

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARCHIE LEE EVANS,

Defendant-Appellant.

UNPUBLISHED

February 10, 2004

No. 244034

Saginaw Circuit Court

LC No. 01-020858-FC

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

A jury convicted defendant Archie Lee Evans of carrying a dangerous weapon with unlawful intent, MCL 750.226; kidnapping, MCL 750.349; armed robbery, MCL 750.529; assault with intent to commit murder, MCL 750.83; and first-degree criminal sexual conduct (weapon used), MCL 750.520b(1)(e). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 76 to 120 months' imprisonment for the carrying a dangerous weapon conviction, and to concurrent sentences of 900 months' to 125 years' imprisonment for the kidnapping, armed robbery, assault with intent to murder, and first-degree criminal sexual conduct convictions. Defendant appeals as of right. We affirm.

I. Background Facts

The instant case involves assaults that defendant committed on two women. Brenda Nuby had an ongoing relationship with defendant. On October 17, 2001, Ms. Nuby agreed to have sexual intercourse with defendant but refused his request for oral sex. When she refused, Ms. Nuby claimed that defendant slapped her, placed a butcher knife to her neck, and forced her to perform oral sex on him. The following day, Ms. Nuby drove defendant to the Family Independence Agency building and dropped him off.

Kimberlee Wicks testified that on October 18, 2001, she took a bus to the FIA to get medical insurance. While waiting for her appointment, Ms. Wicks went to a deli across the street and then to the Bearinger Building to see a friend at Ghetto Records. After discovering that the Ghetto Records office was closed, Ms. Wicks stepped back onto the elevator and noticed defendant in the elevator. When the elevator door opened on the first floor, she claimed that defendant pulled her back into the elevator, put his arm around her neck, held a knife to her throat, and took her to the fifth floor. She stated that defendant threatened to kill her if she screamed and then choked her until she lost consciousness. Ms. Wicks subsequently awoke

naked, laying in a closet safe, with blood coming out of her head, and the money in her purse gone. The examining physician testified that Ms. Wicks' injuries were consistent with strangulation and being struck by a fist.

Defendant denied pulling a knife on Ms. Nuby and claimed that she did not perform oral sex on him. He further claimed that he was at the Bearinger Building smoking drugs when he met Ms. Wicks. According to defendant, Ms. Wicks was asking about drugs and offered him sex for money or drugs. Defendant denied hitting, strangling, or having sex with Ms. Wicks. He further claimed that he never possessed a knife.

II. Evidentiary Error

Defendant initially argues that the trial court erroneously admitted testimony regarding defendant's prior bad acts. We disagree. A trial court's decision to admit evidence is reviewed on appeal for an abuse of discretion.¹

At trial, Carol Moten testified about an incident involving defendant that allegedly occurred in 2001. According to Ms. Moten, defendant accosted her after she refused to have sexual intercourse with him. She claimed that defendant grabbed her around the neck, choked her, and hit her in the face. Ms. Moten further testified that during this altercation, defendant placed a knife against her throat and forced her into a car with him. Ms. Moten stated that she was able to escape when defendant let her out of the vehicle.

Evidence of other bad acts is inadmissible to prove an individual's propensity to act in conformity therewith.² But such evidence may be admissible to show "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"³ We evaluate the admission of other acts evidence by considering if: (1) it was offered for a proper purpose under MRE 404(b); (2) it was relevant; (3) its probative value was not substantially outweighed by unfair prejudice; and (4) a limiting instruction was requested and provided by the trial court.⁴

The evidence in this case was offered to prove defendant's scheme, plan or system in performing these assaults. Evidence showing knowledge or a scheme of doing things is recognized within MRE 404(b)(1) as being offered for a permissible purpose. Further, the evidence was relevant because it showed that defendant had a system of strangling women and assaulting them with knives. Defendant has failed to show that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. Moreover, the

¹ *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

² MRE 404(b)(1); *Crawford*, *supra* at 383.

³ MRE 404(b)(1).

⁴ *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994); see also *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

prejudicial effect of this evidence was reduced by the trial court's limiting instruction to the jury.⁵ Accordingly, the trial court did not abuse its discretion by admitting this evidence.

