

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MITCHELL SHANE DOWELL,

Defendant-Appellant.

---

UNPUBLISHED

June 20, 2013

No. 310122

Wayne Circuit Court

LC No. 11-008479-FC

Before: K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of nine counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b, and six counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c. Defendant was sentenced, as a third habitual offender, MCL 769.11, to 28 to 50 years' imprisonment for each count of CSC I. We affirm the convictions and sentences, but remand for correction of the Judgment of Sentence.<sup>1</sup>

At trial, the two teenage victims and siblings, B.L. and T.L., testified that defendant, who was their mother's live-in boyfriend, engaged in ongoing criminal sexual abuse from approximately December 1996 through November 2010. The incidents of criminal sexual conduct started when B.L. was about three years of age and they lived on Mackinac Street in Westland. The conduct continued with B.L. when they later moved to Alanson, Delton, and Ensley Streets in Westland, and defendant also engaged in criminal sexual conduct with T.L. and his mother during the same time period. After they moved in with their maternal grandmother and no longer lived with defendant, the victims eventually disclosed the abuse and reported it to the police in July 2011, resulting in the instant charges.

**I. INSTRUCTIONAL ERROR AND VERDICT UNANIMITY**

---

<sup>1</sup> The lower court record reflects that defendant was actually charged with, and convicted of, nine counts of CSC I and six counts of CSC II. Defendant's judgment of sentence erroneously lists a total of 10 convictions of CSC I and five convictions of CSC II. Although neither party points out this error on appeal, count four should be changed to reflect that he was convicted of CSC II, not CSC I, and the sentence for that conviction should be altered accordingly.

On appeal, defendant argues that the trial court's instructions effectively amended the information and deprived him of his right to a unanimous verdict. Defendant did not object to the instructions at trial. "Thus, our review is limited to plain error affecting defendant's substantial rights." *People v Waclawski*, 286 Mich App 634, 678-679; 780 NW2d 321 (2009). In evaluating a claim of instructional error, we review the instructions as a whole to determine whether, even if they contain some imperfections, they adequately protected defendant's rights by fairly presenting the issues to be tried. *Id.* at 678.

Because this case involved child victims of criminal sexual conduct, time was not of the essence, and the trial court properly instructed the jury that time was not an element that the prosecution had to prove beyond a reasonable doubt. *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). The instructions and verdict form properly confined the jury to consider each charge based on the locations the victims lived, the type of sexual conduct which occurred at the particular location, and the age ranges of the victims at those times. The location associated with each charge helped narrow the applicable range of dates, because the family lived at several different locations during the period in which defendant committed these crimes. Each count of criminal sexual conduct contained an element involving the victims' ages, that is, B.L. was less than 13 years of age for counts one, two, four, and five, and B.L. and T.L. were at least 13 but less than 16 years of age for counts three and 6 through 15, and the trial court instructed on the age range applicable to each count.<sup>2</sup> The victims testified to what age they were when they lived in each location and what sexual acts occurred at each location. Thus, the trial court did not effectively "amend" the information in its instructions.

With respect to defendant's claim that he was denied the right to a unanimous verdict when the trial court provided only a general unanimity instruction to the jury, we find no error.<sup>3</sup> "A defendant has the right to a unanimous verdict and it is the duty of the trial court to properly instruct the jury on this unanimity requirement." *People v Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006), citing *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994). In *Cooks*, the Michigan Supreme Court held that "a specific unanimity instruction is not required in *all* cases in which more than one act is presented as evidence of the actus reus of a single criminal offense." *Cooks*, 446 Mich at 512.

[I]f alternative acts allegedly committed by defendant are presented by the state as evidence of the actus reus element of the charged offense, a general instruction to the jury that its decision must be unanimous will be adequate unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt. [*Cooks*, 446 Mich at 524.]

---

<sup>2</sup> MCL 750.520b(1)(a) and (b); MCL 750.520c(1)(a) and (b).

<sup>3</sup> The trial court instructed: "A verdict in a criminal case must be unanimous. But in order to return with a verdict, it is necessary that each of you agrees on that verdict."

The general unanimity instruction protected defendant's right to a unanimous verdict pursuant to *Cooks*. For each count, a distinct instance of criminal sexual conduct occurred only once and corresponded to only one specific charge, or the same type of conduct, such as fellatio or sexual intercourse, occurred in the same way and place repeatedly and corresponded to only one charge for the particular type of conduct at a particular location. Similar to *Cooks*, the prosecution presented more than one act as evidence of a single charged offense, but the evidence did not materially distinguish among any of the alleged multiple acts; the victims could not recall specific dates or exactly how many times a particular type of conduct occurred, but their testimony offered no material distinction between the acts. *Id.* at 512. There was no risk that the jury was confused or disagreed about the basis for defendant's guilt, and the general unanimity instruction sufficed. *Id.* at 528-529.

## II. PROPENSITY EVIDENCE

Defendant also asserts on appeal that the trial court abused its discretion in admitting evidence of other sexual conduct between defendant and B.L.'s female friend, A.H.

Although defendant contends that the challenged evidence was inadmissible under MRE 404(b), he fails to address or recognize that the trial court admitted the evidence under MCL 768.27a. Pursuant to MCL 768.27a(1), "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." "Because a defendant's propensity to commit a crime makes it more probable that he committed the charged offense, MCL 768.27a permits the admission of evidence that MRE 404(b) precludes." *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012). The statute "supersede[s] MRE 404(b)" and the rule of evidence "must yield" to the statute. *Id.* at 470, 475, 477.

The trial court did not abuse its discretion in admitting the challenged evidence under MCL 768.27a. The record demonstrates that B.L. and A.H. were both "individual[s] less than 18 years of age" at the time of the acts, MCL 768.27a(2)(b), and that the other-acts conduct constituted "listed" offenses as defined "in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722." MCL 768.27a(2)(a). A.H. testified that when she and B.L. would watch movies in defendant's bedroom, he would try to get her to touch his penis and would "rub on" her and put his hand on her vagina over her clothing while B.L. was out of the room. He did this approximately 20 times over a four year period, and he also walked in on her when she was in the shower.<sup>4</sup>

Further, the evidence was relevant to show defendant's propensity to commit criminal sexual conduct against a minor. *Watkins*, 491 Mich at 470. MCL 768.27a "permits the use of evidence to show a defendant's character and propensity to commit the charged crime[.]" *Id.* at

---

<sup>4</sup> We note that the prosecutor properly disclosed and moved for admission of this evidence well before the 15-day period set forth in MCL 768.27a(1) in its November 2011 pretrial motion before the February 2012 trial.

470. Its probative value was not outweighed by its prejudicial effect. *Id.* at 481. The charged acts and the challenged evidence demonstrated a pattern of criminal sexual behavior which involved defendant repeatedly initiating inappropriate sexual conduct when a minor was presumably under his control and alone. His conduct with B.L. and A.H. similarly involved inappropriate touching, attempting to make them touch his penis, and rubbing on them, and occurred during the same time period. *Id.* at 487-488. The other-acts incidents were repeated and relatively frequent. *Id.* A.H.'s testimony was reliable considering that she had nothing to gain. *Id.* Moreover, the evidence lent credibility to the victims' testimony, particularly given that there was no corroborating physical evidence of sexual abuse. *Id.* In addition, the trial court provided a limiting instruction about the other-acts evidence after A.H. testified and during final instructions. This "ensure[d] that the jury properly employ[ed] that evidence." *Watkins*, 491 Mich at 490.

### III. PROSECUTORIAL MISCONDUCT AND EXPERT TESTIMONY

Defendant asserts that the prosecutor improperly vouched for the credibility of the victims through the questions she posed to the detective, Westland Police Sergeant Brian Miller, regarding delays in reporting sexual abuse, and that Miller essentially provided expert opinion testimony without having been qualified as an expert. Although defendant objected to the prosecutor's line of questions, he did not assert that prosecutorial misconduct occurred. While we review a trial court's determination that certain evidence is admissible for an abuse of discretion, *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010), we review unpreserved claims of prosecutorial misconduct for plain error, *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

This Court considers questions of prosecutorial misconduct on a case-by-case basis. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A prosecutor may not vouch for the credibility of a witness by implying that he has specialized knowledge of the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276, 282; 531 NW2d 659 (1995). "Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Id.* at 275-276 (emphasis added). Nor may a prosecutor "place the prestige of his office, or that of the police, behind a contention that the defendant is guilty, but he may argue that the evidence shows that the defendant is guilty." *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973).

