

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ROBERT GISSE,

Defendant-Appellant.

UNPUBLISHED

May 23, 2000

No. 213989

Iosco Circuit Court

LC No. 97-003557-FH

Before: Owens, P.J., and Murphy and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(b); MSA 28.788(5)(1)(b). The trial court sentenced defendant to thirty-six months' probation, with the first nine months to be served in jail. Defendant appeals by right. We affirm.

Defendant first argues that the trial court abused its discretion by admitting evidence of prior uncharged misconduct (other acts) where he denied the incident involving the victim in this case occurred and did not claim lack of intent as a defense. We disagree. This Court reviews a trial court's decision to admit other acts evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would conclude there is no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

To admit evidence of other acts under MRE 404(b) in a criminal prosecution, the trial court must conclude that: (1) the evidence is offered for a proper purpose and not merely to prove the defendant's character or propensity to commit the crime, (2) it is relevant to a material issue or fact at trial, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Starr, supra* at 496, citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Proper purposes include those advanced by the prosecutor in this case: establishing motive, intent, and a defendant's scheme or plan in committing an act. MRE 404(b)(1).

Defendant was charged with CSC IV under MCL 750.520e(1)(b); MSA 28.788(5)(1)(b). In order to be convicted under that subsection, it must be shown that the defendant engaged in sexual contact with another person using force and coercion. “Sexual contact” is defined as an intentional touching that can reasonably be construed as being for the purpose of sexual arousal or gratification. MCL 750.520a(k); MSA 28.788(1)(k).

When the prosecutor moved to be permitted to present other acts evidence, he asserted that the acts were relevant to defendant’s “motive, intent, plan or system.”¹ These are proper purposes under MRE 404(b)(1), and there is no indication that the prosecutor attempted to admit the other acts evidence as a precursor to arguing that defendant had a propensity to commit such crimes. Although defendant challenged the admissibility of the prior acts in response to the prosecutor’s pretrial motion, defendant did not indicate, and the trial court did not require him to disclose, the nature of his defense. MRE 404(b)(2). Nevertheless, defendant’s general denial placed his intent at issue. *Starr, supra* at 501; *VanderVliet, supra* at 78. Moreover, when taking defendant’s case as a whole, including the opening and closing statements as well as the witness testimony, it appears as though defendant was arguing alternatively that the incident did not happen and, that even if it did, it was not for the purpose of sexual gratification.

Additionally, defendant explained in his opening remarks to the jury that he was “a very involved type of guy in the community” and that he was “so well thought of that the State of Michigan licensed him” for foster care. Defendant thus suggested that his involvement with the victim was entirely innocent and that he was simply helping out a young boy. Admission of the prior acts evidence cast a completely different light on defendant’s involvement with the victim by suggesting that his motive for assisting young boys was to enable him to obtain varying degrees of physical intimacy with the boys. In our judgment, the nature of defendant’s theory of defense substantiated the prosecutor’s claim that the admission of the other acts testimony was related to the proper purpose of showing defendant’s motive and intent in doing the charged act.²

The proffered theory of admissibility based on the “scheme or plan” rationale also justified the trial court’s decision to admit the other acts evidence. As noted above, defendant contended that he was very involved in the community, that evidence of his commendable community involvement was reflected in the fact that he was licensed to provide foster care, and that, by extension, his involvement with the victim stemmed from this background. The prosecutor’s theory was that defendant’s involvement in foster care with young boys was merely part of his “scheme and plan” to provide him with the opportunity to obtain unsupervised physical contact with young boys. In the charged offense, and in each of the other acts cases, defendant was alleged to have wrestled with a young boy and, during the course of the wrestling, to have grabbed the boy’s penis. As the trial court correctly reasoned, this evidence sufficiently established that defendant might have had a “scheme or plan” for obtaining close physical contact with young boys for the purpose of sexual gratification. We therefore conclude that the prosecutor provided a proper purpose for admission of the other acts evidence under the scheme or plan alternative of MRE 404(b)(1).

The next prong in the other acts analysis is whether the proffered proper purpose is relevant under MRE 402, as enforced through MRE 404(b), to a fact or issue of consequence at the trial.

Starr, supra at 496; *VanderVliet, supra* at 55. This prong requires a showing of both logical and legal relevance. *Starr, supra* at 497-498; *VanderVliet, supra* at 61-62. The proffered other acts evidence is relevant because, as our Supreme Court observed in *VanderVliet, supra* at 80-81, “it negates the otherwise reasonable assumption that the contact described in testimony . . . was accidental, as opposed to being for the purpose of sexual gratification” and because it was “highly probative of the defendant’s intent” in wrestling with the victim. As our Supreme Court reasoned in *VanderVliet, supra* at 85, “[s]exual purpose is an element of the offense” and defendant’s general denial thus rendered introduction of the other acts evidence relevant. “When relevance to an issue other than mere propensity is found, Rule 404(b) is not violated.” *Id.* We conclude that the proffered evidence has a tendency to make a fact of consequence – whether defendant touched the victim for the purpose of sexual gratification – more probable than it would be without the evidence. MRE 401.

The final prong of the analysis requires a balancing under MRE 403: whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). We note, as did our Supreme Court in *Starr, supra* at 500, that “[t]he danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself.” We conclude that the proffered testimony had significant probative value because it had a strong tendency to support the victim’s claim that the alleged acts were committed and that defendant’s purpose in committing the acts was for his sexual gratification.

Moreover, the prejudicial effect associated with the introduction of this other acts testimony did not substantially outweigh its probative value. The nature of the allegations and the victim’s testimony regarding the alleged sexual assault were sufficiently incriminating that the incremental additional prejudice caused by the proper introduction of the other acts testimony did not cause defendant any unfair prejudice. Accordingly, we conclude that the trial court properly admitted the proffered other acts evidence pursuant to MRE 404(b)(1).

An additional consideration under MRE 404(b) analysis is that the trial court should give a limiting instruction on request. *VanderVliet, supra* at 75. The trial court gave such an instruction.³ Given our finding that the other acts evidence was properly admitted, we also conclude that the trial court’s limiting instruction served to lessen the inevitable prejudice that is created by the introduction of relevant evidence. See *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995).

Defendant finally argues that he received ineffective assistance of counsel where counsel did not file a written motion regarding the similar acts evidence, did not object to the similar acts testimony when it was presented during the trial, and presented other prejudicial testimony at trial. Again, we disagree. This Court presumes effective assistance of counsel, and the defendant’s burden to prove otherwise is a heavy one. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). In *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994), our Supreme Court held that ineffective assistance of counsel will only be found where the defendant shows that his “counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.” To persuade this Court that a defendant was

prejudiced because counsel was ineffective, a defendant must establish “a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), quoting *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant first claims that he was prejudiced because defense counsel failed to submit a written motion regarding the foundation for the admissibility of the other acts evidence. We note that in response to the prosecutor’s motion to admit the other acts evidence, defendant’s trial counsel filed a brief arguing against the admission of the proposed testimony. Defendant acknowledges that trial counsel filed this brief, but argues that it was ineffective not to file a subsequent motion and supporting brief seeking to exclude the evidence after the prosecutor filed a supplemental information. The trial judge had already ruled the evidence admissible, so it is very unlikely the judge would reverse his prior rule had defense counsel submitted a written motion and brief a second time. Defense counsel is not required to make meritless or frivolous motions. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant also argues that he was prejudiced where defense counsel failed to object to the foundation for the testimony of the other acts witnesses and to certain answers they gave during that testimony. A counsel’s failure to object will only constitute ineffective assistance of counsel if it causes prejudice to the defendant. *People v Crawford*, 232 Mich App 608, 615; 591 NW2d 669 (1998). Nothing demonstrates that had counsel objected to the foundation of the other acts testimony, the result of the trial would have been different. The evidence of similar acts was ruled admissible under MRE 404(b) by the trial judge. Our review has led us to conclude that the evidence was properly admitted. Therefore, had counsel made the foundation objections that defendant now contends should have been made, the evidence would still have been admitted. Ineffective assistance of counsel does not occur where counsel failed to make objections and motions that could not have affected the defendant’s chances of acquittal. *People v Chinn*, 141 Mich App 92, 98; 366 NW2d 83 (1985).

