

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID VERNON SWANSON,

Defendant-Appellant.

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UNPUBLISHED

June 18, 2009

No. 284156

Kent Circuit Court

LC No. 07-004659-FH

Before: Fort Hood, P.J., and Cavanagh and K. F. Kelly, JJ.

PER CURIAM.

This case involves defendant's sexual contact the victim when the victim was between six and thirteen years old. After a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a), accosting a child for immoral purposes, MCL 750.145a, and contributing to the delinquency of a child, MCL 750.145. We affirm.

I. Other Acts Evidence

Defendant first argues that the trial court erred in admitting testimony regarding defendant's alleged prior bad acts of domestic violence and an extramarital affair. Specifically, defendant contends that the evidence introduced was not relevant and was unfairly prejudicial. We disagree. Because defendant did not object to the admission of this evidence at trial, we review this evidentiary issue for plain error affecting his substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Generally, evidence of a defendant's other acts is inadmissible to prove the defendant's character in order to show action in conformity therewith. MRE 404(b). The purpose of this rule is to avoid conviction based on a defendant's past conduct. *People v Werner*, 254 Mich App 528, 539; 659 NW2d 688 (2002). However, MRE 404(b)(1)<sup>1</sup> permits the introduction of other

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<sup>1</sup> MRE 404(b)(1) provides:

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

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acts evidence under certain limited circumstances. To be admissible under this rule, the other acts evidence (1) must be offered for a proper purpose, (2) must be relevant to an issue of fact or consequence at trial, and (3) its probative value must not be substantially outweighed by unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

We see no error in the trial court's decision to admit the testimony regarding the domestic violence and extramarital affair. We first note that the evidence was offered for a proper purpose. Mainly, the evidence in this matter is so connected to the charged crime, that proof of the charged crime incidentally involves an explanation of the other acts in order to give the jury the "complete story." *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). Because testimony regarding these events was required to provide "an intelligible presentation of the full context in which disputed events took place" we are of the view that the evidence was offered for a proper purpose. See *id.*

Having concluded that the evidence was introduced for a proper purpose, we turn to defendant's argument that the testimony should have been excluded because it was not relevant. Relevant evidence "is evidence that is material (related to any fact that is of consequence to the action) and has probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence)." *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). A material fact in issue is one that "is within the range of litigated matters in controversy." *Id.*

Here, the other acts evidence was relevant to the victim's credibility, which was called into question because defendant's testimony was contrary to the victim's. The evidence regarding domestic violence was offered to explain the victim's delay in reporting the sexual abuse, *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996), and tended to show that the victim was credible although she had delayed in reporting it. And, the testimony regarding the extramarital affair functioned to verify the victim's testimony because it corroborated the victim's assertion that defendant had purchased underwear for her to model, which he denied. "[W]hether [a] witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact [to which the witness is testifying]." *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod and rem'd 450 Mich 1212 (1995). In both of these instances, the other acts evidence was relevant to the victim's credibility. Accordingly, we cannot agree with defendant's assertion that the evidence of these other acts was not relevant.

Nor can we conclude, as defendant urges us to do, that the probative value of the challenged evidence was substantially outweighed by the danger of unfair prejudice. MRE 403. It is unlikely that the jury gave undue or preemptive weight to the challenged evidence because

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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.

the acts are very dissimilar to the crimes charged. *People v Ortiz*, 249 Mich App 297, 307; 642 NW2d 417 (2001). Accordingly, the trial court did not err in admitting the evidence and defendant's claim fails.

## II. Jury Instructions

Defendant next argues that the trial court erred in failing to provide the jury additional definitions for the terms "gross indecency and moral depravity," which the jury requested. Defendant, however, has waived this issue because he affirmatively agreed with the trial court's decision and indicated that he had no objection. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Nonetheless, even if we were to consider his argument, we would conclude that the instructions were sufficient. A trial court is required to instruct the jury in the applicable law and fully and fairly present the case to the jury in an understandable manner. *People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000). This is necessary so that the factfinder can correctly and intelligently decide the case. *Id.* "Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). "Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

After the trial court read the jury the instruction for accosting a minor for immoral purposes, MCL 750.145a, the jury requested the court to provide it with legal definitions of "gross indecency and moral depravity." The trial court refused to do so and the jury then requested a copy of a Black's Law Dictionary. The court also refused this request. We find no error in this course of action. Rather, the instructions as a whole fairly presented the issues to be decided and sufficiently protected defendant's rights. See *Aldrich*, *supra* at 124. Further, because the statute does not provide definitions of the terms requested, it was not error for the trial court to have the jurors rely on their common sense and general knowledge when considering those elements of the crime. The trial court's refusal to provide the requested definitions did not constitute plain error.

## III. Ineffective Assistance of Counsel

Finally, defendant contends that he was denied effective assistance of counsel when counsel failed to object to the introduction of the other acts evidence and affirmatively agreed with the trial court's refusal to further instruct the jury on the definitions of "gross indecency and moral depravity." As we have already concluded, the evidence was properly admitted and the instructions did not constitute error requiring reversal. It follows that any objection would have been futile. And, because counsel cannot be ineffective for failing to raise a futile objection, defendant's claim of ineffective assistance of counsel is without merit. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Affirmed.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly