STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNECE PIPPEN a/k/a DARENCE PIPPEN,

Defendant-Appellant.

UNPUBLISHED
June 20, 1997

No. 185794
Oakland Circuit Court
LC No. 94-134847 FC

Before: Holbrook, Jr., P.J., and White and S.J. Latreille*, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), and habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to serve an enhanced prison term of twenty-five to sixty-five years. He appeals as of right and we affirm.

Defendant first argues that the trial court abused its discretion in allowing two of defendant's daughters to testify that he had sexually assaulted them on numerous occasions. Under the facts of this case, we find no abuse of discretion. 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. MRE 404(b)(1). However, evidence that is relevant to and probative of an issue other than a defendant's criminal propensity may be admitted if its probative value is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). Specifically, evidence of other acts may be admitted to prove motive, opportunity, intent, preparation, scheme, plan, or system in doing an act. MRE 404(b)(1).

In granting the prosecutor's motion in limine to admit evidence of defendant's prior similar acts, the trial court relied on *VanderVliet*, *supra*, and concluded:

> Other acts evidence in the instant case is highly probative as to the Defendant's alleged intent, scheme, plan, and system of using a weapon to force a victim into a motel

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

> room for purposes of completing a non-consensual sexual assault. Mindful of the high probative value of these acts and the articulated standard which leans toward admissibility, this Court finds that the probative value of the other acts evidence in the case at hand is not substantially outweighed by unfair prejudice to the defendant.

Defendant claims that the trial court abused its discretion because the testimony of his daughters was not probative of whether he committed the current offense. We disagree. While the proffered other acts evidence need not directly tend to prove an essential element of the people's case, it must be probative of a matter in issue. Here, defendant was charged under MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), which provides for a conviction of first-degree criminal sexual conduct where the defendant engages in sexual penetration with another person and "is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon." Defendant's defense was that the victim consented to sexual intercourse. Thus, evidence of defendant's use of a weapon and threats of violence to forcibly engage in sexual abuse of his adolescent daughters was probative of his intent to engage in forcible rape of the complainant. See *People v Oliphant*, 399 Mich 472; 250 NW2d 443 (1976); *People v Gibson*, 219 Mich App 530, 533; 557 NW2d 141 (1996).

Contrary to defendant's assertion, substantial similarity existed between the circumstances surrounding the sexual assault of the complainant and of defendant's daughters. The complainant testified that defendant threatened her with a knife in order to force her to go into a hotel room and have sex with him. She was eighteen years old at the time of assault and stated that she submitted to defendant, by having sex with him, because she believed that he would kill her if she did not do so. After sex, defendant gave her two five-dollar bills and told her to take a taxi. The complainant did not state that defendant was violent during the sexual act. Similarly, defendant's daughters both testified that defendant had sex with them by threatening them with physical violence or with a gun. One daughter testified that she was sexually assaulted by defendant in hotel rooms from the time she was ten years old until she was eighteen. The other, sixteen-year-old daughter stated that she had been sexually assaulted by defendant over the previous 2½years, also in hotel rooms. Both stated that defendant gave them approximately $20 or $30 after having sex with them, and one daughter stated that he would sometimes give her the money for a cab. Both also stated that they feared that defendant would kill them, but the sixteen-year-old testified that he was not violent during sex.

Defendant points to the fact that he used a knife with the complainant and a gun with his daughters as dissimilar; however, defendant ultimately used a weapon to threaten both the complainant and his daughters, and caused each of them to fear that they would be killed if they did not submit to him. Additionally, defendant took the complainant as well as his daughters to hotel or motel rooms in order to have sex and gave them money afterwards. The arresting police officer testified that defendant told him he had paid the complainant for sex. Defendant's intent "to orchestrate events to make it appear that the [victims] consented" could be inferred from this evidence. *Oliphant, supra* at 491-492. Finally, although defendant's minor daughters cannot in any case be said to have consented to being sexually assaulted, the similarity of circumstances in defendant's acts with his daughters and his acts with the complainant are especially probative of his intent to engage in forcible rape.

Defendant contends that, even if the evidence was logically relevant, the prejudicial effect of the testimony of his daughters substantially outweighed its probative value and should have been disallowed under MRE 403. In balancing prejudicial effect against probative value, the trial court should take into consideration such factors as the need for the evidence in order to satisfy an element of the prosecution's case, the defendant's theory of the case, the cumulative nature of the evidence, the tendency of the evidence to inflame or distract the trier of fact, and the degree to which the evidence will subject the trial to unnecessary delay. *Oliphant, supra* at 490.

> Other acts evidence is not admissible simply because it does not violate Rule 404(b). Rather, a 'determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403.' [*VanderVliet, supra* at 75, quoting 28 USCA, p 196, advisory committee notes to FRE 404(b).]

While most evidence presented at trial is prejudicial, it is only where admission of the evidence would be *unfairly* prejudicial that it must be excluded under MRE 403. See *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995).

> The trial judge, not the appellate judge, is in the best position to assess the extent of the prejudice caused a party by a piece of evidence. The appellate judge works with a cold record, whereas the trial judge is there in the courtroom. [*People v Jenkins,* 450 Mich 249, 278; 537 NW2d 828 (1995) (Riley, J., dissenting), quoting *United States v Long,* 574 F2d 761, 767 (CA 3, 1978).]

Although evidence that defendant sexually abused his daughters was undoubtedly prejudicial, it was also very probative of a disputed issue at trial, defendant's intent. Given the broad discretion accorded to the trial judge in performing this balancing test, the lack of other evidence to prove defendant's intent in this case, and the limiting instruction given to the jury, we conclude that it was within the discretion of the trial court to admit the testimony.

Defendant next argues that the trial court abused its discretion in denying his motion for a mistrial because one of his daughters testified on direct examination that she had run away from home after her "first abortion." Defendant argues that this testimony denied him a fair trial. Viewing the direct examination of defendant's daughter in context, we find her answer to be responsive to the prosecutor's question of why she had run away from home. However, it is also clear that this was not the response the prosecutor was expecting since he immediately attempted to clarify her response by asking whether she had run away because of her father's abuse. An unresponsive, volunteered answer to a proper question does not warrant reversal of an otherwise valid conviction. *People v Kelsey,* 303 Mich 715, 717; 7 NW2d 120 (1942); *People v Stinson,* 113 Mich App 719, 318 NW2d 513 (1982). Moreover, the witness' testimony did not directly implicate defendant as the person who had impregnated her. Under the circumstances, we conclude that admission of this testimony, while

erroneous, was harmless. Cf. *People v Carner*, 117 Mich App 560, 579-580; 324 NW2d 78 (1982).

Defendant also contends that he was denied his Fifth Amendment rights to remain silent and be free from double jeopardy and Sixth Amendment right to an impartial jury. However, defendant merely quotes a portion of each amendment without citing any case law and without explaining how those rights were violated. Because defendant has failed to argue the merits of these allegations, the issues are not properly presented for review. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Defendant further asserts that he was denied his constitutional right to decide whether or not to testify because anything he said could have been used against him in a trial on then pending criminal charges regarding the alleged sexual abuse of his daughters. However, defendant cites no authority in support of this argument, and we therefore deem it to be abandoned. *People v Simpson*, 207 Mich App 560, 561; 526 NW2d 33 (1994).

Next, defendant argues that the trial court should have suppressed the preliminary examination testimony of Eric Vann because it was perjured. We find this argument to be wholly without merit. Vann testified under oath at the preliminary examination that he had seen defendant carry a pocket knife that matched the description given by the complainant. At trial, however, Vann testified that he had never seen defendant carry a knife and that his earlier testimony to the contrary was a lie. Pursuant to MRE 801(d)(1)(A), the prosecutor was entitled to impeach Vann at trial with his prior inconsistent statement, and it was for the jury to decide whether Vann was telling the truth during the preliminary examination or at trial. *People v Morrow*, 214 Mich App 158, 165; 542 NW2d 324 (1995). Accordingly, the trial court did not abuse its discretion in denying defendant's motion to exclude evidence of Vann's preliminary examination testimony.

Defendant next argues that there was insufficient evidence to convict him of first-degree CSC because the knife that he allegedly used in the sexual assault against the complainant was never recovered. We find this argument also to be wholly without merit. The complainant testified that defendant threatened her with a knife, and she gave a fairly detailed description of that knife. Given that a rape complainant's testimony need not be corroborated, MCL 750.520h; MSA 28.788(7), the fact that the knife was not recovered cannot support a motion for directed verdict because of insufficient evidence.

Defendant next challenges the scoring of certain offense variables on his sentencing information report, and argues that his sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). First, appellate review of sentencing guidelines calculations is precluded except to the extent that the defendant claims that the sentence is disproportionate. *People v Mitchell*, 454 Mich 145, 177-178; ___ NW2d ___ (1997). As a convicted habitual offender, defendant's sentence is reviewed on appeal to determine whether the sentencing court committed an abuse of discretion. This review is conducted without reference to the sentencing guidelines, which have no bearing on whether an habitual offender's sentence is proportional. See *People v Cervantes*, 448 Mich 620, 625; 532 NW2d 831 (1995); *People v Yeoman*, 218 Mich App 406, 418; 554 NW2d 577 (1996). Although defendant notes that he was a church minister for

fifteen years, we do not find this fact sufficient to mitigate the act of rape. Thus, given defendant's background and the serious, violent nature of the current offense, we find no abuse of discretion by the court in imposing a twenty-five year minimum sentence.

Pursuant to an order of this Court following oral argument, defendant, acting in propria persona, was permitted to file a supplemental brief. In his brief, defendant raises numerous challenges to his conviction other than those already discussed. Although defendant's brief is nearly incomprehensible, we have reviewed the new issues raised and now conclude that none requires reversal of defendant's conviction.

Defendant argues that the trial court abused its discretion in denying his newly retained attorney (the fourth attorney to represent defendant in this matter) a continuance of the trial. Although defendant generally asserts that he was denied effective assistance of counsel because his retained counsel was inadequately prepared for trial, he fails to identify any specific deficiency that might have been outcome determinative. See *People v Pickens,* 446 Mich 298; 521 NW2d 797 (1994). Indeed, at sentencing, defendant indicated to the court that his trial counsel was "a great attorney" who did "a tremendous job" despite only having short preparation time. Under the circumstances, we find no merit to defendant's claim that he was prejudiced by the trial court's denial of a continuance.

Next, defendant argues that, at the preliminary examination, the prosecution intentionally withheld the identity of an exculpatory witness. Defendant claims that had the identity of this witness (a motel clerk who would testify at trial that she saw defendant alone on the night of the incident using a pay telephone) been divulged to the defense or been called to testify that the district court would have dismissed the charges. We disagree. The motel clerk testified at trial and the jury was permitted to assess the weight and credibility of her testimony in light of the other evidence of defendant's guilt. Thus, because sufficient evidence was presented at trial to convict, any alleged error at the preliminary examination stage was harmless. *People v. Meadows,* 175 Mich App 355, 359; 437 NW2d 405 (1989).

Next, we find no error in the prosecutor's general question to a key prosecution witness whether he was afraid of defendant. The prosecutor's question was a proper attempt to establish the witness' motive for presenting inconsistent testimony at the preliminary examination and at trial. See *People v Dorrikas,* 354 Mich 303; 92 NW2d 305 (1958); *People v Jones,* 115 Mich App 543, 549; 321 NW2d 723 (1982).

Defendant also claims bias on the part of the trial judge because jurors were allowed to ask questions of all witnesses except the complainant. Defendant is incorrect. Jurors were in fact allowed to ask questions of the complainant (See Tr I, pp 38-39).

Defendant's remaining issues are wholly without factual or legal basis and we decline to address them.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Stanley J. Latreille