STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN FREDERICK WATKINS,

Defendant-Appellant.

UNPUBLISHED
January 28, 1997

No. 180973
Hillsdale Circuit Court
LC No. 187030

Before: Sawyer, P.J., and Markman and H.A. Koselka,* JJ.

PER CURIAM.

Defendant was convicted of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2). He was subsequently sentenced by the trial court to imprisonment of eight to twenty years. Defendant appeals his conviction and sentence as of right. We reverse the judgment of the trial court and remand this case for a new trial.

On appeal, defendant alleges three separate instances of ineffective assistance of counsel. As there was no *Ginther*[1] hearing in this case, review by this Court is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). To establish that the defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, this Court must find that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

We first consider defendant's allegations that he was denied effective assistance of counsel when defense counsel failed to object to the injection of highly prejudicial testimony that defendant had sexually assaulted an adult woman. Reference to the alleged assault was first made by Troy Dwyer, Sr., the victim's father. During the prosecutor's direct examination, Dwyer testified without objection, that a friend, Keith Wasnich, told him that defendant had sexually abused the victim in this case and that defendant had also raped Wasnich's girl friend (apparently she related the incident to Wasnich sometime after it allegedly occurred). On direct examination, defense counsel elicited defendant's

* Circuit judge, sitting on the Court of Appeals by assignment.

admission to the girl friend's allegations and the fact that there had been a police investigation of her claim. The prosecutor subsequently engaged in pointed cross-examination of defendant, without objection from defense counsel, insinuating that defendant was charged with raping the woman, and eliciting testimony from defendant that he had sex with her, but she was "willing."

First, we conclude that Dwyer's testimony regarding the alleged rape of Wasnich's girl friend was hearsay. MRE 801. Dwyer's testimony was further implicated by MRE 404(b)(1) which provides that "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." However, evidence of another crime or bad act may be admitted if: (1) it is relevant to an issue other than character or propensity, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not outweighed by the danger of unfair prejudice. *People v Catanzarite*, 211 Mich App 573, 578-579; 536 NW2d 570 (1995). In addition, there must be substantial proof that the defendant committed the other act sought to be admitted. *People v Engelman*, 434 Mich 204, 213; 453 NW2d 656 (1990).

In this case, there was no apparent justification for admission of testimony relating to the girl friend's unproved allegations of rape against defendant, other than to show the jury defendant's propensity for sexual abuse. Unrelated incidents of past sexual misconduct are not admissible to show a general propensity to commit sex offenses. See, e.g., *Engelman, supra* at 225; *People v Major*, 407 Mich 394, 400-401; 285 NW2d 660 (1979); *People v Devine*, 168 Mich App 56, 57-58; 423 NW2d 594 (1988). Furthermore, the girl friend's allegations were unsubstantiated and did not result in prosecution or conviction. The evidence was particularly insidious when it was raised three times during defendant's one-day trial. Under such circumstances it would be difficult for the jurors to avoid considering the unrelated rape allegations as evidence of defendant's propensity for sexual abuse, and perhaps convict him in part for that offense. *Devine, supra* at 59.

Although counsel's trial strategy is entitled to a great deal of deference, *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994), the admission of testimony regarding a prior alleged rape was so blatantly inadmissible and prejudicial that defense counsel's failure to object to its admission on two occasions was unreasonable under an objective standard. Defense counsel's error was compounded by his own direct examination which resulted in defendant's admission to the existence of the allegations and the fact that there was a police investigation. Taking the inflammatory nature of the evidence and the circumstances of the trial into consideration, this Court believes that the representation so prejudiced defendant as to deprive him of a fair trial. Therefore, defendant is entitled to a new trial.

Defendant next argues that the trial court erred in finding that the rape shield law, MCL 750.520j; MSA 28.788(10), prohibited the testimony of Doris Purcell regarding an incident in which she caught the victim and two other children "playing doctor." The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). The rape shield law provides that evidence of specific instances of the victim's sexual conduct is inadmissible unless: (1) it

concerns the victim's past sexual conduct with the actor, or sexual activity showing the source or origin of semen, pregnancy, or disease; and (2) the trial court finds that the proposed evidence is not inflammatory or unduly prejudicial. MCL 750.520j; MSA 28.788(10). Defendant offered the evidence of the victim's sexual touching with other children for purposes of demonstrating the "origin" of her knowledge of sexual matters, and claims it was necessary to his constitutional right to present a defense.

Even when a defendant's constitutional right to present a defense is at issue, it must be weighed against other legitimate interests such as those protected by the rape shield law. *Michigan v Lucas*, 500 US 145; 11 S Ct 1743; 114 L Ed 2d 205, 212 (1991). The trial court's decision to bar Purcell's testimony is supported by *People v Arenda*, 416 Mich 1; 330 NW2d 814 (1982), and *People v Byrne*, 199 Mich App 674, 676; 502 NW2d 386 (1993), which concerned similar constitutional challenges. The rape shield law prohibits testimony of a specific instance of a child victim's unrelated sexual conduct when offered to explain the victim's familiarity with sexual matters. *Arenda, supra* at 12-14. Given the lack of similarity between the acts observed by Purcell and those for which defendant was accused, any probative value was outweighed by the danger of unfair prejudice and misleading the jury. *Byrne, supra* at 679. Moreover, defendant was not denied his constitutional right to present a defense. Defendant had ample opportunity to examine whether the victim could have learned about sexual matters from a source other than the alleged abuse by defendant. Nor was defendant prevented from asserting the defense that the victim invented the story because she wanted her parents to be reunited. It was also proper for the trial court to take into account defendant's failure to comply with the rape shield law's ten-day notice requirement in barring the evidence. *People v Lucas (On Remand)*, 193 Mich App 298, 302; 484 NW2d 685 (1992), cert den ___ US ___; 115 S Ct 593; 130 L Ed 2d 505 (1995).[2]

Defendant also argues that he is entitled to an additional fifteen days time served for the fifteen days he served in Florida before his extradition to Michigan. Defendant did not raise this issue before the trial court; therefore, review is limited to preventing manifest injustice. *People v Connor*, 209 Mich App 419, 431; 531 NW2d 734 (1995); *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Whether a defendant is entitled to credit for time served is a question law which is reviewed de novo on appeal. *Connor, supra* at 423. Defendant was arrested in Florida on March 18, 1994, on the basis of a fugitive warrant issued by the State of Michigan, and was subsequently returned to Hillsdale County. However, defendant's official date of arrest is listed as April 2, 1994, the day he was returned to Hillsdale County. At the time of sentencing on August 17, 1994, defendant was only given credit for 138 days time served (April 2, 1994 through August 17, 1994), rather than 153 days (March 18, 1994 through August 17, 1994).

By statute, a criminal defendant must receive credit for time served prior to sentencing. MCL 769.11b; MSA 28.1083(2). This Court has held that a defendant is entitled to credit for time spent in a foreign state awaiting extradition to Michigan. *People v Becker*, 114 Mich App 145, 146; 318 NW2d 506 (1982); *People v Gibson*, 101 Mich App 205, 206; 300 NW2d 500 (1980). It appears that the trial court erred by using April 2, 1994, defendant's official date of arrest, rather than March 18, 1994,

the date defendant's incarceration commenced in Florida. It would be manifestly unjust for defendant to be denied credit for time served as the result of an oversight. However, the issue is moot in light of this Court's finding of ineffective assistance of counsel based on the admission of testimony concerning unrelated rape allegations against defendant.

Reversed and remanded.

/s/ David H. Sawyer
/s/ Stephen J. Markman
/s/ Harvey A. Koselka

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[2] However, to the extent that the rape shield law precludes the introduction of evidence by defendant relating to the complainant's past conduct, the prosecutor cannot be permitted to argue in summation that negative inferences should be drawn from defendant's failure to offer such evidence. We believe that several of the prosecutor's statements concerning the lack of complainant's basis for describing cunnilingus arguably violated this stricture. The prosecutor cannot use the rape shield law both as a shield and a sword.