

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH LAMONT ROGERS,

Defendant-Appellant.

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UNPUBLISHED

October 11, 2005

No. 249496

Wayne Circuit Court

LC No. 03-002196-01

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

PER CURIAM.

Defendant Keith Lamont Rogers appeals as of right his jury trial convictions for first-degree criminal sexual conduct (CSC),<sup>1</sup> felonious assault,<sup>2</sup> and domestic violence.<sup>3</sup> Defendant was sentenced to twenty-five to forty years in prison for the CSC conviction; one to four years in prison for the felonious assault conviction; and three months in prison for the domestic violence conviction. We affirm.

I. Facts

Defendant's convictions arose from the physical and sexual assault of his wife outside of their home on the evening of January 24, 2003. The complainant returned home after visiting her sister's house and found defendant waiting for her. Defendant accused her of having an affair and failing to pick up his son from school. Defendant grabbed the complainant by the inside of her mouth and pulled her from her vehicle. In the driveway, defendant proceeded to tear off the complainant's pants and underwear. He repeatedly shoved his hand into her vagina. Defendant again grabbed the complainant by the inside of her mouth and lifted her into the air. Defendant dragged the complainant into the garage where he continued his physical assault. Defendant choked the complainant by strangling her and by shoving his hand into her mouth. He repeatedly hit the complainant, slammed her against walls, and hit her head against the stone

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<sup>1</sup> MCL 750.520b(1)(f) (sexual penetration through use of force causing injury).

<sup>2</sup> MCL 750.82.

<sup>3</sup> MCL 750.81(2).

steps leading into the house. Defendant ignited the complainant's hair with a lighter. He repeatedly threatened to kill her, once brandishing a shovel. However, in the middle of this prolonged assault, defendant allowed the complainant to answer a phone call from her sister, who summoned the police. Defendant was subsequently arrested and the complainant was hospitalized.

## II. Other Acts Evidence

Prior to trial, the prosecution filed a notice of intent to introduce evidence that defendant had previously been convicted of domestic violence for physically assaulting his former wife in 1997. The prosecution contended that this evidence was relevant to show defendant's intent, common plan or scheme, and the absence of mistake or accident. Following a hearing on the issue, the trial court determined that the evidence was relevant and admissible as it was more probative than prejudicial. Defendant contends that the trial court erred in admitting the evidence as a matter of law and failed to exercise any discretion in making its ruling. We review a trial court's decision to admit other acts evidence for an abuse of discretion,<sup>4</sup> and preliminary questions of law de novo.<sup>5</sup>

Defendant's assertion that the trial judge admitted that she was not prepared to make a ruling on the admissibility of this evidence is completely without merit. The judge noted that she had "less information" regarding defendant's prior trial and conviction than both attorneys. However, the judge refrained from making a ruling until she conducted a full hearing at which both parties adequately argued their positions. The judge obviously had the opportunity to review the relevant law and familiarize herself with the factual and legal issues presented before she made her ruling.

Defendant further contends that he was irreparably prejudiced by the presentation of the testimony of his former wife regarding a prior incident of domestic violence. Evidence of other bad acts is inadmissible to prove an individual's propensity to act in conformity therewith.<sup>6</sup> Such evidence may be admissible to show "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 . . . ."<sup>7</sup> We evaluate the admission of other acts evidence by considering if: (1) it was offered for a proper purpose under MRE 404(b); (2) it was relevant; (3) its probative value was not substantially outweighed by unfair prejudice; and (4) a limiting instruction was requested and provided by the trial court.<sup>8</sup>

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<sup>4</sup> *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

<sup>5</sup> *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

<sup>6</sup> MRE 404(b)(1); *Crawford*, *supra* at 383.

<sup>7</sup> MRE 404(b)(1).

<sup>8</sup> *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000); *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

The trial court properly admitted the testimony of defendant's former wife. This testimony was introduced for the purpose of showing defendant's common plan, scheme or system of exerting physical control over his spouse.<sup>9</sup> Such evidence is admissible if there is a sufficient factual nexus between the prior conviction and the charged offense; i.e. the prior conviction is similar enough to be materially and logically relevant.<sup>10</sup> However, general similarity is insufficient. There must be "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations."<sup>11</sup>

Defendant's former wife testified that defendant returned home after being out all night and accused her of having an affair. He ripped her nightgown, exposing the upper part of her body and her side. Defendant grabbed his former wife by the neck and lifted her into the air, hit her head against the kitchen cabinets, threw her down on the kitchen floor, and dragged her through the kitchen. Defendant threatened to kill her. He dragged her to another room, hit her in the head with a metal vent, suffocated and strangled her. The assaults involved several common features reflecting a common scheme or system in physically abusing his spouses. The incidents of domestic violence were "sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system."<sup>12</sup>

This testimony was also highly relevant. Defendant asserted that an argument with the complainant escalated and that he did not intend to injure her. To establish felonious assault, however, the prosecution must show that defendant intended "to injure or place the victim in reasonable apprehension of immediate battery."<sup>13</sup> The prior incident of domestic violence clearly tends to show that defendant intended to cause harm to the complainant.

### III. Effective Assistance of Counsel

Defendant challenges the effectiveness of counsel both at trial and at sentencing on several grounds. This Court previously remanded this case to the trial court for an evidentiary hearing to determine whether defendant was entitled to a new trial based on the ineffective assistance of counsel or for other grounds.<sup>14</sup> The trial court conducted a *Ginther*<sup>15</sup> hearing and subsequently denied defendant's motion for a new trial.

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<sup>9</sup> The prosecution also contended that the evidence would negate defendant's allegations that the complainant was mistaken about the events or fabricated the charges. However, the trial court need only find one proper purpose to admit evidence of prior bad acts. *People v Starr*, 457 Mich 490, 499; 577 NW2d 673 (1998).

<sup>10</sup> *Sabin, supra* at 63-64; *Crawford, supra* at 394-395.

<sup>11</sup> *Sabin, supra* at 64-65, quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 250-251.

<sup>12</sup> *Id.* at 63.

<sup>13</sup> *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

<sup>14</sup> *People v Rogers*, unpublished order of the Court of Appeals, entered April 19, 2004 (Docket (continued...))

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.<sup>16</sup> To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different.<sup>17</sup> Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.<sup>18</sup>

#### A. At Trial

First, defendant contends that trial counsel was ineffective for failing to present a real defense or strategy, and for conceding defendant's guilt to the domestic violence charge. We disagree. Defendant's trial counsel testified that he conceded to the misdemeanor domestic violence charge and focused on defending against the felonious assault and CSC charges. Defense counsel is not ineffective for conceding to lesser crimes in hopes of avoiding a finding of guilt on greater ones.<sup>19</sup> The fact that the strategy failed did not render counsel ineffective.<sup>20</sup>

Defendant challenges trial counsel's failure to object to the prosecutor's comments during her opening statement that defendant's former wife's testimony was relevant to establish defendant's requisite intent to commit the charged offenses. However, as noted previously, this evidence was relevant to establish defendant's intent to commit felonious assault. Trial counsel is not required to advocate a meritless or futile position.<sup>21</sup>

Defendant also challenges trial counsel's failure to call any character witnesses on his behalf. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy," which we will not second-guess.<sup>22</sup> The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.<sup>23</sup> Defendant did not call any of his alleged character witnesses at the *Ginther* hearing to make a record of their potential testimony. Accordingly, defendant has not established that the failure to call these witnesses affected the outcome of his trial.

Defendant contends that trial counsel should have elicited testimony from the complainant on cross-examination that the police coerced her to testify against defendant and

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(...continued)

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<sup>15</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>16</sup> *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

<sup>17</sup> *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

<sup>18</sup> *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

<sup>19</sup> *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1994).

<sup>20</sup> *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

<sup>21</sup> *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

<sup>22</sup> *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

<sup>23</sup> *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

that she did not feel that she had been raped. Trial counsel testified that he did not ask the complainant whether she wanted to prosecute the case because it could be considered tampering. Trial counsel's decisions regarding the manner of questioning witnesses are presumed to be matters of trial strategy that we will not second-guess.<sup>24</sup> Furthermore, in light of the complainant's testimony on direct examination describing the sexual assault, her testimony that she did not feel that she had been raped could have little effect on the outcome of the trial.

Finally, defendant argues that his counsel was ineffective for failing to obtain the transcripts of his previous trial, and therefore, failed to effectively cross-examine his former wife regarding the accuracy of her current testimony. Defendant also challenges trial counsel's failure to question his former wife regarding her aggressive pursuit of child support, their former marital home, and money from defendant's family trust fund. However, trial counsel testified that defendant never informed him of the former wife's actions during their divorce proceedings. Accordingly, defendant has not overcome the presumption that counsel performed effectively at trial.

### B. At Sentencing

Defendant contends that his counsel was ineffective for failing to call the complainant or other witnesses at sentencing. Prior to trial, the prosecution attempted to negotiate a plea arrangement with defendant. At that time, the complainant specifically stated her desire that defendant spend time in prison and expressed her concern that she would not be safe if defendant were on parole. She also spoke to the prosecutor prior to sentencing and indicated her desire that defendant receive time in prison and counseling. However, the complainant testified at the *Ginther* hearing that she thought that defendant's sentence was excessive. Regardless of her subsequent contrary testimony, trial counsel's failure to call the complainant in light of her previous statements to the prosecutor could not be considered error. Furthermore, as noted previously, defendant has not made any record of the potential testimony of other proposed witnesses.

Defendant also contends that counsel failed to take appropriate actions to correct the incomplete and inaccurate information in his presentence investigation report (PSIR). Therefore, he contends that the trial court lacked adequate information to consider a downward departure from the minimum sentencing guidelines range. At the *Ginther* hearing, trial counsel testified that he made the tactical decision to focus his argument on the scoring of the guidelines. The sentencing transcript indicates that trial counsel reviewed the presentence report and challenged the scoring of several offense variables. Counsel argued that the specific facts of defendant's case supported a reduced sentence. Additionally, counsel asked the court to sentence defendant at the low end of the sentencing guidelines range and to consider a downward departure, given defendant's age and background. Trial counsel was prepared for sentencing and adequately and appropriately sought a reduced sentence.

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<sup>24</sup> *Rice, supra* at 445.

Defendant asserts that counsel should have challenged the accuracy of the PSIR because it does not indicate that he “was a prominent business owner, that he had attended college, and that he was actively involved in the community.” If the PSIR was inaccurate, counsel should have taken steps for its correction. However, defendant presented no evidence at the *Ginther* hearing to establish that the presentence report was inaccurate or that defendant informed his counsel of any factual errors. Defendant’s sentence was within the applicable sentencing guidelines range and, therefore, is presumed to be proportionate.<sup>25</sup> Defendant has not overcome the presumption that counsel was effective at the sentencing phase of his trial. Accordingly, defendant has not established that he is entitled to any relief.<sup>26</sup>

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Jessica R. Cooper  
/s/ Kirsten Frank Kelly

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<sup>25</sup> *People v Greaux*, 461 Mich 339, 342; 604 NW2d 327 (2000). We also note that there were several factors negating defendant’s contention that he was entitled to a reduced sentence. Defendant had four prior felony convictions for fraudulent activities and two misdemeanor convictions, including one for domestic violence. In this case, defendant sexually and physically assaulted the complainant and threatened to kill her with a shovel. The complainant suffered injuries in her mouth, neck, face, chest, leg, and vagina. Defendant’s sentence, which was within the guidelines range, is proportionate to the circumstances surrounding the offense and the offender.

<sup>26</sup> As we have determined that defendant is not entitled to a new trial or resentencing, his request for reassignment of his case to a new judge on remand is moot. *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004) (finding that an issue is moot when an event occurs that renders it impossible for the reviewing court to fashion a remedy to the controversy).