STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 17, 2007
v	No. 269569 Wayne Circuit Court
FELTON LEE BURKS, Defendant-Appellant.	LC No. 05-012184-01

Before: Meter, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e) (actor armed with a weapon) and (f) (actor uses force or coercion and causes personal injury), assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] Defendant was sentenced to concurrent prison terms of 135 to 240 months for each CSC conviction, two to ten years for the assault conviction, and a consecutive two-year term for the felony-firearm conviction. We affirm.

I

Defendant was convicted of sexually assaulting his long-term girlfriend's 18-year-old daughter. The victim testified that before the charged incident occurred, defendant inappropriately touched her when she was 15 years old. The victim was asleep and awoke to find that defendant had removed her panties and was touching her vaginal area. The victim started crying, and defendant apologized and asked her not to tell anyone. The victim later reported the incident to a school social worker during her senior year of high school. The victim's mother talked to a protective services worker, said that nothing happened, and that she "didn't want [the victim] anymore." The victim did not pursue the matter, and subsequently recanted her claim. The victim avoided defendant, and no other incident occurred until October 2005.

[1] Defendant was acquitted of felon in possession of a firearm, MCL 750.224f, and two additional charges of first-degree CSC.

On October 14, 2005, the victim visited from college. On October 15, 2007, at about 2:45 a.m., the victim's mother was at work, and the victim was asleep on a loveseat in the basement. Defendant, who had been drinking alcohol, sat on the loveseat, told the victim that he loved her, and eventually indicated that he was going to have sex with her. A chase and struggle ensued, defendant repeatedly threatened to kill the victim, and the victim cried and pleaded with defendant not to assault her. Eventually, the victim fled up the stairs, but defendant caught her, put her arms behind her back, and pushed her down the stairs. Upon hitting the basement floor, the victim lost consciousness. When she awoke, defendant was on top of her, covering her mouth, repeatedly stating that he loved her, and threatening to rape her, kill her, and dump her body. The victim removed her underwear as defendant directed, and defendant digitally penetrated the victim's vagina and performed oral sex on her. Defendant stopped when he thought he heard someone, and directed the victim to go in an upstairs bedroom. Once upstairs, defendant retrieved a gun from a dresser, and indicated that he was not going to jail. Defendant thereafter put down the gun, performed oral sex on the victim, and put his penis in her vagina. Defendant ejaculated into a towel, pulled up his pants, pointed the gun at the victim, and said, "say goodnight." The victim pleaded with defendant not to kill her, and defendant began indicating that he was going to commit suicide. Defendant directed the victim to return to the basement and dress. Defendant also returned to the basement, drank alcohol, threatened to kill the victim if she moved, and discussed committing suicide before falling asleep.

At about 8:00 a.m., the victim went upstairs after hearing her mother. Shortly thereafter, when the victim and her mother were en route to the mall, the victim disclosed the incidents to her mother. The victim's mother initially supported the victim and attempted to report the incident to the police, but subsequently sided with defendant. The victim's uncle took the victim and her mother to the hospital. The examining physician testified that the victim was "very tearful, anxious, distraught," and had "fresh" bruising and abrasions on her right shoulder and back. Other witnesses observed similar physical injuries on the victim, and that the victim was visibly shaken, nervous, and scared.

The defense denied any wrongdoing, and presented an alibi defense. Crystal Ivanic testified that she and defendant had an affair for a year, and on October 15, 2005, defendant called her at 12:40 a.m., arrived at her home at 1:00 a.m., and left between 4:00 and 5:00 a.m.

II

Defendant first argues that he is entitled to a new trial because a prosecution witness twice gave inadmissible opinion evidence. We disagree. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

At trial, Treva Gordon testified that she had been a patient care associate at the Sinai Grace Emergency Department for five years. She primarily works "in the trauma room, the emergency/acute care," and her job involves assessing patients. She often observes rape victims and their behavior, and is routinely present when rape kits are administered. Gordon, who was working when the victim was brought into the hospital, knew the victim personally, was familiar with her normal demeanor, and was present when her rape kit was done. Gordon testified that when she observed the victim in the emergency room on the day of the incident, she appeared

"nervous, scared," was shaking, and was not relaxed as usual. Gordon further testified that the victim's behavior was consistent with the behavior of other rape victims she had observed, and was consistent with her allegation of rape.

Defendant contends that the trial court was required to qualify Gordon as an expert witness under MRE 702 before she could offer such expert testimony. However, we agree with plaintiff's argument that the proffered testimony was admissible under MRE 701 as lay witness opinion testimony. MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

"Recent panels have liberally applied MRE 701 in order to help develop a clearer understanding of facts for the trier of facts." *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), mod on other grounds 433 Mich 862 (1989). Thus, a lay witness may offer an opinion on matters that are related to her observations and findings and are not "'overly dependant upon scientific, technical, or other specialized knowledge.'" *Id.* (citation omitted); see also *People v McLaughlin*, 258 Mich App 635, 657-659; 672 NW2d 860 (2003). Gordon's opinion regarding the victim's demeanor was rationally based on her own interaction with and perception of the victim, and was not overly dependent on technical or specialized knowledge. Gordon's testimony concerned the victim's physical state and demeanor, and how those were consistent with the history given by the victim. Her opinions "do not involve highly specialized knowledge, and are largely based on common sense." *Id.* at 658 (citation omitted). Consequently, the trial court did not abuse its discretion in allowing the testimony.

