

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT CRAIG HAWTHORNE, JR.,

Defendant-Appellant.

UNPUBLISHED

October 13, 2005

No. 256473

Montmorency Circuit Court

LC Nos. 03-000545-FH

03-000546-FH

Before: O’Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of six counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a)(victim under sixteen years of age). He was sentenced to six concurrent prison terms of three to fifteen years. We affirm.

Defendant first argues that his Sixth Amendment right to present witnesses in his defense was violated when the trial court ruled that a witness’ proffered testimony was inadmissible as irrelevant and highly prejudicial. We disagree. We review a trial court’s evidentiary ruling for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

“The Compulsory Process Clause of the Sixth Amendment guarantees every criminal defendant the right to present witnesses in their defense.” *People v McFall*, 224 Mich App 403, 407; 569 NW2d 828 (1997). However, this right is not absolute. *People v Holguin*, 141 Mich App 268, 271; 367 NW2d 846 (1985). A defendant’s right to present a defense must “be weighed against the need for ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *Id.*, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). “The balancing of these competing interests in determining the admissibility of a witness’s testimony is a matter within the discretion of the trial judge.” *Holguin, supra* at 271.

Generally, all relevant evidence is admissible. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). “The credibility of a witness is always an appropriate subject for the jury’s consideration.” *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995). Accordingly, “[e]vidence of a witness’

bias or interest in a case is highly relevant to credibility.” *Id.* Yet, even if relevant, evidence may nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000).

In the present case, defendant argues that the witness’ testimony was relevant because it supported his claim that the mother of one of the complainants coerced the complainants to testify against defendant because he did not give into demands for money. While evidence of the bias or interest of a witness is highly relevant to credibility, *Coleman, supra* at 8, a party may not seek appellate relief based on an evidentiary error to which he contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003). At no time during defendant’s opening argument or his offer of proof did counsel specifically advance this theory. Defendant first introduced this particular theory during his testimony, which came after the witness’ testimony. At the time defendant’s witness testified it was difficult for the trial court to know that allegations that defendant was providing financial assistance to K.D.’s family would be relevant to the trial. However, speaking generally, defense counsel did indicate to the court that the witness’ testimony would discredit K.D., and the witness’ testimony, as presented during the offer of proof, vaguely suggested that if money was provided by defendant, there would be no testimony. While it is arguable that the trial court abused its discretion, we see no basis for reversal. First, the full extent of the relevant proffered testimony indicated that defendant gave the victims and their families money, plus the witness stated:

Um. I have been asked to ask my cousin for money to relay back to [one of the victims’ family] many of times. They have been over to the house asking for my cousin for money situations, saying that they wouldn’t testify if, you know.

There was no follow up on the statement above. The testimony is vague, cursory, open-ended, and lacks a specific claim that the victims or their families threatened to accuse defendant of criminal sexual misconduct if he did not pay them money. Moreover, there was strong evidence of defendant’s guilt. Police testimony reflected that defendant admitted to having sexual intercourse with one of the victims, and defendant’s own testimony at trial was damaging to his case and essentially implicated him in having sexual relations with minors. Any error in not admitting the evidence was harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Defendant next argues that his Sixth Amendment right to confrontation was violated when the trial court denied defendant a meaningful opportunity to cross-examine K.D. We disagree. Again, this court reviews a trial court’s evidentiary ruling for an abuse of discretion. *Manser, supra* at 31.

A defendant has a constitutional right to confront his or her accuser. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Although “limitations on cross-examination preventing a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes a denial of the constitutional right to confrontation,” *People v Cunningham*, 215 Mich

App 652, 657; 546 NW2d 715 (1996), “neither the Sixth Amendment Confrontation Clause, nor due process, confers on a defendant an unlimited right to admit all relevant evidence or cross-examine on any subject,” *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984).

During cross-examination of K.D., defendant sought to ask K.D.: “isn’t it true that [defendant] was providing financial assistance to your family?” Defendant did not specify his theory of defense until he testified during his case-in-chief. At the time of K.D.’s cross-examination, the trial court did not have notice of defendant’s theory of defense, nor did counsel seek to explain to the court the relevancy of the questioning. Because the trial court was not informed that this evidence would arguably show bias, and because defense counsel did not explain the evidence’s proper use to the trial court when it sustained the prosecution’s objection, the trial court did not abuse its discretion in ruling this evidence inadmissible.

Defendant further argues that counsel was ineffective in three separate instances. In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Our review is limited to the record because no *Ginther*¹ hearing occurred. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

First, defendant argues that counsel was ineffective in conceding with regard to the prosecution’s motion for consolidation that evidence from K.N.’s case, including her pregnancy, would be admissible in a separate proceeding involving K.D. More specifically, defendant argues defense counsel’s performance was deficient when counsel failed to argue that the other acts evidence was inadmissible under MRE 404(b). We disagree.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

MRE 404(b)(1) provides as follows:

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.

In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), our Supreme Court announced the proper analysis for evaluating the admissibility of other acts evidence. First, the evidence must be offered for a proper purpose under MRE 404(b); second, the evidence must be relevant under MRE 402 as enforced through MRE 104(b); third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403; fourth, the trial court may, on request, provide a limiting instruction under MRE 105.

In the present case, the evidence would be permissible for the purpose of proving a plan or scheme. *Sabin, supra* at 58. Additionally, the evidence was relevant. Evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence. MRE 401; *People v Mills*, 450 Mich 61, 66; 537 NW2d 919, mod 450 Mich 1212 (1995). Evidence of uncharged similar misconduct is logically relevant where it is “sufficiently similar to support an inference that [the charged and uncharged conduct] are manifestations of a common plan, scheme, or system.” *Sabin, supra* at 63. *Sabin* explains that the intermediate inference is “that the defendant used that system in committing the charged act as proof that the charged act occurred.” *Id.* at 64 n 10. In this case, the other acts share sufficient common features to infer a plan or scheme. First, there was evidence that the complainants were of similar age at the time they were having sexual relations with defendant. Second, there was evidence of defendant having sexual relations with both complainants while the complainants lived downstate before they moved to Montmorency County. Third, there was evidence that the sexual encounters with the two complainants continued in Montmorency County and took place in the same trailer. Defendant’s actions “demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the other acts.” *Id.* at 66.

Lastly, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. We find that the other acts evidence was probative because it showed defendant’s plan or scheme of engaging in sexual intercourse with minor girls. The fact that the evidence was prejudicial does not mandate that it be excluded. The danger that MRE 404(b) seeks to avoid is that of unfair prejudice. See *Starr, supra* at 496-497.

Because the evidence was admissible under MRE 404(b), counsel was not ineffective in conceding that the evidence would be admissible if the charges as to each complainant were tried separately. Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). We also find that, apart from MRE 404(b), some of the evidence was part of the *res gestae* of the crimes and therefore

admissible. See *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996)(criminal acts are admissible when so blended or connected to the crime charged that proof of one incidentally involves the other or explains the circumstances of the crime). Minimally, it is within the realm of reasonable argument that the other acts evidence was admissible, and we are not prepared to find that counsel's performance was deficient, nor that defendant was prejudiced.

Second, defendant argues that counsel was ineffective for failing to object to unfairly prejudicial and inflammatory questioning by the prosecution regarding group sex. Defendant argues that the question did not have any probative value and that it was damagingly suggestive. Defendant also contends that counsel's failure to object calls into question the fairness of the trial itself. We disagree.

During K.N.'s direct examination, the prosecution asked her:

Q. Did [defendant] ever suggest the three of you have sex together?

A. No.

Q. He didn't suggest that?

A. He would joke around about it, but not –

Q. You figured he was kidding?

A. Yes.

Before the prosecution asked the allegedly improper questions, K.N. had testified:

Q. Do you know if [defendant] had sex with [K.D.]?

A. Yes.

Q. Did [defendant and K.D.] ever have sex while you were in the room?

A. Yes.

Q. What happened?

A. I don't know.

Q. Were you in the same room?

A. Yes.

Q. Were you in the same bed?

A. Yes

Q. You just tried to ignore them?

A. Yes.

In light of K.N.'s testimony, the prosecution's questions were probative of defendant's intent to have sexual relations with K.D. Additionally, the question was aimed at explaining the circumstances of how K.N. was in a position to observe defendant having sex with K.D. Defendant fails to establish that counsel's performance fell below an objective standard of reasonableness where he failed to object to the questioning at issue. But, even assuming, arguendo, that counsel's performance fell below this standard, defendant has failed to establish that but for counsel's failure to object, there is a reasonable probability the result of the proceeding would have been different because the questioning referencing group sex was not significantly more shocking than the testimony Naylor already gave about being present while Dingman and defendant had sex. *Ackerman, supra* at 455.

Lastly, defendant argues that counsel was ineffective for failing to object to the prosecutor's impeachment of defendant based upon defendant's prior retail-fraud conviction. Defendant argues that the conviction was inadmissible under MRE 609 because the probative value of the crime of retail fraud did not outweigh the danger of unfair prejudice. We disagree.

Evidence of a crime can be admitted during cross-examination of a witness if "the crime contains an element of theft," "the crime was punishable by imprisonment in excess of one year or death," and "the evidence has significant probative value on the issue of credibility" and its probative value outweighs its prejudicial effect. MRE 609(a)(2)(A)-(B). In determining the probative value of the crime, the court considers the age of the conviction and the degree to which the crime is "indicative of veracity." MRE 609(b). In determining the prejudicial effect of the crime, the court considers "the conviction's similarity to the charged offense" and "the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify." MRE 609(b).

In the present case, the record does not disclose whether defendant's conviction was for a crime punishable by imprisonment in excess of one year, nor does it reveal what degree of retail fraud was involved. Defendant makes no claim that the conviction was for a crime punishable by imprisonment for one year or less. Because there was no evidentiary hearing and this Court's review is limited to the record, we presume that it was punishable in excess of one year, where defendant does not argue to the contrary. Given that presumption, we believe that there is no reasonable probability that the trial court would have excluded impeachment evidence of the conviction if defense counsel had objected to it. The conviction for retail fraud occurred in 2001 and the current case was tried in 2004 so the relatively recent age of the conviction would have weighed in favor of admissibility. Further, theft offenses have traditionally been viewed by the courts as strongly probative of veracity. *People v Parcha*, 227 Mich App 236, 243; 575 NW2d 316 (1997). The dissimilarity between retail fraud and CSC III would have additionally supported allowing use of the retail fraud conviction to impeach defendant. While defendant's testimony may have been critical to present his defense, we nevertheless believe the other factors relevant to a determination of whether a prior conviction may be used to impeach a defendant would have outweighed that consideration. Moreover, in light of the lack of a concrete record with respect to the nature of the retail fraud conviction, even were we to find that the

impeachment evidence was improperly elicited and that it should have been subject to an objection by counsel, defendant has failed to show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

Affirmed.

/s/ Peter D. O'Connell

/s/ David H. Sawyer

/s/ William B. Murphy