STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 2004
v	No. 246073 Berrien Circuit Court
ROBERT LEE CLOY, Defendant-Appellant.	LC No. 2002-400542-FC

Before: Gage, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for armed robbery, MCL 750.529, and first-degree criminal sexual conduct, MCL 750.520b. He was sentenced to life imprisonment on each count. We affirm.

This case arose when defendant forced his way into the victim's car, drove the victim to another area, sexually assaulted her at knifepoint, dropped her off without any pants or underwear, and deserted the car in the same parking lot from which he took it. While the victim did not get a clear look at defendant, his blood matched semen found on the victim's jacket.

Defendant first argues that the trial court erred when it allowed the prosecutor to introduce evidence that defendant was a suspect in another later robbery of a different woman. We disagree. We review for abuse of discretion the trial court's decision regarding other-acts evidence. *People v Crawford,* 458 Mich 376, 383; 582 NW2d 785 (1998). Other-acts evidence must satisfy three requirements to be admissible under MRE 404(b): (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Sabin (On Remand),* 463 Mich 43, 55; 614 NW2d 888 (2000).

In the present case, all three of these elements have been satisfied. First, the prosecution offered the challenged evidence for the proper purpose of giving the jury a complete picture of what occurred in this investigation leading to defendant's charges. While this evidence was not offered for one of the enumerated purposes set forth in MRE 404(b), our Supreme Court has held that MRE 404(b) is inclusionary rather than exclusionary. *People v Engelman,* 434 Mich 204, 212-213; 453 NW2d 656 (1990). Therefore, the statutory list of examples is nonexclusive. *Id.* Our Supreme Court has recognized the proper purpose of providing the jury with a complete picture of what has occurred in a case.

> It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence. [*People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).]

Here, defendant was identified as a suspect in the present incident only after a similar car-jacking, rape, and robbery was later committed. The perpetrator of the second crime was videotaped, and the image on the tape was identified as defendant. Defendant was shown a still photograph of the image and admitted that it was a picture of him. With this information, police obtained a warrant for samples of defendant's blood and hair. Deoxyribonucleic acid (DNA) gathered from these samples matched the DNA of semen found at both crime scenes. While the prosecutor wanted to justify the investigation to the jury, she recognized that inclusion of all the crime's other details would prejudice defendant. Defense counsel argued that the trial court should exclude all the other crime's circumstances, but recognized that the jury would receive only a sketchy explanation of the investigation without the supplemental information. Without inclusion of the challenged other-acts evidence, the jury would not have understood how defendant properly became a suspect. Under the circumstances of this case, the prosecutor offered the evidence for a proper purpose.

Regarding *Sabin*'s second factor, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In every criminal case, the impetus and reliability of the police investigation leading to arrest relates directly to the proper identification of the charged defendant. This axiom is especially applicable in a case where the primary evidence supporting conviction is DNA evidence completely within the control of police from the moment samples are collected to the moment results are obtained. Such cases are more susceptible to tampering, planting, and other means of false accusation, and a jury will usually need a clearer picture of why the defendant reasonably and legitimately became a target of police investigation. The existence of substantial legitimate reasons for investigating the particular defendant makes it less likely that the police fabricated or planted the evidence and more likely that the circumstantial DNA evidence identifies the true culprit. Therefore, the challenged evidence in this case directly relates to a fact that was of consequence in the proceedings.

Regarding the *Sabin's* final factor, the probative value of the challenged testimony, as limited by the court, was not substantially outweighed by the danger of unfair prejudice. The court limited the evidence to the fact that police were working on a separate robbery complaint involving a vehicle and money, an African-American male perpetrator, and a female victim. The court also allowed evidence that the police reasonably suspected that the perpetrator of the second incident was videotaped, and defendant admitted he was the videotaped individual. The trial court did not allow evidence that the other complaint involved a criminal sexual act or a weapon. It also disallowed the fact that defendant had been convicted of the later incident. Under these circumstances, the probative value of the challenged evidence was not substantially

outweighed by the danger of unfair prejudice. Accordingly, the trial court did not abuse its discretion when it permitted the introduction of this evidence.[1] *Sabin, supra*.

Defendant also argues that the prosecutor improperly introduced evidence that defendant asserted his Fifth Amendment right to silence during police questioning. We disagree. This question was not preserved for appellate review. Accordingly, we review this issue for plain error that affected defendant's substantial rights. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In the present case, a police officer's brief explanation that defendant's earlier request for counsel prevented him from interviewing defendant further was not responsive to the prosecutor's question and did not prejudicially suggest that defendant was hiding the truth. The prosecutor's question was whether the police officer interviewed defendant after his arrest. When the police officer provided the unresponsive explanation, the prosecutor immediately stopped the examination. Unresponsive answers do not usually amount to error. *People v Measles*, 59 Mich App 641, 643; 230 NW2d 10 (1975). Given defense counsel's apparent strategy of allowing the irrelevant and minimally prejudicial statement to fade into the background, the trial court did not commit plain error by failing to *sua sponte* strike the evidence from the record. Such an act would probably have magnified the importance of the evidence in the jury's mind.

Defendant next argues that the prosecutor committed misconduct by introducing the officer's improper testimony and making statements during closing argument that appealed to the jurors' sympathy and sense of civic duty. Defendant also argues that the cumulative effect of these errors denied him a fair trial. We disagree. On this record, we do not find that the prosecutor committed any error regarding the other-acts evidence or the unresponsive answer. While the prosecutor did implore the jury to give the victim "justice" and recounted some of the irrelevant emotional aftermath of the crime, we find no error requiring reversal. We will not reverse based on such misconduct if a timely objection would have procured a limiting instruction which could cure the prejudice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Such an instruction would have remedied any negative effect of the improper argument in this case.

Regarding the cumulative effect of the errors, the other-acts evidence did not generate any improper prejudice. Although the evidence that defendant had asked for an attorney and the prosecutor's closing arguments may have generated some prejudice, a timely objection would have markedly limited any prejudice, and the remaining evidence against defendant was strong. The cumulative effect of these two minor incidents did not deprive defendant of a fair trial. *People v LeBlanc*, 465 Mich 575, 591-592; 640 NW2d 246 (2002).

---

[1] We note that in this and similar cases, the trial court could likely allow the prosecutor to introduce the details of the prior offense without abusing its discretion. *Sabin, supra*. We are not inclined to reverse a conviction when the trial court exercises caution and minimizes the prejudice to a defendant by keeping details of the crime and conviction from the jury.

Finally, defendant argues that trial counsel denied him the effective assistance of counsel when he failed to object to the testimony and arguments challenged above. We disagree. Trial counsel did a fine job obtaining separate trials, excluding an inculpatory statement by defendant, limiting the introduction of other-acts evidence to its least prejudicial components, and obtaining an acquittal on a kidnapping count. As for trial counsel's failure to object to the officer's testimony and the prosecutor's closing arguments, defense counsel adeptly avoided punctuating the officer's brief irrelevant testimony and allowed the prosecutor to appear overzealous, discrediting the impetus of the entire investigation. Given the limited record, defendant fails to overcome the strong presumption that trial counsel's actions were incompetence rather than trial strategy. *Stanaway*, *supra*.

Affirmed.

/s/ Hilda R. Gage
/s/ Peter D. O'Connell
/s/ Brian K. Zahra