S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERVIN DEWAIN MITCHELL, JR., a/k/a ERVIN DWAIN MITCHELL, JR.,

Defendant-Appellant.

UNPUBLISHED
July 31, 1998

No. 188718
LC No. 95-003822 FC
95-003824 FC
95-003826 FC
95-003827 FC

Before: Markman, P.J., and Saad and Hoekstra, J.J.

PER CURIAM.

Defendant appeals from his jury convictions of one count of first-degree felony-murder, MCL 750.316; MSA 28.548, and three counts of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). The trial court sentenced him to life imprisonment for the first-degree felony-murder conviction and to fifty to seventy-five years each for the CSC-1 convictions. We affirm.

I

Defendant argues that the trial court erred in denying his pretrial motion for change of venue due to alleged extensive and inflammatory pretrial publicity. He is wrong.[1]

In adjudicating questions of unfair pretrial publicity, it is necessary to "distinguish . . . largely factual publicity from that which is invidious or inflammatory." *Murphy v Florida*, 421 US 794, 800 n 4; 95 S Ct 2031; 44 L Ed 2d 589 (1975). The mere existence of pretrial publicity does not necessitate a change of venue; rather, the defendant "must show that there is either a pattern of strong community feeling against him and that the publicity is so extensive and inflammatory that jurors could not remain impartial when exposed to it, . . . or that the jury was actually prejudiced or the atmosphere surrounding

the trial was such as would create a probability of prejudice." *People v Passeno*, 195 Mich App 91, 98; 489 NW2d 152 (1992).

Our review of defendant's synopses of allegedly prejudicial newspaper articles discloses that they are factual, not invidious or inflammatory. Furthermore, prospective jurors answered a questionnaire (to which defendant apparently did not object) which dealt in part with media coverage of the crimes. The court and counsel used this questionnaire to exclude those potentially biased jurors, without impinging upon defendant's right to subsequently question and challenge prospective jurors during the jury selection process. *People v Jendrzejewski*, 455 Mich 495, 509; 566 NW2d 530 (1997); *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). Further, plaintiff asserts that defense counsel did not exhaust his peremptory challenges and expressed no objection to the selected jury's composition, and defendant does not contest this assertion. Finally, defendant concedes on appeal that "the record is devoid of bias towards [him]." Under these circumstances, the trial court properly denied defendant's motion for change of venue.

II

Defendant also contends that he was denied the effective assistance of counsel because counsel allowed the four cases against him to be consolidated for trial. The record belies this argument.

The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). Generally, a defendant claiming ineffective assistance of counsel must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994). Unquestionably, defense counsel, for strategic reasons, elected to have the four cases consolidated for trial, and he informed the trial court by letter that defendant had no objection to consolidation. This Court will not substitute its judgment for that of defense counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). Therefore, a claim of ineffective assistance of counsel has not been established.

III

Defendant also maintains that the trial court erred by admitting similar-acts evidence from each of five cases against him. MRE 404(b); *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). MRE 404(b) precludes admission of evidence of "other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith." However, this rule permits such evidence when offered "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." Evidence of other crimes, wrongs or acts is admissible under MRE 404(b) if such evidence is: (1) offered for a proper purpose and not to

prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), opinion amended 445 Mich 1205 (1994); *People v Starr*, __ Mich __, __; 577 NW2d 673 (1998)..

Although the *VanderVliet* Court adopted a new test for admission of evidence under MRE 404(b), the four-part test of *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982) remains valid to show logical relevance where similar acts evidence is offered to show identification through *modus operandi*. *People v McMillan*, 213 Mich App 134, 138; 539 NW2d 553 (1995). The *Golochowicz* test requires that: (1) there is substantial evidence that the defendant committed the similar act; (2) there is some special quality of the act that tends to prove the defendant's identity; (3) that the evidence is material to the defendant's guilt; and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. *Golochowicz, supra*, 413 Mich at 307-309.

These elements are clearly satisfied in this case: (1) There is substantial DNA evidence that defendant committed all four assaults in this case and the December 24, 1994 robbery. (2) The similarity of these acts is the "special quality" that helps prove defendant's identity and a common scheme or plan. In each attack, defendant struck the victim around the face and head, resulting in loss or near-loss of consciousness and facial/cranial injuries. Furthermore, each attack occurred near where defendant lived, worked or socialized. Analogously, in *McMillan, supra*, this Court held that the second element of *Golochowicz* test was satisfied because the similarity of the acts linked all of them to defendant. In *McMillan*, each victim lived near the defendant's home. In each attack, the perpetrator entered the woman's home while she was alone, struggled with her and removed her clothes, but did not have intercourse with her. *Id*. at 138. (3) The evidence was material to defendant's guilt. One victim died; the other three were unable to give good descriptions of their assailant. Because the prosecution could not rely on eyewitness identification of defendant, identification through similar acts evidence was material to defendant's guilt. (4) Under these circumstances, we cannot say that the prejudicial effect substantially outweighed the probative value of the evidence. This "other acts" evidence was not the only evidence of defendant's guilt; it merely supplemented the DNA evidence. *McMillan, supra*, 139. Accordingly, we are satisfied that the *VanderVliet* criteria were satisfied and that the similar-acts evidence was properly admitted.

IV

Defendant asserts, erroneously, that the affidavit in support of the search warrant authorizing the taking of blood specimens from his person was inaccurate and that the trial court erred by denying his motion to suppress evidence seized pursuant to the warrant.

A search warrant may not issue unless probable cause exists to justify the search. US Const, Am IV; Const 1963, art 1, § 11. Probable cause exists when the facts and circumstances would allow a person of reasonable prudence to believe that evidence of a crime or contraband sought is in the stated place. *People v Chandler*, 211 Mich App 604, 612; 536 NW2d 799 (1995). A magistrate's finding of probable cause is based on all the facts related in the affidavit. *People v White*, 167 Mich

App 461, 463; 423 NW2d 225 (1988). An affidavit is not to be read in a negative or hypertechnical way, but is to be interpreted with common sense and in a realistic fashion. *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992); *United States v Giacalone*, 541 F2d 508, 514 (CA 6, 1976). In attacking the affidavit, defendant has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause. *Chandler*, *supra* at 612. This standard also applies to material omissions from affidavits. *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992). Our review of the record demonstrates that defendant failed to show that the affiant knowingly and intentionally, or with reckless disregard for the truth, either inserted false material into the affidavit or omitted material facts, and that the alleged false material inserted or the material facts omitted were essential to the finding of probable cause.

V

Defendant further contends that his sentences of fifty to seventy-five years for the CSC-1 convictions are disproportionate because they significantly exceed the sentencing guidelines' recommendation of fifteen to thirty years. A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). However, sentences that depart from the guidelines because of particularly egregious circumstances are not to be assessed for proportionality based on arithmetical measurements. *People v Merriweather*, 447 Mich 799, 807-808; 527 NW2d 460 (1994).

Regarding sentencing, the trial court stated that the "brutality and viciousness and terrors associated with these cases are beyond any contemplated by the guidelines. The defendant [lay] in wait, hit each victim with enough force to knock them out and then beat them into senselessness before raping them vaginally and anally." We fully agree with the trial court's description of these crimes. Defendant terrorized an entire community for more than two years. His rape victims may never fully recover from these appalling crimes. Defendant's inhumane conduct clearly mandates severe punishment. Defendant's sentences are proportionate to the offenses and the offender.[2]

Affirmed.

/s/ Stephen J. Markman
/s/ Henry William Saad
/s/ Joel P. Hoekstra

[1] We review the trial court's decision for an abuse of discretion. *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993).

[2] Also, we have reviewed defendant's challenge to the scoring of Prior Record Variable 7 and find it to be without merit.