Court will only reverse the trial court's ruling on the admissibility of evidence if the trial court abused its discretion. *Id.* "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court

acted, would say there was no justification or excuse for the ruling made.” *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

“The prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate any of the elements.” *People v Mills*, 450 Mich 61, 69-70; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995). “Photographs are admissible if they are pertinent, relevant, competent and material on any issue in the case.” *People v Curry*, 175 Mich App 33, 46; 437 NW2d 310 (1989). “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401.

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403. Evidence is unfairly prejudicial if it is marginally probative but there is a danger that it will be given undue or preemptive weight by the jury. *Taylor, supra* at 521-522. The assessment of the prejudicial effect of evidence is “‘best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony’ by the trial judge.” *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995), quoting *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). An evidentiary error does not merit reversal “unless it involves a substantial right, and, on review of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome-determinative.” *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192, lv granted 471 Mich 913 (2004).

One element of the crime of CSC I as charged against defendant is that the victim be under thirteen years of age. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999), quoting MCL 750.520b(1)(a). Because the prosecution had the burden of proving this element, the prosecution could offer evidence establishing this element despite the fact that the complainant’s age at the time the abuse occurred was not disputed. *Mills, supra* at 71. Thus, the photographs of the complainant were relevant because they demonstrated her age at the time of the abuse. The photographs depicting the other acts witnesses were also relevant to demonstrate their ages at the time of the alleged acts to clarify for the jury that defendant’s plan involved sexually abusing elementary school-aged children.

Defendant argues that the photographs of “posing children” must have served to inflame the passions of the jury. The assessment of the prejudicial effect of evidence is “‘best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony’ by the trial judge.” *Bahoda, supra* at 291. The trial court rejected defendant’s argument concerning prejudice and ruled the photographs were admissible. The photographs of the children were unaltered depictions of the children at the time of the charged incidents. The photographs did not depict obviously injured or abused children. There was nothing inherent to the photographs that would have served to inflame the passions of the jury. We conclude that there was a justification for the trial court’s ruling admitting the photographs and that the trial court did not abuse its discretion in finding that their probative value was not substantially outweighed by the danger of unfair prejudice.

Defendant next asserts that the trial court erred in sentencing him to life in prison. This Court reviews the sentence imposed for an abuse of discretion. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). Because defendant was convicted for offenses that occurred prior to January 1, 1999, he was subject to the judicial sentencing guidelines. *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Permissible considerations in sentencing under the judicial guidelines “include[d] the severity and nature of the crime, the circumstances surrounding the criminal behavior, the defendant’s attitude toward his criminal behavior, the defendant’s social and personal history, and the defendant’s criminal history, including subsequent offenses.” *Oliver, supra*, 242 Mich App 98. The sentencing judge may also consider the following objectives of sentencing: the likelihood of reformation, the protection of society, the punishment of the offender, and the deterrence of others. *People v Johnson*, 173 Mich App 706, 709; 434 NW2d 218 (1988).

The calculated guideline range for defendant’s sentence was 180 to 360 months’ imprisonment or life in prison. The trial court sentenced defendant to life in prison. Defendant asserts that this sentence is not proportionate because his prior criminal record contained only two misdemeanor convictions and one felony conviction. Defendant further asserts that the sentence is not proportionate because he held the same job for ten years, had obtained vocational certificates, and had voluntarily entered alcohol abuse counseling.

It is apparent from the record that the trial court considered the information contained in the presentence investigation report (PSIR), which included the facts that highlighted. The trial court concluded that to be proportionate, the sentence imposed had to be severe because of the severity and nature of the crimes defendant committed, the circumstances surrounding defendant’s criminal behavior including the uncharged acts of abuse, and defendant’s criminal history. These were permissible factors for the court to consider. *Oliver, supra*, 242 Mich App 98. The trial court also indicated that a severe sentence was required for the protection of society because defendant was “a very dangerous man.” Community protection is a permissible goal of sentencing. *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972).

The testimony adduced at trial established that defendant repeatedly sexually abused the complainant when she was between the ages of five and eleven. The testimony further reflected that defendant used a similar plan to repeatedly sexually abuse his other stepchildren and his biological daughter. The testimony indicated that this abuse spanned multiple years. There was also testimony that defendant would both threaten the children and their mother to ensure the children’s silence and that at other times he would purchase their silence with candy and other rewards. Defendant’s crimes against the children were heinous. We conclude the trial court did not abuse its discretion in sentencing defendant because under the circumstances, a life sentence is proportionate to the seriousness of the offense.

Defendant further avers that his trial counsel was ineffective for failing to articulate a proportionality argument at sentencing. All of the facts that defendant states should have been brought to the attention of the trial court in arguing proportionality – defendant’s employment history, vocational certificates, and attendance at counseling sessions – were included in the PSIR. Therefore, defendant has not established a reasonable probability that but for counsel’s failure to articulate this information that the result of the proceedings would have been different.

Accordingly, defendant has failed to meet his burden on this issue. *Rodgers, supra* at 714.

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Pat M. Donofrio