STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 26, 2000
v	No. 210640 Oakland Circuit Court
JACK LELAND ELDRED, Defendant-Appellant.	LC No. 97-154941-FC

Before: Kelly, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1); MSA 28.788(2)(1). Defendant was sentenced to a term of five to twenty years' imprisonment. We affirm.

I

Defendant first argues that reversal is required because he was unduly prejudiced and denied a fair trial when complainant testified on direct examination that defendant had sexually molested her older sister. We disagree. The disputed testimony came during the following exchange:

> *Q.* Okay. Did you ever tell your grandparents about the incident at their house and why you didn't tell them?
>
> *A.* Because when he did, when he molested my sister Tracy, I know that they would have blamed me because after she had been put in a foster home they were always saying well she is lying and no one is ever going to believe this if he ends up doing anything to anyone else because they didn't believe him then.
>
> *Q.* So you didn't think that they would believe you?
>
> *A.* No.

Defendant argues that the trial court should have excluded this evidence. However, defendant failed to invoke the trial court's discretion in the matter by raising a specific and timely objection to this testimony at trial. MRE 103(a)(1). Further, viewed in context, it is apparent that the prosecutor was not seeking to elicit from complainant the fact that defendant had allegedly sexually molested her sister. Accordingly, complainant's reference to her sister was unexpected and unresponsive. See *People v Burch*, 170 Mich App 772, 776; 428 NW2d 772 (1988). Moreover, the prosecutor did not ask any further questions regarding the alleged incident, nor did the prosecutor discuss the incident during closing argument. Finally, we note that defendant failed to request that the answer be stricken from the record and failed to request a curative instruction to the jury. *Id.* Under these circumstances, we see no error requiring reversal.

II

Defendant next argues that he was denied a fair trial when the prosecution presented the following testimony by a friend of the complainant:

> *Q*. Okay. And is there anything that happened to you that made you believe [complainant][?]
>
> *A*. Yes, he had hurt me, touched me.
>
> * * *
>
> *A*. We were in a- - [complainant] got punished and she was upstairs in her room and me and Michelle were downstairs and he had put, we had got blankets and pillows to lay down on the floor and he put a porno in the VCR and we were watching it and I was laying down and he was giving me he said a rub down and I thought it was just a back massage and he had lifted up my shirt and was rubbing lotion on my back and he had touched under my boobs and then he was rubbing my legs and he went up my boxer shorts and under my panties and touched my vagina.

Defendant argues that the friend's testimony should not have been admitted. However, the record shows that defendant never objected to the introduction of the friend's testimony. Accordingly, we review the alleged error under the plain error rule. MRE 104(d).[1] "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice . . . ." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the

[1] MRE 103(d) states that nothing in MRE 103 "precludes taking notice of plain errors affecting substantial rights *although they were not brought to the attention of the court*." (Emphasis added.)

defendant's innocence."'" *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

Defendant argues that the friend's testimony was inadmissible pursuant to Michigan Rule of Evidence 404(b). MRE 404(b)(1) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the 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 the case.

As our Supreme Court observed in *People v Engelman*, 434 Mich 204, 213; 453 NW2d 656 (1990), MRE 404(b) is a rule of inclusion, not exclusion. However, before such other acts evidence may be admitted, the prosecution must give notice that it is seeking to introduce the evidence, as well as identify "the rationale . . . for admitting the evidence." MRE 404(b)(2). Accord *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). The prosecution's notice of intent to introduce the friend's testimony reads in its entirety:

> PLEASE TAKE NOTICE pursuant to People v VanderVliet 444 Mich 52 and MRE 404(b) that the People intend to introduce evidence of similar acts at trial to wit: Testimony that Defendant also sexually assaulted victim's fifteen year old friend, [name deleted].

We do not believe the prosecutor's notice satisfied the requirements of MRE 404(b)(2). Our Supreme Court has recently opined that the prosecution satisfies the articulation requirement if it is able to set forth a proper purpose at trial, even though an appellate court later concludes that the evidence was not relevant to the stated purpose. *People v Sabin (After Remand)*, ___ Mich ___; ___ NW2d ___ (2000), slip op at 15-16, n 6. This does not mean, however, that the notice requirement is satisfied if the first time the prosecution articulates any proper purpose for the evidence is on appeal. To ratify such a procedure would effectively undermine both the court rule and *VanderVliet*.

Further, mere mention of Michigan authority does not satisfy the articulation requirement. The passing reference to MRE 404(b) and *VanderVliet* is at best a mechanical attempt to tie the evidence to the list of purposes identified in each authority. See *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998).

On appeal, the prosecution makes the blanket statement that the "substance" of the friend's testimony was admissible under MRE 404(b). However, the prosecution only sets forth a proper purpose rationale for the specific reference to pornographic movies. On this point, the prosecution asserts that the fact defendant was watching a pornographic movie makes it less likely that he

accidentally touched the friend's vagina and more likely that this touching was done with a sexual purpose. This rationale does explain how this evidence is relevant to defendant's general intent for the crime charged. We conclude, therefore, that it was error to admit this testimony under MRE 404(b).

However, defendant has failed to establish the requisite level of prejudice. In light of the overwhelming weight of the properly admitted evidence, we conclude that the admission of the friend's testimony did not affect the outcome of the trial. Accordingly, defendant's claim of error has been forfeited. *Carines, supra* at 772.

III

Next, defendant argues that he was denied the effective assistance of trial counsel because defense counsel failed to object to the admission of the above two items of testimony. We disagree.

> Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. [*People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).]

Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, our review is limited to the facts contained on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Regarding complainant's testimony about her sister, we conclude that defendant has not overcome the presumption that trial counsel's failure to object constituted sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Given the brief and isolated nature of the comments, trial counsel may have determined that an objection would have drawn more attention to the allegedly improper testimony. See *People v Bahoda*, 448 Mich 261, 287, n 54; 531 NW2d 659 (1995). This Court will not substitute its judgment for that of 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).[2]

Regarding the friend's testimony, we conclude that the failure to object was harmless in light of the weight of the other evidence properly admitted at trial. We do not believe there is a reasonable probability that the outcome of the trial would have been different had counsel raised a timely objection.

IV

---

[2] For the same reasons, we see no error in defense counsel's failure to object to complainant's reference during cross-examination to defendant having been in jail previously.

Defendant next argues that he was denied a fair trial when a prosecution witness failed to testify as the prosecutor represented during the prosecutor's opening statement. We disagree. The prosecutor indicated during her opening statement that a doctor who examined complainant would testify that it appeared that complainant's vagina had been penetrated. However, the doctor testified that given the limitations of his examination of complainant, he could not "clearly say that she had penetration or not because . . . I could not visualize inside the cervix in detail."

Opening argument is the appropriate time to state the facts that will be proven at trial. When a prosecutor states that evidence will be presented, which later is not presented, reversal is not required if the prosecutor acted in good faith, and the defendant was not prejudiced by the statement. *People v Wolverton*, 227 Mich App 72, 76; 574 NW2d 703 (1997). Defendant's argument is limited to the issue of prejudice.

We conclude that defendant has failed to establish that he was prejudiced by the prosecutor's statement. The jury was properly instructed that it could only consider properly admitted evidence during deliberations, and that the lawyers' statements and arguments are not evidence. Jurors are presumed to follow their instructions. *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994). Accordingly, we hold that defendant was not entitled to a fair trial on this basis.[3]

V

Finally, defendant argues that his sentence is disproportionate. Again, we disagree. Because defendant's five-year minimum sentence is within the sentencing guidelines range, it is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994). After reviewing the record, we conclude that defendant has failed to overcome this presumption.

Affirmed.

/s/ Michael J. Kelly
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin

[3] Within this issue, defendant also briefly mentions that the prosecutorial misconduct, coupled with the other errors, denied him a fair trial. It is possible that the cumulative effect of a number of errors may constitute error warranting reversal. *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984). However, because defendant has failed to establish requisite errors, reversal is not warranted.