

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS LEE TUCKER,

Defendant-Appellant.

UNPUBLISHED

June 28, 1996

No. 182704

LC Nos. 94-130219 FH;

94-130220 FH;

94-130221 FH

Before: Young, P.J., and Corrigan and M.J. Callahan,* JJ.

PER CURIAM.

Defendant appeals of right his convictions by jury of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(ii); MSA 28.788(3)(1)(b)(ii), and one count of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a); MSA 28.788(5)(1)(a). We affirm.

Other Acts Evidence

Defendant first argues that the trial court abused its discretion by admitting evidence that depicted him as a bad person in contravention of MRE 404(b). We disagree. This Court reviews the admissibility of other acts evidence for an abuse of discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). However, defendant has failed to cite specific examples of error, which forfeits this aspect of his claim on appeal. *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994); *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Moreover, because defendant failed to object to the other acts evidence at trial,¹ our review is limited to whether relief is necessary to avoid manifest injustice. See *City of Troy v McMaster*, 154 Mich App 564, 570-512; 398 NW2d 469 (1986). After review of the record, we find no manifest injustice.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant claims that the trial court erred by failing to give a limiting instruction regarding the other acts evidence. The record indicates that defendant failed to request an instruction under *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). As a result, this issue is forfeited. MCL 768.29; MSA 28.1052; *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973). Additionally, because defense counsel injected much of the evidence now challenged on appeal, these particular claims are forfeited. *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992); *People v Stanton*, 97 Mich App 453, 460; 296 NW2d 70 (1980).

Impeachment

Defendant does not provide record citations to support his claim that the trial court precluded cross-examination for impeachment purposes. This claim is thus forfeited. *People v Grant, supra*; *People v Jones, supra*. Next, defendant claims that the trial court prevented him from testing complainant's testimony under MRE 608(b) regarding the issue of photographs of her that defendant had allegedly taken. Defendant failed to raise MRE 608(b) or to make an offer of proof with respect to the photos, thereby forfeiting this issue. *People v Grant, supra*.

Regarding defendant's assertion that the trial court prevented him from questioning complainant about her treatment at the Fox Center,² the trial court decided to exclude testimony regarding the Fox Center before trial commenced. No offer of proof appears in the record that would show how this testimony was relevant. The issue is consequently forfeited. *Grant, supra*; MRE 103(a)(2).

Prosecutorial Misconduct

Defendant failed to object at trial on grounds of prosecutorial misconduct. The issue is therefore not preserved for appeal absent manifest injustice. This Court should consider whether the allegedly prejudicial effect of the prosecutor's remarks could have been cured by a cautionary instruction, had a timely objection been made. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Biggs*, 202 Mich App 450, 455; 509 NW2d 803 (1993). Here, contrary to defendant's claim that the prosecutor made impermissible appeals to the jurors' sympathies, a review of the prosecutor's remarks reveals that she simply asked the jurors to believe complainant. This form of argument constitutes permissible advocacy. See *People v Bahoda*, 448 Mich 261, 276, 282; 531 NW2d 659 (1995); *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Moreover, the prosecutor's remarks about defendant's commitment to the martial arts represented permissible commentary on the evidence. *Bahoda, supra*, at 282. No manifest injustice resulted from the prosecutor's comments. *Id.* at 281.

Jury Instructions

Defendant's assertion that the trial court gave erroneous jury instructions is not preserved because defendant failed to object to the instructions on the ground he now raises on appeal. *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). No manifest injustice resulted from

the trial court's instructions. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Ineffective Assistance of Counsel

Defendant claims that he was deprived of the effective assistance of counsel because defense counsel failed to move in limine to exclude the other acts evidence. As discussed *supra*, the court properly admitted this evidence. Counsel is not required to advance a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Defendant further contends that counsel's failure to object constituted ineffective assistance of counsel. However, a failure to object is considered trial strategy and this Court will not substitute its judgment on matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Lawless*, 136 Mich App 628, 635; 357 NW2d 724 (1984). Regarding defendant's contention that counsel was ineffective in cross-examining Grace Tucker, the record reflects that counsel intended to test Tucker's credibility. Although defense counsel might not have anticipated Tucker's answer, this Court will not assess counsel's competence with the benefit of hindsight. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). Defendant also points to additional questions that were strategic and therefore proper. *Barnett, supra*.

Scoring of Defendant's Sentencing Information Report

Contrary to defendant's assertion, the trial court properly assessed defendant fifteen points under Offense Variable (OV) 25. Ample evidence supported the scoring. The trial court did not abuse its discretion. *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993). Defendant's proportionality claim is not properly preserved as defendant failed to set forth a separate question to this effect in the statement of the issues. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). However, because defendant's sentence fell within the guidelines, it is presumptively proportionate. *People v Albert*, 207 Mich App 73, 75; 523 NW2d 825 (1994). Defendant has not overcome the presumption.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Maura D. Corrigan

/s/ Michael J. Callahan

¹ At one point, defense counsel objected on hearsay grounds to testimony concerning defendant's alleged threats to kill his family. On appeal, defendant failed to replicate the challenge on hearsay grounds. Instead, he asserted an other acts claim, thereby forfeiting the issue for review. *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). Later, defendant highlighted a passage during the prosecutor's questioning of Detective Sergeant Rosenau where defendant objected

to the testimony on foundational grounds. As defendant raises only a MRE 404(b) argument on appeal, he has forfeited this claim. *Furman, supra*.

² It appears from the record that the Fox Center provides counseling services for victims of abuse.