

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA ALLEN YEAKEY,

Defendant-Appellant.

UNPUBLISHED

January 18, 2011

No. 293912

Allegan Circuit Court

LC No. 2008-015937-FH

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third degree criminal sexual conduct, MCL 750.520d(1)(a). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 10 to 25 years' imprisonment. Because the trial court did not abuse its discretion in permitting the admission of "prior bad acts" evidence, the prosecutor did not engage in misconduct, and defendant was not denied the effective assistance of counsel, we affirm.

On or about June 15, 2008, 15-year-old K. and her 14-year-old friend T. were spending the night at T.'s grandparent's house. Earlier that day, they had met one of the grandparent's neighbors, defendant, when he was playing drums in an open garage. The girls snuck out of T.'s grandparent's home later that night and went back to the garage to play video games with defendant. According to K., during the course of the evening, and against her wishes, defendant engaged in sexual intercourse with her. Defendant was charged with third degree criminal sexual conduct in connection with this matter and was, as previously indicated, found guilty of that charge.

On appeal, defendant first asserts that the trial court erroneously allowed the admission of "other acts" evidence at trial, specifically evidence of a prior conviction of criminal sexual conduct and evidence that defendant failed to register as a sex offender, in violation of MRE 404(b) and MCL 768.27a. Defendant claims he was deprived of his right to a fair trial as a result of the erroneous admission of the challenged evidence. We disagree.

A trial court's admission of other acts evidence is reviewed for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). An abuse of discretion occurs when the trial court "chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, 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.

To be admissible under MRE 404(b), other acts evidence 1) must be offered for a proper purpose, 2) must be relevant, and 3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

MCL 768.27a provides:

(1) Notwithstanding section 27, 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. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

(2) As used in this section:

(a) “Listed offense” means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.

(b) “Minor” means an individual less than 18 years of age.

Under MCL 768.27a, if a defendant is accused of committing a listed offense against a minor, the prosecution may present evidence that the defendant committed another listed offense against a minor without justifying the admissibility of the evidence under MRE 404(b). *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007). While such evidence is still subject to the requirements of MRE 401 and 403, (See, e.g., *Id.* at 620-621), the statute allows, in many cases, “evidence that previously would have been inadmissible, because it allows what may have been categorized as propensity evidence to be admitted. . .”*Id.* at 619.

In this matter, the prosecution filed a “Notice of Intent to Present Other Acts Evidence at Trial Pursuant to MCL 768.27a and MRE 404(b).” There was apparently no objection to the introduction of such evidence by defense counsel and there is no indication whether the trial court allowed the admission of the challenged evidence under MCL 768.27a, or MRE 404(b), or

both. We will initially proceed with our review, then, as though the court found the evidence admissible under MCL 768.27a.

It is uncontested that defendant was previously convicted of a listed offense against a minor, as defined in MCL 768.27a, and was charged in the instant matter with a listed offense against a minor, specifically third degree criminal sexual conduct. The evidence of defendant's prior conviction was thus admissible and "may be considered for its bearing on any matter to which it is relevant." MCL 768.27a. We are satisfied that the evidence of defendant's prior conviction was relevant under the definition set forth in MRE 401, because the evidence made the likelihood of defendant's behavior with K. more probable. See, e.g. *People v Mann*, ___Mich App ___; ___NW2d ___ (2010).

We are also satisfied that the probative value of defendant's prior conviction was not substantially outweighed by the danger of unfair prejudice under MRE 403. The defendant's prior conviction was probative on the issue of whether K. was telling the truth at trial, or whether defendant was telling the truth. Defendant denied that any sexual contact took place. He further portrayed himself as an honest person and one that would admit when he has done something wrong. The testimony concerning defendant's prior conviction focused, in large part, on whether he initially admitted to police in that case that he had had sexual intercourse with an underage girl, or whether he had denied it. Given that defendant's credibility was directly placed at issue and his denial of any sexual contact also placed K.'s credibility at issue, the circumstances surrounding his prior criminal sexual conduct conviction were highly probative and the value of this evidence was not substantially outweighed by unfair prejudice.

Finally, the trial court instructed the jury:

The prosecution has introduced evidence of a claimed sexual misconduct by the defendant with a minor, for which he is not now on trial. Before you may consider such alleged acts as evidence against the defendant, you must first find that the defendant actually committed those acts. If you find that the defendant did commit those acts, you may consider them in deciding if the defendant committed the offense for which he is now on trial.

Because a jury is presumed to follow its instructions (See, *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003)), it is presumed that it followed the trial court's caution regarding the use of defendant's prior conviction in this matter.

The trial court did not abuse its discretion in admitting evidence of defendant's prior criminal sexual conduct conviction under MCL 768.27a. We therefore need not address whether it was also/alternatively admissible under MRE 404(b).

With respect to defendant's alleged failure to register as a sex offender, while this evidence is not a "listed offense" and would thus not be admissible under MCL 768.27a, the prosecution did not elicit this information on direct examination. Defendant actually volunteered the information. The prosecutor asked defendant on cross-examination, "Now, you've testified under oath in direct exam that you've never been in any other trouble except for failing—failure

to pay child support . . .” To which defendant interrupted, “Well, I –I had—I had two failure to registers, but I’ve never been in any criminal charges.” The questioning continued as follows:

Prosecutor: You testified to and told, I think, the Court under oath that you’ve never been in any trouble except for the prior CSC?

Defendant: Right.

Prosecutor: But now you’re telling us you got in trouble also for failure to register, correct?

Defendant: Right. But—but I was never incarcerated or anything. I got—they gave me a ticket.