MRE 701 governs the admissibility of lay witness opinions. MRE 701; *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). A lay witness may testify about his opinions and inferences if they are "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based in scientific, technical, or other specialized knowledge within the scope of Rule 702." MRE 701. This rule has been liberally applied "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). Expert opinion testimony pursuant to MRE 702 is appropriate when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a

fact in issue,” and the witness is “qualified as an expert by knowledge, skill, experience, training, or education[.]” MRE 702.

In the present case, Miller testified during direct examination that he has dealt with sexual assault cases in which victims delayed reporting the abuse, that this occurred in approximately 50 percent of the cases he dealt with, that some of his cases involved a delay of 10 or 15 years, and that he has dealt with cases involving ongoing abuse for extended periods of time. He also testified that, in his experience as a police officer investigating cases involving delayed reporting and abuse that occurred over a long time, the victims were typically not able to pinpoint the date and time of every incident.

The prosecutor did not commit misconduct in eliciting the challenged testimony and the trial court did not abuse its discretion in allowing the testimony. Miller testified about his experiences in past criminal sexual conduct cases that he investigated. He did not offer expert opinion testimony about the in-depth psychology and behavior of child sexual assault victims in general. At most, he expressed an opinion that when there was an extensive delay in reporting in an ongoing abuse case, the victims typically could not recall each date and detail. But this was based on his experiences and not a general prediction or opinion. His testimony was relevant to rebut defendant’s theory that the victims were not credible given their failure to report the conduct sooner. Thus, his testimony was admissible under MRE 701.

This Court has allowed officers to provide lay opinion testimony regarding their observations and “opinions formed as a result of those observations.” *Oliver*, 170 Mich App at 50-51 (allowing the lay opinion testimony of two officers who, based on their prior experience and their observations in the defendant’s case, believed that dents in the victim’s car could have been caused by bullets). See also *Dobek*, 274 Mich App at 76-79 (no prosecutorial misconduct occurred when a detective testified about the tendency of sexual abuse victims to delay disclosure; although testimony was arguably expert testimony because it was based on the detective’s training and experience, instead of his perception of events, some cases have permitted a lay officer to testify to an opinion based on his perceptions and past experience, and the detective would have qualified as an expert “to the extent of the testimony actually presented.”) In that regard, the prosecutor’s good-faith effort in the present case to present Miller’s testimony did not amount to misconduct. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Further, to the extent that Miller provided any expert opinion testimony, he would have qualified as an expert to the limited extent of the challenged testimony. The test of qualification as an expert witness is broad. MRE 702; *People v Christel*, 449 Mich 578, 592 n 25; 537 NW2d 194 (1995). Miller had substantial experience as a police officer, as a detective, and in investigating sex crimes cases; he had approximately 14 years of experience working as a police officer for Westland Police Department, was assigned to the Detective Bureau for approximately five years, and was responsible for investigating all sex crime cases. Miller did not opine that in all cases with delayed reporting, the allegations must be or were likely true, and he did not offer expert testimony regarding the in-depth psychology or behavior of child sexual assault victims. Miller never vouched for the veracity of the victims in this case. The prosecutor did not ask whether, and Miller did not testify that, the victims’ behavior was “consistent with” that of

sexually abused children in general. Further, defendant had the opportunity to cross-examine Miller concerning any specific details about his experience or investigations.

We affirm defendant's sentences and convictions. However, we remand for the trial court to correct the error in defendant's judgment of sentence referenced in footnote 1. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly  
/s/ Douglas B. Shapiro  
/s/ Amy Ronayne Krause