Defendant further claims that the trial court abused its discretion in admitting the opinion testimony of Gordon that the victim had a reputation for truthfulness. It is improper for a witness to comment on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 432 (1985). However, testimony concerning the credibility of a witness is permissible under MRE 608(a), "after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." MRE 608(a)(2). "Where a defense counsel attacks a witness' character for truthfulness in an opening statement, the prosecution may present evidence that supports the witness' character for truthfulness on direct examination." *People v Lukity*, 460 Mich 484, 489; 596 NW2d 607 (1999).

Defendant's defense was that the incident did not occur, and that the victim was lying. During his opening statement, defense counsel questioned the credibility of the evidence and the victim, and stated that defendant had been "falsely accused," the incident "simply did not happen," and that the allegations were "simply" false. These remarks were clear attacks on the victim's character for truthfulness. Therefore, the trial court did not abuse its discretion in admitting Gordon's testimony regarding the victim's character for truthfulness.

III

Defendant also claims that he is entitled to a new trial because the trial court erred in admitting evidence of the uncharged sexual incident against the victim, contrary to MRE 404(b). We disagree.

A. Background

Before trial, the prosecution filed notice and moved to admit evidence of defendant's other crime or wrong of touching the victim's vagina while she was asleep, under MRE 404(b). The prosecution sought to admit the evidence as proof of a common system, scheme, or plan for assaulting the victim. The prosecutor theorized that on both occasions, defendant approached the victim while she was sleeping and told her not to tell. Defendant filed a responsive brief, arguing that the facts concerning the other act were "vague." The defense indicated that it "may not oppose the admission of prior bad act evidence," and requested that the court require the prosecution to provide a more definite statement and an offer or proof regarding the prior allegation. The record does not indicate that a ruling was made. On the second day of trial, evidence of the prior allegation was presented during the victim's testimony, without objection. On the sixth day of trial, defense counsel made a motion to strike "all of the testimony . . . regarding specific prior acts," or for a curative instruction conforming to the actual language of MRE 404(b), regarding prohibited uses under the rule. In its final instructions to the jury, the trial court gave the requested cautionary instruction concerning the proper use of the other acts evidence. Defense counsel indicated that he was satisfied with the instructions.

B. Analysis

Because defendant failed to timely object to the evidence, we review this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

MRE 404(b) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). But other acts evidence is admissible under MRE 404(b) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In application, 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. *Id.* at 75.

In this case, we conclude that any error did not affect defendant's substantial rights. In *Sabin*, *supra* at 63, our Supreme Court explained, "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." See also *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). The *Sabin* Court noted that "[g]eneral similarity between the charged and uncharged acts does

not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Sabin, supra* at 64. "For other acts evidence to be admissible there must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan." *Hine, supra* at 251; see also *Sabin, supra* at 64-65. Here, the evidence of the uncharged act does not support an inference that the defendant employed a common plan in committing the charged offenses. See *Hine, supra* at 253, citing *Sabin, supra* at 65-66.

But even if the testimony constitutes plain error, defendant has not demonstrated that his substantial rights were affected. *Carines, supra* at 763-764. It is highly unlikely that the evidence of the uncharged act caused the jury to convict an otherwise innocent person. *Id.* Although the victim testified that defendant touched her vagina when she was 15 years old, she also testified that she did not report the matter until more than a year later, and thereafter recanted the allegation for various reasons. When moving to strike, defense counsel noted that he "wanted some of the evidence to come in because it went to the credibility of the complaining witness in this matter[.]" Further, the victim provided detailed testimony regarding the charged acts, and witnesses testified concerning her physical injuries and demeanor. In addition, when instructing the jury concerning the proper use of the other acts evidence, the trial court cautioned the jurors that they "must not convict the defendant here because [they] think he is guilty of other bad acts." "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Under these circumstances, defendant is not entitled to appellate relief.

IV

Defendant further argues that he is entitled to a new trial because the prosecutor engaged in misconduct. We disagree. Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

We reject defendant's claim that the prosecutor improperly introduced the opinion evidence discussed in part II, *supra*. A finding of prosecutorial misconduct cannot be based on a prosecutor's good-faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Here, defendant has made no showing that the prosecutor acted in bad faith. Indeed, defendant has not demonstrated that the evidence was inadmissible. Consequently, this claim does not warrant reversal.

We also reject defendant's claim that the prosecutor denied him due process by failing to test the bed sheets seized from his residence to determine if "vaginal secretions" from the victim were present. Trial testimony indicated that extensive testing was not performed on the bed sheets because there was a backlog and not enough time to complete testing before trial. In the absence of "a showing of suppression of evidence, intentional misconduct, or bad faith," due process does not require that the prosecution seek and find exculpatory evidence or test evidence for a defendant's benefit. *People v Coy (After Remand)*, 258 Mich App 1, 21; 669 NW2d 831 (2003) (citation omitted). Similarly, there is no requirement that the prosecution exhaust all scientific means at its disposal, *People v Allen*, 351 Mich 535, 548-549; 88 NW2d 433 (1958), nor is the prosecution required to negate every theory consistent with a defendant's innocence,

People v Nowack, 462 Mich 392, 400; 614 NW2d 78 (2000). For these reasons, we reject this claim of error.

Finally, we reject defendant's assertion that the cumulative effect of several errors deprived him of a fair trial. Because no cognizable errors warranting relief have been identified, reversal under the cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Donald S. Owens