This evidence was relevant to defendant’s honesty -- which he placed directly in issue as discussed below-- and its probative value was not substantially outweighed by the danger of unfair prejudice. The jury was already aware that defendant was a convicted sex offender. Whether he failed to register as such had no bearing on the jury’s determination of whether defendant was guilty of criminal sexual conduct in the instant matter. Moreover:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. MCL 769.26.

Thus, were there any error in the admission of evidence concerning defendant’s failure to register as a sex offender (or his prior conviction, for that matter), it did not result in a miscarriage of justice.

Defendant next claims that the prosecutor engaged in misconduct when she asked him detailed questions concerning his prior criminal sexual conduct conviction and whether he had failed to register as a sex offender. According to defendant, the prosecutorial misconduct deprived him of a fair trial. We disagree.

Issues of prosecutorial conduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003). Where, as here, however, no objection was made to the alleged misconduct, review is limited to plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Under the “plain error” standard, this Court will reverse the jury’s verdict only where “plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings” regardless of the defendant’s innocence. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). We evaluate claims of prosecutorial misconduct on a case-by-case basis, reviewing the prosecution’s comments as a whole, in context, and in light of defense arguments and the relationship they bear to the admitted evidence. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

As acknowledged by defendant, the issue of his prior criminal sexual conduct conviction first came to the jury's attention when a recorded interview of defendant by Detective Koster was played during the trial. In the interview, Detective Koster asked defendant if he had ever been arrested for anything. Defendant stated, "Back in 2000, I did get in trouble for a CSC fourth degree misdemeanor where I had sex with somebody who was underage who told me they were 19. That was eight years ago." When asked what the prior conviction was about, defendant provided specific details concerning the incident, indicating among other things that the girl had told him she was 19 years old and had a child. Defendant told Detective Koster that he and the girl ended up going to a party together, got extremely intoxicated, and had sex. Defendant stated that he was informed the next day that the girl was underage and that her parents were pressing charges against him. At trial, Detective Koster testified that he confirmed, through a records check, defendant's prior criminal sexual conduct conviction, and added that he believed the girl involved in the incident had been 14 or 15 years old.

Defendant later testified at trial concerning the incident. On direct examination, defense counsel asked defendant, ". . . you also talked about an incident which occurred some eight or nine years ago . . . can you tell me what happened?" Defendant essentially repeated what he had told Detective Koster in the recorded interview. Defendant added that he had pleaded guilty in the prior case because he did have sex with the girl and it was "bad judgment" on his part. Defendant further testified that the reason he pled not guilty to the instant charges was because he did not have sex with K. Defendant further testified:

"Well, if I did something, yes. I – I mean, I'm an honest guy, man, if – if I do something wrong, I'm the first to stand up and take the lashing for it."

On cross-examination, the prosecutor asked defendant:

Now, you told Detective Koster here on the tape about the prior CSC—that you committed against an underage girl.

Prosecutor: --and you had sex with her. . .

Defendant: Mmmmhmm.

Prosecutor: You told the officer you were too drunk to remember?

Defendant: At first, yes.

Prosecutor: Okay, so that was a lie, is that correct?

Defendant: No. No . . . as the story went on and as we had thought about it more, more things had popped up. We were very intoxicated. . .

Prosecutor: And then you told Detective Koster and to us today the very specific facts about that CSC. . . .So were you lying to the Kent County Police Officer?

Defendant: No. Most definitely not.

Prosecutor: Okay. So were you lying to Detective Koster then?

Defendant: No most definitely not. This is ten years later.

Defendant not only denied that any sexual contact at all had taken place with K., but specifically stated that he was an honest guy and that if he did anything wrong, he was the first to admit it. Defendant, then, placed his credibility and his reputation for truth and veracity directly at issue, and the prosecutor's questioning of defendant concerning the circumstances surrounding his prior charge was a proportional and justified response to defendant's claim that if he did anything wrong, he would admit it. "A prosecutor's comments must be considered in light of defense arguments." *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

The same rationale applies to the prosecutor's questions concerning defendant's failure to register as a sex offender. As previously indicated, these questions arose in response to defendant's assertion on direct examination that he had never been in trouble before, except for the prior criminal sexual conduct charge. The prosecution's question on cross-examination concerning whether such assertion was true elicited a voluntary statement by defendant that he had also failed to register as sex offender. Given the context and limited nature of the questions, we conclude that the questions concerning defendant's failure to register as a sex offender were not improper.

Moreover, under the invited response doctrine, an instance of prosecutorial misconduct which might otherwise require reversal may not require reversal if it occurred in response to conduct of the defendant which invited the response. *People v Jones*, 468 Mich 345, 352-353; 662 NW2d 376 (2003). Whether the invited response requires reversal depends on the nature of the defendant's initiating conduct and the proportionality of the response. *Id.* at 353. Here, if the prosecutor's questioning could have in any way been determined to have been inappropriate, the questioning was clearly in direct response to defendant's claims of being honest and prone to admitting when he has done something wrong. Defendant's testimony, then, invited the prosecution's attempts to discredit defendant's claims of being honest. Given that the prosecutor's questions were supported by the evidence, were in direct response to defendant's trial testimony, and were directed at defendant's truthfulness, we conclude that the questions were not improper.

Defendant's final argument on appeal is that counsel was ineffective due to his failure to object to both the erroneous admission of the prior bad acts evidence and to the prosecutor's misconduct. However, the admission of other acts evidence did not constitute an abuse of discretion and the prosecutor's conduct was not improper. A trial counsel's failure to lodge an objection will not be considered deficient conduct if the objection would have been futile. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Affirmed.

/s/ Christopher M. Murray

/s/ Joel P. Hoekstra

/s/ Deborah A. Servitto