

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG GEORGE COLE,

Defendant-Appellant.

UNPUBLISHED

July 28, 1998

No. 194640

Clinton Circuit Court

LC No. 95-005949 FH

Before: Doctoroff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by jury of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), stemming from defendant's actions toward his girlfriend's daughter. He was sentenced to six to fifteen years in prison. We affirm.

Defendant first argues that the trial court committed error requiring reversal in allowing testimony regarding defendant's allegedly sexual touching of the victim's sister. Use of prior acts or conduct as evidence of a defendant's character must be excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982). To be admissible under MRE 404(b), bad acts evidence must satisfy four requirements: (1) there must be some evidence that the defendant actually perpetrated the bad act sought to be introduced; (2) it must be offered for a proper purpose; (3) it must be relevant; and (4) its probative value must not be substantially outweighed by its potential for unfair prejudice. *Id.* at 309. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW 2d 338 (1993), modified 445 Mich 1205 (1994).

The prosecution offered the victim's sister's testimony for the proper purpose of showing the state of mind or intent of defendant. MRE 404(b); *VanderVliet*, *supra* at 74. Defendant's main theory of defense was that he was sleeping at the time he touched the victim. The testimony of her sister was that defendant had touched her in a similar manner. Although prejudicial, this testimony was highly probative with respect to the question of whether defendant had "accidentally" touched the victim or

had done so with criminal intent. After looking at the testimony and the theories of the defense and the prosecution, we conclude that the trial court did not abuse its discretion in deciding to admit the victim's sister's testimony concerning defendant's previous actions. *People v Bahoda*, 448 Mich 261, 290; 531 NW2d 659 (1995).

Defendant next argues that he was denied the effective assistance of counsel when his trial counsel failed to object to the victim's sister's testimony based on MRE 403. We disagree. The record indicates that, measured against an objective standard of reasonableness and without the benefit of hindsight, defendant's counsel did properly object to this testimony. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 523 (1995). Although counsel did not expressly mention MRE 403, he did argue that the evidence was more prejudicial than probative. While counsel may not have objected as eloquently as defendant would have liked, defendant's evaluation of his counsel's performance with the benefit of hindsight is irrelevant. *People v Mitchell*, 454 Mich 145, 151 n6, 167; 560 NW2d 600 (1997).

Defendant next argues that his trial counsel failed to properly object to hearsay evidence regarding the victim's statements to her sister, her mother and a detective. He maintains that this also constituted ineffective assistance of counsel. We disagree. Defendant's counsel questioned the victim and these witnesses at length, trying to develop the fact that the victim had made statements that were inconsistent with each other. Defendant's attorney used the inconsistencies in these statements when presenting his closing argument to imply that the victim was lying, either in court or before when she made the statements to the others. Just because these trial tactics did not succeed does not mean that counsel's actions constituted ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Finally, defendant argues that the trial court should have reduced defendant's sentence based on defendant's record as a veteran, and that the court improperly failed to take into account his veteran and employment status when deciding defendant's sentence. However, since the sentence imposed by the trial court fell within the sentencing guidelines and defendant has not presented facts that would constitute unusual circumstances to overcome the presumption of proportionality, *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994), we find the sentence to be valid.

Affirmed.

/s/ Martin M. Doctoroff

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot