

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID MICHAEL LEHMAN,

Defendant-Appellant.

UNPUBLISHED

March 2, 2010

No. 287844

Kent Circuit Court

LC No. 08-001544-FH

Before: Stephens, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

A jury convicted defendant of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim younger than 13). The trial court sentenced defendant to 2 to 15 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant's conviction stems from an incident in the summer of 2003, when the victim was seven years of age. The victim recalled at trial that he and his two brothers stayed overnight at defendant's residence, where defendant babysat for the boys. The victim recounted that he and his brothers slept in the same bedroom that night; that he awoke thirsty during the night and asked defendant for a glass of water; that defendant produced a glass of water but told the victim to go to defendant's bedroom and get on the bed; and that defendant laid down with the victim, "unzipped [his] pants and . . . started rubbing" the victim's penis beneath his clothing, before instructing the victim to return to his original bedroom. The victim revealed defendant's abuse to his father in 2008.

I. Other Acts Evidence

Defendant initially asserts that the trial court erroneously allowed his former stepsons to testify about past sexual abuse by defendant. We review for an abuse of discretion a trial court's ultimate decision to admit evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). To the extent that an evidentiary ruling "involves a preliminary question of law," we consider this legal question de novo. *Id.*

The prosecutor offered the testimony of defendant's former stepsons under MRE 404(b)(1), for the purpose of showing defendant's intent and lack of accident or mistake in committing the sexual contact of the victim in this case, and pursuant to MCL 768.27a(1), which reads as follows:

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.

The statute “[i]n many cases . . . allows evidence that previously would have been inadmissible” under MRE 404(b), “because it allows what may have been categorized as propensity evidence to be admitted in this limited context.” *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007). However, this Court has cautioned that the prejudice inquiry mandated in MRE 403 still applies and may warrant exclusion of evidence otherwise admissible under MCL 768.27a. *Id.* at 621.

Because the prosecutor urged the admission of defendant’s other acts of sexual misconduct pursuant to both MRE 404(b)(1) and MCL 768.27a, and the trial court found the proffered evidence admissible under both the rule of evidence and the statute, we consider both provisions. The testimony of defendant’s two former stepsons qualifies as admissible pursuant to the plain language of MCL 768.27a. The prosecutor in this case charged defendant with CSC II, a “listed offense” identified in MCL 28.722(e)(10). The two stepsons’ trial testimony reflects that defendant committed CSC II or fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a), with each child by engaging in sexual contact with the children; like CSC II, CSC IV appears as a “listed offense” in MCL 28.722(e)(10). Consequently, the two stepsons’ testimony comes squarely within the category of admissible evidence set forth in MCL 768.27a. *People v Smith*, 282 Mich App 191, 198-200; 772 NW2d 428 (2009).

MRE 404(b)(1)¹ prohibits the admission of evidence of a defendant’s other acts or crimes when introduced solely for the purpose of showing the defendant’s action in conformity with his criminal character. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). But evidence of a defendant’s other acts or crimes qualifies as admissible under the following circumstances: (1) the prosecutor offers the evidence for a proper purpose under MRE

¹ According to MRE 404(b)(1),

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.

404(b)(1), including to prove the defendant's intent or lack of accident or mistake in committing a charged crime; (2) the other acts evidence satisfies the definition of logical relevance within MRE 401; and (3) any unfair prejudice arising from the admission of the other acts evidence does not substantially outweigh its probative value, MRE 403. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003).

In this case, defendant's two former stepsons testified at trial that defendant had fondled their genitalia. The elder stepson described that over the course of about two years when he was between 12 and 14 years of age, he routinely slept overnight at defendant's residence, and that once or twice each month defendant would lay next to the elder stepson, place his hand on the stepson's penis, and move the stepson's hand onto defendant's penis. The younger stepson estimated that for several years, when he was "about five or six to ten" years of age, defendant repeatedly took advantage of his mother's absence from their shared residence on Saturday mornings by entering the younger stepson's bed and fondling his penis. Defendant conceded at trial that he had touched the instant victim's penis, but he insisted that the touching was accidental and inadvertent, and not for the purpose of sexual arousal or gratification. Given the trial defense that defendant accidentally or inadvertently touched the victim, the testimony of defendant's stepsons about his prior, repeated acts of entering their beds and touching their penises had strong probative value toward disproving defendant's asserted lack of intent, a material issue in this case, an element of the CSC II charge in this case,² and an expressly recognized proper purpose under MRE 404(b)(1). See *People v Knox*, 469 Mich 502, 513; 674 NW2d 366 (2004) (observing that "the signs of past physical abuse of the child were relevant to prove that his subsequent fatal injuries were not inflicted accidentally"); *People v Mills*, 450 Mich 61, 69-70; 537 NW2d 909, mod 450 Mich 1212 (1995).

