STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT ALLEN BROUGHTON,

Defendant-Appellant.

UNPUBLISHED
January 20, 1998

No. 198642
Allegan Circuit Court
LC No. 95-009895 FC

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and second-degree criminal sexual conduct, MCL 750.529c(1)(a); MSA 28.788(3)(1)(a). He was thereafter sentenced to concurrent terms of ten to twenty-five years' imprisonment for the conviction of first-degree criminal sexual conduct and five to ten years' imprisonment for the conviction of second-degree criminal sexual conduct. Defendant appeals as of right and we affirm.

I

Defendant's first argument on appeal is that the prosecutor improperly used evidence that defendant used drugs and alcohol and that the children involved in the charges also used drugs and alcohol. Defendant contends that such evidence was improperly used in order to establish his bad character contrary to MRE 404(b). However, defendant has waived review of this issue by failing to object at trial. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); MRE 103(a)(1).

Moreover, there is no plain error here, MRE 103(d), because the challenged evidence does not properly fit within MRE 404(b) analysis because it was not offered to show defendant's criminal propensity. Rather, the evidence was offered as part of the res gestae of the crime. Evidence offered for such a purpose is generally accepted as an exception to the rule under MRE 404(b). See McCormick on Evidence (3d ed.), § 190, pp 558-559 (1984); *People v Bowers*, 136 Mich App 284, 293; 356 NW2d 618 (1984); *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983). In *Bowers, supra*, p 294, this Court stated that the principle of res gestae applies to allow the admission of evidence of other conduct where "the act or conduct evidence being introduced was offered for the purpose of explaining the circumstances leading up to the charged offense and was not offered to prove that defendant, by virtue of his commission of the separate act, had committed the offense for which he was on trial." Similarly, this Court stated in *Robinson, supra*, p 340, that other acts evidence is admissible "where those acts are 'so blended or connected with the (charged offense) that proof of one incidentally involves the other or explains the circumstances of the crime,'" quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

In this case, defendants' and others' use of drugs and alcohol was inextricably intertwined with the sexual events that allegedly took place. Excluding this evidence would change the picture entirely. The eight-year-old complainant's household lacked any order and was apparently commonly used for partying, drinking, drug use, and sexual activity by both adults and children. To remove all of the surrounding circumstances and allow testimony of only the sexual act involving several children and adults would leave the jury wondering how such an incident would come about. Admitting the evidence, however, placed the sexual "bad touch party" in context and changed the picture to indicate that such an incident was in fact quite possible given the bizarre surrounding circumstances. Therefore, evidence of drug and alcohol use was proper as part of the res gestae of the crime and was not improperly offered as evidence of defendant's "bad" character.

II

Defendant next argues that he was denied a fair trial as the result of several instances of prosecutorial misconduct. Again, defendant failed to preserve this issue by objecting below. Therefore, appellate review is precluded unless an objection could not have cured the error or failure to review would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

We have reviewed defendant's allegations of prosecutorial misconduct and find that, taken in their proper context, the statements did not result in a miscarriage of justice. Moreover, had defendant objected at trial, the trial court could have cured any prejudice on the record. Under these circumstances, we decline to further review this issue.

III

Defendant next argues that he was denied the effective assistance of counsel. Defendant did not move for a new trial or an evidentiary hearing below regarding this issue, therefore, our review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). In order to prove a claim of ineffective assistance of counsel, defendant must show the counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced defendant so as to deprive him of a fair trial. *People v Pickens,* 446 Mich 298, 309; 521 NW2d 797 (1994).

Defendant argues that trial counsel was ineffective for failing to object to the "bad acts" evidence (see Issue I, *supra*), for failing to object to the allegations of prosecutorial misconduct (see Issue II, *supra*), and for failing to object to the trial court's instruction that the complainant's younger brother's testimony was to be used to judge the credibility of testimony regarding the act for which defendant was on trial.

With regard to the claim that counsel was ineffective for failing to object to the "bad acts" evidence, we have already concluded that such evidence was properly admissible. Therefore, defendant cannot show that he was prejudiced by counsel's conduct in this regard. With respect to the claim that counsel was ineffective for not objecting to certain allegations of prosecutorial misconduct, we again find no prejudice because the prosecutor's comments, when taken in their proper context, were not impermissible. Finally, there is no error with respect to the failure to object to the jury instruction because the trial court properly instructed the jury that the younger brother's testimony could not be used substantively. Accordingly, defendant has not proven that counsel's conduct was prejudicial such that he was denied a fair trial.

IV

Lastly, in a pro per brief, defendant argues that he was denied his constitutional right to a speedy trial, US Const, Am VI; Const 1963, art 1, § 20, and his statutory right to a speedy trial, MCL 780.131; MSA 28.969.

A

The complaint in this case was filed on August 23, 1995.[1] Defendant was arraigned on October 16, 1995, and the first trial in this case began on April 1, 1996. The motion to dismiss based on a violation of the 180-day rule was filed on November 16, 1995 and heard by the trial court on December 14, 1995. It was defendant's contention below, as now on appeal, that the prosecutor must bring the case to trial within 180 days of the complainant's allegations.

Only four months after the complaint was filed in this case, defendant moved to dismiss the case based on a violation of the 180-day rule. Although defendant argued before the trial court and again argues on appeal that the 180 days within which the prosecutor must bring the case to trial begins to run at the time of the victim's allegations, defendant cites no authority for such a proposition. The trial court denied defendant's motion based on the fact that the plain language of MCL 780.131(1); MSA 28.969(1) requires that the case be brought to trial within 180 days of when the warrant, indictment, information, or complaint are known to be "pending," not within 180 days of when a victim has made allegations and no formal charge has been made. Further, application of the statutory requirements is set forth in MCR 6.004(D) which states that a person is charged with a criminal offense if a warrant, complaint, or indictment has been issued against the person. Because defendant raised the 180-day issue only four months after the complaint and warrant were issued, the trial court correctly denied defendant's motion.

Nevertheless, defendant's case was not brought to trial until June 1996, nine months after the complaint was filed. However, the 180-day rule does not require that trial commence within 180 days; rather, if apparent good-faith action is taken well within that period, and the prosecutor

proceeds promptly toward readying the case for trial, the rule is satisfied. MCR 6.004(D); *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). Although defendant asserts that the prosecutor failed to make a good-faith effort to bring the case to trial, he cites no support for his argument, and there is nothing in the record to indicate a lack of good faith. Within ten months of filing the complaint, a preliminary examination was held, both parties raised pretrial motions, defendant's first trial was held, which resulted in a hung jury on some charges, and defendant was retried on those charges in the present case. The record indicates that the prosecutor acted in good faith toward proceeding to trial, and defendant's argument does not necessitate reversal. *Id.*, p 279.

B

We now turn to defendant's claim that he was denied his constitutional right to a speedy trial. In determining whether a defendant has been denied a speedy trial, four factors must be balanced: (1) the length of the delay; (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182, 2192; 33 L Ed 2d 101 (1972); *People v Hill*, 402 Mich 272, 283; 262 NW2d 641 (1978); *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997).

Defendant's failure to assert his right to a speedy trial in the trial court weighs heavily against his claim on appeal that he was denied that right. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987). Further, when a delay from arrest to trial is less than eighteen months, as in this case, the burden is on the defendant to prove prejudice. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972); *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). Defendant asserts that he was prejudiced because the delay resulted in "the intimidation and coercion" of the victim. However, such a general allegation of prejudice is insufficient to establish that defendant was denied his right to a speedy trial. *Gilmore, supra*, p 462; *People v Cooper*, 166 Mich App 638, 655; 421 NW2d 177 (1987). He also asserts that there were "threats" made to defendant's girlfriend to force her to testify against him. There is nothing in the portion of the record cited by defendant, or anywhere else in the record, to indicate that she was threatened to testify against him. Defendant has failed to show that he was prejudiced by the delay, and therefore, we conclude that defendant was not denied his constitutional right to a speedy trial.

Affirmed.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ Jane E. Markey

[1] The complaint alleged that the acts in this case occurred in September and October of 1993.