

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JOHNNIE DUANE GORDON,

Defendant-Appellant.

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UNPUBLISHED

October 28, 2010

No. 291745

Saginaw Circuit Court

LC No. 07-029654-FC

Before: MURPHY, C.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), first-degree criminal sexual conduct (CSC I), MCL 750.520b, and second-degree criminal sexual conduct (CSC II), MCL 750.520c. Defendant was originally sentenced to 84 months to 20 years for home invasion, 120 months to 15 years for CSC II, and 75 months to 170 months for CSC I; the home invasion sentence was to be served consecutively to and preceding the CSC sentences. The sentences were changed in an amended judgment such that defendant was sentenced to 71 months to 15 years for CSC II and 120 months to 15 years for CSC I. Defendant appeals as of right. Because we conclude that defendant was not denied the effective assistance of counsel, and because the original judgment of sentence provided that defendant's home invasion sentence was to be served consecutively to his CSC sentences, we affirm.

**I. BASIC FACTS**

The victim claimed that defendant sexually assaulted her during the early morning hours of May 12, 2007. Defendant maintained that they had consensual sex.

The victim and defendant knew each other because they worked together and defendant did maintenance at the victim's apartment. The victim testified that, prior to the alleged sexual assault, defendant had exposed his penis when he came over to fix her heater. A number of the victim's coworkers testified that the victim told them about this encounter. The victim said that on another occasion when defendant was fixing her heater, he had digitally penetrated her against her will. She told no one of this incident. She did not report either incident to the police. She testified that after these incidents she was uncomfortable around defendant.

On May 11, 2007, the victim went with a friend to Meinberg's bar, a bar that they regularly frequented. Defendant showed up at the bar, but the victim testified that there had been

no plan to meet defendant. The victim said that defendant danced with her friend but they told him to go away. They did not seek help from the bartender or security. They left earlier than usual because defendant was making them uncomfortable. In the parking lot, they stopped when defendant flagged them down. He jumped in the car and learned that they were going to a restaurant to eat. He appeared at the restaurant, sat with them, and was obnoxious. They said that they again asked him to leave but again did not seek assistance. He left the restaurant before the victim and her friend.

The victim was then dropped off at her apartment. As she was entering at 2:59 a.m., defendant called her. According to the victim, defendant said he was coming over and when she told him not to, he said he was in the hallway. She said she cracked her door to see if he was there because, if so, she was going to call the police. Her cat then ran out and she chased it up some steps. She testified that when she came back defendant was in her apartment. He put his arms around her waist and shoulders and started grabbing her. She claimed that he pulled her shirt up and put his mouth on her breast. She said that she told him to get away as she backed up against her couch, that he grabbed her pants as she fell backwards, that he pulled her pants down, and that he penetrated her vagina with his penis. He then grabbed a plastic bag, wiped himself off, said “don’t think you can call me now because this happened,” and then “just took off.” The victim’s dog was secured behind a baby gate while the assault happened. There was testimony from numerous witnesses indicating that the victim’s demeanor changed after this incident in that she became more withdrawn.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises numerous claims of ineffective assistance of counsel. Defendant raised these claims in a motion for a *Ginther*<sup>1</sup> hearing. Thus, the issues are preserved, but because the trial court denied the motion and did not hold an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).<sup>2</sup>

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To establish a claim of ineffective assistance, a defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different and the resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>2</sup> This Court denied defendant’s motion to remand for an evidentiary hearing for failure to meet the requirements of MCR 7.211(C)(1)(a). *People v Gordon*, unpublished order of the Court of Appeals, entered November 2, 2009 (Docket No. 291745).

Defendant first asserts that counsel was ineffective for failing to object to the evidence of his prior sexual assaults of the victim.<sup>3</sup> He claims that counsel should have objected to the bad acts evidence because the prosecution failed to provide pretrial notice, as required by MRE 404(b)(2). Defendant also claims that the evidence was more prejudicial than probative, and notes that counsel failed to request a limiting instruction.

Evidence of a defendant's other bad acts is admissible if (1) the evidence is offered for a proper purpose, (2) the evidence is relevant to an issue of fact that is of consequence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009). In addition, upon request, a trial court may issue a limiting instruction. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Defendant does not contest that evidence of his prior sexual assaults of the victim was offered for a proper purpose. While evidence of a defendant's bad acts is not admissible to prove the defendant's character "in order to show action in conformity therewith," bad acts evidence is admissible for noncharacter purposes. MRE 404(b)(1); *People v Roper*, 286 Mich App 77, 92; 777 NW2d 483 (2009). The defense in the present case was consent, and defendant concedes that "use [of] the evidence to show lack of consent is one of the permissible purposes under Rule 404(b)." Defendant also does not contest that the evidence was relevant.

We reject defendant's contention that the probative value of the bad acts was substantially outweighed by its probative value. See MRE 403. While "all evidence is prejudicial to some extent," *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002), "[e]vidence is unfairly prejudicial [only] when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury," *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003) (quotations omitted). Here, the evidence of defendant's prior sexual assaults of the victim was highly probative to the ultimate issue whether the victim consented to having sex with defendant on May 12, 2007. Thus, any objection based on MRE 403 would have been futile. Counsel was not ineffective for failing to make a futile objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

We also reject defendant's contention that counsel was ineffective for failing to object based on the lack of pretrial notice. If the prosecution intends to introduce bad acts evidence at trial, it "shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rational, whether or not mentioned in [MRE 404(b)(1)], for admitting the evidence." MRE 404(b)(2). Here, the lower court file contains no notice by the prosecution that it intended to introduce evidence of defendant's prior sexual assaults.<sup>4</sup> Defendant's

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<sup>3</sup> Defendant also claims that evidence that he spanked a child was improper under MRE 404(b). However, there was no evidence that this spanking was abusive or otherwise per se a bad act.

<sup>4</sup> A notice of intent to offer other acts evidence was filed on October 21, 2008, but it related to defendant's sexual assault of another coworker. This evidence was never offered at trial. The parties discussed an MRE 404(b) motion at the beginning of trial. However, there is no motion in the record and, in any event, the record indicates that it dealt with other acts.

argument assumes that because the prosecution failed to provide notice of its intent to introduce the bad acts evidence, had counsel objected on the lack of notice, the trial court would have excluded the evidence. However, no Michigan appellate court has ever held that bad acts evidence must be excluded solely because the prosecution failed to provide pretrial notice.

In *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001), this Court held that the prosecution's failure to provide pretrial notice of its intent to introduce bad acts evidence was plain error. However, it held that the lack of notice did not require reversal of the defendant's convictions. *Id.* at 455. First, it stated that because the bad acts evidence was substantively admissible, any pretrial notice would not have had any effect on whether the trial court should have admitted the evidence. *Id.*<sup>5</sup> Second, the Court reasoned that because the defendant failed to indicate that he would have reacted differently to the evidence had the prosecution given notice, it could not conclude that the lack of notice had any effect on the trial. *Id.* at 455-456. In addition, in *People v Dobek*, 274 Mich App 58, 87; 732 NW2d 546 (2007), this Court stated that the defendant was not prejudiced by the prosecution's failure to provide pretrial notice of its intent to introduce evidence of sexual incidents between the defendant and the victim, when defense counsel was aware of the incidents before trial. These two cases suggest that any objection to the admission of bad acts evidence based on a lack of pretrial notice would be futile where the evidence was admissible and the defendant was neither surprised by the evidence nor able to articulate a different course of action that would have been taken had notice been given.

In this case, the bad acts evidence of the prior sexual acts was substantively admissible. In addition, while there is no written notice in the lower court file, defendant has never claimed that he was surprised by the introduction of the bad acts evidence. Moreover, defendant has never suggested that, had pretrial notice been given, counsel would have taken a different course of action. There has been no assertion that counsel would have objected to the evidence, that counsel would have called witnesses, or that counsel would have introduced additional evidence. See *Hawkins*, 245 Mich App at 455-456. Under the circumstances, defendant has failed to establish that an objection based on a lack of pretrial notice would have been granted. Accordingly, counsel was not ineffective for failing to object to the bad acts evidence based on a lack of pretrial notice. *Milstead*, 250 Mich App at 401.

We further reject any contention by defendant that counsel was ineffective for failing to request a limiting instruction. The decision to request a limiting instruction is a matter of trial strategy. See *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Defendant has failed to overcome the presumption that counsel's decision not to request a limiting instruction was sound strategy. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007).

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<sup>5</sup> The Court noted that the purpose of the notice provision was (1) to force the prosecutor to articulate a proper purpose for the evidence, (2) to allow the defendant the opportunity to object to the evidence, and (3) to facilitate a thoughtful ruling by the trial court. *Hawkins*, 245 Mich App at 454-455.

Defendant next asserts that counsel was ineffective for failing to object to the hearsay statements regarding what the victim had told her coworkers about the prior sexual assault. Hearsay is “a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). Here, the defense was consent. The testimony of the victim’s coworkers was not offered to prove that defendant had committed the prior sexual act, but to show the victim’s dislike for defendant, which would imply that the victim did not consent to having sex with defendant. Because the victim’s out-of-court statements, as testified by her coworkers, were not offered for the truth of their contents, the statements were not hearsay. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 540; 775 NW2d 857 (2009). Thus, any hearsay objection would have been futile. Counsel was not ineffective for failing to making a futile objection. *Milstead*, 250 Mich App at 401.

Defendant argues that counsel was ineffective in eliciting testimony from one of the victim’s coworkers about the desire to confront defendant over the coworkers’ discomfort with his behavior. Presumably, counsel was trying to show that the victim knew defendant would be at the bar on May 11, 2007. The coworker’s response was not unfavorable to defendant. The coworker testified that, approximately a month earlier, the victim had told her that defendant was generally at the bar whenever the victim went and that the victim had asked her coworkers to go so as to present a united front against defendant. Counsel successfully established that the victim would have known that it was likely defendant would be at the bar. Defendant has failed to establish that counsel’s cross-examination of the coworker fell below an objective standard of reasonableness. *Odom*, 276 Mich App at 415.

Defendant also argues that counsel was ineffective in not having defendant testify. The decision to have a defendant testify is a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). We disagree with defendant’s claim that no reasonable trial strategy supports the decision not to have defendant testify. Counsel was able to present a credible defense based on consent without defendant’s testimony. For example, he elicited testimony showing that the victim likely knew that defendant would be at the bar, was with him at the bar and the restaurant with no request that defendant be asked to leave, and opened and left open the door to her apartment at 3:00 a.m. just after defendant told her that he was coming over, and kept her dog in a bedroom. Counsel could have tactically concluded that the case would be better without defendant’s testimony.

Defendant next asserts that counsel was ineffective for conceding in closing argument that the victim could be believed regarding his prior act of exposing himself. However, given the number of witnesses who testified that the victim had reported the incident, counsel could have legitimately determined that nothing would be lost by conceding the point. Defendant has failed to overcome the presumption that counsel’s concession was sound trial strategy. *Cline*, 276 Mich App at 637.

Finally, defendant argues that counsel was ineffective for failing to object to numerous prosecutorial comments and questions. We have reviewed the alleged improper statements and questions, and find none of them improper. Any objection to the statements or questions would have been futile.

### III. SENTENCING

Defendant argues that when the trial court issued an amended judgment correcting his sentences, it impermissibly modified the judgment to order that the home invasion sentence be served consecutively to the CSC I and CSC II sentences. However, there was no modification. The original judgment of sentence provided for a consecutive sentence.

Affirmed.

/s/ William B. Murphy

/s/ Joel P. Hoekstra

/s/ Cynthia Diane Stephens