

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DONALD BROWN,

Defendant-Appellant.

UNPUBLISHED

May 25, 2006

No. 259191

Roscommon Circuit Court

LC No. 04-004610-FH

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

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct MCL 750.520d(1)(a) (victim between age 13 and 15). The trial court sentenced him to 22 to 180 months' imprisonment. We affirm.

I. Prosecutorial Misconduct

Defendant first argues that the prosecutor committed misconduct by asking a police officer to provide an opinion on the victim's credibility. We disagree.

Generally, we review de novo claims of prosecutorial misconduct. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Because defendant failed to preserve this issue, "[r]eversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Id.* at 448-449. "Thus, where a curative instruction could have alleviated any prejudicial effect we will not find error requiring reversal." *Id.* at 449.

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's allegedly improper conduct in context." *Id.* It is improper for a prosecutor to ask a witness to comment on the credibility of another witness because matters of credibility are to be determined by the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

Viewed in context, the prosecutor was not asking the witness to comment on the victim's credibility. Rather, the prosecutor asked the witness to describe his interview with the victim

and, specifically, to describe why he pressed the victim even after she denied having sexual relations with defendant. The prosecutor asked Deputy David Vogel whether, during the initial interview of the victim, she denied having sexual intercourse with the defendant. Vogel stated that she did. Vogel further stated, "During the interview, she had a hard time looking at me during the answering. She was fidgety, which raised some flags with my training in investigation and interviewing." The prosecutor then asked whether Vogel conducted a second interview. He stated that he did. The prosecutor asked Vogel why he came back for another interview. Specifically, he asked whether Vogel believed the victim's answer in the first interview. Vogel stated that he did not. Vogel further stated that he "didn't know if she was covering for [defendant] for the purpose of whether she was infatuated with the man, or if she was in some sort of under threat of him [sic]." The prosecutor then asked, "So you didn't believe her?" Vogel answered, "I did not believe her." Vogel testified that he interviewed the victim three times. In the second interview, the victim admitted "that there was sex between her and Mr. Brown." Vogel reiterated that he did not believe the victim during the first interview because of her demeanor.

Viewed in context, it appears that the prosecutor was not asking Vogel to bolster the victim's credibility, but rather, to describe how the interview process had occurred between Vogel and the victim. Specifically, it was important for Vogel to describe why he went back to interview the victim even after she had denied any sexual contact with defendant and to refute any implication that Vogel was pushing the victim to implicate defendant. Under the circumstances, the victim's demeanor red flagged her initial response. Because Vogel suspected her response of being untrue, he continued to question her. After reviewing the record and viewing the questions in context, we conclude that the prosecutor's conduct in asking these questions was not improper.

However, even if the prosecutor's conduct was improper, we would not consider it an error requiring reversal because a curative instruction could have alleviated any prejudicial effect. Furthermore, even if this was a plain error, it would not have been outcome determinative. There was substantial evidence that defendant sexually assaulted the victim. The victim herself testified that she at first lied to Deputy Vogel to protect defendant and her friend, defendant's daughter. The victim's father also testified that the victim initially lied, but he convinced her to tell the truth about defendant. Additionally (as discussed *infra*), another witness offered testimony demonstrating defendant's common scheme or plan of giving gifts to young girls he was close with and having sexual relations with them. Therefore, we conclude that the prosecutor's questions to Deputy Vogel were not outcome determinative.

II. Other Acts Evidence

Next, defendant argues that the trial court abused its discretion when it admitted defendant's former stepdaughter's testimony about defendant having sexually assaulted her. We disagree.

We review the admission of other acts evidence under MRE 404(b) for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts upon which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998).

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if the evidence is (1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the evidence under MRE 403. *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993).

The prosecution offered the other acts evidence for the proper purpose of showing defendant's scheme, plan, or system in 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 Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). The logical relevance of such evidence "is not limited to circumstances in which the charged and the uncharged acts are part of a single continuing conception or plot." *Id.* at 64. "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan revealed need not be distinctive or unusual." *Id.* at 65-66, quoting *People v Ewoldt*, 7 Cal 4th 380, 403; 867 P2d 757 (1994). This Court has found a common scheme or plan where "(1) the victims and defendant knew each other, (2) the victims were all of a tender age, (3) the alleged sexual abuse occurred when defendant was alone with the children, and (4) the improper contact allegedly involved the touching of the children's sexual organs when defendant and the victims were disrobed." *People v Katt*, 248 Mich App 282, 306; 639 NW2d 815 (2001).

In this case, both the witness and the victim knew defendant and had frequent contact with him. The witness was defendant's stepdaughter who lived with him. Although the victim did not live with defendant, she frequently spent time at his apartment in a family setting while babysitting for his daughter. She also spent the night there on occasion. Further, defendant was in a position of authority over both the witness and the victim. Defendant was the witness's stepfather and he was the victim's employer. The witness testified that defendant had vaginal intercourse with her when she was in her early teens. The victim also asserted that defendant had vaginal intercourse with her when she was of a similar age. Finally, defendant presented both girls with the same kind of gifts in the same sort of relation to the sexual assaults.

On this record, we conclude that the other acts evidence was sufficiently similar to demonstrate a common scheme or plan, and thus, evidence of the prior assault was relevant to proving that defendant committed the charged criminal sexual conduct. Similar to *Katt*, there was a " 'concurrency of common features,' " between the charged and uncharged acts such that they are " 'naturally to be explained as caused by a general plan of which they are the individual manifestations.' " *Katt, supra* at 306, quoting *Sabin, supra* at 64.