With respect to the required MRE 403 unfair prejudice inquiry, "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Given the substantial probative value inherent in the two stepson's testimony tending to prove material facts in dispute at defendant's trial, we detect no risk of any unfair prejudice that substantially outweighs the significant probative force arising from the stepsons' testimony. *Mills*, 450 Mich at 74-80. Furthermore, at defendant's request the trial court read the jury, both before the stepsons testified and again in the course of the final instructions, limiting instructions describing the appropriate purposes for which it could consider the stepsons' testimony. We conclude that the trial court did not abuse its discretion in admitting the stepsons' testimony under either MCL 768.27a or MRE 404(b).

² In the CSC II statute, MCL 750.520c, the Legislature proscribed "sexual contact," which MCL 750.520a(q) defines as "include[ing] the *intentional touching* of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being *for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner . . .* ." (Emphasis added).

II. Evidentiary Issues

Defendant next challenges the trial court's allowance of two portions of the prosecutor's redirect examination of investigating officer Detective Daniel L. Adams. We review for an abuse of discretion a trial court's decisions whether to admit evidence and its rulings concerning "the order and mode of the presentation of evidence," including the extent to which the court permits redirect examination. *Katt*, 468 Mich at 278; *People v Stevens*, 230 Mich App 502, 507; 584 NW2d 369 (1998).

In the first challenged exchange, the prosecutor read aloud excerpts from a child protective services (CPS) worker's notes of an interview of the victim in January 2008, in which Detective Adams participated. The prosecutor's references to the CPS worker's notes elicited Detective Adams's affirmations that the victim previously had related an account of defendant's abuse that matched the account the victim supplied at trial. The prosecutor's questions about the CPS worker's notes of details reported by the victim plainly contained hearsay, inadmissible absent an applicable hearsay exception. MRE 801, MRE 802.

The trial court did not specify what rule of evidence justified admission of Detective Adams's testimony concerning the victim's 2008 abuse recollections.³ Our review of the record reflects that the trial court apparently admitted Detective Adams's testimony under the rule of completeness in MRE 106.⁴ Defense counsel briefly referenced the CPS worker's notes of the victim's January 2008 interview on cross-examination of Detective Adams; defense counsel initially posed a few questions about how the victim had ended up in his father's custody at the time the victim revealed defendant's abuse, and then asked Detective Adams about his familiarity with some "trademark" activity of abusers in child sexual abuse cases. On redirect, the prosecutor employed the CPS worker's notes of the victim's recollections to elicit from Detective Adams the details of the victim's prior report of the sequence of events involved in defendant's sexual contact with the victim. The prosecutor's references to the CPS worker's notes exceeded the scope of any permissible references dictated by fairness pursuant to MRE 106, primarily because the prosecutor's summary of the victim's out of court abuse description had nothing to do with the limited subjects referenced by defense counsel on cross-examination. *People v Herndon*, 246 Mich App 371, 412 n 85; 633 NW2d 376 (2001). Therefore, the trial court abused its discretion to the extent that it allowed under MRE 106 the prosecutor to place on the record the victim's 2008 account of defendant's abuse.

³ Defense counsel's objection to this portion of the prosecutor's redirect examination of Detective Adams alluded to the inadmissibility of the victim's prior abuse account in 2008 under MRE 803A, given that the 2008 account occurred nearly five years after defendant had inflicted the abuse. Although the trial court did not rely on MRE 803A as a basis for admitting the prosecutor's references to the victim's 2008 account, we note that the victim's 2008 statements did not qualify as admissible under MRE 803A.

⁴ The prosecutor did not mention MRE 106 when arguing for the admissibility of Detective Adams's testimony, but his argument seemingly invoked the fairness principles contained in MRE 106.

We nonetheless find it more probable than not that the prosecutor's improper injection of the victim's 2008 abuse description did not affect the outcome of defendant's trial, given (1) the cumulative nature of the improperly referenced information and the brevity of the improper references; (2) the victim's trial testimony describing defendant's sexual contact, and the victim's father's consistent testimony concerning the circumstances leading to the victim's disclosure of defendant's abuse; and (3) the properly admitted testimony of defendant's former stepsons, which tended to undermine defendant's lack of intent or accidental touching defense. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

With respect to defendant's appellate claim that the prosecutor improperly elicited child sexual abuse "trademark" testimony from Detective Adams, we detect no error because (1) defense counsel himself injected, or opened the door to, the topic of child sexual abuse trademarks by broaching this subject during his cross-examination of Detective Adams, *People v Riley*, 465 Mich 442, 448; 636 NW2d 514 (2001) (explaining that defense counsel may not harbor error as an appellate parachute); *People v Dobek*, 274 Mich App 58, 79; 732 NW2d 546 (2007) (observing that otherwise inappropriate conduct by a prosecutor "might not require reversal if they address issues raised by defense counsel"); (2) defendant offers no legal authority in support of his claim that the trademark testimony was inadmissible, *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007) (noting that an appellant's failure to offer legal authority supporting his position amounts to abandonment of an issue); and (3) generally, an individual with expertise and experience, like Detective Adams, can offer testimony regarding trademarks of child sexual abusers. *Dobek*, 274 Mich App at 79.

III. Prosecutorial Misconduct

Defendant additionally raises a claim of prosecutorial misconduct concerning the prosecutor's cross-examinations of defense character witnesses, specifically the prosecutor's questions about the character witnesses' knowledge of some purported past financial improprieties engaged in by defendant. The record reflects that the prosecutor asked three of defendant's four character witnesses about knowledge of defendant's financial irregularities, but that defendant only objected at trial to two of the prosecutor's inquiries, thus only partially preserving this claim for appellate review.

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).]

This Court reviews alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). But appellate review of improper remarks by the prosecutor is generally precluded absent an objection by defense counsel because a failure to object deprives

the trial court of an opportunity to cure the alleged error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court reviews unpreserved claims of prosecutorial misconduct only for plain error that affected the defendant's substantial rights. *Schutte*, 240 Mich App at 720.

In conformity with MRE 404(a)(1), defendant called four witnesses to opine regarding aspects of defendant's good character and good reputation. The prosecutor then properly cross-examined three of the witnesses by inquiring of three character witnesses "into reports of relevant specific instances of conduct." MRE 405; *People v Whitfield*, 425 Mich 116, 130-131; 388 NW2d 206 (1986). "The valid purpose of such impeachment is to test the credibility of the character witness by challenging the witness' good faith, information, and accuracy." *Id.* at 131-132.

Although the prosecutor properly approached the impeachment of defense character witnesses by asking about specific conduct of defendant, the prosecutor improperly phrased his questions with respect to alleged financial irregularities in terminology ("Are you aware ___?") "that assumes that defendant was, in fact," involved in financial improprieties when the only purpose of the character witnesses' cross-examination was "to explore the reliability of the witness[es]' claim[s] to know defendant's reputation" *People v Fields*, 93 Mich App 702, 709; 287 NW2d 325 (1979). However, "absent a showing of actual prejudice to the defendant's cause, such a defect in the form of the question put forth to a character witness does not require automatic reversal." *Id.* In light of (1) the isolated nature of the prosecutor's incorrectly fashioned questions to the character witnesses; (2) the fact that the prosecutor did not elicit from any of the witnesses specific information relating to defendant's purported past financial improprieties; (3) the trial court's appraisal of the jury with respect to the parties' stipulation that defense counsel had a recent "telephone contact with Thomas Vereecke, CPA," in which Vereecke expressed that he "was not aware of any 'financial irregularities' at St. Anthony Catholic School during the defendant's service as principal of the school"; (4) the trial court's instructions to the jury that the lawyers' questions did not constitute evidence; and (5) and the properly introduced evidence of defendant's guilt, we reject that the improperly phrased questions of the prosecutor adversely impacted defendant's right to receive a fair and impartial trial. *Watson*, 245 Mich App at 586.⁵

⁵ The same harmless error analysis applies to the extent defendant also disputes the propriety of one question of the prosecutor to one of defendant's character witnesses: "We've talked to the attorneys for St. Anthony's, as well as some people that worked there. Are you aware that he left St. Anthony's under this cloud of financial irregularities?" This inquiry of the prosecutor at least arguably "violated the well-known rule that the prosecutor may not ask the jury to convict the defendant on the basis of the prosecutor's personal knowledge and the prestige of his office rather than on the evidence." *People v Fuqua*, 146 Mich App 250, 254; 379 NW2d 442 (1985), overruled on other grounds in *People v Gray*, 466 Mich 44, 46; 642 NW2d 660 (2002). However, given the unpreserved nature of defendant's appellate contention and the factors detailed above, the prosecutorial impropriety did not affect defendant's substantial rights. *Schutte*, 240 Mich App at 720.

