

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERBERT LEE, JR.,

Defendant-Appellant.

UNPUBLISHED

June 24, 2004

No. 246418

Wayne Circuit Court

LC No. 01-004416-01

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (sexual penetration of a person under thirteen years of age), assault with intent to rape, MCL 750.520g(1), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to three hundred to six hundred months' imprisonment for each of the criminal sexual conduct convictions and the assault conviction, and to two years' imprisonment for the felony-firearm conviction. Defendant received enhanced sentences, pursuant to MCL 769.11, as a third habitual offender. We affirm.

Defendant first argues that he was denied his right of due process under both the federal and Michigan constitutions when the prosecution impermissibly presented "other acts" evidence. We disagree.

Defendant did not object at trial on the same grounds he now asserts on appeal, and, therefore, this issue is not preserved. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Consequently, this Court's review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). To avoid forfeiture of an unpreserved issue on appeal, a criminal defendant must show that (1) an error occurred, (2) the error was plain, and (3) the plain error affected substantial rights. It is the defendant, rather than the government, that bears the burden of persuasion with respect to prejudice. *Id.* at 763.

Whether evidence of a defendant's other crimes, wrongs, or acts is admissible is governed by MRE 404(b). Evidence is admissible under this rule if: (1) it is offered for a proper purpose under MRE 404(b), (2) it is relevant under MRE 402 as enforced through MRE 104(b), and (3) if the probative value of the evidence is not substantially outweighed by unfair prejudice. In addition, the trial court may, upon request, provide a limiting instruction to the jury. *People v*

VanderVliet, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). See also *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998). The admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *VanderVliet*, *supra* at 75.

Here, the victim was given her diary to refresh her memory regarding the date on which the first sexual assault occurred, and the details of the assault. She then testified regarding an argument between defendant and his wife and defendant's subsequent actions. Defendant's allegation of error centers on two "other acts" mentioned in this testimony: defendant's argument with his wife, and the fact that the victim heard gunshots.

However, the testimony regarding the argument, and the ensuing departure from the house by everyone except defendant and the victim, was relevant as proof of the opportunity for defendant to commit the assault with little chance of immediate discovery. MRE 404(b)(1). Moreover, it is unlikely that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. The victim's testimony regarding the argument was similar to defendant's testimony, in which he admitted to not only having the argument with his wife, but also punching a hole through the wall. Defendant did not request a specific limiting instruction regarding the testimony at issue, and none was given. However, the judge's general instructions to the jury about weighing the witnesses' credibility presumably diminished any danger of unfair prejudice. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

The second "other acts" evidence defendant now objects to is that "[the victim] heard gunshots." However, this was not "other acts" evidence under MRE 404 because the victim never testified that defendant fired these shots, only that she heard shots. Consequently, the trial court's failure to exclude this evidence under MRE 404(b) did not constitute plain error.

Defendant next argues that he was denied his constitutional right to due process when the prosecutor allegedly vouched for the victim. We disagree. Because defendant did not make a timely, contemporaneous objection to the prosecutor's alleged misconduct, this issue has not been properly preserved, *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003), and this Court's review is limited to plain error that affected defendant's substantial rights. *Carines*, *supra* at 774.

Viewing the prosecutorial comments at issue in context, we conclude that such comments constituted proper argument from the evidence that the victim was credible. See *People v Thomas*, 260 Mich App 450; 678 NW2d 631 (2004); *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003); *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The prosecutor's statements made it clear that he was not claiming special knowledge regarding the witnesses' veracity, *Howard*, *supra* at 548; rather, his appeal to the jury to believe the victim was based on the evidence. Because it is not improper for a prosecutor to summarize the facts in evidence and encourage the jury to draw reasonable inferences from those facts, *Aldrich*, *supra* at 112, defendant has failed to show plain error. *Carines*, *supra* at 763-764.

Finally, defendant argues that he was denied effective assistance of counsel when his trial counsel failed to file a motion in limine for an order requiring the Department of Corrections to remove defendant's record of two prior convictions from its website during the pendency of the trial. Again, we disagree.

Defendant raised this issue in a motion for a new trial, thereby preserving it for review. *Sabin (On Remand), supra* at 658. However, because the trial court did not hold an evidentiary hearing, this Court's review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). In applying this test, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant cites no authority to support his contentions that trial counsel's failure to file a motion in limine to remove defendant's record constituted ineffective assistance of counsel, or that the trial court would have had a basis for granting such a motion. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, and he may not give an issue cursory treatment with little or no citation of supporting authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). By his failure to cite any relevant authority, defendant has abandoned this issue. *Id.* Furthermore, we note that defendant does not even allege that any of the jurors viewed the information on the website, only that some of the jurors were familiar with computers. This does not suffice to meet defendant's burden of establishing that "there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Effinger, supra* at 69.

Affirmed.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood