

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OBLEE STEMBRIDGE,

Defendant-Appellant.

UNPUBLISHED
February 10, 2005

No. 248548
Oakland Circuit Court
LC No. 02-185135-FC

Before: Schuette, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim was under thirteen years of age). He was sentenced to fifteen to fifty years in prison. Defendant appeals as of right. We affirm.

I. FACTS

This appeal arises out of defendant’s 2003 conviction for molesting Kevin, his then 8-year-old step-son in May of 1996. On appeal, defendant contests the admission of evidence regarding defendant’s alleged molestation of his other step-son, Keith, in 1996. The alleged molestation of Keith took place at defendant’s home while Katrina, Keith’s mother and defendant’s wife, momentarily stepped out of the house because of an altercation between defendant and her. During the altercation, defendant threatened to hurt the children, in order to force Katrina from a locked room where she was hiding from defendant. In Katrina’s absence, defendant became hostile toward the children, especially Keith. Defendant allegedly saw Keith sucking his thumb and remarked, “I’ll give you something to suck on.” Defendant allegedly ordered Keith into the bedroom to perform oral sex on him. After the alleged event, Keith neglected to report the alleged molestation to Katrina or authorities out of fear for his and Katrina’s safety. Keith allegedly disclosed the event to his now deceased grandmother. Approximately five years later, Keith, at the age of thirteen, sexually assaulted two female cousins, ages eight and nine years old. Keith subsequently disclosed the alleged molestation by the defendant to Donald Crumbsy, a youth specialist at Star Commonwealth Detention Center, which by law, Crumbsy was required to report.

During trial, the prosecution introduced evidence of the alleged molestation of Keith by way of testimony of Crumbsy. Testimony was also given by Katherine Connell, director of Carehouse in Oakland County, regarding the propensity of abused children to later become

abusers themselves. Over no objection to the testimony by defense counsel, the trial court allowed the testimony to be admitted into evidence. The gist of defendant's argument is that such evidence was improper character evidence and should have been excluded.

II. ADMISSIBILITY OF EVIDENCE

Defendant's first issue on appeal is whether the trial court erred in admitting testimony regarding defendant's alleged prior bad acts. Defendant argues that the trial court erred in admitting testimony about defendant's abuse of his wife, the victim's mother. We disagree.

A. Standard of Review

Defendant did not object to the admission of the bad acts evidence at trial, and thus, the issue is not preserved. Unpreserved evidentiary issues are reviewed for plain error. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is appropriate only if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceedings. *Knox, supra* at 508, citing *Carines, supra* at 763.

B. Analysis

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, 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 this case.

Use of bad acts as evidence is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's past conduct. *People v Werner*, 254 Mich App 528, 539; 659 NW2d 688 (2002). To be admissible under MRE 404(b), bad acts evidence generally must satisfy four requirements: (1) the prosecutor must offer the prior bad acts evidence for something other than character or propensity; (2) the evidence must be relevant, MRE 402; (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice, MRE 403; and (4) the trial court, upon request, may provide a limiting instruction, MRE 105. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). The prosecution bears the initial burden of establishing that the evidence is relevant within an exception to its general exclusion. MRE 404(b)(1); *Knox, supra* at 509.

We hold that the trial court did not err in admitting the testimony regarding defendant's abuse of the victim's mother. First, the prosecutor offered the evidence for a proper purpose. A proper purpose is a non-character purpose. *People v Ortiz*, 249 Mich App 297, 305; 642 NW2d 417 (2001), citing *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). The list of proper purposes enumerated in MRE 404(b) is not exclusive. *Ortiz, supra* at 305. The evidence was not offered simply to establish defendant's bad character or his propensity to commit the crime. It was offered to explain the victim's delay in disclosing the sexual assault and to provide the content of the disputed events.

Second, the evidence is relevant to a material fact at issue. "Relevant evidence" means 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." MRE 401. If the proposed evidence is relevant only to the defendant's character or propensity to commit the crime, the evidence must be excluded. *Knox, supra* at 510.

