

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOWARD KAPLAN,

Defendant-Appellant.

UNPUBLISHED

May 30, 1997

(AMENDED)

No. 172567

Oakland Circuit Court

LC Nos. 92-121934-FC,

92-121935-FC, 92-121936-FC

92-121937-FC, 92-121938-FC,

92-121941-FC, 92-121606-FC,

92-121607-FC, 92-121608-FC

(ON REHEARING)

Before: Young, P.J., and O'Connell and W.J. Nykamp,* JJ.

PER CURIAM.

Defendant appeals as of right his convictions of sixteen counts of first-degree criminal sexual conduct [CSC I], MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), eighteen counts of second-degree criminal sexual conduct [CSC II], MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and habitual offender, fourth offense, MCL 769.12; MSA 28.1084. After the opinion was released in this matter, defendant moved for rehearing, arguing, in part, that this Court did not address the issues raised in his supplemental brief. We granted defendant's motion and will now address those issues. In this opinion, as before, we affirm.

Defendant was charged with molesting his eight-year-old daughter and three of her friends during sleepovers on nine separate occasions between September 11, 1992 and November 6, 1992. Following a seventeen-day trial, a jury convicted defendant of all thirty-four counts of CSC with which he was charged. A separate jury then convicted defendant as an habitual offender. Defendant received twenty-two life terms and twelve thirty-five to eighty-five year sentences.

Defendant first contends that the trial court abused its discretion and violated defendant's due process rights in finding the children competent to testify when investigators did not videotape or audiotape their interviews with the children. Defendant claims that the recordings were necessary to support his defense that the investigators improperly influenced the children's testimony. Whether the

* Circuit judge, sitting on the Court of Appeals by assignment.

children were improperly influenced impacts on their credibility rather

than their competence to testify. MCL 600.2163; MSA 27A.2163; MRE 601; *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991). Therefore, the trial court did not abuse its discretion in permitting the children to testify after determining that they were capable of distinguishing the truth from falsity and that they were aware of their obligation to testify truthfully.

Defendant cites no Michigan authority requiring that interviews with sexual abuse victims be videotaped or audiotaped. Nor did the absence of videotapes or audiotapes of the interviews prejudice defendant in the presentation of his defense because the trial court permitted the introduction of the testimony of two experts regarding the dangers of interviewer bias and children's susceptibility to suggestive or leading questioning. The jury apparently found the testimony of the prosecution's witnesses to be more credible than that proffered by defendant. Defendant "is not entitled to retry his case on appeal." *People v Lee*, 391 Mich 618, 643; 218 NW2d 655 (1974). Therefore, reversal is not required on the basis of this issue.

Defendant next claims that the trial court abused its discretion by admitting into evidence the preliminary examination testimony of one of the victims. When defense counsel attempted to use portions of the child's testimony at the preliminary examination to impeach her testimony at trial, the prosecutor asked to have the entire transcript admitted so that the jury could read her answers in context. A party waives review of the admission of evidence that he introduced or that was made relevant by his own placement of a matter in issue. *People v King*, 158 Mich App 672, 677; 405 NW2d 116 (1987). Moreover, even if the admission of the child's preliminary examination testimony was error, Michigan courts have repeatedly held that "improperly admitted hearsay evidence constitutes harmless error when it is merely cumulative of other properly admitted evidence." *Solomon v Shuell*, 435 Mich 104, 146; 457 NW2d 669 (1990); *People v Van Tassel (On Remand)*, 197 Mich App 653, 655-656; 496 NW2d 388 (1992); *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988). Finally, introduction of the remainder of this testimony was permissible under MRE 106, which permits admission of remaining portions of a writing or recorded statement that in fairness should be considered contemporaneously with portions already introduced into evidence.

Defendant also contends that his due process rights were violated when the trial court sua sponte remarked that the similarity in two investigative reports might reflect their truth. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial. *City of Lansing v Hartsuff*, 213 Mich App 338, 349-350; 539 NW2d 781 (1995).

When reviewed in context, it is apparent that the court's comment related to the relevance of the line of questioning and the court's observation that the similarity of the reports could be equally probative of either their truth or their falsity. Consequently, the comment cannot be characterized as an expression of the court's opinion regarding the credibility of the testimony that unduly influenced the jury. *People v Paquette*, 214 Mich App 336, 340-341; 543 NW2d 342 (1995). Moreover, any prejudice to defendant was overcome by the trial court's instructions to the jury directing it to disregard

any of the court's comments or rulings. Therefore, we do not find that this issue provides grounds for reversal.

Defendant also argues that the trial court violated his due process rights by refusing to allow defense counsel to ask the mother of one of the children whether her son ever told lies. We disagree. Although specific instances of prior acts may, at the trial court's discretion, be inquired into on cross-examination of a witness concerning the character for truthfulness or untruthfulness of another witness, the witness subject to cross-examination must already have testified as to the character of the other witness on direct examination. MRE 608(b)(2). In this case, the child's mother had not been called as a character witness and had not testified regarding her son's reputation for truthfulness. Consequently, the trial court properly precluded defense counsel from inquiring whether the boy "ever lied" on cross-examination. Moreover, such evidence does not meet the test of relevancy under MRE 401 and 402.

Defendant argues next that the trial court abused its discretion when it refused to allow defense counsel to question one of the victims' mothers about what a detective said to her. Defense counsel claimed that the statement was not hearsay because it was being offered to show its effect on the listener and establish bias in the speaker. Although defense counsel argued that the statement was admissible, he failed to make an offer of proof as to the contents of the statement. Thus, this issue is not preserved for appellate review. MRE 103; *Slayton v Michigan Host, Inc*, 144 Mich App 535, 550; 376 NW2d 664 (1985). Even if exclusion of the question was error, it was harmless in light of the fact that the detective later testified regarding what he told the parents of the children. *People v Minor*, 213 Mich App 682, 688; 541 NW2d 576 (1995). Therefore, reversal is not required on the basis of this issue.

Defendant also claims that the trial court abused its discretion by allowing the late endorsement of two witnesses: defendant's former girlfriend and another child that defendant allegedly molested two or three years earlier. We disagree. MCL 767.40a(4); MSA 28.980(1)(4) [§ 40a] "contemplates that the prosecutor will give advance notice of all known res gestae witnesses and specify before trial which known witnesses it intends to call." *People v Burwick*, 450 Mich 281, 290; 537 NW2d 813 (1995). A violation of § 40a does not require automatic dismissal. Rather, the trial court must exercise its discretion in fashioning a remedy for non-compliance with a discovery statute, rule, order or agreement. *People v Williams*, 188 Mich App 54, 58-59; 469 NW2d 4 (1991).

In the instant case, there was no violation of § 40a because neither the former girlfriend nor the child were res gestae witnesses and the prosecutor did not intend to call either of them before trial. The prosecution became aware of defendant's former girlfriend's knowledge relating to the case only a few days before her testimony. Defense counsel was permitted to interview defendant's former girlfriend prior to her testimony and was able to present a witness to challenge her credibility. Hence, the court's denial of defendant's request for a continuance did not prejudice defendant and was not in error.¹ *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

It was established at trial that the decision to bring the child witness, who lived in another state, to Michigan to testify was made only one week prior to her testimony and that the prosecutor was informed of her potential testimony only the day before. Defendant did not object to the admission of

the child's testimony, did not ask to interview her prior to her testimony and did not request a continuance. Instead, defense counsel waited until after her testimony to move for a mistrial on that basis. It is well established in Michigan that "error requiring reversal must be that of the trial court and not that to which the appellant contributed by plan or negligence." *Fellows v Superior Products Co*, 201 Mich App 155, 165; 506 NW2d 534 (1993). Furthermore, defendant's contention that the court's late admission of these witnesses prejudiced him in the choice of a defense theory is without merit. Defendant's failure to identify any alternative defense theory precludes a finding of prejudice. *Burwick, supra* at 295 n 18.

Next, defendant claims that the trial court abused its discretion and violated his due process rights by admitting the testimony of the late endorsed witnesses. Defendant argues that the testimony regarding other acts was inadmissible under MRE 404(b) because it was offered solely to show that defendant had a propensity to commit such acts. "Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205; 520 NW2d 338 (1994). Thus, if there is some other ground under MRE 404(B) for admission of the testimony regarding defendant's other acts, the testimony is admissible. *Id.*, at 83-84.

In this case, the prosecutor stated that she was offering the child's testimony with regard to defendant's conduct occurring approximately two years earlier to rebut defendant's claim that the children in the instant case had been coached and that he was a victim of a conspiracy on the part of the adults involved. In *People v Lee*, 212 Mich App 228, 245-246; 537 NW2d 233 (1995), this Court held that the testimony of another victim of the defendant was admissible "for the limited purpose of showing that defendant committed the crime at issue" when the testimony was admitted to show the defendant's plan or pattern of attracting victims and was accompanied by a limiting instruction. See also *People v Miller (On Remand)*, 186 Mich App 660, 664; 465 NW2d 47 (1991). In the instant case, the witness was the same age as the victims when the alleged molestation occurred, was a friend of defendant's daughter and was molested in the same manner and under the same circumstances, a sleepover visit. Consequently, her testimony was admissible under MRE 404(b) to show defendant's common plan, scheme or system of sexually abusing his daughter and her friends during sleepovers. The trial court gave the jury a limiting instruction. Therefore, reversal is not required on the basis of this issue.

In addition to corroborating other specific aspects of the victims' testimony, defendant's former girlfriend testified that he had asked her at one point to shave her pubic hair. Although testimony regarding defendant's sexual practices with another consenting adult is not probative of whether defendant transferred those practices to children, his admitted preference for the appearance of prepubescent girls is arguably probative of his motivation in committing the charged offenses. MRE 404(b). Ordinarily, a trial court's decision on a close evidentiary issue cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). However, even if admission of the testimony was error, reversal is not required in view of the overwhelming evidence of defendant's guilt. MCL 769.26; MSA 28.1096. Although the victims had little or no contact with each other, they each

gave the same graphic and detailed account from the outset and their version of what happened was supported by the other evidence at trial. Therefore, we find no error rising to the level of that requiring reversal.

Finally, defendant contends that he was denied his right to a fair trial by the prosecutor's remarks in closing argument in which defendant claims the prosecutor vouched for the credibility of the witnesses and appealed to the jurors' civic duty. In the absence of an objection on these grounds, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995). A prosecutor may argue, as the prosecutor did in this case, that a witness should be believed. *People v Swartz*, 171 Mich App 364, 371; 429 NW2d 905 (1988). In addition, reversal is not required because the prosecutor's remarks addressed defendant's theory of the case and were based on the expert testimony introduced at trial. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Guenther*, 188 Mich App 174, 181-182; 469 NW2d 59 (1991). Even if the remarks were improper, however, we find no miscarriage of justice occurred in light of the overwhelming evidence of defendant's guilt and the fact that the trial judge instructed the jury that the attorneys' arguments were not evidence and were not to be considered in reaching a verdict. Consequently, defendant's claim of error is without merit.

Next we address the issues raised in defendant's supplemental pro per brief. In his first pro per issue, defendant argues that the trial court improperly limited defense counsel's impeachment of Dr. Kathleen Faller, an expert proffered by the prosecution in rebuttal to defendant's expert, Dr. Ralph Underwager.² Defendant contends that he was not allowed to impeach Dr. Faller during voir dire or during cross-examination to show that her conduct in past cases reflected her bias as a validator of false allegations of sexual abuse. Defendant concludes that the court's action prevented him from asserting his theory that the complainants in this matter had falsified their allegations after being coached by professionals. Defendant's argument is without merit.

A trial court's decision to limit cross-examination is reviewed for an abuse of discretion. *Minor, supra*, 213 Mich App at 684. Dr. Faller's testimony was admitted for the narrow purpose of refuting defendant's theory that children who have been treated for sexual abuse tend to fabricate allegations of sexual abuse. Dr. Faller's examination of other sexual abuse victims and her prior testimony in those cases was wholly irrelevant in this matter because Dr. Faller did not purport to testify regarding the credibility of the complainants in this case. A witness may not be impeached or contradicted regarding collateral, irrelevant, or immaterial matters. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995)(citing *People v McGillen No 1*, 392 Mich 251; 220 NW2d 677 (1974)). Thus, the court properly limited cross-examination of Dr. Faller to exclude impeachment on collateral matters.

In his second pro per issue, defendant reiterates his claim that the court abused its discretion regarding his limitation of Dr. Faller's cross-examination, and further contends that the court was biased against him in making his rulings on this and other matters. Defendant contends that it was unfair to allow the prosecution to show evidence regarding his expert's bias while denying the same opportunity to defendant with Dr. Faller, the prosecution's expert. We disagree. First, defense counsel argued that

he sought to challenge Dr. Faller's truthfulness, not bias. To preserve an evidentiary issue for appellate review, a party must object timely at trial and specify the same ground for objection as is asserted on appeal. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Second, because we hold that the court properly exercised his discretion in limiting cross-examination and impeachment of Dr. Faller and given the overwhelming evidence against defendant, any prejudice that occurred from this alleged inequity was harmless. *People v Mateo*, 453 Mich 203; 551 NW2d 891 (1996).

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Peter D. O'Connell

/s/ Wesley J. Nykamp

¹ In our previous opinion, we stated, in error, that defendant had not requested a continuance with respect to the late endorsement of defendant's former girlfriend as a witness. The fact that defendant had requested a continuance, however, does not alter our conclusion that no error occurred for the reasons stated in the text.

² Faller was introduced as a rebuttal witness for the narrow purpose of responding to Dr. Underwager's testimony. Dr. Underwager testified in essence that children, who receive traditional psychological treatment for alleged sexual abuse, lose memories of actual events and fabricate allegations of sexual abuse. Dr. Faller testified that her research indicated that an eight-year-old child's memory was equivalent to an adult's memory and that at this age, children were no more subject to psychological suggestion than an adult was. She also testified that children were generally reluctant to divulge that they have been sexually abused.