

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 16, 2012

v

WENDOR MONCADO, SR.,

Defendant-Appellant.

No. 305368
Saginaw Circuit Court
LC No. 10-034104-FC

Before: TALBOT, P.J., AND WILDER AND RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under the age of 13), second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under the age of 13), and third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim at least 13 and under 16 years of age). Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of 25 to 40 years for each count of first-degree criminal sexual conduct, 5 to 30 years for second-degree criminal sexual conduct, and 5 to 30 years for third-degree criminal sexual conduct. We affirm.

I. FACTUAL BACKGROUND

This case arises out of the repeated criminal sexual conduct between the victim and defendant. Defendant was in a dating relationship with the victim's aunt. The victim testified that between the ages of 11 and 14, defendant touched her in a sexual manner over 20 times. One incident occurred when the victim was 11 years old and was at her grandmother's house. Defendant came over to fix the cable television and went into the basement. When the victim went into the basement to give defendant a flashlight, defendant told her he wanted to see if his penis would fit inside of her vagina. Defendant then placed his penis inside of the victim's vagina. The victim did not tell anyone what happened because she was embarrassed and scared. Another incident occurred at the grandmother's house where defendant touched the victim's breast with his hand.

On the victim's twelfth birthday, defendant drove her to the store to buy her a present. When the car was parked, defendant began to touch the victim and inserted his fingers into her vagina. Another incident occurred when the victim was 13 years old and was sleeping over at her cousin's house, where defendant also resided. The victim was in the basement watching television and defendant came down to the basement and brought her upstairs to a bedroom,

purportedly because he did not want her sleeping on the floor. Once in the bedroom, defendant placed his finger and penis inside of the victim's vagina.

Three other females testified that defendant touched them sexually when they were under the age of 18. One of the witnesses testified that she was 17 years old when defendant came to her grandparent's house. The witness was in the living room when defendant approached her from behind with a butcher knife, dragged her to the porch, and threatened to stab her if she did not have sex with him. Defendant had sex with the witness while holding the knife against her body. Defendant was convicted of second-degree criminal sexual conduct for this behavior.

In the instant matter, the victim eventually reported defendant's behavior to the police. Defendant was convicted of two counts of first-degree criminal sexual conduct, second-degree criminal sexual conduct, and third-degree criminal sexual conduct. Defendant now appeals.

II. OTHER CRIMINAL SEXUAL CONDUCT EVIDENCE

A. Standard of Review

We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

B. Analysis

Defendant first argues that the trial court abused its discretion when admitting evidence of his second-degree criminal sexual conduct conviction from 1992. The evidence was admitted pursuant to MCL 768.27a, which states that "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."¹ Relevant evidence, in turn, "is evidence 'having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008), quoting MRE 401.

The trial court did not abuse its discretion in admitting this evidence. The evidence of defendant's past conviction is relevant because it demonstrated his propensity to commit criminal sexual conduct acts, which makes it more likely that he committed the criminal sexual conduct acts in this case. As the Michigan Supreme Court recently recognized in *People v Watkins*, __Mich __; __NW2d__ (Docket Nos. 142031, 142751, issued June 8, 2012) (slip op at 17), MCL 768.27a "permits the use of evidence to show a defendant's character and propensity to commit the charged crime, precisely that which MRE 404(b) precludes." The Court explained that while the rules of evidence have at times excluded character evidence, "this Court has long

¹ Defendant does not challenge that his 1992 conviction was a listed offense against a minor.

recognized that a defendant's character and propensity to commit the charged offense is highly relevant because "an individual with a substantial criminal history is more likely to have committed a crime than is an individual free of past criminal activity." *Watkins*, __ Mich at __ (slip op at 17), quoting *People v Allen*, 429 Mich 558, 566; 420 NW2d 499 (1988). Thus, evidence of defendant's past conviction was relevant because it renders it more likely that he committed the crime against the victim in this case.

The evidence was also relevant because it makes it more likely that the victim in the instant case was testifying truthfully. As this Court recognized in *People v Mann*, 288 Mich App 114, 118; 792 NW2d 53 (2010), evidence of the defendant's prior criminal sexual conduct "was relevant because it tended to show that it was more probable than not that the two minors in this case were telling the truth when they indicated that [the defendant] had committed CSC offenses against them." This Court further explained that evidence of past criminal sexual conduct was relevant because "[w]hether the minors in this case were telling the truth had significant probative value because it underlies whether [the defendant] should be convicted of the crimes for which he was charged." *Id.* Hence, evidence of defendant's second-degree criminal sexual conduct conviction made it more likely that the victim in this case was telling the truth, which is highly probative of whether defendant was guilty of the charged crimes.

