

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS KEITH CARTER,

Defendant-Appellant.

UNPUBLISHED

June 11, 1999

No. 203173

Midland Circuit Court

LC No. 96-008125 FH

Before: Griffin, P.J., and Wilder and Danhof*, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of one count of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). The trial court sentenced defendant to a five to fifteen year prison term. We affirm defendant's conviction and sentence but remand for administrative correction of the presentence investigation report.

Defendant claims that the prosecutor intentionally elicited testimony from three witnesses that improperly interjected evidence of prior abuse by him against the complainant. MRE 404(b). Defendant only preserved the testimony of Maria Mandelstamm, M.D., for review. MRE 103(a)(1); *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). We review a lower court's decision to admit evidence of a defendant's other acts for an abuse of discretion. *People v Rockwell*, 188 Mich App 405, 410; 470 NW2d 673 (1991). A trial court abuses its discretion when "an unprejudiced person, considering the facts upon which the court acted, would say there was no justification or excuse for the ruling." *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

Defendant contends that Mandelstamm's testimony was irrelevant and prejudicial. "Evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts." *People v Engelman*, 434 Mich 204, 211; 453 NW2d 656 (1990). Other acts evidence is admissible if: (1) the prosecutor offers it to prove "something other than a character to conduct theory"

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

as prohibited by MRE 404(b); (2) the evidence fits the relevancy test articulated in MRE 402, as “enforced by MRE 104(b)”;

and (3) the balancing test provided by MRE 403 demonstrates that the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is being offered. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205; 525 NW2d 338 (1994).

The prosecutor offered Mandelstamm’s testimony not to show that defendant acted in conformity with a bad character trait, see *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998), but rather to rebut the defense theory of consent and to prove that the victim’s complaint was not merely a reaction to ending her relationship with defendant. This testimony was also relevant and material under MRE 402 because defendant raised consent and the complainant’s emotional state as part of his defense. See *People v Miller*, 198 Mich App 494, 497; 499 NW2d 373 (1993). Mandelstamm’s testimony tended to show that the complainant sustained real injuries, indicating that defendant had used force against her, and that her demeanor could be explained as a reaction to physical pain even if she had suffered an emotional injury. See *People v Kline*, 197 Mich App 165, 166; 494 NW2d 756 (1992), citing CJI2d 20.15; *People v Worrell*, 417 Mich 617, 621-622; 340 NW2d 612 (1983).

We agree with the lower court that Mandelstamm’s testimony was not substantially more prejudicial than probative. Her recommendation that the complainant should leave defendant was relevant to a prescribed course of treatment, which properly comments on the severity of the complainant’s injuries and falls within the hearsay exception of MRE 804(3). The statement about escalation of violence explained the foundation of Mandelstamm’s recommendation and was akin to telling the complainant to remove a source of injury, an appropriate consideration for a physician. Taken as a whole, Mandelstamm’s testimony was relevant, for a proper purpose, and not objectively inflammatory. Compare *People v Ullah*, 216 Mich App 669, 675-676; 550 NW2d 568 (1996).

We do not condone the prosecutor’s failure to give notice to defendant regarding his intent to elicit this testimony. The evidence falls within the definition of other “acts” or “wrongs” under MRE 404(b)(1) and is not merely an explanation of “the complete story” in this case. *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). However, we note that defendant did not claim unfair surprise or request a limiting instruction at trial. *VanderVliet*, *supra* at 75. Therefore, we conclude that this testimony did not cause the prejudice necessary to hold that this error requires reversal of defendant’s conviction. *People v Graves*, 458 Mich 476, 482-483; 581 NW2d 229 (1998); *People v Gearns*, 457 Mich 170, 204-205; 577 NW2d 422 (1998).

Moreover, we are not convinced that the testimony of the complainant and defendant regarding prior abuse constitutes a miscarriage of justice. MRE 103(d); MCL 769.26; MSA 28.1096. This very brief testimony was harmless in light of the other compelling evidence of defendant’s guilt and we do not find a miscarriage of justice when a timely objection and a request for a limiting instruction could have cured any resulting prejudice. *In re Snyder*, 223 Mich App 85, 92-93; 566 NW2d 18 (1997).

Defendant, a second habitual offender, also claims that his sentence is disproportionately harsh because the offense was more like a simple assault than criminal sexual conduct. We disagree. We

apply the abuse of discretion standard to review a sentence. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). “[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990). Whether to impose an enhanced sentence on an habitual offender is within the sentencing court’s discretion. *People v Bewersdorf*, 438 Mich 55, 59; 475 NW2d 231 (1991). The court decided to exercise its discretion by *not* enhancing defendant’s sentence and by imposing the five-year minimum sentence that is within the range recommended by the guidelines. *Id.* at 66.

The offense in question fits the definition of CSC III under MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). Even if, as defendant argues, he did not have a deviant sexual purpose to commit the penetration, the pertinent statute does not require that he have any sexual intent at all. MCL 750.520d(1); MSA 28.788(4)(1). This was not a minor offense, yet the lower court exercised its discretion to be lenient by declining to enhance the sentence under the habitual offender provisions. We find no abuse of discretion in that decision.

Finally, defendant claims that improper information remains in his PSIR. The lower court clearly expressed its intent to exclude defendant’s former wife’s allegations of domestic violence from the PSIR. MCL 771.14(5); MSA 28.1144(5); see *People v Swartz*, 171 Mich App 364, 379-380; 429 NW2d 905 (1988); *People v Taylor*, 146 Mich App 203, 205-206; 380 NW2d 47 (1985). “[T]he presentence investigation report should accurately reflect any determination the sentencing judge has made concerning the accuracy or relevancy of the information contained in the report.” *People v Norman*, 148 Mich App 273, 275; 384 NW2d 147 (1986). Therefore, we remand this case to the lower court to exclude those allegations from the PSIR.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Robert J. Danhof