

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH WYNIEMKO,

Defendant-Appellant.

UNPUBLISHED

March 7, 1997

No. 183157

Macomb Circuit Court

LC No. 94-002001

Before: Doctoroff, P.J. and Hood and P. J. Sullivan,* JJ.

PER CURIAM.

A jury convicted defendant of breaking and entering, MCL 750.110; MSA 28.305, armed robbery, MCL 750.529; MSA 28.797, and fifteen counts of first-degree criminal sexual conduct, MCL 750.520b(1); MSA 28.788(2). The court sentenced defendant to ten to fifteen years' imprisonment for the breaking and entering conviction, fifteen to twenty-five years' imprisonment for the armed robbery conviction, and forty to sixty years' imprisonment for each criminal sexual conduct (CSC) conviction, all to be served concurrently. Defendant appeals of right, and we affirm.

Defendant entered complainant's home, held a razor to her neck, and repeatedly sexually assaulted her, in several ways at different locations in her home. Prior to leaving complainant's home, defendant also stole \$2,500. The victim did see defendant's face briefly during the two-hour ordeal when he lifted his mask. Defendant raises three issues on appeal. He argues that the trial court abused its discretion by admitting testimony of an ex-girlfriend, that prosecutorial misconduct denied him a fair trial, and that he was denied effective assistance of counsel. We do not find that any issue requires reversal.

Defendant first argues that the trial court abused its discretion by admitting testimony of his ex-girlfriend because the testimony of their sexual relationship was highly prejudicial. Prior to trial, the trial court granted the prosecution's motion in limine for admission of similar acts testimony pursuant to MRE 404(b) and *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), modified 445 Mich 1205

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

(1994). Pursuant to *VanderVliet*, other acts evidence is admitted pursuant to MRE 404(b) if (1) it is relevant to an issue other than propensity, (2) it is relevant under MRE 402 to an issue of fact or consequence at trial, (3) under MRE 403, the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice and, (4) upon request, the trial court provides a limiting instruction under MRE 105. *Id.* at 74-75.

In *People v McMillan*, 213 Mich App 134; 539 NW2d 553 (1995), evidence of two prior bad acts by the defendant was admitted into evidence during his trial for abducting and murdering a woman. Specifically, testimony was offered that the defendant had entered the homes of two women on previous occasions and assaulted them. *Id.* at 137. The prosecution introduced the testimony for the purpose of establishing that the defendant was the person who kidnapped and killed the victim in the present action. The defendant argued that there was no “special quality or circumstance” linking the prior acts and the present offense, and that the evidence was more prejudicial than probative pursuant to *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982). *Id.* at 138-139. This Court disagreed, finding that there were considerable circumstances and similarities linking the acts. *Id.* at 138. This Court further found that the other acts evidence had been offered to establish identity and the trial court had given a cautionary instruction to the jury not to use the evidence to characterize the defendant as a “bad person.” *Id.* at 139.

We find that the trial court did not abuse its discretion by allowing the ex-girlfriend to testify as to the sexual relationship between her and defendant. Their sexual acts were very similar in many particulars to the acts committed on the complainant. The testimony was relevant to the disposition of the case and offered for a proper purpose, namely to show defendant’s “trademark” during sexual activity. Further, the probative value of the evidence was not substantially outweighed by unfair prejudice because it was probative of whether defendant committed the crime and why the police were led to and arrested defendant. Because the ex-girlfriend’s testimony was properly admitted pursuant to MRE 404(b), the trial court did not abuse its discretion.

Defendant also argues that the trial court abused its discretion by allowing the testimony of the officer in charge of the case. However, defendant failed to object to his testimony. We do not address this issue as no manifest injustice occurred. *People v Grant*, 445 Mich 535, 543; 520 NW2d 123 (1994).

Defendant next argues that he was denied a fair trial due to prosecutorial misconduct. Specifically, defendant argues that the prosecutor: (1) elicited testimony about defendant’s possible drug use and (2) commented that stalking charges had been filed against defendant by his ex-girlfriend. We note at the outset that only one question was objected to and thus preserved for review on appeal. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den ___ US ___; 115 S Ct 923; 1306 L Ed 2d 802 (1995).

The prosecution asked the complainant if the smoke she smelled on her attacker could have been cocaine, marijuana, cigar or some other kind of smoke. Prior to answering, defendant objected to the question as leading. The trial court sustained the objection and the prosecution rephrased the

question. The trial court also instructed the jury that attorneys' statements, arguments, and questions to the witnesses were not evidence. Therefore, defendant was not denied a fair trial by the prosecution's question.

Defendant failed to object to the questioning regarding the cocaine sniffer found in his home. Since the other evidence was substantial against defendant, failure to review this issue will not result in manifest injustice. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). Further, the prosecution did not raise the issue of the stalking charges against defendant, rather it was defendant who volunteered the information on direct-examination. Therefore, failure to review this issue will not result in manifest injustice. Finally, defendant failed to object to comments the prosecution made during her closing remarks. Failure to review this issue will not result in a miscarriage of justice.

Finally, defendant argues that he was denied the effective assistance of counsel. He contends that counsel did not seek to exclude damaging evidence, that counsel presented inadequate cross-examination, that counsel failed to call a witness, and that counsel failed to request a limiting instruction on the evidence. In order to prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that counsel was not functioning as an attorney guaranteed by the federal and Michigan constitutions. *Stanaway, supra*; *People v Briseno*, 211 Mich App 11; 535 NW2d 559 (1995).

Defendant's claims are not supported by the record. If defense counsel had objected to defendant's use of the cocaine sniffer, the jury may have attached significance to it beyond it being found in defendant's home. Further, the claim that defense counsel should have objected to the admission of the evidence of defendant's stalking charges is without merit since it was defendant who volunteered the information.

Second, defendant argues that defense counsel inadequately cross-examined his ex-girlfriend in regard to the time defendant returned home on the night in question. Decisions concerning the questioning of witnesses is considered part of trial strategy. *People v Hyland*, 212 Mich App 701, 710-711; 538 NW2d 465 (1993). Defense counsel elicited testimony that the ex-girlfriend was unsure as to the exact time defendant returned home. Thus, there is no evidence that a different line of questioning would have yielded a different result, and defendant has failed to show that counsel's representation fell below the standards of a reasonably competent attorney. *Stanaway, supra*.

Defendant also argues that counsel's failure to call the ex-girlfriend's ex-husband, who would allegedly corroborate defendant's testimony as to the time he returned home, amounted to ineffective assistance. Decisions concerning which witness to call is also considered trial strategy. *Hyland, supra* at 710. There is no evidence that calling the ex-husband would have yielded a different result. The ex-husband had initially provided the wrong date to the authorities. Further, the jury may have interpreted the ex-husband's testimony as an attempt to draw attention away from the sexual relationship between defendant and defendant's ex-girlfriend. Therefore, defendant has failed to show that trial counsel's representation fell below the standards of a reasonably competent attorney. *Stanaway, supra* at 688.

Defendant finally argues that he was denied effective assistance of counsel because counsel failed to request a limiting instruction on the evidence. During the motion in limine hearing, the trial court found that the evidence of the ex-girlfriend's testimony was more probative than prejudicial. While it was questionable trial strategy not to request the limiting instruction at trial, the evidence was relevant and had already been admitted by the trial court. Since the sexual encounters were so similar between that of defendant and his ex-girlfriend, and complainant and her attacker, we believe that a limiting instruction would not have changed the outcome of the trial. Accordingly, we conclude that defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Harold Hood

/s/ Paul J. Sullivan