Defendant, however, insists that evidence of his past conviction should have been excluded because it was dissimilar to the charged offenses, particularly in terms of the age of the victims and the level of force used. Defendant's argument is based on the flawed premise that the trial court was required to find that defendant's past conviction was factually similar to the charged crimes. MCL 768.27a does not reference any type of similarity requirement. Moreover, this Court has specifically held that while the similarity of crimes is relevant for MRE 404(b) purposes, "similarity is simply an inapposite consideration under MCL 768.27a." *People v Watkins*, 277 Mich App 358, 365; 745 NW2d 149 (2007).

Regarding the prejudicial effect of such evidence, while all relevant evidence is inherently prejudicial, it is only unfairly prejudicial evidence that should be excluded under MRE 403. *People v Wilson*, 252 Mich App 390, 398; 652 NW2d 488 (2002). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010), quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The evidence of defendant's past conviction had significant probative value. It illuminated whether defendant had a propensity to commit such crimes and related to whether the victim was telling the truth. Moreover, defendant's past conviction was not the only evidence of a pattern of sexually assaulting minors, as two other females testified that defendant sexually touched them when they were minors. Therefore, there is no indication that the jury placed undue or preemptive weight on the evidence of defendant's past conviction and the trial court properly admitted this evidence.

III. MOTION FOR A MISTRIAL

A. Standard of Review

“We review for an abuse of discretion a trial court’s decision on a motion for a mistrial.” *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). As noted above, an abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

B. Analysis

During its rebuttal argument, the prosecution stated that two thirds of victims do not report crimes. Defendant objected and after the jury was excused, defendant requested a mistrial on the basis that no evidence was introduced at trial regarding these statistics. The trial court denied defendant’s motion.

In regard to whether the prosecutor’s statement was proper, “[a] prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence.” *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). As defendant recognizes, there was no evidence introduced at trial regarding the frequency with which victims report crimes to the police. However, “[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.” *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003) (emphasis added), quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). After defendant objected to the prosecutor’s statements, the trial court sustained defendant’s objection. The court also instructed the jury that counsel’s statements were not evidence. “Jurors are presumed to follow the instructions of the court[.]” *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011), and defendant offers no evidence contrary to this presumption that the jury ignored the instructions of the court. Moreover, considering that the prosecutor’s statement was relatively fleeting and immediately objected to, defendant has not established that his right to a fair trial was impaired. See *Alter*, 255 Mich App at 205. Thus, the trial court did not abuse its discretion in denying defendant’s motion for a mistrial.

IV. PROSECUTORIAL MISCONDUCT

A. Preservation & Standard of Review

Lastly, defendant identifies three instances of alleged prosecutorial misconduct during rebuttal argument. “Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error.” *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Defendant must establish that there was plain error that affected his substantial rights. *Id.* “Where issues of prosecutorial misconduct are preserved, we review them 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).

B. Analysis

A prosecutor's remarks "must be considered in light of defense counsel's comments" because "[a]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Unger*, 278 Mich App at 238 (internal quotations and citations omitted). Furthermore, "[a]bsent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant first challenges the prosecutor's statement that to return a verdict of not guilty, the jury had to believe the victim was lying. Yet, in defendant's closing argument, he stated that in order to find defendant not guilty, the jury would have to find that the victim was lying. Thus, the prosecution was only reiterating defendant's exact statement. Since the prosecution was permitted to respond to defendant's statements and defendant failed to object, there was no plain error requiring reversal.

Defendant next challenges the prosecutor's statement that a female vagina stretches in instances such as child birth and, thus, the lack of physical injury was not unreasonable. In defendant's closing argument, however, he highlighted that there was no sign of injury on the victim, including bleeding or fluids. The prosecution's comments, therefore, can be construed as a response to defendant's mention of the lack of physical injury. Moreover, defendant failed to object to this statement and has failed to establish any prejudice that a curative instruction would not have cured.

Lastly, defendant challenges the prosecution's statement regarding the frequency with which victims report crimes. Yet, as discussed more fully above, the trial court sustained defendant's objection and subsequently instructed the jury that the prosecution's statements were not evidence. Considering the trial court's response, "[d]efendant has failed to establish that the trial court's instructions were insufficient to cure any alleged unfair prejudice." *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008).

V. CONCLUSION

Evidence of defendant's 1992 second-degree criminal sexual conduct conviction was properly admitted pursuant to MCL 768.27a. Additionally, the trial court did not abuse its discretion in denying defendant's motion for a mistrial based on the prosecution's statements regarding the frequency with which victims report crimes, as this statement did not deny him a fair and impartial trial. Lastly, the prosecution's other statements during rebuttal argument were merely in response to defendant's argument and did not deny him a fair trial. We affirm.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Riordan