

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

DONALD MARSHALL PAGE,

Defendant-Appellant.

UNPUBLISHED

May 14, 1999

No. 203284

Ogemaw Circuit Court

LC No. 96-001050 FH

Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction and sentence for first-degree criminal sexual conduct (CSC I), MCL 750.520(b)(1)(b); MSA 28.788(b)(1)(b). He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to fifteen to thirty years' imprisonment. We affirm.

I

Defendant argues that the lower court erred in admitting evidence that defendant had an ongoing sexual relationship with the complainant from the time she was ten until the time of the charged incident.

We agree with defendant's assertion that the prosecution failed to provide adequate notice of its intent to use the other acts evidence pursuant to the requirements of MRE 404(b). The prosecution filed notice of intent to use other acts evidence on August 6, 1996; however, this notice did not include a rationale for admitting the evidence, as required by MRE 404(b). Also, the record suggests that neither the court, nor the prosecution, nor defense counsel realized that the prosecution was required to provide this information. Further, the court failed to weigh the factors set forth in *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994), to determine whether the proffered evidence was admissible. To be admissible, other acts evidence must be offered for a proper purpose, it must be relevant, and the probative value must not be substantially outweighed by the risk of unfair prejudice. *Id.* at 55. Rather than consider these factors, the record indicates that the court admitted the evidence merely because the prosecution provided notice. Failure to recognize and weigh the above factors was plain error. *See, e.g., People v Stafford*, 434 Mich 125, 134 n 4; 450 NW2d 559 (1990). However, defendant's substantial rights were not affected,

because the error was not decisive of the outcome. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

Evidence of other sexual acts between a complainant and a defendant may be admissible under *People v DerMartex*, 390 Mich 410; 213 NW2d 97 (1973). Such is the case here. Defendant contends that the probative value of the evidence in this case was substantially outweighed by the risk of unfair prejudice. We disagree. As in *DerMartex*, the testimony in this case went directly to the credibility of the complainant. *Id.* If not allowed to testify regarding the *pattern* of conduct, the complainant's testimony regarding one isolated incident would have seemed incredible in light of the relationship between the parties. *People v Dreyer*, 177 Mich App 735, 738; 442 NW2d 764 (1989).

Defendant suggests that this Court's decision in *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996), requires reversal. That case, however, involved testimony that was offered for an improper purpose, had no logical relevance to an element of the charged offense, and was deemed more prejudicial than probative. Further, the prosecution had not given notice of its intent to use the evidence. The evidence in the present case was offered for a proper purpose, was relevant to the case, and was no more prejudicial than the acts for which defendant was charged. *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). Because the disputed other acts evidence would have been admissible, the court's failure to recognize and exercise its discretion did not affect the outcome of the case.

II

Defendant next claims that he was denied effective assistance of counsel due to his trial counsel's failure to object to the other acts testimony discussed above. No evidentiary hearing was requested or held on this issue; therefore this Court's review is limited to mistakes apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

A claim of ineffective assistance of counsel requires a defendant to satisfy a two-part test. First, the defendant must show that his counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms. Second, the defendant must show that, but for counsel's error, there is a reasonable probability that the outcome of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

As discussed above, regardless of whether counsel had objected to the disputed testimony, it was admissible, and therefore there is no evidence that the outcome of the case would have

been different had counsel objected to the testimony. Therefore, defendant has not met the burden required to show that he has been denied the effective assistance of counsel.

Affirmed.

/s/ Hilda R. Gage

/s/ Helene N. White

/s/ Jane E. Markey