

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD ASHLEY MOREY,

Defendant-Appellant.

UNPUBLISHED

March 15, 2005

No. 253186

Lapeer Circuit Court

LC No. 03-007710-FC

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(ii), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(ii), involving his daughter. He was sentenced as an habitual offender, third offense, MCL 769.11, to prison terms of twenty-six to forty years and ten to thirty years for the respective convictions. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial by the erroneous introduction of other acts evidence under MRE 404(b). Specifically, defendant objects to the admission of other acts of violence and physical and sexual abuse perpetrated on his daughter, his son, and two of his former live-in girlfriends.

Defendant's argument that other acts evidence was improperly admitted under MRE 404(b) is without merit. First, defense counsel indicated before trial commenced that he did not take exception with "the other incidents relating to Brandi or even to the children as far as any kind of physical abuse or continued sexual abuse." Defendant is not allowed to assign error on appeal to something his own counsel deemed proper at trial. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). "To do so would allow a defendant to harbor error as an appellate parachute." *Id.*

Second, in his brief on appeal defendant does not offer any citation to the record and does not specifically identify the allegedly improper testimony. A party may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Defendant also fails to offer any specific argument with regard to the allegedly improper testimony. To properly present an appeal, an appellant must appropriately argue the merits of the issues he identifies. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

Third, even if this Court were to disregard the above irregularities, review of the evidence to which defense counsel raised no objection is limited to plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). MRE 404(b) involves the admission of other crimes, wrongs, or acts to prove the character of a person. Evidence of defendant's physical and sexual abuse of the children and of certain of his former girlfriends was not introduced as character evidence, but rather, to explain Brandi's delay in reporting the alleged assaults. Evidence of a defendant's other bad acts is relevant to explain a victim's delay in reporting the alleged abuse. *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). Although there is a danger of unfair prejudice in the admission of the evidence, it does not necessarily follow that the danger of unfair prejudice substantially outweighed by the probative value of the evidence. Here, the victim's credibility was harmed by her delay in reporting the abuse. And, in light of defendant's testimony that the victim made a threat to "make him pay" for denying her request for a driver's permit only days before he was questioned by police regarding the alleged abuse, evidence of defendant's other bad acts offered an explanation for the delay. As such, the probative value of the testimony regarding defendant's violence and abuse was not outweighed by the danger of unfair prejudice. Defendant has failed to demonstrate plain error.

Defendant next argues that he was denied a fair trial by several instances of prosecutorial misconduct. Defendant did not object to any of the allegedly improper prosecutorial remarks. When a claim of prosecutorial misconduct is not properly preserved, this Court's review is limited to whether a plain error affected defendant's substantial rights. *People v Abraham*, 256 Mich App 265, 274-275; 662 NW2d 836 (2003). This Court will not find error requiring reversal unless the prejudicial effect of the prosecutor's comments could not have been cured by a timely instruction. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant first asserts that the prosecutor improperly vouched for the victim during closing argument when he stated that the victim testified "as honestly as she could" and that the victim "wasn't lying when she said what had occurred." A prosecutor may not vouch for the credibility of a witness "by implying that he has some special knowledge of their truthfulness." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). But a prosecutor may nevertheless "comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Id.* at 455. Defendant has not demonstrated plain error affecting his substantial rights. Even if the prosecutor's remarks were improper, they involved only a brief portion of his closing argument, and were not so inflammatory that defendant was prejudiced. Furthermore, any prejudice that may have resulted from these comments could have been cured by a timely instruction. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 LEd2d 177 (2004)

Defendant also argues that the prosecutor injected improper prejudicial innuendo in his closing argument. Defendant has not identified any specific comments to which he objects and makes no reference to the transcript. Rather, he simply cites general case law and concludes that "the prosecutor's closing arguments encouraged the jury to convict Appellant . . . because of the kind of person she [sic – he] characterized" defendant to be. A party may not leave it to this

Court to search for the factual basis to sustain or reject his position. *Traylor, supra* at 464. Additionally, an appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Defendant also contends that the prosecutor elicited prejudicial testimony regarding defendant's character and personality. However, we have already concluded that evidence regarding defendant's other bad acts was properly admitted at trial.

Last, defendant asserts that the prosecution raised an improper civic duty argument at the conclusion of his closing argument when he stated, "Does the abuse ever end where these children are concerned? Ladies and gentlemen, it ends here." A prosecutor is not permitted to urge jurors to convict a defendant based on their civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, a prosecutor is permitted to argue the evidence and any reasonable inferences from the evidence as it relates to his theory of the case. *People v Knowles*, 256 Mich App 53, 60; 662 NW2d 824 (2003). Here, the prosecutor did not make an improper appeal to the jury's sense of civic duty. The prosecutor's remark that the "abuse ends here" was based on evidence presented at trial that the abuse was ongoing for some time and the reasonable inference that the abuse would continue to occur if defendant was not convicted. The prosecutor's remark focused on this victim and this defendant and did amount to an improper civic duty argument.

Lastly, defendant argues that the trial court abused its discretion by denying defendant's motion for a mistrial. This Court will review a trial court's decision to deny a mistrial for abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Id.*

Defendant contends that he was entitled to a mistrial based upon one comment by the victim and one comment by former girlfriend Ilesa Bordeaux. When the prosecutor asked the victim what happened to her and her brother after they ran away from defendant's home, the victim stated that she was in a foster home and that her brother "went into a treatment facility for the sexually abused." When the prosecutor asked Bordeaux how her relationship with defendant ended and why she asked him to move out, Bordeaux responded, "The kids had left and gone to Florida and Todd became dependent on Vicodin and we fought all the time and I told him I wasn't going to tolerate the fighting and the yelling and the abuse that he was inflicting on his children." Defendant did not object to either comment.

Unresponsive testimony by a prosecution witness generally does not justify a mistrial unless the prosecutor conspired with or encouraged the witness to give unresponsive testimony the prosecutor knew in advance that the witness would give that testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Here, the prosecutor merely asked Brandi where she and her brother went after they ran away, and merely asked Bordeaux why she asked defendant to move out. It is clear the prosecutor was not attempting to elicit improper testimony. Further, the questions that elicited the unresponsive answer were proper and did not appear to be calculated to elicit inadmissible evidence. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999); *Hackney, supra*. The unresponsive answers provided no significant details, and there was no further mention throughout the trial of the victim's brother's placement or

defendant's use of Vicodin. The answers were not so egregious that they denied defendant a fair trial. The test is not whether there were irregularities, but whether the defendant received a fair and impartial trial. *People v Lumsden*, 168 Mich App 286, 298; 423 NW2d 645 (1988). The determination whether to grant a mistrial due to an unresponsive answer is within the sound discretion of the trial court and the decision is not disturbed on appeal absent an abuse of discretion. *Haywood, supra* at 228. The trial court did not abuse its discretion in denying a mistrial due to two unresponsive statements.

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly