STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 28, 2000
v	No. 216975 Kent Circuit Court
THOMAS CHRISTOPHER NEAL, Defendant-Appellant.	LC No. 98-005024-FC

Before: Fitzgerald, P.J., and Bandstra, C.J., and O'Connell, J.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and first-degree criminal sexual conduct (CSC I), MCL 750.520b(1); MSA 28.788(2)(1). He was sentenced as an habitual offender, third offense, to prison terms of twenty to forty years for the home invasion conviction and twenty to sixty years for the CSC I conviction. He appeals as of right. We affirm.

Defendant first argues that he was denied the right to a speedy trial because the prosecutor failed to bring him to trial within 180 days of his demand and because there was an unreasonable prearrest delay. We disagree.

Defendant was not charged with the criminal offenses at issue until an arrest warrant was issued against him on March 27, 1998. Pursuant to the plain language of MCR 6.004, defendant's right to a "speedy trial" was not violated because the trial took place within 180 days of the issuance of the arrest warrant.

Defendant's claim that his due process rights were violated because of the delay in issuing the arrest warrant similarly has no merit. In order to establish a due process violation in the context of prearrest delay a defendant must first demonstrate prejudice. *People v Cain*, 238 Mich App 95, 108-109; ___NW2d___ (1999), lv pending. A defendant's claim of prejudice should not be indefinite or speculative. *People v Adams*, 232 Mich App 128, 138-139; 591 NW2d 44 (1998). The threshold requirement is that "actual and substantial" prejudice must be shown by the defendant before the burden of persuasion shifts to the prosecutor to justify the delay. *Id.*

In this case, defendant completely fails to make any showing of prejudice. He merely states that, because of the delay, "lack of memory as to details must be presumed." Defendant cites no authority to support his assertion that lack of memory must be presumed. In addition, his general assertion of prejudice is inadequate to demonstrate "actual and substantial" prejudice. Defendant has failed to set forth what details may have been forgotten and how those details were relevant and beneficial to his case. See *Cain, supra* at 109-110; *Adams, supra* at 138-139. Because defendant does not show "actual and substantial" prejudice, we reject defendant's claim that his due process rights were violated by any prearrest delay.

Defendant also claims that the trial court erred when it failed to quash "the" search warrant. Specifically, defendant complains about the inadequacy of an affidavit used to secure a March 1997 search warrant for his premises. However, defendant did not move to quash this search warrant. Rather, defendant moved to quash an April 1997 search warrant to collect defendant's blood and saliva. Consequently, any arguments with regard to the March 1997 search warrant are not preserved for appellate review. Further, because defendant fails to address the basis of the trial court's decision to quash the April 1997 search warrant, appellate relief is not warranted. See e.g. *Joerger v Gordon Food Service, Inc,* 224 Mich App 167, 175; 568 NW2d 365 (1997)*; Robert Son's Contracting, Inc v North Oakland Development Corp,* 163 Mich App 109, 113; 413 NW2d 744 (1987).

Defendant also argues that the trial court abused its discretion when, after conducting an evidentiary hearing, it allowed three female witnesses to testify about similar prior acts of defendant. We disagree.

The admissibility of other similar acts evidence is within the trial court's discretion. *People v Crawford,* 458 Mich 376, 383; 582 NW2d 785 (1998). MRE 404(b) provides:

> (1) 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. It may, however, be admissible 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, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue.

In *People v VanderVliet,* 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1201 (1994), the Court clarified the test to be utilized to determine the admissibility of other similar acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; forth, that the trial court may, upon request, provide a limiting instruction to the jury.

It is insufficient for the prosecution to merely recite one of the purposes articulated in MRE 404(b). *Crawford, supra* at 387. The prosecution must also demonstrate that the evidence is relevant.

Here, the similar acts evidence was offered for the purpose of identifying defendant as the perpetrator of the charged sexual assault in this case where the victim could not identify him. Given that this proper purpose was articulated, the next determination is whether the evidence is relevant. In *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998), this Court set out the test to be utilized to demonstrate logical relevance when the similar acts evidence is offered to identify a defendant using a modus operandi theory.

> Although the *VanderVliet* Court adopted a new test for the 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) 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* at 307-309.

The *Golochowicz* Court indicated:

> [I]f the trial court determines that there is substantial evidence that the defendant in fact committed the other or uncharged crime, it must then turn to the task of determining whether the manners or systems employed by the perpetrator of the uncharged crime and the crime in question were sufficiently "like" or "similar" and involved such distinctive, unique, peculiar or special characteristics as to justify an ordinary reasonable juror to infer that both were the handiwork of the same person. [413 Mich at 312.]