Regarding counsel’s failure to object to specific remarks made by the other acts witnesses and the victim during the course of their testimony, defense counsel stated at the *Ginther*⁴ hearing that he was using the trial strategy of not objecting to evidence because he did not want to emphasize or draw attention to testimony that would be harmful to defendant. Defense counsel’s decision not to object was a reasonable trial strategy. Our Supreme Court has noted in *People v Bahoda*, 448 Mich 261, 287, n 54; 531 NW2d 659 (1995) that sometimes it is better not to object and thereby draw attention to an improper argument; we believe the same conclusion applies to witness testimony. This Court should not substitute its judgment for that of defense counsel regarding matters of trial strategy, nor should it assess the competence of defense counsel with the benefit of hindsight. *Pickens, supra* at 330. In any event, having reviewed the challenged testimony, we conclude that it was only minimally prejudicial and that counsel’s strategy was appropriate.

Finally, defendant argues that he received ineffective assistance of counsel where his counsel presented a character witness who testified that he had named defendant guardian of his children, but also testified that he changed the guardianship because of the charges filed against defendant. However, we note that most of this witness’ testimony was of benefit to defendant. Elimination of this witness

would have resulted in the loss of the witness' favorable testimony. Moreover, despite the admission of the evidence, it is unlikely the outcome of the trial would have been different had the witness not testified because the evidence against defendant was overwhelming. *People v Launsburry*, 217 Mich App 358, 362; 551 NW2d 460 (1996). Thus, reversal on this basis is not warranted.

Affirmed.

/s/ Donald S. Owens

/s/ William B. Murphy

/s/ Helene N. White

¹ Defendant claimed in his brief in support of his answer to the prosecutor's motion that in the prosecutor's brief (which is not contained in the trial court file) the prosecutor also asserted absence of mistake as a justification for admission of the prior acts evidence. When the prosecutor addressed these justifications at the motion hearing, he began to say "absence of," but then stated that his proffered proper purposes for the prior acts evidence were "motive, intent, and plan and scheme." We conclude that although the prosecutor did not verbally offer "absence of mistake" as one of the purposes with which to justify the admission of the prior acts evidence, "absence of mistake or accident is simply a special form of the exception that permits the use of other crimes to prove intent." *VanderVliet, supra* at 80, n 37, quoting 22 Wright & Graham, Federal Practice & Procedure, §5247, pp 517-518. Because the prosecutor sought to use the other acts to show defendant's intent to touch the victim for the purpose of sexual gratification, the "absence of mistake or accident" is subsumed within the intent justification.

² We recognize that our Supreme Court in *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998) cautioned that a prosecutor could not simply mechanically recite a listed proper purpose as a means of complying with MRE 404(b)(1), but must instead explain how the proposed other acts evidence relates to the cited purpose. We conclude from a review of the record that the prosecutor satisfied this requirement.

³ The trial court instructed the jury as follows:

Now, you have heard evidence that was introduced to show that the Defendant committed other improper acts for which he's not on trial. This evidence came through the testimony of witness Kevin Pridemore and Anthony Kircus. If you believe this evidence, you must be careful only to consider it for certain purposes. You may only think about whether this evidence tends to show that the Defendant specifically meant to touch the scrotum, testicles and penis of [the victim], or that the Defendant acted purposefully, that is, not by accident or mistake, or because he misjudged the situation or that the Defendant used a plan, scheme or characteristic scheme or system that he has used before or since.

You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the Defendant is a bad person, or that he is likely to commit crimes. You must not convict the Defendant here because you think he's guilty

of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the Defendant committed the alleged crime, or you must find him not guilty.

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).