

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW HATH,

Defendant-Appellant.

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UNPUBLISHED

January 15, 2002

No. 227639

Ingham Circuit Court

LC No. 99-075033-FH

Before: Fitzgerald, P.J., and Bandstra and K. F. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct (person under thirteen), MCL 750.520C(1)(a) and was sentenced to eighty-four to 180 months' imprisonment and sixty to 180 months' imprisonment for his respective convictions. He appeals as of right. We affirm.

Defendant first argues that evidence of his prior conviction for CSC involving this same victim was improperly admitted because the prior act and the alleged acts are dissimilar and do not contain "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations" *People v Sabin (After Remand)*, 463 Mich 43, 64-65; 614 NW2d 888 (2000). We disagree.

The admissibility of evidence is within the trial court's discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v Aguwa*, 245 Mich App 1, 6; 626 NW2d 176 (2001). An abuse of discretion exists only where an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.* at 6.

For evidence of a prior conviction to be admissible under MRE 404(b), the evidence must generally satisfy three requirements: (1) the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory; (2) it must be relevant under MRE 402, as enforced through MRE 104(b) to an issue of fact of consequence at trial; and (3) under MRE 403, a determination must be made whether the danger of undue prejudice substantially outweighs the probative value of the evidence in view of the availability of other means of proof and other facts. *Sabin, supra* at 55-56; *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). A proper purpose is one other than establishing the defendant's

character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

Here, the evidence was offered for a proper purpose – to show a common plan, scheme, or system by which defendant perpetrated the sexual contact, it was relevant, and its probative value was not substantially outweighed by the danger of undue prejudice. *Sabin, supra* at 55-56. The similarities between the charged and uncharged acts include: (1) the victim in the prior and charged acts was the same; (2) the acts occurred over a prolonged period; (3) they occurred in defendant's home when defendant was convinced that he was alone with the victim; (4) they were done notwithstanding that other persons were nearby; and (5) they involved acts designed for sexual gratification. This was sufficient to establish a common plan, scheme, or system. *Sabin, supra* at 63, 66; *People v Katt*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 225632, issued November 13, 2001), slip op 13. Additionally, the cautionary instruction delivered by the court was sufficient to alleviate the danger of any lingering prejudice. *People v Gibson*, 219 Mich App 530, 534; 557 NW2d 141 (1996); *People v Knapp*, 244 Mich App 361, 380; 624 NW2d 227 (2001).

Defendant next challenges the admission of hearsay testimony under MRE 803(2), the “excited utterance” exception to the hearsay rule. Defendant contends that the evidence was insufficient to establish that the victim was under the continuing stress of an event that allegedly occurred two nights before the statement was made. We disagree.

To be admissible as an excited utterance, the statement must have been made when the declarant was still under the influence of excitement precipitated by an external startling event and did not have the reflective capacity essential for fabrication, so that the utterance was spontaneous and trustworthy. MRE 803(2). *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998); *People v Edwards*, 206 Mich App 694, 697; 522 NW2d 727 (1994). The justification for the exception is the lack of *capacity* to fabricate rather than the lack of *time* to fabricate. *People v Straight*, 430 Mich 418, 425; 424 NW2d 257 (1988). Here, although the statement was made following a two to three day interval and in response to questioning, the circumstances of the questioning do not suggest that the statement was made as a result of reflective fabrication. *Smith, supra* at 553; see also *People v Layher*, 238 Mich App 573, 583-584; 607 NW2d 91 (1999).

Defendant next contends that he was denied the effective assistance of counsel at trial. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard or reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed and a defendant must overcome the strong presumption that assistance of his counsel was effective. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Garza; supra* at 255.

Here, the evidentiary record created during defendant's hearing on his motion for new trial established that counsel's actions were consistent with his trial strategy. 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. *Garza, supra* at 255; *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Last, defendant maintains that the court erred by amending defendant's sentence. Whether the court could amend defendant's otherwise valid sentences is a question of law that this Court reviews de novo. *People v Thenghkam*, 240 Mich App 29, 69; 610 NW2d 571 (2000). Resolution of this issue is predicated on a determination of the validity of defendant's sentence, which in turn resolves the question whether the trial court had the authority to modify the judgment of sentence. Generally, authority to modify a sentence is vested in the provisions of MCR 6.429(A) and allows the court to correct an invalid sentence after sentencing; however, the court may not modify a valid sentence after it has been imposed except as provided by law. MCR 6.429(A); *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Absent a tangible legal or procedural error that makes a sentence invalid, the trial court cannot alter a sentence that a defendant has begun to serve. *People v Wybrecht*, 222 Mich App 160, 167; 564 NW2d 903 (1997). Sentences based on a misconception of law are deemed invalid and subject to amendment by the sentencing court. *Miles, supra* at 96.

Here, the court acted under the improper presumption that the sentences that it imposed were within the applicable guidelines<sup>1</sup> and this was a misinterpretation of the law. Because the sentences imposed were based on this misinterpretation, the sentences imposed were invalid and properly subject to amendment by the trial court. *Miles, supra* at 96.

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Richard A. Bandstra  
/s/ Kirsten Frank Kelly

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<sup>1</sup> Count I is subject to the judicial sentencing guidelines and Count III is subject to the legislative guidelines.