The evidence is relevant to the victim's credibility because it explains his delayed disclosure of the sexual assault. The victim's mother testified that her children did not like defendant "because they used to see him beat on me all the time." Initially, the eight year-old victim did not tell anyone about the sexual assault because he was worried about what defendant would do to his mother. The victim did not believe that the police would help him because the police had never helped his mother when they were called regarding defendant's abuse. Expert testimony was presented that children frequently do not disclose sexual abuse when they have witnessed domestic violence, especially if the perpetrator is violent and lives in the home. Thus, the testimony regarding defendant's abuse of the victim's mother tends to make the victim's testimony more credible as it explains his delayed disclosure of defendant's sexual abuse.

Similarly, the evidence is relevant to provide the full context of the sexual assault. A party should "be able to give the jury an intelligible presentation of the full context in which the events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Defendant's violence toward the victim's mother provides the context of the progression of events that culminated in defendant's sexual assault of the victim. On the day in question, defendant attempted to fight with the victim's mother and chased her around the kitchen. She ran into a room and locked herself in. Defendant grabbed the victim by the collar and, holding a metal pipe in his hand, told the victim's mother "he was going to bust my son in the head with the pipe if I didn't come to him." She came out of the room and defendant released the victim. Defendant locked the door and told the victim's mother that if she tried to leave the apartment, he would cut the children's throats. Later that evening, after the victim's mother left the apartment, defendant sexually assaulted the victim. In this respect, the evidence is also relevant to defendant's potential motive for the sexual assault, i.e., defendant was carrying out his previous threat that he would harm the victim's children if she left the apartment. Establishing motive is one of the purposes for which bad acts evidence is expressly admissible. MRE 404(b)(1).

Third, the probative value of the bad acts evidence was not substantially outweighed by unfair prejudice. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. In the context of bad acts, that danger is prevalent." *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998).

However, if the prior bad act is not the same as the crime charged, the danger of unfair prejudice is greatly lessened. *Ortiz, supra* at 307.

The weighing of probative value and unfair prejudice is “best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony.” *People v Magyar*, 250 Mich App 408, 415-416; 648 NW2d 215 (2002), quoting *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995). The trial court was able to make a contemporaneous assessment of the presentation, credibility and effect of the testimony and, in denying defendant’s motion for a new trial, found that the evidence was not prejudicial.

It is unlikely that the testimony regarding defendant’s abuse of the victim’s mother was given undue or preemptive weight by the jury. Defendant’s alleged abuse of the victim’s mother differs from the criminal sexual conduct offense with which defendant was charged and convicted. This “greatly lessened the danger that the jury would conclude that ‘if he did it before, he probably did it again.’” *Ortiz, supra* at 307. Although the abuse of the victim’s mother and the sexual assault of the eight year-old victim both involved assaultive behavior, the underlying crimes were sufficiently different such that the jury was unlikely to give undue weight to the testimony. The probative value of the evidence was not substantially outweighed by unfair prejudice.

III. VICTIM’S INCARCERATION

A. Standard of Review

Defendant did not raise the evidentiary issue at trial, thus he has failed to properly preserve this issue. This court reviews an unpreserved constitutional issue for plain error affecting a defendant’s substantial rights. *Wilson, supra* at 359-360.

B. Analysis

Defendant’s second issue on appeal is whether the trial court erred in admitting evidence regarding the reason for the victim’s present incarceration at a juvenile detention facility. Defendant argues that the admission of the evidence of the victim’s incarceration for sexual assault was erroneous because of the implication that the victim committed the offenses as a result of being sexually assaulted by defendant. However, not only did defendant fail to object to this evidence at trial, thereby failing to preserve this issue for appeal, but defendant also raised the issue during his opening statement, cross-examination of the victim and closing argument. In denying defendant’s motion for a new trial, the trial court stated, “it is clear that this evidence was elicited by defense counsel as trial strategy to discredit the victim.” Defense counsel elicited information regarding the facts of the victim’s incarceration and argued that the victim fabricated the incident after he was sent to the juvenile detention facility for sexually assaulting his cousins.

A party waives review of the admission of evidence which he introduced, or which was made relevant by his own placement of the matter in issue. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). “Thus, any testimony elicited by the prosecutor regarding this issue was relevant to the issues raised by defendant. A defendant will not be heard to introduce and use evidence to sustain his theory at trial and then argue on appeal that the evidence was prejudicial or denied him a fair trial.” *Id.*, citing *People v Green*, 228 Mich App 684, 691; 580

NW2d 444 (1998). Defendant waived this issue on appeal, and therefore, any error is extinguished. *People v Carter*, 462 Mich 206, 209; 612 NW2d 144 (2000).

IV. EFFECTIVENESS OF COUNSEL

Defendant's third issue on appeal is whether he was denied effective assistance of counsel. Defendant argues that he was deprived of the effective assistance of counsel by defense counsel's failure to move to preclude or object to testimony regarding (1) defendant's abuse of the victim's mother or (2) the facts of the victim's present incarceration. Again, we disagree.

A. Standard of Review

Defendant made a timely motion for a new trial raising the issue of ineffective assistance of counsel, thus preserving the issue for this Court's review. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). However, because the trial court did not hold an evidentiary hearing, this Court's review is limited to the facts on the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003); *Wilson, supra* at 352. The determination of whether a defendant has been denied effective assistance of counsel is a mixed question of fact and law. *Riley, supra* at 139. After finding the facts, the trial court must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.*, citing *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

B. Analysis

To establish a denial of effective assistance of counsel under the Michigan Constitution and United States Constitution,

“[f]irst the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.’ In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. ‘Second, the defendant must show the deficient performance prejudiced the defense.’ To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for the counsel's error, the result of the proceeding would have been different. ‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” [*People v Hill*, 257 Mich App 126, 138; 667 NW2d 78 (2003), quoting *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), quoting *Strickland v Washington*, 466 US 668, 687, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (internal citations omitted).]

We hold that defendant was not deprived of the effective assistance of counsel. Defendant's claim of ineffective assistance of counsel fails because it was dependent on the validity of his first two issues on appeal. As the trial court did not err in admitting evidence regarding defendant's abuse of the victim's mother or the facts of the victim's incarceration, defense counsel was not ineffective for failing to object to this evidence. Defense counsel is not

required to make a meritless motion or a futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003), citing *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

First, defendant was not deprived of the effective assistance of counsel by defense counsel's failure to object to testimony regarding defendant's prior bad acts. The testimony regarding defendant's abuse of the victim's mother was properly admissible. Second, defendant was not deprived of the effective assistance of counsel by defense counsel's failure to object to testimony regarding the facts of the victim's incarceration. Defense counsel elicited and used this evidence as part of an unsuccessful trial strategy to discredit the victim. Defendant failed to overcome the strong presumption that counsel's performance constituted sound trial strategy. *Hill, supra* at 138. "This Court does not substitute its judgment for the counsel's judgment regarding trial strategy. That the strategy [defense counsel] chose ultimately failed does not constitute ineffective assistance of counsel." *People v Kevorkian*, 248 Mich App 373, 414; 639 NW2d 291 (2001). "This Court will not assess counsel's competence with the benefit of hindsight." *Hill, supra* at 139.

Additionally, any objection to the prosecution's presentation of the evidence would have been futile. Generally, all relevant evidence is admissible. MRE 402. As defendant used the evidence to sustain his defense theory at trial, any testimony elicited by the prosecutor regarding this issue was relevant to the issues raised by defendant. *Knapp, supra* at 378. Also, the evidence regarding the facts of the victim's incarceration was relevant to provide the circumstances of the victim's disclosure to a juvenile detention facility staff member. The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Thus, the evidence regarding defendant's prior bad acts and the facts of the victim's incarceration was properly admissible. Defense counsel's failure to object to this evidence did not render his performance deficient and could not have prejudiced the defense. Therefore, defendant was not deprived of the effective assistance of counsel.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Peter D. O'Connell