In this case, there was substantial evidence that defendant committed the similar acts about which the three witnesses testified. In two of the cases, defendant was identified as the perpetrator. In the other, a tracking dog tracked the attacker's scent from the victim's home to the front lawn of the apartment building where defendant lived. In addition, the victim suspected that defendant, with whom she was acquainted, was the attacker. The other crimes were also sufficiently "like" or "similar" to the case at hand to justify the inference that they were the "handiwork of the same person." All of the cases involved a victim who lived within close proximity of defendant. All of the victims were woken up from their sleep by the attacker. A struggle took place in each attack. In two of the similar cases, as in the case at hand, the attacker had a sharp object, threatened to kill, and straddled the victims during the attack. In addition, in three of the four attacks, including the case at hand, defendant covered the eyes of the victim during the attack. The evidence was relevant to this case. See *McMillan*, *supra* at 138; *Ho*, *supra* at 186-187.

The probative value of the evidence also outweighed any unfair prejudicial effect. MRE 403 does not prohibit the use of prejudicial evidence. It only prohibits the use of unfairly prejudicial evidence. *Crawford, supra* at 398. "Evidence is unfairly prejudicial when there exists a danger that

marginally probative evidence will be given undue or preemptive weight by the jury." *Id.* Here, the victim could not identify her rapist. The evidence linking defendant to the crimes was strong. Therefore, the probative value of the evidence was great, not marginal. *Ho, supra* at 187. Although the evidence was clearly prejudicial, like all evidence implicating a defendant, there has been no showing of any danger that the evidence was marginally probative and would be given undue weight by the jury or that the most powerful inference to be made was an improper character inference.

The similar-acts evidence was offered for a legitimate purpose, was logically relevant, and had a probative value that was not substantially outweighed by the danger of unfair prejudice. In addition, the trial court issued a cautionary instruction to inform the jury how to consider the evidence. Therefore, the trial court did not abuse its discretion in allowing the evidence. *VanderVliet, supra.*

Finally, defendant argues that the trial court abused its discretion when it determined that a witness, Fred Simpson, was unavailable and allowed Simpson's testimony from a prior, preliminary examination to be read into the record. We agree that the trial court abused its discretion when it found that the prosecution used due diligence to try and obtain Simpson to testify.

> The Sixth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, and Const 1963, art 1, § 20, guarantee an accused the right to "be confronted with the witnesses against him. . . ." Prior testimony may nonetheless be used by the prosecution consistent with such constitutional guarantees if the witness is "unavailable" for trial, MRE 804(b)(1), and if the former testimony bears satisfactory indicia reliability. [*People v Conner,* 182 Mich App 674, 680-681; 452 NW2d 877 (1990).]

MRE 804(a) defines "unavailability" as including numerous circumstances, only one of which is pertinent to this case:

> "Unavailability as a witness" includes situations in which the declarant –
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> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.

Here, the prosecution made inquiries at Simpson's last known address and tried to gather information with regard to his location from his family. It did not, however, make any other efforts to find him until defendant challenged the prosecution's request to declare Simpson unavailable. The prosecution, at that point, made a half-hearted effort to obtain information from Simpson's last known employer. We find that the prosecution's efforts do not evidence due diligence. The prosecution failed to follow-up on known leads, including failing to check with the Friend of the Court to determine what information, if any, it had with regard to the witness and failing to follow-up on information that Simpson may work through a temporary agency. In addition, the prosecution never checked any local telephone or utility records. In *People v Bean,* 457 Mich 677, 685-687, 689-690; 580 NW2d 390 (1998), the

Court found that due diligence was not utilized to try and find a witness and the effort made in that case was far greater than the effort in this one.

Although we find that due diligence was not utilized, we find that the error does not require reversal. Not all constitutional errors require automatic reversal. *People v Anderson*, 446 Mich 392, 405; 521 NW2d 538 (1994). Constitutional errors that do not constitute structural defects, such as the error here, are subject to review to determine if the beneficiary of the error can prove that the error is harmless beyond a reasonable doubt. *Id.* at 405-406. In order to demonstrate that an error is harmless beyond a reasonable doubt, it must be proved that there was no reasonable possibility that the error contributed to the conviction. *Id.* The error must be assessed in the context of the other evidence presented at trial. *Id.*

Here, the error was harmless beyond a reasonable doubt. The testimony was critical only to a collateral matter and did not directly implicate defendant's guilt in this case. Moreover, and more importantly, when considering the other evidence at trial, reversal based on the error would be improper. Defendant's DNA sample, which had a one in 1.84 billion chance of being only randomly or coincidentally matched to the evidence, was undisputedly matched to all of the items of evidence to which it was compared. Additionally, a tracking dog tracked a scent from the victim's condominium to the front of the building where defendant lived. Those facts, taken with the properly admitted similar-acts evidence, lead to a conclusion that there was no reasonable possibility that the error with regard to Simpson contributed to the conviction.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell