

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL ANTHONY PLAIR,

Defendant-Appellant.

UNPUBLISHED
February 15, 2005

No. 251535
Genesee Circuit Court
LC No. 03-011235-FC

Before: Markey, P.J., and Murphy and O’Connell, JJ.

PER CURIAM.

Defendant was convicted of second-degree murder, MCL 750.317. He was sentenced to 100 to 150 years in prison for his conviction. He appeals by right. We affirm.

Defendant’s first issue on appeal is that the trial court abused its discretion when it allowed the prosecution to introduce “other bad acts” of defendant into evidence. We disagree.

This Court reviews for a clear abuse of discretion a claim that the trial court admitted improper evidence. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists if an unprejudiced person would find no justification for the ruling. *People v Geno*, 261 Mich App 624, 632; 683 NW2d 687 (2004). A trial court’s decision on a close evidentiary question does not amount to an abuse of discretion. *Id.* We review de novo any preliminary question of law, such as whether a rule of evidence, statute, or constitutional provision precludes the admission of evidence, and will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, but may 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, whether the crimes, wrongs or acts are contemporaneous with or prior or subsequent to the conduct at issue. MRE 404(b)(1). The purpose of the limitation on the admissibility of bad acts evidence is to avoid convicting a defendant based upon his bad character rather than upon evidence that he is guilty beyond a reasonable doubt of the crime charged. *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998). MRE 404(b)(1) contains a non-exhaustive list of proper purposes for other acts

evidence. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). A proper purpose is any purpose other than one establishing the defendant's character to show his propensity to commit the charged offense. *Id.* at 55-56; *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

If a proper purpose is shown, the other acts evidence will be admissible if the evidence is relevant and has a probative value that is not substantially outweighed by unfair prejudice. *Id.* at 74-75. Further, upon request the trial court must provide a limiting instruction to the jury. *Id.* at 75; MRE 105. Relevant evidence is evidence having any tendency to make the existence of any fact which is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401, 402; *Crawford, supra* at 388. The prosecution must give pretrial notice of its intent to introduce other acts evidence and its rationale for admitting the evidence, and the trial court may require the defendant to articulate his theory of the case, if necessary to determine admissibility. MRE 404(b)(2); *VanderVliet, supra* at 89.

Evidence of defendant's misconduct similar to that charged is logically relevant to show that the charged act occurred when 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. *Sabin, supra* at 63. But logical relevance "is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot." *Id.* at 64. Other acts evidence may be admitted to show motive. *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). Motive is the inducement for doing an act, and a defendant's motive to commit the charged crime can be relevant to show identity, actus reus or mens rea. *Sabin, supra* at 68.

Here, the evidence was offered for a purpose other than establishing defendant's character to show his propensity to commit the charged offense of first-degree murder. Thus, it was for a proper purpose. The evidence in question established that defendant ran a pimping operation, run on control, fear, and chemical addiction. Defendant used violence and any means necessary to protect his operation. Defendant had a motive to kill the victim because she owed him money; she embarrassed him in public, and he needed to show his other prostitutes that they could not get away with what the victim did.

All of the "other acts" evidence that was presented had a tendency to render the prosecution's theory more probable than it would have been without it. The evidence also made defendant's testimony and theory less believable. Even the most questionable evidence in regard to relevance that Jennifer Jahari (Jen) had hidden drugs in her vagina was relevant. Chris Blosser's and Officer Villarreal's testimony about this showed how far defendant would go to protect his operation and what defendant's girls would do for him out of fear. The testimony further established a foundation for Blosser's subsequent testimony regarding Jen's subsequently hiding in the closet out of fear, and defendant's non-hearsay admission of killing the victim.

Consequently, because the evidence was offered to establish the prosecution's theory of defendant's system of operation and his motive to protect that system, the probative value of the evidence substantially outweighed any unfair prejudice it may have created. Furthermore, any unfair prejudice that was created by its admission was cured when the jury was instructed that defendant's prior bad acts could not be considered to show defendant's propensity to commit the

charged crime. Therefore, the trial judge did not abuse his discretion when he allowed the witnesses to testify to defendant's prior bad acts.

Defendant also argues he was denied the effective assistance of counsel. We disagree.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Further, "this Court will not assess counsel's competence with the benefit of hindsight." *Rice, supra* at 445. Moreover, counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant's claim that he was denied effective assistance of counsel when counsel failed to object to the other acts evidence must fail because the evidence was properly admitted. So, defendant was not deprived of effective assistance of counsel due to his lawyer's failure to object. *Ackerman, supra* at 455. Further, the factual predicate of defendant's claim fails because his counsel did move to exclude the other acts evidence.

Defendant's claim that he was denied effective assistance of counsel because his counsel failed to object to hearsay evidence must also fail. Defendant argues that his counsel should have objected to specific hearsay testimony on three occasions. Defendant first cites Jerry Osborn's testimony that "[the prostitute] was scared because she thought [defendant] was going to beat her." Defendant improperly characterizes this testimony as Jerry's relating what the prostitute had told him; however, this testimony is Jerry's opinion, based on his own observations, regarding the prostitute's attitude towards defendant. Because Jerry did not testify that the prostitute told him anything, the testimony was not hearsay.

Defendant's second claim is Jerry's testimony that "every other ho" and persons who were smoking crack in the area were all saying that defendant killed the victim. Immediately after this testimony, counsel requested a sidebar, and the trial judge ruled that the statement was not hearsay. Therefore, an objection by defense counsel would have been futile. Furthermore, defense counsel later objected to testimony about what "people on the streets" were saying. The trial judge sustained that objection and instructed the jury that it was not to consider any testimony that related to what the "people on the streets" were saying. Thus we conclude that neither of these claims establishes ineffective assistance of counsel.

Defendant's final contention pertains to Sergeant Sorenson's testimony relating what Heather Welch told him about the crime. Defendant states that counsel's failure to object to this hearsay prejudiced him because it allowed the prosecution's star witness to testify without being cross-examined. Defendant's argument fails for two reasons. First, Heather Welch testified; thus, she was subject to cross-examination. Second, defendant's counsel did object to this anticipated testimony. The objection was overruled because Sorenson's testimony relating what Heather Welch had told him was not offered to prove the truth of the matter asserted, MRE 801(c), but rather, to prove that Heather had knowledge about specific details of the murder that were not contained in Sorenson's press release to the public.

Because defendant's ineffective assistance of counsel is based on his counsel's failure to object to testimony that was objected to or was proper testimony where an objection would have been futile, defendant's claim must fail. *Ackerman, supra* at 455.

We affirm.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Peter D. O'Connell