STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 22, 2013
v	No. 310706 Wayne Circuit Court
PAUL ANTHONY DAVIS, Defendant-Appellant.	LC No. 11-004936-FC

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct, MCL 750.520b, and two counts of third-degree criminal sexual conduct, MCL 750.520d. He was sentenced as a third habitual offender, MCL 769.11, to serve 20 to 40 years in prison for the conviction of first-degree criminal sexual conduct and 15 to 30 years in prison for the convictions of third-degree criminal sexual conduct. We affirm.

Defendant asserts on appeal that the trial court erred in failing to grant his motion for a mistrial based on a law enforcement officer's testimony that defendant had something "outstanding." Defense counsel objected and the officer uttered no additional words. Appellant argues that the jury knew from the words uttered that the defendant had outstanding criminal matters other than the charges for which he was on trial. It is further argued that this knowledge prejudiced the defendant and denied him a fair trial. The officer's statement was made in response to the prosecution's question regarding what the officer did after checking the Law Enforcement Information Network (LEIN).

A mistrial is appropriate only when an error is prejudicial to the defendant's rights and impairs his ability to receive a fair trial, and the decision not to grant a mistrial is reviewed for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). An unresponsive answer to an appropriate question is generally not grounds for mistrial, unless the prosecutor knew the witness would give that answer or conspired with or encouraged the witness to testify improperly. *People v Waclawski*, 286 Mich App 634, 710; 780 NW2d 321 (2009). This officer's statement was logically responsive to the inquiry made. Nothing has been offered to indicate a conspiracy between the prosecutor and the officer. No motion in limine was filed that would have focused the officer and prosecutor on the need to avoid the mention of outstanding criminal matters. It is reasonable, however, that an experienced officer would know

that testimony regarding other pending matters was inappropriate and that a diligent prosecutor should have been aware of the law enforcement routine of checking for LEIN entries. However, it is not outside the range of principled outcomes for the trial court which had specific knowledge of this prosecutor and this officer to find no evidence that the prosecutor expected the experienced officer to reveal anything about defendant's criminal record when she asked what action the officer took next. Additionally, the court also did not abuse it discretion when it found little prejudicial effect because it was highly speculative to determine what conclusion the jury reached upon hearing "outstanding."

Defendant also asserts that he received ineffective assistance of counsel because his attorney did not object to or request that the jury be instructed on how to consider evidence of other uncharged acts by defendant against the victim. We must determine whether the attorney's performance fell below an objective level of reasonableness and the defendant was denied a fair hearing as a result. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant did not request an evidentiary hearing in the trial court under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), see *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000); therefore, review is limited to any mistakes apparent on the record, *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

An attorney does not have a duty to make a meritless argument. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Under MCL 768.27a, when a defendant is charged with criminal sexual conduct against a minor, evidence that the defendant committed another listed offense against a minor is admissible for its bearing on any matter to which it is relevant. See *In re Brown*, 294 Mich App 377, 386; 811 NW2d 531 (2011). Evidence that is admitted under MCL 768.27a is still inadmissible under MRE 403 if its probative value is substantially outweighed by unfair prejudice; however, "courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *People v Watkins*, 491 Mich 450, 456; 818 NW2d 296 (2012). Defendant's attorney was not ineffective for failing to object to evidence that was clearly admissible.

Attorneys are presumed to perform effectively and the exercise of strategic judgment is integral to effective lawyering . *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). In this case, if defense counsel had requested a limiting instruction, she risked the trial court instructing the jury that it could use evidence of other criminal sexual conduct to establish that defendant had a propensity to commit all the charged crimes.

In a supplemental brief filed in propria persona pursuant to Supreme Court Administrative Order No. 2004–6, Standard 4, defendant challenges numerous other actions by the trial court and prosecution, including the trial court's decision to allow a police officer to testify regarding what defendant told him. The court found the written statement itself inadmissible because defendant did not examine it for accuracy before signing it. Defendant asserts on appeal that what he told the officer was inadmissible because it was testimonial hearsay. Defendant cites *Crawford v Washington*, 541 US 36, 52-53; 124 S Ct 1354; 158 L Ed 2d 177 (2004), which protects a defendant's right to confront witnesses against him and does not bar the prosecution from using a defendant's own testimonial statements as evidence.