Furthermore, the probative value of the evidence was not substantially outweighed by its prejudicial effect. The determination of whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony. *Katt, supra* at 306. Although the danger of unfair prejudice existed in this case, it was not outweighed by the tendency of the evidence to demonstrate a common plan, scheme, or system by defendant to sexually abuse young girls with whom he had established a relationship of intimacy and trust. The trial court did not abuse its discretion in admitting this evidence.

III. Ineffective Assistance of Counsel

Defendant next argues that he was denied the effective assistance of counsel because defense counsel did not object to allegedly improper rebuttal evidence. We disagree.

In reviewing a claim of ineffective assistance of counsel when an evidentiary hearing was not held, our review is limited to the facts contained on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). As a matter of constitutional law, we review the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302.

After, the prosecution presented defendant's former stepdaughter's testimony that defendant sexually assaulted her under circumstances similar to those alleged by the victim, defendant testified that he did not sexually assault the witness, that he did not know of the allegations until recently, and that the witness fabricated the story. In rebuttal, the prosecution called defendant's ex-wife, the witness's mother, who testified that she confronted defendant with the allegations in 1999, several years before defendant claimed he learned of the allegations. In addition, defendant's ex-wife testified that when she confronted defendant with the allegations, defendant laughed saying, "Prove it" and "Nobody is going to believe you because you just put away her biological father for the same thing, so they are just going to say that you are just lying about it."

We conclude that the complained of testimony was proper rebuttal evidence. Rebuttal testimony is limited to refuting, contradicting, or explaining evidence presented by the opposing party. *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997). As discussed above, evidence that defendant sexually assaulted his step-daughter was relevant to show that defendant committed the charged offense. After defendant presented a defense, which included denying the other acts and testifying that he did not know of that allegation until recently, the prosecution properly offered this rebuttal evidence to contradict defendant's testimony. Counsel does not render ineffective assistance by failing to raise futile objections. *Ackerman, supra* at 455. Accordingly, defendant has failed to show that his attorney's performance fell below an objective standard of reasonableness in failing to object to this rebuttal evidence.

In his supplemental brief, defendant argues that defense counsel was ineffective or failing to call certain witnesses, object to the admission of evidence, and present certain evidence. We disagree.

Defendant first contends that trial counsel failed to call several witnesses including potential alibi witnesses. However, defendant's argument regarding alibi witnesses relies solely on information that is not part of the lower court record. There is no basis to conclude, on the existing record, that defendant was denied a substantial defense because defense counsel failed to

call these witnesses. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant also argues that counsel was ineffective for failing to object to the introduction of a knife and a “tiger love stone.” However, because defendant has failed provide any legal argument to support his assertion, defendant has abandoned this issue on appeal. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Defendant also argues that defense counsel was ineffective for failing to introduce the police report and the victim’s initial statement to the police. But again, these documents are not part of the lower court record. Defendant has not established that defense counsel was constitutionally ineffective.

IV. Offense Variable 15

Next, defendant argues that the trial court erred in scoring 15 points for Offense Variable (OV) 10. We disagree.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). " 'Scoring decisions for which there is any evidence in support will be upheld.' " *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Under MCL 777.40(1)(a), the trial court must consider the “exploitation of a vulnerable victim” and must assign 15 points to this variable if “[p]redatory conduct was involved.” Predatory conduct is defined as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a).

The evidence demonstrates that before committing the offense, defendant recruited the victim to baby-sit for his eleven-year-old daughter, gave the victim jewelry, gave the victim a “tiger love stone,” which he said is only given to someone you love, gave the victim a necklace the night before the assault, and then sexually assaulted the victim after he was alone with her in his apartment. The victim’s father also testified that the defendant worked to gain the victim’s trust, but also made her feel insecure. It can be inferred that defendant’s course of conduct over the weeks preceding the assault and on the night of the assault was intended to groom the victim by lowering her resistance to sexual contact and increasing the chance that they would be alone together. The evidence supports a scoring of 15 points for OV 10.

V. Substitution of Counsel

Finally, in his supplemental brief, defendant argues that the trial court abused its discretion when it refused to hold an evidentiary hearing on defendant’s claim regarding his requested substitution of counsel. We disagree.

“A trial court’s decision regarding substitution of counsel is reviewed for an abuse of discretion.” *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). “An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced.” *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). When a defendant asserts that the assigned attorney is not adequate or diligent, or is disinterested, the trial court should hear the defendant’s claim and, if there is a factual dispute, take testimony and state its findings and

conclusion on the record. *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973). Appointment of substitute counsel is warranted only where a defendant can show good cause and if substitution will not unreasonably disrupt the judicial process. *Mack, supra* at 14. Good cause exists where a legitimate difference of opinion develops between a defendant and appointed counsel with regard to a fundamental trial tactic. *Id.*

Defendant made only one pretrial request for substitute counsel. Defendant stated that the reason for the request was counsel's failure to file a copy of a letter defendant sent regarding bond revocation and failure to notify the court of defendant's change of address while on bond. However, the court correctly informed defendant that his bond was not revoked and it was his responsibility to inform the court of any change in address. Defendant made no further complaints in reference to counsel. Thus, there was no dispute necessitating a hearing. In addition, defendant has failed to show good cause for substitution of counsel. There is no record evidence that defendant and defense counsel had a difference of opinion with regard to a fundamental trial strategy. The record merely indicates that, after defendant's initial request for substitute counsel, defense counsel moved to withdraw twice because defendant failed to meet with him or cooperate in the defense. Defense counsel ultimately withdrew these motions. "A defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel." *Traylor, supra* at 462-463, quoting *People v Meyers (On Remand)*, 124 Mich App 148, 166-167; 335 NW2d 189 (1983). The trial court did not abuse its discretion in addressing defendant's request for substitute counsel.

Affirmed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Alton T. Davis