III. Sufficiency of the Evidence

Defendant next argues that insufficient evidence was presented to support his assault with intent to commit murder conviction. We disagree. In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.⁶ “[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.”⁷

To obtain a conviction for assault with intent to murder, the prosecution must establish the following beyond a reasonable doubt: “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.”⁸ In this case, defendant claims that there was insufficient evidence to show that he possessed the intent to kill. Such intent, however, may be inferred from facts in evidence and given “the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient.”⁹ The record shows that defendant held a knife to Ms. Wicks' throat and threatened to kill her. When she tried to escape, defendant choked her into unconsciousness and left her inside a wall safe. Viewing this evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could find that defendant was guilty of assault with intent to commit murder.

IV. Ineffective Assistance of Counsel

Defendant ultimately asserts that the trial court improperly refused his request for an evidentiary hearing regarding his claims of ineffective assistance of counsel. A remand for an evidentiary hearing is unnecessary if a defendant does not show a factual dispute or an “area in which further elucidation of the facts might advance his position.”¹⁰ Because the trial court did not conduct a *Ginther*¹¹ hearing, our review of defendant's ineffective assistance of counsel claim is limited to the existing record.¹²

⁵ See *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001).

⁶ *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

⁷ *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

⁸ *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999); quoting *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995).

⁹ *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

¹⁰ *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995).

¹¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

¹² *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.¹³ To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different.¹⁴ Defendant must also overcome the strong presumption that his counsel's performance was sound trial strategy.¹⁵

Defendant initially claims that defense counsel was ineffective for failing to obtain medical records concerning defendant's arthritic condition and for not calling a dozen allegedly exculpatory witnesses. Decisions about what evidence to present and whether to call particular witnesses are presumed matters of trial strategy.¹⁶ A failure to call witnesses, however, may constitute ineffective assistance if it deprives the defendant of a substantial defense that would have affected the outcome of the proceeding.¹⁷ Here, defendant failed to show that any of his proposed witnesses or the medical records would have affected the outcome of the proceeding. We note that testimony was presented to the jury concerning defendant's medical condition.

To the extent defendant contends that defense counsel was ineffective for failing to request a severance of the two trials, we disagree. Defendant argues that because the assaults occurred on different days and at different locations, the offenses were unrelated. But under MCR 6.120, offense are considered related if they are based on the same conduct or represent a series of connected acts constituting a part of a single scheme or plan. In this case, the assaults occurred within hours of each other and the second assault was the result of Ms. Nuby's interaction with defendant. Thus, severance was not warranted in this case under MCR 6.120(B). Counsel is not required to advocate a meritless position.¹⁸ In any event, defendant has not shown how counsel's actions in this regard affected the outcome of the proceedings, as evidence regarding each victim would have been admissible under MRE 404(b).

Defendant also contends that his counsel was ineffective because his opening statement conflicted with defendant's testimony. Assuming, arguendo, that defense counsel's performance was deficient in this respect, defendant cannot demonstrate that the result of the proceeding would have been different. The trial court specifically instructed the jury that the lawyers' statements and arguments are not evidence. Jurors are presumed to follow their instructions.¹⁹

¹³ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

¹⁴ *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

¹⁵ *Id.* at 600.

¹⁶ *Rockey*, *supra* at 76.

¹⁷ *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

¹⁸ *Snider*, *supra* at 425.

¹⁹ *Dennis*, *supra* at 581.

Defendant next maintains that defense counsel deprived him of a defense when he failed to provide notice under the Rape Shield Statute, MCL 750.520(j), that defendant and Ms. Nuby had customarily engaged in “rough sex.” Defendant claims that this type of sex included using a knife in bed. Again, we “will not second-guess counsel regarding matters of trial strategy . . . [nor] assess counsel’s competence with the benefit of hindsight.”²⁰ The “failure to raise a substantive defense, where there is substantial evidence to support the defendant’s claim” may amount to ineffective assistance of counsel.²¹ However, defendant has not presented any evidence, let alone substantial evidence, to support the claim that he was deprived of a substantial defense.

Defendant finally challenges defense counsel’s failure to object when the prosecutor referenced defendant’s 1980 sexual assault conviction. Evidence of prior convictions are admissible to rebut specific statements of a defendant who testifies at trial.²² Here, the 1980 conviction was admissible to rebut defendant’s testimony that he had never hurt anybody like that in his life. Counsel is not required to make futile objections.²³

On this record, we find that defendant has failed to show that he was entitled to a *Ginther* hearing.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper

²⁰ *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

²¹ *People v Moore*, 131 Mich App 416, 418; 345 NW2d 710 (1984).

²² *People v Douglas Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985).

²³ *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).