IV. Cumulative Error

Defendant also maintains that the erroneous evidentiary rulings and prosecutorial misconduct combined to deprive him of a fair trial. “The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not.” *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002). But “[r]eversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial.” *Id.* Even considering together the errors that occurred in the course of defendant’s trial, we conclude that they did not qualify as so seriously prejudicial that they deprived defendant of a fair trial, in light of (1) the victim’s trial testimony describing defendant’s sexual contact, and the victim’s father’s consistent testimony concerning the circumstances leading to the victim’s disclosure of defendant’s abuse; (2) the properly admitted testimony of defendant’s former stepsons describing defendant’s prior abuse; (3) the cumulative and brief nature of the improperly referenced January 2008 statement by the victim describing defendant’s abuse; and (4) the trial court’s proper instructions to the jury that the lawyers’ questions did not constitute evidence, which mitigated the impact of the minor and brief instances of prosecutorial misconduct.

V. Sentence Variable Scoring

Defendant lastly raises several challenges to the trial court’s scoring of the applicable offense variables (OVs), specifically OV 4, MCL 777.34, OV 8, MCL 777.38, and OV 10, MCL 777.40. When scoring the guidelines, “[a] sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision “for which there is any evidence in support will be upheld.” *Id.* (internal quotation omitted). We review scoring decisions “to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The interpretation and application of the sentencing guidelines present questions of law subject to de novo appellate review. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

In OV 4, the Legislature authorized the scoring of 10 points when the defendant has occasioned “[s]erious psychological injury requiring professional treatment” of a victim. MCL 777.34(1)(a). As further guidance, MCL 777.34(2) directs that a court should “[s]core 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.” In this case, the record contains a presentence letter from the victim expressing that defendant’s abuse “bothers [him] everyday” and continues to make the victim angry. At the sentencing hearing, the victim’s mother appeared with the victim’s current counselor or therapist and informed the trial court that the victim and his brothers still experienced “emotional trauma.” Because the record establishes that the victim suffered serious psychological injury and currently received professional treatment, the trial court correctly assigned 10 points under OV 4.

With respect to OV 8, MCL 777.38(1)(a) instructs that a court should score 15 points when “[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” The victim testified at trial that immediately before the sexual assault defendant had directed him away from the bedroom the victim was sharing with his brothers, and toward defendant’s bedroom and into

defendant's bed, where the sexual contact took place. Because the victim's testimony amply substantiated that defendant led the victim into defendant's bedroom, a location where discovery of the sexual contact became less likely, the trial court did not abuse its discretion by scoring 15 points for asportation to a place of greater danger under OV 8. *People v Steele*, 283 Mich App 472, 490-491; 769 NW2d 256 (2009); *People v Cox*, 268 Mich App 440, 454-455; 709 NW2d 152 (2005); *People v Spanke*, 254 Mich App 642, 647-648; 658 NW2d 504 (2003).

Regarding OV 10, MCL 777.40(1)(a) authorizes a 15-point score if the defendant engaged in "predatory conduct." "Predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Our Supreme Court has clarified that in ascertaining whether OV 10 warrants a 15-point score, courts should consider the following questions: "(1) Did the offender engage in conduct before the commission of the offense? (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation? (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct." *Cannon*, 481 Mich at 161-162.

Here, the presentence investigation report (PSIR) and the trial testimony of the victim and defendant showed that defendant had developed a relationship between the victim, his brothers, and their mother and father during the one or two years that defendant resided next door to the victim and his family, and that this relationship led to the victim's mother's requests that defendant babysit the victim and his brothers overnight several times around the summer of 2003. This evidence suggests an affirmative answer to the first OV 10 predatory conduct inquiry instructed by the Supreme Court in *Cannon*, 481 Mich at 162. The trial record additionally substantiated that in developing a relationship with the five-year-old victim, defendant directed conduct toward a specific victim "who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation[.]" *Id.* In light of the evidence that defendant, while exercising authority and control over the young boys by hosting them at his residence, directed the very young victim into his bedroom where the sexual contact took place, a reasonable inference of record also exists that victimization was defendant's primary purpose for engaging in his preoffense conduct. Defendant's intent to victimize the instant victim becomes even clearer on consideration of his similar predatory conduct in victimizing his former stepsons. Because at least some evidence supports each OV 10 area of inquiry delineated by the Supreme Court in *Cannon*, 481 Mich at 161-162, we conclude that the trial court did not abuse its discretion by scoring 15 points for OV 10.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly