

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD JAMES LONG,

Defendant-Appellant.

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UNPUBLISHED

May 14, 2013

No. 308709

Wayne Circuit Court

LC No. 11-009056-FC

Before: BORRELLO, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(b) (force), for which he was sentenced to 7 to 15 years' imprisonment. We affirm.

**I. BASIC FACTS AND PROCEDURAL HISTORY**

The 15-year-old victim testified that defendant sexually assaulted her during a family reunion in July 2011. On the night of the assault, the victim spent the night in a hotel room with her cousins. They ordered pizza, which was delivered at approximately 1:30 a.m. The victim went to defendant's room to get plates. There were no lights on in the room at the time; only a television was on. After letting the victim into the room, defendant grabbed the victim by her wrist and threw her on the bed. Defendant held both of the victim's wrists above her head and proceeded to have sexual intercourse with the victim. Defendant admonished the victim not to tell anyone because they would get in "big trouble." Defendant's 88-year-old mother-in-law was in the room while this incident happened. She suffered from dementia or Alzheimer's disease and may have been asleep at the time.

The victim told her mother what happened ten days after the incident. A medical examination indicated that the victim's hymen appeared to be intact and there was no physical evidence of sexual contact.

LB, who is defendant's daughter's maternal cousin, testified that on July 30, 1998, defendant sexually assaulted her when she was 13 years old. LB was using the bathroom when she heard a knock at her front door. She answered the door with her pants and underwear not pulled up all the way. Defendant was at the door. Defendant's wife was also outside of LB's home. Defendant asked if LB's parents were home. LB told defendant that her parents were not

home. Defendant then opened the screen door and went inside. He had a cup of alcohol in his hand. Defendant again confirmed that LB's parents were not home. He pushed LB up against the refrigerator and started fondling her breasts and then her vaginal area. LB tried to get defendant off of her. Then defendant got on top of LB on the floor, took his pants down, and had sexual intercourse with her. Defendant stopped when he heard his wife approaching.

A jury convicted defendant of third-degree CSC and he was sentenced to 7 to 15 years' imprisonment. After filing his claim of appeal, defendant filed a motion to remand for a *Ginther*<sup>1</sup> hearing. Defendant argued that defense counsel was ineffective by not calling his daughter, LaTonya, to testify. Defendant attached an affidavit of LaTonya to his motion to remand as support that LaTonya would have testified that she went to defendant's hotel room on the night in question at approximately 2:15 a.m. and that only defendant and her grandmother were present and both were asleep. Allegedly, LaTonya would have also testified that the victim only went to defendant's room to drop off a salad and then left. Defendant also asserted that defense counsel was ineffective by not calling either his wife, Jacqueline Fears, or LaTonya to testify that they witnessed LB sign an affidavit that LB disavowed signing during trial. Defendant also appears to have argued that both Fears and another family member, Audrey Crump, could have testified that the victim did not appear to be suffering from any trauma after the alleged incident took place. This Court denied defendant's motion to remand for "failure to persuade the Court of the necessity of a remand." *People v Long*, unpublished order of the Court of Appeals, entered September 24, 2012 (Docket No. 308709).<sup>2</sup>

## II. OTHER ACTS EVIDENCE

Defendant argues that LB's testimony regarding defendant's previous sexual assault against her was not admitted for a proper purpose; rather, the evidence was improper character evidence. We disagree. This Court reviews a trial court's evidentiary ruling regarding other acts and propensity evidence for an abuse of discretion. *People v Sabin*, 463 Mich 43, 55-60; 614 NW2d 888 (2000).

The Michigan Rules of Evidence, in relevant part, provide as follows:

(1) 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 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. [MRE 404(b)(1).]

"In deciding whether to admit evidence of other bad acts, a trial court must decide: first, whether the evidence is being offered for a proper purpose, not to show the defendant's propensity to act

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

<sup>2</sup> We decline to revisit our order denying defendant's motion for remand.

in conformance with a given character trait; second, whether the evidence is relevant to an issue of fact of consequence at trial; third, whether its probative value is substantially outweighed by the danger of unfair prejudice in light of the availability of other means of proof; and fourth, whether a cautionary instruction is appropriate.” *People v Smith*, 282 Mich App 191, 194; 772 NW2d 428 (2009). “[E]vidence of *sufficiently similar* prior bad acts can be used to establish a definite prior design or system which included the doing of the act charged as part of its consummation.” *Id.* at 196 (internal quotation marks and citation omitted).

However, general similarity between the charged act and the prior bad act is not enough to show a pattern. Rather, 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 the individual manifestations. A high degree of similarity is required—more than is needed to prove intent, but less than is required to prove identity—but the plan itself need not be unusual or distinctive. [*Id.*]

Even when “reasonable persons could differ concerning whether the charged act and the prior bad acts were sufficiently similar to infer the existence of a common system, plan, or scheme . . . there is no abuse of discretion if an evidentiary question is a close one.” *Id.* at 197.

Here, the incident involving the victim and LB were similar in nature. Both incidents were against female relatives of a relative of defendant. Both incidents involved females in their early teens. Both encounters appear to have taken place on the spur of the moment on defendant’s part. There was evidence that defendant had been drinking alcohol during both incidents. Defendant forced himself on both victims. Also, there was evidence in both incidents that defendant had little regard for the presence of others during the sexual encounters. Therefore, LB’s testimony regarding her sexual encounter with defendant was evidence of a *sufficiently similar* prior bad act which was appropriately used and admitted to establish a definite prior design or system which included the doing of the act charged as part of its consummation. *Id.* at 199. Furthermore, the trial court gave the jury a limiting instruction directing the jury to only consider the evidence to help it judge the believability of the testimony regarding defendant’s actions. Accordingly, the trial court did not abuse its discretion in admitting evidence of defendant’s prior bad acts.

### III. RIGHT TO A DEFENSE

Defendant argues that he was denied his due process right to present a defense when the trial court excluded an alleged sworn affidavit from LB stating that defendant never sexually assaulted her. We disagree. “This Court reviews for an abuse of discretion a trial court’s decision to exclude evidence.” *People v Steele*, 283 Mich App 472, 478; 769 NW2d 256 (2009). This Court reviews de novo an issue regarding a defendant’s constitutional due process rights. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

“It is well settled that the right to assert a defense may permissibly be limited by established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000) (quotation marks and citations omitted). Authentication or identification is required for the admission of evidence. MRE 901(a) provides: “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to

support a finding that the matter in question is what its proponent claims.” Testimony that a witness signed a prior written inconsistent statement is proper authentication for the admission of the statement as impeachment evidence. See *People v Jenkins*, 450 Mich 249, 259; 537 NW2d 828 (1995); MRE 901(b)(1).

During LB’s cross-examination, defense counsel attempted to lay a foundation for a document he asserted was an affidavit signed by LB. LB testified that while her name was on the document, it was not her handwriting and that she did not sign the document. Therefore, a proper foundation was not laid for the document to be admitted into evidence. Also, defendant’s claim that he was denied the right to confront LB is without merit because she testified during cross-examination that the signature on the document was not hers. “Although a defendant must be given the opportunity for cross-examination, the defendant has no constitutional right to successful cross-examination.” *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001). Accordingly, the document was properly excluded from evidence by the trial court.

#### IV. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel. We disagree.

This Court reviews ineffective assistance of counsel claims, which are questions of constitutional law, de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In the absence of an evidentiary hearing, this Court reviews a defendant’s claim of ineffective assistance of counsel based on the existing record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To demonstrate ineffective assistance of counsel, a defendant must show that his attorney’s performance fell below an objective standard of reasonableness under prevailing professional norms and this performance prejudiced him. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). To demonstrate prejudice, the defendant must show the probability that, but for counsel’s errors, the result of the proceedings would have been different. *Id.* Counsel is presumed to be effective and engaged in trial strategy, and the defendant has the heavy burden to prove otherwise. *Id.* This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel’s competence with the benefit of hindsight. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Defendant attached affidavits of his wife, Jacqueline Fears, his daughter, LaTonya, and family reunion attendee Audrey Crump to his brief on appeal. These affidavits support that allegedly LaTonya would have testified that the victim only went to defendant’s hotel room on the night in question to drop off a salad and then left, and that she witnessed LB sign the affidavit LB disavowed signing during trial. Audrey allegedly would have testified that the victim did not appear to be suffering from any trauma after the alleged incident took place. However, decisions regarding whether to call and question witnesses and what evidence to present are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). “[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defense counsel presented the testimony of Fayette Turner, a family reunion attendee who testified that on the night in question he was with defendant in defendant's hotel room from approximately 11:00 p.m. until 2:00 a.m., and that the victim was not in the room during that time. Turner also testified that the next day during the family reunion the victim did not appear to be upset and that she performed her dance routine with no signs of trauma. Therefore, defendant was not deprived of the substantial defense that he did not commit this crime. Accordingly, defendant has failed to establish that he was denied the effective assistance of counsel.

## V. SUFFICIENCY OF THE EVIDENCE

Finally, defendant argues that there was insufficient evidence to prove beyond a reasonable doubt the penetration element of his third-degree CSC conviction. We disagree.

“This Court reviews de novo challenges to the sufficiency of the evidence to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012) (internal quotation marks and citation omitted). This Court reviews the evidence in the light most favorable to the prosecution. *Id.*

Pursuant to MCL 750.520d(1)(b):

(1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

(b) Force or coercion is used to accomplish the penetration. . . .

Sexual penetration includes any intrusion, however slight, into a female's vagina. MCL 750.520a(r).

Defendant only challenges the sufficiency of the evidence regarding the penetration element of his third-degree CSC conviction. While there was evidence that approximately 10 days after the incident happened, the victim's hymen appeared to be intact and no physical evidence that the victim had been sexually involved with another person was found, this is not dispositive of penetration. See *People v Bristol*, 115 Mich App 236, 237; 320 NW2d 229 (1981). Furthermore, the victim testified that defendant, while holding both of her wrists above her head, inserted his penis into her vagina. Therefore, there was sufficient evidence for a rational trier of fact to find that defendant penetrated the victim's vagina with his penis. Accordingly, there was sufficient evidence to sustain defendant's conviction.

Affirmed.

/s/ Stephen L. Borrello  
/s/ Kirsten Frank Kelly  
/s/ Christopher M. Murray