STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 23, 2001
v	No. 215824 Livingston Circuit Court
ADRIAN HENRY RIVAIT, Defendant-Appellant.	LC No. 98-010486-FH

Before: Saad, P.J., and Griffin and R. B. Burns*, JJ.

PER CURIAM.

Defendant was convicted of four counts of third-degree criminal sexual conduct with a person between the age of thirteen and fifteen, MCL 750.520(d)(1)(a); MSA 28.788(4)(1)(a). He was sentenced to concurrent terms of ten to fifteen years' imprisonment. He appeals of right. We affirm.

I

Defendant first claims that the trial court deprived him of his state and federal constitutional due process rights to a fair trial when it permitted plaintiff to introduce inadmissible other acts evidence at trial. We disagree.

The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only where there has been a clear abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Other acts evidence is admissible if 1) it is relevant, 2) it is introduced for a proper purpose, and 3) the danger of undue prejudice does not substantially outweigh the probative value of the evidence. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). Furthermore, a defendant's use of marijuana on the night of the alleged sexual conduct crime is admissible to explain to the jury the circumstances of the crime. *People v Sholl*, 453 Mich 730, 740-743; 556 NW2d 851 (1996).

*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Here, the victim's testimony concerning defendant's delivery and use of marijuana was relevant because these acts were an integral part of defendant's efforts to befriend the victim, to establish a level of trust with her, and ultimately to commit sexual acts with her. For that same reason, plaintiff offered the other acts evidence for a proper purpose.

Nevertheless, if the danger of unfair prejudice substantially outweighs the probative value of the challenged other acts evidence, it is inadmissible. *VanderVliet*, *supra* at 444 Mich 74. "Unfair prejudice" does not mean "damaging." *Bradbury v Ford Motor Co*, 123 Mich App 179, 185; 333 NW2d 214 (1983), mod 419 Mich 550 (1984). Rather it

> denotes a situation in which there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury. In other words, where a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, a situation arises in which the danger of "prejudice" exists. [*Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735; 344 NW2d 347 (1983).]

We find that the contested evidence was not merely "marginally probative." On the contrary, the evidence is highly probative of defendant's plan or scheme to entice the victim into engaging in sexual activity with him because it shows how defendant went about establishing a relationship with the victim.

Furthermore, there is little danger that the jury gave this contested evidence undue or preemptive weight. Even if the jury believed the evidence that defendant offered the victim marijuana, this testimony would not lead the jury to find defendant guilty of criminal sexual conduct. The evidence does not have the potential to inflame such passion or bias in the jury that the jurors would feel compelled to find defendant guilty of criminal sexual conduct on the basis of this evidence. Rather, irrespective of the alleged marijuana use, the victim's direct testimony that these criminal sexual acts occurred is the most telling evidence on which the jury could rest its guilty verdict.

We have held that the idea of unfairness in the context of an MRE 403 analysis requires us to consider whether it would be inequitable to allow the proponent of the evidence to use the evidence. *Sclafani*, *supra* at 735-736. We find that it would not be unfair or inequitable to allow the prosecution to introduce the contested evidence. It is important that the jury, as factfinder, know of the circumstances leading up to the offense. Accordingly, we hold that the trial court did not abuse its discretion when it admitted this evidence.

II

Defendant next contends that the guilty verdict was against the great weight of the evidence. Defendant has failed to supply this Court with the necessary transcripts, MCR 7.210(B)(1)(a), and thus has abandoned this issue on appeal. *People v Coons*, 158 Mich App 735, 740; 405 NW2d 153 (1987).

III

Defendant next argues the trial court abused its discretion when it permitted plaintiff's late endorsement of two trial witnesses. We disagree.

We review a trial court's decision to allow a late endorsement of a witness for an abuse of discretion. *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Gadomski*, 232 Mich App 24, 33; 592 NW2d 75 (1998).

Defendant first challenges the late endorsement of defendant's son, Damon Rivait, at trial. As a general rule, the prosecutor is required to notify the defendant of the witnesses he intends to produce at trial. MCL 767.40a; MSA 28.980(1), *Gadomski*, *supra* at 35-36. However, reversal is not required when a defendant fails to demonstrate prejudice from the late endorsement of a witness. *People v Carner*, 117 Mich App 560, 574; 324 NW2d 78 (1982).

In *Carner*, we concluded that reversal was not required where despite the late endorsement of two trial witnesses, defendant did not show "prejudicial surprise which deprived him of an opportunity to meet the evidence." *Id*. In that case, the trial court made it clear that defense counsel could interview the endorsed witnesses that day. *Id*. Thus, we held that because defendant did not claim that he was denied this opportunity to interview the endorsed witnesses, he failed to demonstrate any prejudice. *Id.*

As in *Carner*, the trial court in the present case did permit defense counsel to question Damon Rivait during an extended lunch break. In addition, the lower court record indicates that defense counsel did in fact interview Damon Rivait that day. Thus, because defendant was not "deprived of an opportunity to meet the evidence," we hold that the trial court's decision to permit the late endorsement of Damon Rivait was not an abuse of discretion.

Likewise, we find that plaintiff's late endorsement of a medical expert did not prejudice defendant, because the trial court ordered that plaintiff make the expert available for an interview. Where the late endorsement of a witness does not result in prejudice, reversal is not required. *Canter, supra*. Therefore, we hold the trial court did not abuse its discretion when it permitted the late endorsement of two of plaintiff's trial witnesses.

IV

Defendant also argues that the prosecution's concealment of exculpatory evidence in the victim's medical report completed by the emergency room examining physician denied him his due process right to a fair trial. We disagree.

Due process requires disclosure of evidence in the prosecutor's possession which is exculpatory and material. *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Lester*, 232 Mich App 262, 280-281; 591 NW2d 267 (1998).

Although this Court has not articulated a specific standard of review for a *Brady* violation, we believe this issue involves a mixed question of law and fact. A trial court's findings of fact may not be set aside unless clearly erroneous. MCR 2.613(c). A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the basis of the entire record is left with the definite and firm conviction that a mistake has been made. *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976). This Court reviews questions of law de novo. *Bennet v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996).

In order to establish a *Brady* violation, a defendant must prove that: (1) the state possessed evidence favorable to the defendant; (2) he neither possessed the evidence nor could have obtained it himself with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Lester*, *supra*, at 281.

Defendant must first prove that the state possessed evidence favorable to defendant. Plaintiff argues that the report was not favorable to defendant. However, defendant claims that, according to this medical report, the victim denied that defendant inserted his penis inside her vagina. At trial, the victim testified defendant penetrated her vagina with his penis. Because this statement the victim made to the emergency-room physician directly contradicts the victim's trial testimony, it was clearly favorable to defendant. Moreover, the lower court record indicates that the state was in possession of this evidence because it was the prosecutor who furnished the report. Thus, defendant has established the first prong of the *Brady* test.

Defendant must also prove he did not possess the evidence and could not have obtained it himself with reasonable diligence. On appeal, defendant fails to argue that he could not have obtained the medical report himself with reasonable diligence. Defendant should have been alerted to the existence of such a report by police testimony indicating that the victim was taken to the hospital to be examined after defendant was placed under arrest. It is not clear why defendant could not have obtained the report himself.

Even assuming there was some reason that defendant could not have obtained the report, defendant also fails to establish the third prong of this test. Defendant must show the prosecutor suppressed the favorable evidence to establish a *Brady* violation. Here, while the date on the report does indicate that this report is five months old, defendant has failed to establish that the prosecutor was concealing the evidence until the last moment. Rather the prosecutor indicated he had only received the report the day before he gave it to defense counsel.

Because defendant has failed to establish all four prongs of the test necessary to establish a *Brady* violation, his claim that he was denied due process is without merit.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Robert B. Burns