

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM JASON WRIGHT,

Defendant-Appellant.

UNPUBLISHED
November 3, 2005

No. 256182
Allegan Circuit Court
LC No. 03-013251-FC

Before: Kelly, P.J. and Meter and Davis, JJ.

PER CURIAM.

A jury found defendant guilty of one count of first-degree criminal sexual conduct, MCL 750.520(b)(1)(a) for forcing his stepdaughter to engage in sexual intercourse with him. Defendant appeals as of right his conviction and sentence. We affirm defendant's conviction, but remand for resentencing.

Defendant first argues that the trial court abused its discretion in admitting testimony that defendant also sexually molested his sister when he was a teenager. We disagree. This Court reviews the trial court's rulings on the admission of evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Evidence of other bad acts is inadmissible to prove an individual's propensity to act in conformity therewith. MRE 404(b)(1). However, such evidence may be admissible to show "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 . . ." MRE 404(b)(1). This Court evaluates the admission of other acts evidence by considering if: (1) it was offered for a proper purpose; (2) it was relevant; (3) its probative value was not substantially outweighed by unfair prejudice; and (4) a limiting instruction was requested and provided by the trial court. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

In this case, the evidence was admitted for the proper purpose of showing defendant's common scheme or plan, which was evident because his abuse of his sister was similar to his abuse of the victim. In both cases, defendant abused a younger family member living in the same home. In both cases, defendant took advantage of the close familial relationship, and was able to abuse the victims over a long period of time. The victims were also of a similar age when defendant's abuse began: in this case, the victim was nine while defendant's sister was six.

Defendant also argues that the trial court erred by allowing the prosecution to introduce testimony that he had abused his sister in its case-in-chief, when it indicated in its pretrial motion that the testimony would only be admitted as rebuttal evidence. However, it is clear from the record that the trial court admitted the evidence to show a common scheme or plan *or* as rebuttal evidence should defendant deny abusing the victim. We find no error.

Defendant next argues that the trial court erred in not allowing the defense to cross-examine witnesses “as to their understanding of the [victim’s] reputation for truthfulness or untruthfulness pursuant to MRE 608.” We disagree.

MRE 608(b) provides:

Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into *on cross-examination* of the witness (1) concerning the witness’ character for truthfulness or untruthfulness or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. [Emphasis added.]

Defendant’s issue is without merit for two reasons. First, the trial court did not prevent defense counsel from cross-examining witnesses. Rather, defense counsel called his own witnesses and questioned them on direct examination. Further, the trial court did not sustain objections to questioning about the victim’s “reputation for truthfulness or untruthfulness” as defendant suggests. Rather, the trial court sustained the prosecutor’s objection to defense witnesses’ testimony about *specific instances* of the victim lying. MRE 608 does not permit questioning a witness on direct examination about specific instances of conduct.

Defendant next argues that “defendant’s constitutional right to confront witnesses was violated when the prosecution suggested that the people had a witness, which they didn’t call, who would refute defendant’s wife’s testimony.” Despite framing the statement of the issue presented in this way, defendant does not argue that the trial court improperly admitted evidence. Rather, defendant argues that the prosecutor behaved improperly by testifying. Instead of viewing the issue, as framed, as abandoned because not properly argued, we will review defendant’s issue for whether the prosecutor’s conduct was improper.

Although defendant asserts that his counsel did not preserve this issue, our review of the record reveals that counsel did object stating, “I’m going to object, your Honor. I’m going to object to what Pam Brown supposedly said.” The trial court ruled that the testimony elicited was regarding what defendant’s wife said, not what Brown said. This Court reviews preserved issues of prosecutorial misconduct case by case, examining the challenged remarks in context to determine whether the defendant received a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002).

More specifically, defendant argues that the prosecutor “testified” as to what Brown, a therapist, “will say” about what defendant’s wife said to the victim.¹ On cross-examination, the following exchange occurred:

Q. So, you were aware that you weren’t supposed to talk to [the victim] about the case but yet you go to her and say why do you lie, why do you lie and not tell the truth ‘cause now I’m going to lose my kids, now he’s going to jail. You knew—

A. That is not what I said.

Q. Well, that is what--

A. That is not what I said.

Q. --Pam Brown will say.

A. Do you want to hear what I said?

Q. Sure.

A. I said you told me you were going to tell the truth, you told me it didn’t happened and it [sic] lied. Now, this could possibly lead to you never being able to come home.

This Court has held that the use of testimonial questions is improper. *See Rodriguez, supra* at 35. However, in the exchange of which defendant complains, the testimonial nature of the prosecutor’s question was limited to an assertion that Brown “will say” that defendant’s wife made a particular statement in her presence. Defendant’s wife immediately corrected the prosecutor, testifying as to what she actually did say. This line of questioning was permissible impeachment of the witness’s credibility based on a perceived inconsistent prior statement. See *id.*; MRE 613. Once defendant corrected the prosecutor, stating what she actually said, the prosecutor dropped that line of questioning. Therefore, this question did not rise to the level of improper testimonial questioning. Even if it did, it was a brief statement that was not revisited and the trial court instructed the jury that the attorneys’ statements are not evidence.

Defendant next argues that his “confrontation rights and compulsory process rights were violated by the trial court not sua sponte conducting a hearing as to the missing DNA evidence.” After defendant filed a motion to dismiss the charges against him based on the lost evidence, the trial court conducted a hearing. At the hearing, the prosecution asserted that the loss of evidence

¹ Defendant also asserts that the prosecutor may not “vouch for the character of a witness.” However, Brown was never called as a witness. Defendant also asserts that the prosecutor “argued” facts not in evidence, citing cases involving closing and rebuttal arguments. However, here, the alleged improper statement was part of cross-examination of a witness, not part of a closing or rebuttal argument.

was “a negligent act at best.” The trial court informed defendant that he had presented no evidence indicating that “there was other than neglect.” After defendant stated that he wished to further research the case law, the trial court stated:

if you determine there’s reason to believe that it was other than negligence then I suggest that you get a hearing date. But, to have a hearing date – well, I suppose you can go fishing if you want. Unless you have some indication that it was other than neglect I’m going on the basis of the case law.

I’ll give you an opportunity to file a brief. And, if you legitimately think there’s any reason to have a hearing you request it and we’ll have it.

Defendant never requested a hearing. Defendant has cited no authority indicating that the trial court had a duty to sua sponte conduct a hearing. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims; nor may he give issues cursory treatment with little or no citation of supporting authority. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). An appellant’s failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Defendant’s next argument, that he must be resentenced based on the Supreme Court’s decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) is without merit. As noted in *People v Drohan*, 264 Mich App 77, 89 n4; 689 NW2d 750 (2004), this Court is bound by our Supreme Court’s decision in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), that *Blakely* does not apply to issues concerning Michigan’s sentencing scheme.

Defendant also argues that the trial court failed to sufficiently state on the record its reasons for departing from the sentencing guidelines range. We agree. The statutory sentencing guidelines, M.C.L. § 769.34(3), permit a trial court to depart from the appropriate sentence range “if the court has substantial and compelling reason for that departure and states on the record the reasons for departure.” A substantial and compelling reason means “an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of the sentence; and exists only in exceptional cases.” *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003) (punctuation omitted). Further, the reasons for departure cannot have been already taken into account in determining the appropriate sentence range unless the court finds that the reason was given inadequate or disproportionate weight. *Id.* at 258 n 12. In this case, the trial court sentenced defendant to life in prison when the sentencing guideline minimum range was 51 to 85 months. Yet the trial court failed to articulate substantial and compelling reasons for departure. Thus, we must vacate defendant’s sentence and remand to the trial court for resentencing. In remanding, we are not suggesting that a maximum sentence is not appropriate as a matter of law in this case. Rather, it is mandatory that if the trial court decides to exceed the statutory guideline range in any fashion, the court must follow *Babcock, supra*, and articulate substantial and compelling reasons for the departure on the record.

Affirmed in part and remanded in part.

/s/ Kirsten Frank Kelly

/s/ Patrick M. Meter

/s/ Alton T. Davis