

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY LYNN BALES,

Defendant-Appellant.

UNPUBLISHED

April 24, 2007

No. 267756

Wayne Circuit Court

LC No. 05-000880-01

Before: Neff, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age).¹ Defendant was sentenced to 4 to 15 years’ imprisonment for these convictions. We affirm.

I

On appeal, defendant argues that prosecutorial misconduct denied him a fair trial. We disagree. Although defendant made numerous objections and two motions for a mistrial below on the basis of prosecutorial misconduct, he failed to timely and specifically object to all of the claimed instances of prosecutorial misconduct. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002) (a defendant must make a timely and specific objection below to preserve an issue of prosecutorial misconduct “unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice.”) This Court reviews preserved issues of prosecutorial misconduct de novo “to determine if the defendant was denied a fair and impartial trial.” *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). However, this Court reviews unpreserved issues of prosecutorial misconduct for plain error affecting substantial rights. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). If a curative

¹ Defendant was also charged with, and acquitted of assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2). Also, this was defendant’s second trial on these charges because the first trial concluded with a hung jury.

instruction could have alleviated any prejudicial effect, there is no error requiring reversal. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

A

Defendant first claims that the prosecutor improperly expressed her personal opinion concerning defendant's veracity and denigrated defendant in the presence of the jury. Defendant complains that the prosecutor's cross-examination of defendant and closing argument were saturated with improper questions and comments. We find no error requiring reversal.

"[A] witness is subject to cross-examination concerning any issue in a case, including credibility." *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999), citing MRE 611(b). Moreover, in evaluating issues of prosecutorial misconduct, this Court must examine the prosecutor's remarks in context, on a case-by-case basis. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Thomas*, *supra* at 454. Considered in context, the prosecutor's questions ("[s]o what is your testimony today at 10:01 about that," "[d]o you want to stick with the answer absolutely not by yourself," and "[w]hich answer would you like us to hold you to?") addressed defendant's inconsistent testimony and were not improper.

Defendant complains that other comments and questions by the prosecutor, such as those regarding defendant's hearing loss, whether defendant was crying at trial, and whether defendant could see up the prosecutor's dress were improper attacks on defendant's character. Although "[i]t is not proper for the prosecutor to comment on the defendant's character when his character is not in issue," *People v Quinn*, 194 Mich App 250, 253; 486 NW2d 139 (1992), here, the prosecutor did not commit misconduct by improperly attacking defendant's character. Regarding defendant's alleged hearing loss, the prosecutor's inquiries addressed defendant's assertion that he had not heard the majority of questions in his first trial.² The prosecutor's comments regarding whether defendant could see up her dress were made in response to defendant's nonresponsive answers of how he was able to see that the victim was not wearing underwear, and were merely a crass attempt to elicit an answer from defendant.

Defendant claims that the prosecutor's references during closing argument to defendant as "a child molester," "a control freak," "a predator," and "a boogey man," as well as her descriptions of defendant's conduct as "revolting" and "atrocious," and her references to defendant telling dirty jokes, were improper. We note that defendant's objection to some of these references was sustained by the trial court, e.g., "control freak" and "boogey man." With regard to the other references, there was evidence that defendant repeatedly molested two young girls, sometimes in the middle of the night, was "[v]ery controlling" regarding his wife's relationship with her family, and told dirty jokes in front of children. Therefore, the evidence supported the prosecutor's comments, which, although harsh, did not constitute misconduct requiring reversal. "[P]rosecutors may use 'hard language' when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

² Defendant failed to assert a timely and specific objection to these comments.

Defendant also notes that the prosecutor improperly called him “a liar” during closing argument.³ “A prosecuting attorney has the right to comment upon the testimony in a case, to argue upon the facts and evidence that a witness is not worthy of belief and to contend that a defendant is lying.” *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982); see also *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). In this case, the prosecutor’s conduct was not so egregious that defendant was denied a fair trial.

Contrary to defendant arguments, all of the prosecutor’s comments were not improper, and were not mere attempts to denigrate defendant. Nor did the prosecutor improperly use defendant’s character to argue that defendant had a propensity to commit some bad act. See MRE 404(b). Although some of the challenged comments and questioning were arguably irrelevant, we find no error requiring reversal.

B

Defendant next argues that the prosecutor repeatedly denigrated defense counsel. It is improper for a prosecutor to suggest that defense counsel is intentionally trying to mislead the jury, to personally attack or denigrate defense counsel, or to question defense counsel’s veracity. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996); *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). However, a prosecutor is entitled to point out deficiencies in defense counsel’s arguments in light of the evidence presented. *Howard*, *supra* at 544-545. Moreover, under the invited response doctrine, a prosecutor’s comment that might otherwise require reversal may not require reversal if the comment was made in response to a defendant’s conduct that invited the response. *People v Jones*, 468 Mich 345, 352-353; 662 NW2d 376 (2003). Whether the comment requires reversal depends upon the nature of the initiating conduct and the proportionality of the response. *Id.* at 353.

At the outset, we note that although both attorneys’ conduct at trial was contentious, defense counsel’s conduct was especially so. Indeed, at one point, the court noted, “I will admonish both of you, because I do believe that--I do believe you, particularly, [defense counsel] have placed some things on the record in front of the jury that you shouldn’t be saying. Comments on what the witness said, rather than asking them particular questions.” The court further admonished the attorneys that they were to address the court and “not talk directly to each other or about each other.” Given these circumstances, when the prosecutor’s comments are viewed in their proper context, it is apparent they were generally responses to defense counsel’s arguments and theories, or were invited by the contentious conduct of defense counsel himself.

Regardless, to the extent that any of prosecutor’s comments were objectionable, the trial court repeatedly instructed the jurors that the attorney’s arguments were not evidence and that they, alone, were the judges of witness credibility. Given that juries are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), any error created by the prosecutor’s comments was cured by the instructions, *Ackerman*, *supra* at 449. In addition,

³ Defendant failed to assert a timely and specific objection to this comment.

to the extent this issue is unpreserved, defendant has failed to show that his substantial rights were affected. Indeed, given the incriminating testimony of two different witnesses claiming that defendant sexually molested them, none of the prosecutor's comments were outcome determinative.

II

Defendant next argues that the court's denial of additional peremptory challenges, where the court refused to dismiss for cause prospective jurors who had experience with sexual abuse, denied him a fair trial. We disagree. This Court reviews a trial court's denial of a request for additional peremptory challenges for an abuse of discretion. *Howard, supra* at 536.

MCR 6.412(E)(2) permits a court to grant additional peremptory challenges upon a showing of good cause. *Id.* at 536. Here, the trial court excused for cause from the venire all potential jurors who demonstrated any prejudice or bias toward defendant. Further, the remaining juror at issue clearly indicated that her previous experience with sexual abuse would in no way affect her ability to fairly decide the case. In light of this, defendant's bare assertion that the trial court erred in denying him additional peremptory challenges is untenable given that there is no support in the record of good cause that could justify the granting of additional peremptory challenges.⁴

III

Defendant next argues that the trial court erred in admitting testimony that he had sexually abused a different victim on previous occasions. We disagree. This Court reviews a trial court's decision to admit evidence pursuant to MRE 404(b) for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). A trial court has not abused its discretion if, in cases where there is "more than one reasonable and principled outcome, . . . the trial court selects one of these principled outcomes." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Generally, evidence is admissible if it is relevant and inadmissible if it is not. MRE 402; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 562 (2002). Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. MRE 401; *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). Regarding the admissibility of wrongful or criminal acts, 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,

⁴ Contrary to defendant's argument, *People v Manser*, 250 Mich App 21, 26-30; 645 NW2d 65 (2002), is not instructive because that case dealt with a prospective juror's disclosure of relevant information after voir dire thereby preventing the defendant from exercising a peremptory challenge.

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.

For evidence of prior acts to be admissible under MRE 404(b), it must satisfy three requirements: (1) the evidence must be offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) the evidence must be relevant under MRE 402, as enforced by MRE 104(b), to an issue or fact of consequence at trial, and (3) the danger of unfair prejudice must not substantially outweigh the probative value of the evidence, pursuant to MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

The trial court did not abuse its discretion in admitting evidence of defendant's prior acts with the previous victim. First, the evidence was admitted for the proper purpose of showing defendant's common scheme, plan, or system pertaining to the sexual abuse of both the victim in this case and the previous victim. Specifically, defendant knew both girls because of his wife's relationship with their parents, "wanted" or "favored" both girls to the exclusion of their siblings, provided both girls with expensive gifts, took both girls on trips without their parents, molested both girls when they were at his house, exposed his penis and masturbated in front of both girls, and told "dirty" or "weird" jokes in the presence of both girls. In addition, defendant and his wife were godparents to the victim in this case and also "kind of adopted [the previous victim] as their godchild." From these similarities, it could be inferred that defendant was a sexual predator whose common plan or scheme involved taking advantage of young girls whom he met through his wife's relationship with their parents.

