

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY EARL BROWN,

Defendant-Appellant.

UNPUBLISHED

April 20, 2006

No. 258825

Oakland Circuit Court

LC No. 2003-192454-FH

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ

PER CURIAM.

Defendant was convicted by a jury of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b), and sentenced to two concurrent prison terms of seven to fifteen years each. He appeals as of right. We affirm.

I. Bad Acts Evidence

Defendant first argues that reversal is required because of the admission of evidence of his prior acts of sexual misconduct against the complainant, his then 16-year-old stepdaughter. We review the trial court's decision for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

MRE 404(b) governs the admission of evidence of prior bad acts. The rule provides, in pertinent part:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

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. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People*

v Starr, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

The trial court admitted evidence of defendant's prior acts of sexual misconduct involving the complainant and instructed the jury that the evidence could be considered only to: (1) show the absence of mistake or accident, (2) show a plan, system, or scheme, or (3) rebut a claim of fabrication, and was not to be considered to show that defendant was a bad person or likely to commit crimes. The trial court thus identified proper, noncharacter purposes for the admission of the evidence.

Additionally, the bad acts evidence was relevant for the non-character purposes identified. First, because complainant testified that the charged offenses occurred while the family was "goofing around" in the swimming pool, to the extent that defendant suggested this was innocent horseplay rather than criminal sexual conduct, the evidence of defendant's prior sexual misconduct was relevant to negate any claim of mistake or accident. Next, because the evidence of prior bad acts indicated defendant had inappropriately touched the complainant's breasts and bottom on other occasions while swimming and had fondled her breasts during other physical games, the evidence was relevant to show that defendant had a plan, system, or scheme of using playful behavior to commit sexual acts. Finally, because defendant suggested at trial that the complainant was fabricating the charges, the evidence of defendant's prior acts was admissible to rebut this claim. *People v Layher*, 238 Mich App 573, 585; 607 NW2d 91 (1999), aff'd 464 Mich 756 (2001). In *People v DerMartex*, 390 Mich 410, 415; 213 NW2d 97 (1973), the Court found that evidence of other acts of sexual conduct between the defendant and a child victim living in the same household was admissible to corroborate the victim's testimony, because absent the excluded evidence, the victim's testimony would seem to concern an isolated assault and would therefore seem incredible to jurors. In this case, defendant and the complainant lived in the same household and her testimony about prior similar acts corroborates her testimony about the charged acts, tending to explain what might otherwise appear improbable. The evidence rebuts "the incredibility inherent in a seemingly isolated act of sexual misconduct within a household." *People v Dreyer*, 177 Mich App 735, 738; 442 NW2d 764 (1989).

Finally, the probative value of the prior acts evidence was not substantially outweighed by the potential for unfair prejudice, given the trial court's cautionary instruction to the jury that the evidence could be considered only for the identified non-character purposes and could not be considered as evidence that defendant was a bad person or was likely to commit crimes. Where evidence that is potentially excludable under 404(b) is offered for admission for other purposes, the prosecution and the court both must tread carefully to avoid infringing on defendant's fair trial rights; here this standard of care was met.

For these reasons, the trial court did not abuse its discretion in admitting the evidence of defendant's prior acts of sexual misconduct.

II. Admission of Excerpts of Defendant's Letters

Next, defendant argues that the trial court erred by admitting only selected portions of letters that he wrote to his wife. Defendant argues that the entire content of the letters should have been admitted under the rule of completeness. See MRE 106. Although defendant raised

various objections to the admission of the letters at trial, he never objected on the ground that it was unfair to admit portions of the letters without admitting other parts. Therefore, this issue was not preserved, *People v McGuffey*, 251 Mich App 155, 161; 649 NW2d 801 (2002), and our review is limited to plain error affecting defendant's substantial rights, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The doctrine of completeness, codified at MRE 106, provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

The clause "at that time" plainly requires a timely objection to admission of partial content; it does not allow a party the option of waiting to see how the proffered evidence helps or hurts before making a tactical decision about whether to require other parts of the writing or recorded statement. The rule requires the trier of fact to consider the original proffered evidence and the additional parts of it requested by the adverse party "contemporaneously" so that adverse parties have the opportunity to correct situations where pieces of a writing or recorded statement might be considered out of context and therefore misinterpreted; the logical cure for such potential errors is to include the proper context at the time the trier of fact considers the evidence.

The rule of completeness was not violated in this case because defendant never asked to introduce other parts of the letters, but rather sought to exclude the letters in their entirety. The trial court agreed that portions of the letters contained material that was inadmissible, but did not agree that the letters in their entirety were inadmissible. To successfully challenge his conviction on the basis of this evidentiary ruling, defendant must establish plain error, which requires that defendant must make "a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines, supra* at 763. This defendant has not done.

The excerpts that were admitted were not admissions of guilt as to the charged offenses, although some statements did refer to other inappropriate behavior to which defendant had already admitted.¹ Defense counsel suggested at trial that the lack of reference to the offenses charged, given defendant's expressions of remorse about other inappropriate behavior, indicated innocence as to the offenses charged. A thorough review of the letters at issue suggests that defendant would not have been appreciably helped by inclusion of the letters in their entirety: at no point did he explicitly deny that he penetrated the complainant, but many of the statements he did make would likely have irretrievably inflamed the jury.² We cannot say that there is plain error here, nor even error at all.

¹ Ex. "I have been open and honest in confessing my inappropriate behavior." "I made a mistake and I recognize it and took steps to correct the thoughts that led to the mistakes."

² Ex. "Satan is bombarding you [defendant's wife] with fiery arrows of lies and unbiblical reasoning." "You need to get the counsel of some believers that can help you get back to the truth. You're not going to get good counsel from your lawyer or child protective services or the
(continued...)

III. Sentencing

Defendant argues that resentencing is required because the trial court erroneously scored 50 points for offense variable (OV) 11. We disagree. The trial court's scoring of the sentencing guidelines will be upheld if there is any evidence in the record to support it. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

A score of 50 points for OV 11 is proper if two or more criminal sexual penetrations arose out of the sentencing offense, excluding the one penetration that forms the basis of the sentencing offense. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004); *People v McLaughlin*, 258 Mich App 635, 674-677; 672 NW2d 860 (2003). In this case, the complainant testified that defendant penetrated her three times during the sentencing offense. This testimony was sufficient to support the trial court's score of 50 points for OV 11.

Defendant argues the penetrations that form the basis of the 50 point score cannot be used in scoring OV 11 because they were used in scoring PRV 7 at 10 points. Defendant argues this is double counting. This court has considered and rejected this contention before: PRV and OV "are two separate categories addressing two different situations," and the different purposes allow for separate calculations based on the same underlying conduct. *People v Jarvi*, 216 Mich App 161, 163-164; 548 NW2d 676 (1996).

IV. Ineffective Assistance of Counsel

In a pro se supplemental brief, defendant argues that he was denied the effective assistance of counsel at trial. Because defendant did not preserve this issue by raising it in a motion for a new trial or a hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent from the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, the defendant must show that counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 600. The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense such that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Defendant first argues that trial counsel erred by not attempting to exclude his police statement on grounds of relevancy and undue prejudice. In his statement, defendant admitted to

(...continued)

FIA or the Prosecutor. You need spiritual counseling. You know that I am right. You have been seduced by whoever you have been getting your counseling from."

certain inappropriate behavior, but denied committing the more serious conduct charged. The record discloses that defense counsel attempted to use defendant's police statement at trial to defendant's advantage by pointing out that defendant came forth voluntarily, was willing to cooperate, and candidly admitted to some prior, less serious indiscretions, but always maintained that he did not commit the charged offenses. Defendant has not overcome the presumption that defense counsel did not object to the police statement as a matter of trial strategy.

Defendant next argues that counsel was ineffective for failing to object to the other acts evidence. As previously discussed, however, this evidence was properly admitted at trial. Counsel is not ineffective for failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Further, the record does not support defendant's claim that counsel was ineffective for cross-examining the complainant about the prior incidents. Rather, the record discloses that counsel was attempting to highlight that the other incidents arose from innocent conduct, or to discredit the complainant.

Defendant also asserts that defense counsel was ineffective for failing to interview or call character witnesses. Decisions about whether to call witnesses are presumed to be matters of trial strategy and this Court will not substitute its judgment for that of counsel regarding matters of strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). The failure to call a witness will establish ineffective assistance of counsel only if it deprived the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

In this case, the record does not disclose to what extent, if any, counsel investigated or considered calling character witnesses, or counsel's reasons for not doing so. Additionally, injecting character into a trial generally opens the door to the prosecutor's rebuttal of that evidence. MRE 404(a)(1). Defendant has not overcome the presumption that counsel reasonably decided not to present this evidence. Further, the record does not disclose the substance of any proposed character testimony. Because a character witness has no personal knowledge of the charged conduct, this case is distinguishable from cases where counsel failed to discover and present witnesses who could have directly contradicted the prosecution's case. See, e.g., *People v Grant*, 470 Mich 477; 684 NW2d 686 (2004), and *People v Johnson*, 451 Mich 115, 118; 545 NW2d 637 (1996). For these reasons, defendant has not demonstrated that defense counsel was ineffective for failing to call character witnesses.

Defendant also complains that defense counsel failed to properly investigate this case because he did not obtain a medical expert to review the complainant's counseling records. The failure to make a reasonable investigation can constitute ineffective assistance of counsel. *People v McGee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). In support of this claim, defendant asserts that defense counsel reviewed the complainant's counseling records and determined that they lacked any information of value. Defendant maintains that counsel was unqualified to make this determination and instead should have had the records reviewed by a medical expert, who possibly could have found some exculpatory value. The record discloses, however, that defense counsel did believe that the counseling records had exculpatory value and sought, unsuccessfully, to present this evidence at trial. Moreover, counsel did request that the records be reviewed by a medical expert, but the trial court denied this request and opted instead to conduct an in camera review of the records. In sum, the record does not support defendant's claim that defense counsel was ineffective in his handling of this matter.

Defendant also claims that defense counsel failed to adequately investigate the history of the complainant's family. We find no support in the record for this claim. Further, defendant has not explained what additional information could have been obtained that would have been helpful to his case. Therefore, we reject this claim of error.

Defendant also argues that defense counsel was ineffective for failing to object to the admission of portions of his letters, without insisting that other parts also be received. As previously discussed, defendant's substantial rights were not affected by the admission of portions of the letters. Therefore, defendant has not shown the requisite prejudice to sustain his claim of ineffective assistance of counsel. *Carbin, supra*.

Finally, in light of the foregoing analysis, there is no basis to conclude that the cumulative effect of several errors by defense counsel denied defendant a fair trial. *Ackerman, supra* at 454. We wish to note that despite our findings on these facts that the evidentiary rules at issue were not violated, the rules are critical to maintaining the integrity of the judicial process, and we do not lightly dismiss challenges, but rather carefully review the entire record and consider all facts and circumstances in each individual case to ensure a fair trial for every defendant.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald