

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE BARNARD,

Defendant-Appellant.

UNPUBLISHED

April 19, 2007

No. 265068

Bay County Circuit Court

LC Nos. 04-010067-FC

04-010068-FC

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

PER CURIAM.

A jury convicted defendant of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years old), and three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years old).¹ Defendant appeals and, for the reasons stated in this opinion, we affirm.

I. Expert Witness

Defendant claims that the trial court erred when it admitted the testimony of the prosecution's expert witness, Pamela Knight Mays, who testified that children often delay reporting when sexual abuse occurs. MRE 702 governs the qualification of expert witnesses. The rule provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

¹ In LC No. 04-010067-FC the jury convicted defendant of one count of CSC II. The other three convictions occurred in LC No. 04-010068-FC.

“[T]he determination regarding the qualification of an expert and the admissibility of expert testimony is within the trial court’s discretion.” *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). “An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes.” *People v Havens*, 268 Mich App 15, 18; 706 NW2d 210 (2005).

Mays testified that she holds a bachelor’s and a master’s degree in social work and that she has worked in the field of sexual assault since 1986. Mays further testified that she worked as a therapist with victims of sexual assault and as a forensic interviewer to evaluate children suspected to be victims of sexual abuse. Further, Mays stated that as part of her ongoing training, she had familiarized herself with the body of literature related to sexual assault of children² and had previously testified in numerous Michigan courts as an expert witness on the issue of child victims of sexual assault.³ In light of this background, the trial court did not abuse its discretion in qualifying Mays as an expert. See *People v Beckley*, 434 Mich 691, 713; 456 NW2d 391 (1990).

Defendant cites *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 469 (1993), and argues that the prosecution failed to show that Mays’s testimony was the product of reliable principles or methods. Because defendant did not make this argument below, this issue is not preserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). We will not reverse a conviction on the basis of an unpreserved issue unless there is plain error that affected the defendant’s substantial rights. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

Under MRE 702,⁴ the proponent of expert witness testimony must show that “the data underlying the expert’s theories and the methodology by which the expert draws conclusions from the data [are] reliable.” *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 789; 685 NW2d 391 (2004). Defendant is incorrect that *Daubert* requires that an expert witness must have published writings and must have conducted research. Though publication and peer review of the *theory* proposed by an expert may be relevant to establish whether the theory is reliable,⁵ there is simply no requirement under either *Daubert* or the Michigan Rules of Evidence that the expert must have personally published his or her writings. Moreover, Mays testified at length that her conclusions regarding delayed reporting were based in part on extensive published research as well as her extensive experience with child sexual abuse victims. Thus, Mays

² See *People v Whitfield*, 425 Mich 116, 123-124; 388 NW2d 206 (1986) (finding that the trial court abused its discretion when it declined to qualify a doctor as an expert on the issue of gonorrhea transmission when “[h]e had treated patients with gonorrhea . . . , and he was familiar with the literature on the subject”).

³ A court may consider a witness’s prior trial experience in determining qualification. *People v Lewis*, 160 Mich App 20, 28; 408 NW2d 94 (1987).

⁴ MRE 702 has incorporated the *Daubert* requirements. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780 n 46; 685 NW2d 391 (2004) and the staff comment to MRE 702.

⁵ *Daubert, supra* at 592.

offered unrefuted testimony that the theory of delayed reporting has been extensively published and this supports the trial court's conclusion that her data is reliable. See *Daubert, supra* at 592.

Regarding the methodology from which Mays drew her conclusions concerning delayed reporting, Mays testified that she had personally observed delayed reporting when she worked with victims of sexual assault. Mays further testified that, though she had not conducted formal research on delayed reporting, she had previously worked in a child advocacy center that tracked the fact that "children typically did not disclose sexual abuse immediately after it occurred" and the center "developed . . . local protocols based on" the center's experience with delayed reporting. Because her own direct professional experience corroborated the data she had studied, Mays reliably concluded that delayed reporting is common among child victims of sexual assault. See *Gilbert, supra* at 789.

We reject defendant's assertion that admission of Mays's testimony runs contrary to *Beckley, supra*. In *People v Peterson*, 450 Mich 349, 379-380; 537 NW2d 857, amended 450 Mich 1212 (1995), our Supreme Court observed that, although "*Beckley* has been interpreted to allow expert testimony only to rebut an inference created by the defendant," the prosecution could introduce expert testimony in its case-in-chief and the Court further opined that delayed reporting is a common trait among victims of child sexual abuse. The Court in *Peterson* reasoned that because there was a common misperception among lay jurors that a victim of sexual abuse would immediately report the incident, "the prosecutor may present limited expert testimony dealing solely with the misperception." The Court cautioned, however, that "unless a defendant raises the issue of the particular child victim's post-incident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child [because] it [suggests] that the particular child is a victim of sexual abuse." *Id.* at 373-374. Here, Mays only testified that delayed reporting is a common trait among victims of child sexual abuse.

II. Jury Instructions

Defendant asserts that the trial court gave confusing jury instructions about the use of prior acts evidence. However, defendant expressed satisfaction with the instructions and he has, therefore, waived this issue on appeal. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Regardless, we find no error in the challenged instruction. Defendant maintains that the trial court misled and confused the jury when it used the terms "characteristic" or "characteristic scheme" in the following instruction:

If you believe this [prior act] evidence, you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show that the defendant used a plan, a scheme or characteristic—I'm sorry—a plan, a system or characteristic scheme that he's used before, his intent as well to show lack of mistake or accident.

To the extent defendant asserts the phrase "characteristic scheme" injected character into the proceedings, the argument is without merit. Viewing the excerpt in context, it is clear that the trial court properly explained how the jury could use the 404(b) evidence. The use of the

adjective “characteristic” to modify the noun “scheme” did not invite the jury to consider defendant’s character. Further, the court specifically instructed the jury that it could not use the prior acts evidence for any other purpose and could not “consider that it shows that the defendant is a bad person or that he’s likely to commit crimes.” Thus, the instructions fairly represented the issues to be tried. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999).

III. Prosecutorial Misconduct and Prior Acts Evidence

Defendant argues that the prosecutor failed to comply with the trial court’s directive to summarize the testimony of the proposed prior acts witnesses, defendant’s biological daughter and stepdaughter. Defendant contends that this failure prejudiced him because he could not prepare to cross-examine his stepdaughter. We review de novo claims of prosecutorial misconduct. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

We reject defendant’s assertion that he was unaware of the testimony of his stepdaughter. Though the trial court asked the prosecutor to summarize the evidence in the documents accompanying the prosecutor’s request to admit the testimony, the court noted that it had looked at the documents before ruling that the testimony would be admitted. Defendant does not challenge the trial court’s finding that the documents effectively communicated the content of the stepdaughter’s testimony. Additionally, defendant does not challenge the truth of the sexual abuse testified to by his stepdaughter. Rather, defendant testified that his prior behavior was the result of drug and alcohol abuse.⁶

We also see no abuse of discretion in the admission of the prior acts evidence. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). “[E]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith.” MRE 404(a). However, such evidence may be admissible for other purposes under MRE 404(b)(1), which provides in part as follows:

Evidence of other crimes, wrongs, or acts . . . may . . . 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.

As part of his defense, defendant told the court that, though he rubbed lotion on the victim, he never touched her in a sexual manner. In light of this theory, the trial court did not abuse its discretion when it admitted the testimony of the daughter and stepdaughter to show absence of mistake.

⁶ Defendant does not argue that he was prejudiced by the prosecutor’s failure to summarize his biological daughter’s testimony. She testified that defendant sexually abused her when she was between the ages of eight and ten years old.

Furthermore, the testimony of both witnesses was relevant to show a common plan, scheme, or system of doing an act. “[E]vidence 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.” *People v Ackerman*, 257 Mich App 434, 440; 669 NW2d (2003), quoting *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). The testimony of the prior acts witnesses and the current victim demonstrates defendant’s pattern of selecting victims of nearly the same age who perceived defendant as a familial figure. The sexual touching and method of engaging the victims is also similar in all three instances. While there are some differences between the charged and uncharged acts, this does not mean that the court abused its discretion in admitting the prior acts evidence. See *Sabin (After Remand)*, *supra* at 67 (observing that where “reasonable persons could disagree on whether the charged and uncharged acts contained sufficient common features to infer the existence of a common system,” admission of the evidence does not constitute an abuse of discretion).

We also hold that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Moreover, the trial court specifically instructed the jury only to consider the prior acts evidence with respect to whether it tended to show that defendant used a common plan or scheme, and to show lack of mistake or accident. “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant further claims that the prosecutor’s use of the term “pedophile” during closing argument, amounts to a use of the prior acts evidence to show that the crime charged was in conformity with defendant’s character. See MRE 403(a). Though the prosecutor did not refer to defendant as a pedophile and instead stated that drinking or drug use does not make a person a pedophile, the prosecutor’s comments seemed to imply that defendant was a pedophile. Regardless of the propriety of the “pedophile” reference, we do not believe that the comment was outcome determinative. Again, the trial court properly instructed the jury on use of the 404(b) evidence and that the attorneys’ comments were not evidence. Again, “[i]t is well established that jurors are presumed to follow their instructions.” *Graves*, *supra* at 486.

IV. Representation

Defendant contends that the trial court improperly denied his request to represent himself. However, the record clearly shows that the trial court granted defendant’s motion. We also reject defendant’s assertion that the trial court unfairly intimidated him to not represent himself when, before it granted his motion, it warned him repeatedly about the dangers of self-representation. Under Michigan law, the court clearly had an obligation to inform defendant of the dangers and disadvantages of self-representation. *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472,479-480 (2005).

Defendant avers that the trial court denied his right to self-representation when it forced defense counsel on him. However, when the trial court asked defendant if he had any objections to the court appointing stand-by counsel, defendant stated that he had no objections. The trial court also informed defendant that he could have stand-by counsel “just sit there and do nothing”

or he could ask the lawyer questions if he had any. Defendant later hired his own counsel. Thus, defendant's argument that the trial court forced him to have stand-by counsel lacks merit.

V. Assistance of Counsel

Defendant further asserts that his trial counsel was ineffective. Because defendant did not move for a *Ginther*⁷ hearing or for a new trial, this issue is not preserved, *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002), and our review is limited to errors apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Defendant claims that counsel failed to challenge (1) the materiality of the expert witness's testimony, (2) the prosecutor's closing argument, and (3) the jury instructions. However, because there was no error on any of these matters, counsel cannot be faulted for failing to raise a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Defendant's claim that counsel was ineffective for failing to request that the court answer his personal objection to the prior acts evidence fails for the same reason. The court properly admitted the evidence over counsel's objection. Requesting that the court respond to defendant's personal comments would not have changed this outcome. We also reject the claim that counsel tainted the jury by asking potential jurors about their experiences with sexual assault because, as defendant concedes, these jurors were stricken. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).⁸

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski

⁷ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁸ Defendant's remaining claims are not properly before us because they are not supported by appropriate references to the record. See MCR 7.212(C)(7); *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 381; 689 NW2d 145 (2004). In any event, we see no support in the record for these claims.