Second, given that defendant denied the charges against him, this evidence was relevant to show that defendant had a system he used to molest young girls and to rebut defendant's claim that the charges against him were fabricated on account of his wife's selfish motives resulting from their divorce. Third, although this evidence was prejudicial, it was not unfairly so. Indeed, the majority of similarities between defendant's interaction with both victims involved details that were not sexually explicit. The fact that evidence may be damaging does not make it unfairly prejudicial. *People v Mills*, 450 Mich 61, 74-76; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995). Further, the trial court provided a cautionary instruction that the jury was not to use the previous victim's testimony as substantive character evidence thereby curing any error that could have resulted from its prejudicial nature. See *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002) (an appropriate limiting instruction may protect defendant's right to a fair trial).

Defendant claims that too much dissimilarity between his interactions with the victims existed to establish a common plan or scheme. This claim fails. If reasonable people may disagree whether similarities are sufficient to constitute a common plan or scheme, such that the issue presents a close evidentiary question, the trial court's decision is not ordinarily an abuse of discretion. *People v Sabin*, 463 Mich 43, 68; 614 NW2d 888 (2000). Here, although there were some dissimilarities in these situations, they were inconsequential for purposes of admission on MRE 404(b). Given the secondary importance of the evidence of dirty jokes, we reject

defendant's argument that the admission of this evidence compounded any alleged error. The trial court's decision to admit this evidence cannot be considered an abuse of discretion.

IV

Defendant next argues that the trial court erred in allowing the prosecutor to call a rebuttal witness. We disagree. This Court reviews a trial court's decision to admit rebuttal evidence for an abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). "Rebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" *Id.* at 399 (citations omitted).

[T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief. [*Figgures, supra* at 399 (citations omitted).]

Here, both victims testified during the prosecutor's case in chief that defendant had told dirty or "weird" jokes in their presence. Later, a witness testifying during defendant's case in chief explained that defendant did not tell dirty jokes in front of children. In rebuttal, the prosecutor called a witness to testify that she had, in fact, heard defendant tell dirty jokes in the presence of children. Although this rebuttal witness's testimony overlapped evidence admitted in the prosecutor's case in chief, this testimony was responsive to evidence presented by the defense. Therefore, the trial court did not abuse its discretion in permitting the testimony of the rebuttal witness on this issue.

V

Defendant next argues that the trial court's refusal to admit testimony from his "expert" witnesses denied him his right to present a defense. We disagree. This Court reviews a trial court's decision pertaining to the admission of expert testimony for abuse of discretion. *Ackerman, supra* at 442-443. "For expert testimony to be admissible, (1) the expert must be qualified, (2) the evidence must provide the fact-finder a better understanding of the evidence or assist in determining a fact in issue, and (3) the evidence must come from a recognized discipline." *People v Matuszak*, 263 Mich App 42, 51; 687 NW2d 342 (2004); MRE 702.

Regarding Dr. Michael Abramsky, defendant claims that Abramsky would have testified that he tested defendant and concluded that defendant did not display abnormalities consistent with profiles of child molesters. However, this Court has held that this type of sex offender profiling is inadmissible because it is not sufficiently reliable and would not assist the jury in understanding the evidence or determining facts at issue. *People v Dobek*, ___ Mich App ___; ___ NW2d ___ (2007) (Docket No. 264366, issued January 30, 2007), slip op at 20-22. Defendant's argument that such expert testimony should have been admitted as evidence of defendant's good character under MRE 404(a)(1) and MRE 405 also fails. *Dobek, supra*, slip op at 23. Therefore, the trial court did not abuse its discretion in excluding Abramsky's testimony.

Regarding Dr. Katherine Okla, the trial court concluded that testimony regarding false or repressed memories or a “tainted interview” inducing these memories would not aid the trier of fact and that the jury could judge the credibility of the witnesses. Further, many of the issues cited by defense counsel were not relevant in this case, there had been no evidence of a “tainted interview” in this case, and the proffered expert testimony would merely confuse the jury. We find no abuse of discretion in the trial court’s ruling.

It appears that the victim provided more details about her sexual interaction with defendant at this trial than she did at the first because she “remembered more things that have happened [sic]” concerning her sexual encounters with defendant, such as defendant exposing his penis to her. However, the victim also claimed that the reason she neglected to mention certain other actions by defendant, in the first trial, was because she didn’t think it would be important. Similarly, the previous victim indicated that her testimony was more detailed in this trial than it was in the first because she remembered “more things.” But she also explained that her testimony was more detailed because she felt more comfortable in the courtroom because she “didn’t know what to expect,” and noted that she was very sick at the time she testified in the first trial.

Given the witnesses’ own testimony about their memories, the expert testimony on the issue of “false memory” would arguably amount to an impermissible “opinion or assessment as to the veracity of a complaining witness in a criminal sexual conduct case.” *People v Graham*, 173 Mich App 473, 478; 434 NW2d 165 (1988). As the trial court noted, expert testimony in this regard concerning the witnesses’ testimony would be improper.

Defendant also argues that the trial court denied him his right to present a defense in not allowing him to present evidence that the victim lived with an uncle believed to be a child molester. We disagree. This Court reviews this unpreserved issue for plain error affecting substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

Defendant’s reliance on *Washington v Texas*, 388 US 14; 87 S Ct 1920; 18 L Ed 2d 1019 (1967), is misplaced. Unlike the issues presented here, *Washington* held that a state may not deny a defendant his right to compulsory process where a witness is able to provide relevant testimony. *Id.* at 23. Defendant’s cursory argument on this issue is insufficient to show any basis for disturbing the trial court’s ruling.

VI

Defendant argues that the cumulative effect of the errors denied him a fair trial. We disagree. “This Court review[s] a cumulative-error argument to determine if the combination of alleged errors denied the defendant a fair trial.” *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). In order for a claim of cumulative error to warrant reversal, the errors must be of consequence. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). In other words, the cumulative effect of the errors must be so prejudicial that it denied defendant a fair trial. *Ackerman, supra* at 454. In some cases, the cumulation of minor errors may amount to error requiring reversal, even if individual errors, alone, would not. *Hill, supra* at 152. Nevertheless, “[o]nly actual errors are aggregated to determine their cumulative effect.” *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999) (citation omitted). Here, defendant has failed to show any actual errors that denied him a fair trial. Therefore, “a

cumulative effect of errors is incapable of being found.” *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

VII

Defendant next argues that the trial court erroneously scored his sentencing guidelines based on inaccurate information and in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. This court reviews de novo whether *Blakely* applies in this case. *People v Bell*, 473 Mich 275, 282; 702 NW2d 128, amended 474 Mich 1201 (2005). However, this Court reviews the number of points scored against a defendant for a particular offense variable for an abuse of discretion. *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.* (citation omitted.)

Our Supreme Court has found that Michigan’s sentencing scheme is unaffected by *Blakely* because Michigan uses an indeterminate sentencing scheme in which the trial court sets the minimum sentence, but can never exceed the statutory maximum sentence. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Similarly, contrary to defendant’s argument, *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), is inapplicable because *Booker* also failed to address an indeterminate sentencing scheme. The recent decision in *Cunningham v California*, ___ US ___; 127 S Ct 856; ___ L Ed 2d ___ (2007), does not change this result. Thus, “[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury’s verdict.” *Drohan, supra* at 164.

Here, defendant’s sentence of 15 years is within the statutory maximum of CSC II (i.e., 15 years). MCL 750.520(c)(2). Thus, the trial court was permitted to consider facts not found by a jury in fashioning defendant’s sentence. In scoring defendant’s guidelines range, the court assessed ten points for OV 4 [serious psychological injury that may require professional treatment, MCL 777.34(2)], and ten points for OV 13 [“pattern of felonious criminal activity involving a combination of 3 or more crimes against a person . . .,” MCL 777.43(c)]. The evidence supported both of these scores.

When scoring an offense variable, “[a] sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial.” *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). Supporting the finding of serious psychological injuries that may require professional treatment, the victim’s mother indicated that the victim experiences nightmares, cannot sleep in her bedroom, and carries a personal alarm. Supporting the finding of a pattern of activity involving three or more crimes against a person was the victim’s testimony that defendant pulled her hand towards his genitals on several occasions and that, in addition to the specific instances of abuse she had mentioned, defendant had molested her after he and his wife moved from the house she used to visit on weekends. Further, defendant was convicted of two counts of CSC II. Therefore, given the evidentiary support in the record, the trial court’s scoring of the offense variables was not erroneous.

Affirmed.

/s/ Janet T. Neff

/s/ Peter D. O'Connell

/s/ Christopher M. Murray