

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVE BERKLEY HAISLIP,

Defendant-Appellant.

UNPUBLISHED

June 20, 2006

No. 259464

Wayne Circuit Court

LC No. 04-006696-01

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant was convicted by jury of five counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a). He appeals as of right. We affirm.

This case arises from allegations of sexual abuse by defendant of his minor stepdaughter. At trial, the victim testified that defendant had, on a weekly or monthly basis over the course of two years, come into her bedroom at night and placed his finger into her vagina. The victim also recalled defendant having attempted on two occasions to penetrate her vagina with his penis, and having more than twice also engaged in cunnilingus.

On appeal, defendant first argues that the trial court erred in denying his motion for a mistrial after the prosecutor elicited testimony from the victim about uncharged acts of sexual misconduct. We disagree.

A trial court's decision to deny a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). An abuse of discretion occurs when "an unprejudiced person considering the facts upon which the court acted, would say there is no justification or excuse for the ruling." *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted).

Although a prosecutor may not introduce evidence of uncharged acts to prove that a defendant acted in conformity therewith, MRE 404(b), such evidence is admissible if relevant and offered for a proper purpose, and the probative value of the evidence is not substantially outweighed by unfair prejudice, *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).

Moreover, in a criminal sexual conduct case where the defendant and the victim reside in the same household, evidence of uncharged sexual acts between the defendant and the victim may also be admissible if, without such evidence, the victim's testimony may seem incredible. *People v DerMartzex*, 390 Mich 410, 414-415; 213 NW2d 97 (1973); *People v Sabin (After Remand)*, 463 Mich 43, 69-70; 614 NW2d 888 (2000). "The rationale behind [this] . . . exception is that [uncharged] sexual acts between the defendant and the victim are a part of the principal transaction necessary to weigh the victim's testimony regarding the principal transaction." *People v Dreyer*, 177 Mich App 735, 738; 442 NW2d 764 (1989); see also *Sabin, supra* ("evidence of uncharged acts of sexual misconduct perpetrated by the defendant on the complainant [is] admissible for the purpose of corroborating the complainant's testimony").

Here, the sexual abuse suffered by the victim occurred over a period of approximately two years. At trial, however, the victim was able to only generally testify regarding the circumstances and nature of the sexual acts perpetrated on her by defendant. For instance, the victim testified that she was "probably" watching TV or sleeping when defendant would come into her bedroom, and that although the acts always occurred at night, she could not recall at what time. The victim also testified that while defendant would at times subject her to abuse while her mother was asleep in the house, her mother was at other times out with friends when the abuse occurred. The victim additionally testified that she could not remember how old she was when defendant tried to place his penis into her vagina, but rather only that these events occurred sometime after her ninth birthday.

Given her inability to recall the specific circumstances of any one act of abuse, without the victim's generalized testimony of abuse the jury would have been left to wonder why the victim did not have a better recollection of the details if the sexual misconduct occurred only six times. Allowing the victim to testify that defendant engaged her in uncharged sexual acts on a weekly or monthly basis over the course of two years lent credibility to the victim's testimony by providing the jury with a necessary explanation for the vagueness of her testimony detailing the charged acts. As such, admission of the testimony was proper. *DerMartzex, supra* at 415; *Sabin, supra*.

Furthermore, we note that the trial court instructed the jury that it could use the evidence of defendant's uncharged acts only for the limited purpose of evaluating the credibility of the victim's testimony with regard to the charged acts. Because juries are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), the court's limiting instruction cured any prejudice that may have resulted from the victim's testimony regarding acts of abuse for which defendant was not on trial. Under such circumstances, we do not conclude that the trial court abused its discretion in denying defendant's motion for a mistrial premised on the admission of other bad-acts evidence.

Defendant next claims that the prosecutor improperly vouched for the credibility of the victim when, during her closing argument, the prosecutor argued that the victim had no reason to lie. We again disagree. Because defendant failed to raise an objection to the prosecutor's allegedly improper argument at trial, our review of this unpreserved claim of prosecutorial misconduct is for plain error affecting defendant's substantial rights. *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003).

Although a prosecutor may not vouch for the credibility of a witness by implying that she has some special knowledge of the witness's truthfulness, she may argue that a witness is credible based on the facts. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Here, the prosecutor did not imply that she had special knowledge of the victim's truthfulness. Nor did she state her personal opinion regarding whether the victim was telling the truth. Rather, the prosecutor argued that based on the testimonial record, the victim had no reason to lie. Specifically, the prosecutor argued that no evidence was presented to support that the victim disliked or otherwise wished to harm defendant. To the contrary, the victim testified that she loved defendant and found it difficult to testify against him at trial. The prosecutor also argued that the physical evidence corroborated the victim's testimony because a torn hymen can be caused by trauma such as digital or penile penetration. Because the prosecutor argued that the victim was credible based on the evidence, her comments were not improper. *Id.*

Finally, defendant claims that he was denied his right to be sentenced by the judge who presided over his trial. Because defendant failed to raise this issue below, our review is again for plain error affecting defendant's substantial rights, i.e., error that was outcome-determinative. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"Generally, a defendant should be sentenced by the judge who presided at his trial, provided that the judge is reasonably available." *People v Pierce*, 158 Mich App 113, 115; 404 NW2d 230 (1987). Here, it is not disputed that defendant was sentenced by a judge other than the visiting judge who presided over his trial. We note, however, that defendant received the lowest minimum sentence possible under the legislative guidelines recommended range, and he does not argue that a substantial and compelling reason exists that would justify a downward departure from the recommended minimum sentence range. Under such circumstances, defendant has failed to demonstrate any outcome-determinative error arising from his being sentenced by a judge other than that who presided over his trial. *Carines, supra.*

Affirmed.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray