

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SABAH GORGES,

Defendant-Appellant.

UNPUBLISHED
October 13, 1998

No. 199605
Oakland Circuit Court
LC No. 94-134577 FH

Before: Smolenski, P.J., McDonald and Saad, JJ.

PER CURIAM.

A jury convicted defendant of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), and the trial court sentenced him to four to fifteen years' imprisonment. He appeals his conviction and sentence as of right. We affirm.

Defendant was involved in a relationship with the victim's mother, and at one point lived with the victim, her mother, and her brother. The victim testified that one night in June 1992, when defendant was no longer living there, he entered the home through an unlocked door while her mother was gone and raped her. She further testified that he threatened to kill her and her family if she told anyone. The victim did not reveal the events of that night to anyone until approximately two years later, in August 1994.

Defendant argues on appeal that he was denied a fair trial because the prosecution introduced, without advance notice, testimony concerning prior bad acts by defendant. The prosecution elicited testimony concerning defendant's prior acts of violence toward the victim and her family, and testimony concerning a previous incident when defendant allegedly intruded on the victim while she was showering and made inappropriate comments about her body. Because defendant did not object to the admission of the other acts testimony at trial, this issue has not been preserved for appeal. *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995). However, in the absence of such an objection, this Court may review for manifest injustice. *Id.*

The prosecution is required to provide notice prior to trial when it intends to introduce other acts evidence. MRE 404(b)(2); *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996).

Although the prosecution in this case failed to provide such notice, we find that manifest injustice did not result from the introduction of the other acts evidence. Under MRE 404(b), other acts evidence is admissible if it is offered for a proper purpose, it is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 338 (1993). However, it is not admissible if offered solely to show the criminal propensity of an individual and that he acted in conformity with that propensity. *Id.* at 65. Essentially, other acts evidence is admissible whenever it is relevant on a noncharacter theory. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996).

The evidence in this case of defendant's prior violence toward the victim and her family was relevant to explain her delay in reporting the assault, see *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996) and *People v Wright*, 161 Mich App 682, 688-689; 411 NW2d 826 (1987). Its probative value was not substantially outweighed by its potential for unfair prejudice. See *People v Starr*, 457 Mich 490, 498; 577 NW2d 673 (1998). The trial court also properly admitted testimony that defendant viewed plaintiff in the shower and commented on her body. Prior sexual acts between a defendant and complainant who are members of the same household may be admitted to show that the charged sexual conduct is not an isolated incident. *People v DerMartzex*, 390 Mich 410, 415; 213 NW2d 97 (1973). In *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995), this Court held that the trial court properly admitted testimony that the defendant had taken a bath with the five-year-old complainant and her younger sister. We believe that the shower incident, like the bath incident in *Smith*, was sufficiently sexual in nature to be admitted under *DerMartzex*. Although defendant contends that the victim manufactured the rape story to avoid her mother's anger concerning a stolen pager, that theory was countered by testimony from witnesses that the victim told them about the assault *before* the pager was stolen. Furthermore, the testimony of the witnesses to whom the victim had revealed the circumstances of the assault was consistent. Thus, we find that defendant was not denied a fair trial.

Finally, defendant contends that the court's failure to provide a limiting instruction concerning the proper use of the other acts evidence constitutes error requiring reversal. However, because defendant did not request a limiting instruction, the failure to so instruct does not constitute reversible error. See *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994).

Defendant contends that defense counsel's failure to object to the introduction of the other acts evidence in this case constituted ineffective assistance of counsel that deprived him of a fair trial. To establish ineffective assistance of counsel, a defendant must show that (1) trial counsel's performance was below an objective standard of reasonableness according to prevailing professional norms, and (2) that there is a reasonable probability that absent counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Graham*, 219 Mich App 707, 711; 558 NW2d 2 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because the introduction of evidence of defendant's prior violent acts and the shower incident was proper, counsel's performance in this regard was not deficient. Therefore, defendant was not denied his right to effective assistance of counsel.

Defendant claims that he is entitled to resentencing because the trial court considered a victim's impact statement made by the victim's mother in fashioning his sentence. Defendant contends that the court should not have considered a statement made by the victim's mother concerning his alleged violent behavior toward her, because that behavior was not the subject of his conviction.

The trial court did not err in considering the victim's mother's impact statement in determining defendant's sentence. Pursuant to MCL 780.752(i); MSA 28.1287(752)(i), a parent of a victim under the age of eighteen qualifies as a victim of the crime against his or her child. Victims are entitled to make written and/or oral statements concerning the sentencing of defendants pursuant to MCL 780.764; MSA 28.1287(764), MCL 780.765; MSA 28.1287(765) and MCR 6.425(D)(2)(c). The content of a victim's impact statement is not limited by statute or court rule. Such statements "may include information about a defendant that was not admissible nor admitted at defendant's trial or plea. . ." *People v Fleming*, 428 Mich 408, 418; 410 NW2d 266 (1987).

Moreover, there is no indication that the trial court gave undue weight to the victim's impact statement or that defendant's sentence was not proportionate. His minimum sentence is within the guidelines range and the court took into account on the record the crime committed and defendant's background. *People v Milbourn*, 435 Mich 630, 634-636; 461 NW2d 1 (1990); *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995).

Affirmed.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Henry William Saad