

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON BENSON,

Defendant-Appellant.

UNPUBLISHED

August 2, 2002

No. 232236

Wayne Circuit Court

LC No. 99-010126

Before: Fitzgerald, P.J., and Holbrook, Jr. and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a bench trial of three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b). The trial court sentenced defendant to concurrent terms of 5½ to 15 years imprisonment. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that his jury trial waiver is invalid because the trial court did not adequately establish on the record that it was voluntarily, intelligently, and understandingly made. Defendant maintains that the trial court failed to inform defendant of the nature of a jury trial, did not verify that defendant understood its significance, and did not inquire about any expectations of leniency or any possible promises, threats, or inducements. Defendant's argument is without merit.

We review the validity of a defendant's waiver for clear error. *People v Taylor*, 245 Mich App 293, 305, n 2; 628 NW2d 55 (2001); *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). A finding is clearly erroneous where, after reviewing the entire record, we are "left with a definite and firm conviction that a mistake has been made." *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998).

There is no requirement that a trial court give an in-depth explanation of waiver of the right to a jury trial that defendant claims was necessary. See *Leonard, supra* at 596; *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993); *People v James (After Remand)*, 192 Mich App 568, 570-571; 481 NW2d 715 (1992). MCR 6.402(B) directs that

Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and

that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

Here, a review of the record indicates that the trial court complied with these requirements. Consistent with the court rule, the trial court specifically advised defendant that he had a constitutional right to a trial by jury and asked defendant if he wished to waive that right, which would result in a trial by the court. Defendant responded affirmatively that he intended to waive this right and signed a written waiver that described his constitutional right to a jury trial. Defendant did not at that time express any concern about waiving his right to jury trial and does not now claim that he was coerced or induced into signing the jury waiver. Because these circumstances demonstrate that defendant understood and voluntarily relinquished his right to a jury trial, we conclude that the trial court did not clearly err in accepting defendant's waiver. *Taylor, supra* at 305, n 2; *Leonard, supra* at 595-596.

Next, defendant argues that the trial court abused its discretion by allowing the prosecutor to introduce into evidence prejudicial other acts testimony concerning his purported addiction to drugs, even though defendant was being tried for crimes unrelated to any alleged drug activities. The victim testified that defendant wanted her to ask his cousin, who was sleeping in the motel room where two of the charged assaults occurred, for drugs because his cousin did not know about defendant's drug addiction and defendant did not want to "let on" that he had a drug problem. Defendant also contends on appeal that the prosecution failed to give proper notice pursuant to MRE 404(b)(2) of its intent to introduce this evidence.

The defense did not object to this testimony; thus, the issue has not been properly preserved for appellate review, MRE 103; *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994), and is reviewed only for plain error, *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). Three requirements must be met to withstand forfeiture of an unpreserved, nonconstitutional error under the plain error rule: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights. *Id.* at 763. Reversal is necessitated only if plain error resulted in the conviction of an actually innocent defendant, or where the error seriously affected the fairness, integrity, or reputation of judicial proceedings. *Grant, supra* at 550-551.

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if such evidence is (1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, MRE 403. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Motive and intent are two proper purposes for admitting other acts evidence under MRE 404(b), if relevant. *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000). Our Supreme Court has characterized MRE 404(b)(1) as a "rule of inclusion" that "permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct." *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). Consequently, "evidence of prior 'bad acts' 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.'" *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). See also *People v Williamson*, 205 Mich App 592, 596; 517 NW2d 846 (1994);

People v Medina, 100 Mich App 358, 361-362; 298 NW2d 648 (1980). “Res gestae” has been defined as “the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect.” *Robinson, supra*, quoting *People v Castillo*, 82 Mich App 476, 479-480; 266 NW2d 460 (1978).

In *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996), our Supreme Court, citing *Delgado, supra*, reaffirmed the rule that evidence of other crimes or bad acts is admissible without regard to MRE 404(b), where the evidence is part of the complete story of the case or is directly related to the circumstances of the crime. *Sholl*, like the present case, involved a charge of criminal sexual conduct. The Court held that evidence that the defendant had used marijuana on the evening when he and the complainant had sexual relations was properly admitted into evidence:

As this Court has frequently explained, there are substantial limits on the admissibility of evidence concerning other bad acts. MRE 404(b); *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993).

Nevertheless, it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which the disputed events took place. The presence or absence of marijuana could have affected more than the defendant’s memory. It could have affected the behavior of anyone who used the drug. Further, inferences made by a person about the intended conduct of another might have been affected by the person’s knowledge that the other’s conduct was taking place in a setting where illegal drugs were being used.

In this case, a jury was called upon to decide what happened during a private event between two persons. The more the jurors knew about the full transaction, the better equipped they were to perform their sworn duty. [*Sholl, supra* at 741-742].

In the instant case, we conclude that the challenged testimony was admissible under this “res gestae” exception to MRE 404(b)(1). In the instant case, the victim initially testified that after defendant first assaulted her in her automobile, he began “ranting” that what he had just done was rape and that his actions were wrong. The victim testified that defendant stated that if it were not for his drug addiction, he never would have assaulted her. Defendant began to cry, asked for her forgiveness, and asked the victim to pray with him. According to the victim, defendant then took her to a motel room where his cousin was sleeping, sexually assaulted her two more times in the bathroom, and then wanted her to ask his cousin for drugs because his cousin did not know about defendant’s drug addiction. Under the circumstances, where the credibility of the witnesses was of critical importance, “an intelligible presentation of the full context in which the disputed events took place,” was warranted and provided ample justification for the admission of this other acts evidence. *Id.* at 741.

Moreover, we note that this was a bench trial, and the trial judge who sits as factfinder is presumed to know the limits on the use of such evidence. See *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992); *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). We are therefore satisfied that the admission of this evidence did not amount to plain error so as to avoid forfeiture of this unpreserved issue.

In a related argument, defendant contends that his trial counsel was ineffective for failing to object to the introduction of the above other acts evidence concerning his drug addiction. However, like defendant's substantive argument based on MRE 404(b), his related ineffective assistance claim is without merit. As previously discussed, the evidence was properly admitted, and any objection by defense counsel would have been meritless. "A trial attorney need not register a meritless objection to act effectively." *Hawkins, supra* at 457. Further, to establish ineffective assistance of counsel, a defendant must demonstrate that his attorney performed deficiently and that the deficiency likely affected the outcome of the case. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). A defendant must overcome a strong presumption of effectiveness. *Id.* Defendant has not borne his burden here.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin