

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DION TINO WARREN,

Defendant-Appellant.

UNPUBLISHED

July 24, 1998

No. 191979

Oakland Circuit Court

LC No. 94-134281 FC

Before: Sawyer, P.J., and Kelly and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (personal injury), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), third-degree criminal sexual conduct (force), MCL 750.520d(1)(b); MSA 28.788(4)(1)(d), assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1); MSA 28.788(7)(1), aggravated assault, MCL 750.81a(1); MSA 28.276(1)(1), and entering without breaking, MCL 750.115; MSA 28.310. Defendant was sentenced to concurrent terms of fifteen to sixty years' imprisonment for the first-degree criminal sexual conduct conviction, ten to fifteen years' imprisonment for the third-degree criminal sexual conduct conviction, three to five years' imprisonment for the assault with intent to commit criminal sexual conduct conviction, one year imprisonment for the aggravated assault conviction, and ninety days' imprisonment for the entering without breaking conviction. Defendant appeals as of right. We affirm, but remand for correction of the judgment of sentence.

Defendant first argues that he was not given proper notice that the prosecutor planned to introduce evidence of a prior bad act involving an incident between defendant and the victim in March, 1994, during which defendant beat the victim following an argument. We disagree.

The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). The prosecution must provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, that it intends to introduce evidence at trial of other crimes, wrongs or acts. MRE 404(b)(2); *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). In this case, the record does not indicate that the

prosecutor provided the requisite notice in advance of trial. However, on the first day of trial and before any testimony, defense counsel inquired concerning whether the prosecutor intended to introduce the evidence. The prosecutor stated that she was not planning to do so, but that she reserved the right to do so during rebuttal. In addition, the court instructed defense counsel that he was on notice that such evidence may be admissible depending on counsel's cross-examination of the victim. The record indicates that the evidence of defendant's prior act was subsequently introduced in response to this cross-examination. Therefore, we conclude that defendant had reasonable notice regarding the admission of the evidence of defendant's prior act.

Defendant also argues that the court erred in admitting evidence of the March, 1994, incident because the prosecutor falsely indicated to the court that the judge previously assigned to the case had ruled that the evidence was admissible. We disagree.

The prosecutor stated that the prior judge assigned to the case had already ruled that evidence of the March, 1994, incident was admissible. The prosecutor was not able to support her claim with any evidence in the record, and the court initially stated that it would not revisit any prior rulings. However, the transcript indicates that the court considered the parties' arguments and made its own ruling, with little or no reliance upon the alleged prior ruling by the original judge. In fact, the court's ruling (to preclude the evidence unless defense counsel's cross-examination of the victim made the evidence relevant) was contrary to the claimed original ruling permitting the evidence. Therefore, the prosecutor's unsubstantiated claim of a prior ruling on the issue does not warrant reversal. No reliance on the phantom ruling is shown in this record.

Defendant also argues that the court erred in admitting evidence of the March, 1994, incident because the prosecutor used it to show that defendant was a bad person and because it was unfairly prejudicial. We disagree.

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. MRE 404(b)(1); *Ullah, supra*. However, other acts evidence is admissible whenever it is relevant on a noncharacter theory and the probative value of the evidence is not substantially outweighed by the danger of undue prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994); *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996).

In this case, the trial court instructed defense counsel that the introduction of prior consensual sexual acts between defendant and the victim could make the March, 1994, incident relevant and admissible. Defendant, not the prosecutor, first elicited testimony of prior arguments and physical altercations between the couple. The inference raised by defendant was that these incidents always resulted in consensual sex and that this was what had occurred on the day of the incident for which defendant was charged. The prosecutor stated to the court that her intent in using evidence of defendant's prior bad act in March, 1994, was only to refute this inference. Thus, the evidence was introduced for a relevant, noncharacter purpose. In light of the evidence of the other altercations elicited by defense counsel, the probative value of the evidence was not substantially outweighed by the danger

of unfair prejudice. Accordingly, we conclude that the court did not abuse its discretion in admitting evidence of the March, 1994, incident.

Next, defendant argues that the court denied defendant's right to a fair trial by refusing to excuse two jurors for cause. We disagree.

This Court reviews a trial court's refusal to excuse a juror for cause for an abuse of discretion. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). During voir dire in this case, Juror J stated that she was not sure if she could give defendant a fair trial due to her association with victims of sexual assault. The court refused to excuse the juror for cause. However, this juror was subsequently excused during voir dire when defendant used one of his peremptory challenges with several peremptory challenges remaining. Because defendant had not used all his peremptory challenges, the trial court's refusal to remove Juror J for cause does not require reversal. See *People v Lee*, 212 Mich App 228-229, 248; 537 NW2d 233 (1995).

When the victim took the stand during trial, Juror S recognized her and, after looking in a yearbook, realized that they were in the same graduating class in high school. The juror informed the court of this fact in a letter. Defendant requested the court to excuse the juror, but the court refused. We find that the court did not abuse its discretion in refusing to excuse Juror S. During a hearing outside the presence of the other jurors, Juror S indicated that their class had had approximately 1,000 students, and that she did not know the victim, have any contact with her, or have any feelings about her one way or the other. The juror stated that she could give defendant a fair trial. Accordingly, we conclude that the court did not abuse its discretion in refusing to excuse Juror S. *Emerson, supra*.

Next, defendant argues that the court erred in barring certain evidence that defendant contends on appeal was admissible under MRE 613 as a prior inconsistent statement by the victim. However, we decline to review this issue for two reasons. First, defendant failed to make the requisite offer of proof. MRE 103(a)(2); *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992). Alternatively, defendant did seek to admit the evidence on this ground below but rather contended that the evidence was admissible as the admission of a party. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

Accordingly, we affirm. However, although the record indicates that defendant was actually convicted of and sentenced for aggravated assault, the judgment of sentence incorrectly states that defendant was convicted of felonious assault. Accordingly, we remand for the purely administrative task of correcting the judgment of sentence to reflect that defendant was convicted of aggravated assault. The trial court shall ensure that the corrected judgment of sentence is transmitted to the Department of Corrections.

Affirmed and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Michael J. Kelly

/s/ Michael R. Smolenski