A defendant's confession while in police custody is admissible if it followed a voluntary, knowing, and intelligent waiver of his rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). *People v Daoud*, 462 Mich 621; 614 NW2d 152 (2000). In the present case, defendant did not challenge the officers' testimony that he listened to and understood his rights and signed the rights form before he began to speak. A criminal defendant's prior statement can be used as substantive evidence against him and is not inadmissible hearsay. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). Under MRE 801(d)(2), a party's own statement is not hearsay when used against him.

Defendant also argues in his standard 4 brief that the prosecution violated his due process rights by bringing multiple criminal sexual conduct charges against him and failing to provide a bill of particulars. Defendant did not request a bill of particulars in the trial court and was not prejudiced by the form of the charges. See *People v Traughber*, 432 Mich 208, 216-217; 439 NW2d 231 (1989). The prosecution was not required to identify specific dates of the abuse if the young victim, who resided with defendant, was unable to recall. See *People v Dobek*, 274 Mich App 58, 82-84 & n 13; 732 NW2d 546 (2007); *People v Naugle*, 152 Mich App 227, 233-234; 393 NW2d 592 (1986). The prosecution was not vindictive, as defendant claims, merely because multiple charges were brought against defendant. The charges were not excessive and were distinguishable by place, time, and type.

Defendant raised additional objections regarding destruction of evidence and failure to disclose favorable evidence; however, his objections are vague and unsupported by any evidence. Our review is limited to the lower court record. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 580; 609 NW2d 593 (2000), aff'd sub nom *Byrne v State*, 463 Mich 652; 624 NW2d 906 (2001).

In his standard 4 brief, defendant raises additional objections to his trial counsel's performance. He argues that his attorney was ineffective for failing to seek a hearing on the voluntariness of his confession. His attorney successfully challenged admission of the written statement based on testimony that defendant did not review the statement for accuracy. Defendant does not assert any basis for his counsel to have argued that the statement was coerced or otherwise involuntary.

Defendant also claims that his attorney failed to consult with him during the pretrial period and failed to contact an investigator who wished to testify on his behalf; however, our review is limited to mistakes apparent on the record, *Rodriguez*, 251 Mich App at 38, and there is nothing to support defendant's assertions. Defendant asserts further that his trial counsel should have challenged the legality of his arrest and failed to seek an appropriate first-degree criminal sexual conduct instruction; however, defendant does not explain his assertions. A party cannot announce a position and leave it to the appellate court to elaborate his argument and find authority to support it. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

Defendant also argues that defense counsel was ineffective by failing to assert his right to not be tried at one time for separate offenses arising out of substantially different transactions. Under MCR 6.120, the trial court may join related offenses that were charged in multiple informations or indictments, and a defendant may seek separate trials for offenses that are not related; related offenses are defined as those involving the same conduct or a series of connected

acts that are part of a single scheme or plan. *People v Williams*, 483 Mich 226, 233-234; 769 NW2d 605 (2009). Multiple acts of criminal sexual conduct against the same victim are clearly related offenses; therefore, the trial court correctly granted the motion to consolidate and would not have granted a motion to sever. See *id.*

Defendant claims further that his attorney ignored his request to testify and have witnesses testify on his behalf. Defendant told the trial court that he agreed with the decision not to call witnesses and that it was his decision not to testify. Decisions whether to call witnesses are presumed to be trial strategy and do not constitute ineffective assistance unless they deprived the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). We cannot know whether defense counsel had reason to fear that defendant's or his witnesses' testimony might harm rather than help his case. The attorney focused on cross-examining the victim-witness, which was semi-successful because the jury was unable to reach a decision on certain charges.

Finally, defendant argues that his trial counsel should have moved for a directed verdict and a judgment notwithstanding the verdict; however, defendant does not explain why either motion would have been granted. It was the jury's role to judge witness credibility and weigh the evidence. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens