

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY ALLEN TRIMM,

Defendant-Appellant.

UNPUBLISHED

August 12, 1997

No. 190535

Calhoun Circuit

LC No. 95-001073-FH

Before: Saad, P.J., and Neff and Reilly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), and sentenced to serve twenty-two to forty-two years' imprisonment, with 210 days' credit for time served. Defendant appeals as of right from his conviction and sentence. We affirm.

Defendant first argues that the trial court erred in admitting evidence regarding a prior bad act, where defendant allegedly forced sexual relations with another victim. This Court reviews a trial court's decision to admit bad acts evidence for abuse of discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). In a criminal case, the trial court abuses its discretion when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The use of bad acts evidence is precluded except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982). To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993).

In the instant case, the prosecution offered the challenged testimony for the purpose of showing, inter alia, a common scheme. Common scheme evidence is generally admissible only where the

defendant commits a series of crimes in a unique, regular, or regimented manner. See, e.g., *People v Lee*, 212 Mich App 228, 245-246; 537 NW2d 233 (1995). We find that the similar manner in which defendant and his accomplice assaulted both the previous victim and the instant victim rendered the evidence of the prior sexual assault admissible in the case at bar. Further, we conclude that the trial court properly reasoned that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to defendant. Accordingly, we cannot say that the trial court abused its discretion in admitting the challenged testimony.

Defendant next argues that he was denied due process because the prosecution failed to disclose a prior statement made by a prosecution witness which contained information that could have been used by defendant for impeachment purposes. A violation of a discovery order or agreement does not automatically entitle a defendant to exclusion of otherwise admissible evidence. *People v Paris*, 166 Mich App 276, 281; 420 NW2d 184 (1988). We must consider (1) whether the suppression of the sought-after evidence was deliberate, (2) whether the evidence was requested, and (3) whether in retrospect, the defense could have put the evidence to significant use. *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). Upon our comparison of the witness' unverified prior statement with her trial testimony, we find that the prior statement is materially identical to her trial testimony, and therefore, defendant would not have succeeded in impeaching the witness even if he had possession of the prior statement during trial.

Defendant next argues that the trial court erred in not granting a mistrial following the testimony of a prosecution witness, where the witness inaccurately testified that she had been threatened not to testify. We review the denial of a motion for a mistrial for abuse of discretion. *People v Gonzales*, 193 Mich App 263, 265; 483 NW2d 458 (1992).

A mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way. *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). Moreover, this Court will reverse a trial court's decision not to grant a mistrial only if the trial court's ruling is "so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice." *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983). In the instant case, rather than granting a mistrial, the trial court instructed the jury to disregard that portion of the witness' testimony which indicated that she had been threatened not to testify. We find that the curative instruction removed any prejudice which might have resulted from the testimony, and therefore, the trial court did not abuse its discretion in electing not to grant a mistrial.

Defendant next argues that the trial court erred in refusing to consider at sentencing two letters that were submitted on defendant's behalf by third parties. Defendant, however, has neglected to submit or describe to this Court the contents of the letters. Therefore, by not revealing the contents of the letters, defendant cannot show any resulting prejudice. Accordingly, we find no error in the trial court's decision not to consider the letters.

Defendant finally argues that the trial court erred at sentencing respecting its scoring of OV 7 and OV 9. However, we will not review a sentencing court's scoring determination unless (1) a factual

predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). In the instant case, we find that the challenged guidelines scoring determinations are supported by the evidence, and we note that defendant has failed to allege that his sentence is disproportionate. Accordingly, defendant has not stated a cognizable claim respecting the trial court's scoring determinations.

Affirmed.

/s/ Henry William Saad

/s/ Janet T. Neff

/s/ Maureen P. Reilly