

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID B. BUHNERKEMPER,

Defendant-Appellant.

UNPUBLISHED
September 3, 1996

No. 167359
LC No. 93-123801-FC

Before: Young, P.J., and Holbrook, Jr., and J. Richard Ernst,* JJ.

PER CURIAM.

Defendant was convicted by an Oakland Circuit Court jury of one count of kidnapping, MCL 750.359; MSA 28.581, and seven counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). He subsequently pleaded guilty of being an habitual offender, third offense, MCL 769.11; MSA 28.1083. He appeals as of right and we affirm.

Defendant first argues that he was denied a fair trial by the admission of similar acts evidence. At trial, the court allowed the prosecutor to offer the testimony of three women whom defendant had similarly abducted, driven to an isolated area, verbally threatened, and forced to engage in repeated sex acts. Contrary to defendant's argument, the testimony regarding the other alleged rapes did not go to propensity or character, but was properly offered under MRE 404(b) to establish the prosecutor's modus operandi theory of the perpetrator's identity. *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993); *People v McMillan*, 213 Mich App 134, 138; 539 NW2d 553 (1995). Because defendant proffered a general denial to the charges in this case, all elements of those charges were at issue, including his identity as the victim's assailant. The striking similarities between the assaults on the other alleged victims constituted a "special quality or circumstance" linking the prior acts and the current offense. *Id.*, citing *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982).

The potential for unfair prejudice through the admission of this evidence did not substantially outweigh its probative value. MRE 403. Although the witnesses' testimony was disturbing, it was not the type of testimony that would interject considerations extraneous to the merits of the case. See

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

People v Pickens, 446 Mich 298, 337; 521 NW2d 797 (1994). Other evidence was presented to establish defendant's identity, including defendant's physical appearance and the description of his car. In addition, the trial court was careful to instruct the jury regarding the use of similar acts evidence before each of the witnesses testified. *VanderVliet*, *supra* at 75. Finally, we note that "[t]here is no rule requiring the prosecution to use only the least prejudicial evidence per se to establish the facts at issue." *People v Fisher*, 449 Mich 441, 442; 537 NW2d 577 (1995). Accordingly, we conclude that the trial court did not abuse its discretion in admitting the evidence.

Defendant next argues that the trial court abused its discretion in denying his motion for a mistrial after the prosecutor, during cross-examination, showed him photographs of the victim of a murder that defendant was alleged to have committed. Although the prosecution showed defendant photographs allegedly depicting distinctive bite marks on a murder victim, the photographs were not admitted into evidence. More importantly, any reference to what was depicted in the photographs came from defendant himself in an unresponsive answer to his own attorney's questions on redirect examination. As a general rule, an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Our review of the record indicates that both the court and the prosecutor repeatedly warned defendant during cross-examination that he should not offer unresponsive comments when no question was pending. Accordingly, defendant's motion for a mistrial was properly denied.

Defendant next argues that he was denied a fair trial because of the cumulative effect of various instances of prosecutorial misconduct. Defendant's failure to object to the challenged instances of prosecutorial misconduct precludes appellate review unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). First, defendant challenges the prosecutor's questioning of defendant regarding a fourth similar acts witness whose testimony was excluded because of the prosecutor's failure to provide adequate notice. The record indicates that, during cross-examination by the prosecutor, defendant denied having been in any other secluded areas with anyone other than his former girlfriend and victims Carley and Tiller. The prosecutor then sought to impeach defendant's statement by asking about the location where the assault on the excluded witness occurred. This was proper cross-examination under MRE 608(b). Second, defendant challenges the prosecutor's comment during closing argument that "Tiller was the first case [defendant] tried . . . on a disgruntled prostitute theory . . . in four separate incidents." Even assuming this comment was improper, no prejudice resulted because the jury had already been apprised that defendant was alleged to have committed similar acts against other victims. Moreover, defendant's own testimony established his belief that victims Scott, Carley, and Tiller were "disgruntled," and that he had "outsmarted" an unnamed fourth victim who had pulled a knife on him. Third, defendant argues that the prosecutor misrepresented the facts when he stated during closing argument that the investigating police officer had included in her report that the victim made a "positive" identification of defendant. Although the officer admitted that her report did not expressly state that the victim made a "positive" identification of defendant, the report did reflect the victim's repeated statements that "it was Number 3," which was defendant's position in the lineup. Accordingly, further appellate review of the challenged instances of misconduct is precluded because a miscarriage of justice will not result.

Defendant next argues that he was denied effective assistance of counsel because of counsel's failure to move to suppress the victim's identification of defendant at the lineup. Defendant specifically complains that he was the only person in the lineup with crooked teeth. While this was true, the victim testified at trial that she first identified defendant based on his size and structure, and that she became "positive" of his identity when defendant was instructed to smile. Furthermore, the victim testified that she had not been told by the officers before the lineup whether the alleged perpetrator would be in the lineup, and she did not recall whether they had told her if there was a suspect in her case. Accordingly, because there is no evidence that the lineup procedure was unduly suggestive, see *People v Kurylczyk*, 443 Mich 289, 312 (Griffin, J), 318 (Boyle, J); 505 NW2d 528 (1993), any motion to suppress made by defense counsel would have been futile. This Court does not require counsel to make futile motions.

Finally, defendant argues that he was denied a fair trial when he was exposed to the jury wearing handcuffs. We disagree. Although freedom from shackling and manacling of a criminal defendant during trial is an important component of a fair trial, see *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994), this rule does not generally extend to circumstances where a defendant is shackled outside a courtroom to prevent escape, *People v Oscar Moore*, 164 Mich App 378, 384-385; 417 NW2d 508 (1987), modified on other grounds 433 Mich 851 (1989). Here, defendant claims, without record support, that the jury saw him handcuffed while he was led from the courtroom to the lockup. In denying defendant's motion for a mistrial, the trial court noted, "we have had two to three officers here at all times during the trial, and obviously [the jurors] know he is incarcerated, and I don't think that is going to affect it in any way." Accordingly, under the facts of this case, we find no basis on which to find prejudicial error.

Affirmed.

/s/ Richard P. Young

/s/ Donald E. Holbrook, Jr.

/s/ J. Richard Ernst