STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2011
v	No. 297340 Wayne Circuit Court
DEUVOY LEROY CARROLL, Defendant-Appellant.	LC No. 09-023433-FH

Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(b) (sexual penetration involving force or coercion). The trial court, applying a fourth-offense habitual offender enhancement under MCL 769.12, sentenced him to 15 to 30 years' imprisonment.

The trial court allowed into evidence the testimony of a woman, P.T., who stated that defendant sexually assaulted her in 1994. The court allowed the testimony under MRE 404(b)(1), which states:

> 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 act are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Defendant contends that the prosecutor committed misconduct by arguing, in closing, that P.T.'s testimony was pertinent to show a scheme, plan, or system employed by defendant, when the trial court only allowed the testimony to show motive. The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). However, defendant did not object to the prosecutor's argument, and therefore we review this issue for plain error that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We find no plain error. While the trial court did refer to "motive" in making its pretrial ruling regarding P.T.'s testimony, the court also stated, "So because I do think it shows the motive in terms of like if he gave her something that he expects something in return, I think that's important really." Without using the words "scheme, plan, or system," the court did in fact indicate that the testimony was pertinent to show that defendant had a system whereby he tried to obtain sex from women after providing them with alcohol or drugs.[1] The prosecutor emphasized this scheme during closing arguments and did not err in doing so.

Defendant argues that P.T.'s testimony did not in fact support the prosecutor's theory of admissibility because she did not indicate that defendant demanded sex in exchange for alcohol. However, this was a reasonable inference from P.T.'s testimony. The prosecutor, referring to the beginning of the sexual assault against P.T., asked her, "Did [defendant] say anything to you about that . . . [wine] and beer that you had drank?" P.T. answered, "yes, he did mention that he had brought that over, but I told him, 'I already had some. You did that on your own.'" A reasonable inference from P.T.'s testimony is that defendant mentioned bringing over the wine and alcohol when demanding sex from P.T. We find no basis for reversal.

Defendant additionally argues that the trial court erred in allowing the testimony of P.T. in the first instance. We review the trial court's decision for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). As noted in *McGhee*: "Before other-acts evidence may be introduced, the prosecution must satisfy a three-part test: (a) there must be a reason for its admission other than to show character or propensity, (b) it must be relevant, and (c) the danger of undue prejudice cannot substantially outweigh its probative value, especially if there are other means of proof." *Id*.

Defendant specifically argues that P.T.'s testimony was more prejudicial than probative and thus should have been excluded under MRE 403. We cannot agree. Given the similarities between the assault on P.T. and the assault on the victim—primarily, the use and mention of intoxicants as part of committing the rapes, but also the removal of clothes by defendant and the hitting in the head of the women by defendant—the evidence from P.T. was admissible. See, generally, *People v Sabin*, 463 Mich 43, 65-66; 614 NW2d 888 (2000). Moreover, the trial court gave a limiting instruction with respect to the evidence, and jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next argues that the prosecutor committed misconduct requiring reversal by eliciting a prior bad act involving an earlier rape of the victim by defendant. Defendant contends that the prosecutor, by introducing this evidence, violated the notice provision of MRE 404(b)(2). Defendant did not object to the evidence, and we again review this issue under the plain-error doctrine. *Carines*, 460 Mich at 763. We agree that the prosecutor erred by introducing this evidence without prior notice or good cause shown. MRE 404(b)(2). However, we find that the evidence did not affect defendant's substantial rights—i.e., it did not affect the

[1] The trial court specifically mentioned, in its instructions to the jury, that they could use P.T.'s testimony to evaluate whether defendant employed a scheme, plan, or system.

outcome of the proceedings—given the limited scope of the evidence elicited by the prosecutor.[2] *Id*. Accordingly, reversal is not warranted.

Defendant next argues that his attorney rendered ineffective assistance of counsel.

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. (emphasis in original). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (citations omitted).]

Defendant contends that his attorney was ineffective for failing to object to the testimony about the prior assault on the victim by defendant. However, as noted above, we find that the evidence in question did not affect the outcome of the proceedings. Accordingly, counsel's failure to object did not amount to ineffective assistance of counsel. *Id*.

Defendant also contends that his attorney was ineffective for failing to object to the prosecutor's closing argument regarding P.T.'s testimony and for failing to raise an additional objection to P.T.'s testimony because the testimony did not, according to defendant, align with the prosecutor's pretrial expectations. As discussed earlier in this opinion, however, P.T.'s testimony and the prosecutor's actions with regard to it were proper. Counsel was not required to raise a meritless objection. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto

[2] While the trial court—not the prosecutor—elicited more details about the prior assault, defendant does not make a reasoned argument on appeal concerning the further details.