STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 26, 2001
v	No. 216488 Genesee Circuit Court
PAUL VINCENT WRIGHT, Defendant-Appellant.	LC No. 98-002629-FH

Before: Zahra, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of seven counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a) (victim between thirteen and fifteen years of age). The convictions stem from a relationship between defendant and the then-fourteen-year-old sister of defendant's girlfriend. The trial court sentenced defendant to concurrent terms of ten to fifteen years' imprisonment on each count. We affirm.

Appellate counsel raises one issue on appeal, and defendant raises three additional issues in propria persona. We will consider each in turn.

Appellate counsel argues that the trial court erroneously admitted over hearsay objections three letters that the complaining witness wrote. We disagree. The complainant wrote one of the letters to defendant, and two to friends of her own age and gender, but none was sent. The letters were written during the course, and reveal the sexual nature, of the complainant's relationship with defendant. The trial court admitted them as exempt from the definition of hearsay as prior consistent statements offered to rebut a charge of recent fabrication, MRE 801(d)(1)(B), and alternatively as excepted hearsay as statements of the complainant's then-existing state of mind or emotion, MRE 803(3).

Defense counsel's statements to the prospective jurors during voir dire suggested that the complainant, when originally confronted with one of the letters indicating an improper relationship with defendant, had maintained that the improper relationship was purely a matter of fantasy, but that later, when the romance between defendant and the complainant's sister ended, admitted to the sexual relationship with defendant. Defense counsel thus implied that the complainant changed her story to allege that the sexual relationship occurred. Because defense counsel had placed before the jury the implication that the complainant's current posture was a

fabrication borne of antipathy resulting from defendant's decision to move away from the complainant's sister, the letters were properly admitted to rebut that defense theory. MRE 801(d)(1)(B).

Defendant in propria persona first argues that the trial court erroneously admitted evidence of unrelated bad acts, when the prosecutor had failed to provide notice of the intention to introduce such evidence as required by MRE 404(b)(2). This argument was not preserved below with a timely objection and, therefore, defendant must show plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

The evidence in question did not concern other bad acts, as envisioned by MRE 404(1), but instead concerned activity that was part of the course of conduct at issue at trial. Before trial, the prosecutor agreed to drop one count because it concerned alleged conduct that took place in Oakland County, where the prosecutor and the judge agreed at the preliminary examination that defendant should be bound over on charges stemming from alleged conduct taking place in Genesee County exclusively. At trial, the prosecutor elected to drop the one count in order to avoid creating an issue for appeal. Nonetheless, the conduct in question remained germane to the question before the jury. After the prosecutor elicited testimony about the initial digital and oral sexual contact that occurred between the complainant and defendant, the prosecutor logically elicited testimony concerning the next such encounter, and how defendant and the complainant progressed, in both frequency and degree, in their sexual activity. The circumstances surrounding the first act of sexual intercourse was part of the totality of the circumstances about which the jury was entitled to hear evidence.

The practical and procedural maneuver of dropping one count among several that concerned one episode in a series of related behaviors did not operate to sever that alleged conduct from its obvious linkage to the conduct over which defendant was actually charged and tried. Under these circumstances, there was not plain error affecting defendant's substantial rights and defendant is not entitled to appellate relief for this unpreserved claim of error. *Carines, supra*.

Defendant next argues that the trial court abused its discretion in declining to grant the jury's request to have certain testimony played back. We disagree. MCR 6.414(H) governs how a court should respond to a jury's request to review evidence, providing:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Review of the trial court's treatment of the jury's request in this case reveals that the court acted consistently with the rule. Further, defense counsel assented on the record to the way that the trial court responded to the jury's request, thus waiving this issue. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Finally, defendant argues that the trial court erroneously seated the jury according to the struck-jury method expressly forbidden by our Supreme Court in *People v Miller*, 411 Mich 321, 323-324; 307 NW2d 335 (1981). However, defense counsel used only two of five allowed peremptory challenges, see MCR 6.412(E)(1), and expressed satisfaction on the record with the jury as selected. Thus, defendant waived appellate review of this issue. *Carter, supra*.

The issue lacks merit in any event. *Miller* concerned examination and challenges, both peremptory and for cause, of prospective jurors in batches of seventy-three and thirty-seven, which had the effect of greatly diluting the effectiveness of the peremptory challenges. *Miller, supra* at 324-325. The procedure used in this case neither involved such great numbers, nor forced counsel to target for peremptory challenges a panel larger than that finally seated. The trial court conducted examination of a total of twenty-six prospective jurors, but the parties' inquiries and challenges attendant to peremptory challenges were directed at the fourteen prospective jurors seated in the jury box. Because defense counsel was permitted five peremptory challenges, MCR 6.412(E)(1), but used only two, counsel suffered no dilution in the exercise of that right.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Hilda R Gage