STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 27, 2004
v	No. 248547 Oakland Circuit Court
FREEZEL JONES, JR., Defendant-Appellant.	LC No. 2002-185952-FC

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of criminal sexual conduct, first-degree, MCL 750.520(b)(1)(e). He was sentenced as a fourth felony offender, MCL 769.12, to sixteen to forty years' imprisonment. Defendant appeals as of right, and we affirm.

I

Complainant testified that she and defendant lived together at their place of employment, a hotel called the Ambassador Inn, in Southfield, and that on the evening of January 7, 2002, she and defendant were working a banquet at the hotel when defendant accused her of being unfaithful, an accusation he made periodically throughout their relationship. After the banquet finished around 1:00 a.m., complainant and defendant went to their room. Defendant locked the door behind them and placed a plastic bag by the door so that complainant could not leave the room without waking him. Complainant testified that defendant accused her of being unfaithful, called her "bitch," "whore," and "tramp," and around 4:00 a.m. picked up complainant's underwear. Defendant saw a discharge on the underwear, which complainant said was caused by medication she was taking, but which defendant thought was another man's semen. Defendant then got a knife, told complainant to remove her clothes, had her bend over on the bed on her hands and knees, and anally penetrated her, saying that she better scream in the pillow because he did not want anyone hearing her. Complainant testified that defendant used no lubricant and ripped her anus during the rape, and that she was bleeding and temporarily lost control of her bowels after the rape. Complainant testified that after the rape, she did not feel she could safely leave the hotel room because defendant would hear her, and because defendant had threatened her and her family previously.

Complainant testified that she fell asleep around 6:00 a.m. and got up for work about three hours later. She testified that defendant was still in the room, and that she was still

bleeding. She and defendant punched in for work. She then went down to the bathroom in the hotel, and then left the hotel without her coat or purse. The police were called from a nearby office. The police responded to the call and she reported the incident to them. She was then taken to Providence Hospital.

The police went to the Ambassador Inn to pick up defendant. They were told he was cleaning rooms and he was summoned by hotel staff, but defendant never appeared. While police were searching the hotel for defendant, a 911 call was received, in which the caller reported an "officer down" at a Southfield location. Several uniformed police officers left the Ambassador Inn to attend to that 911 call, but Officer Porter, who was in plain clothes, stayed. Officer Porter located and arrested defendant in the Ambassador Inn, and noted a recent 911 call on defendant's cell phone. Defendant admitted making the false 911 call, and at that time admitted hiding in a linen closet while the police searched for him.

Jeanne Taunt, a registered nurse at Providence Hospital's emergency room, testified that she treated complainant on the morning of January 8, 2002, that complainant presented complaining of rectal pain from an assault, and that complainant was crying and visibly upset. After her memory was refreshed with her nursing notes, Taunt testified that complainant was also complaining of rectal bleeding, and had said that at 4:00 a.m. that morning she had been forced to have anal sex and was threatened with a carving knife. Taunt testified that complainant's injuries on examination included "a fissure, which is a tear of the tissue right at the base of the perineal[1] area, the vaginal area," and an internal discharge. Complainant's medical records were admitted at trial without objection.[2]

Complainant testified at trial that defendant was a controlling person prone to violence. She described violent episodes, including defendant's barricading the doors so she would not be able to leave, threatening to kill her, not allowing complainant to go anywhere by herself, and threatening her family members by telephone. Complainant also testified that she lost her job at the hotel because of this incident, that she was not permitted to go on living at the hotel, that she stayed at a shelter for battered women for about a month after the incident, and then returned to live with defendant. Complainant testified that she still loved defendant, and that she feared he would continually harass her family if she did not go back to him.

Defense counsel vigorously cross-examined complainant about the circumstances that led her to move back in with defendant, eliciting from complainant that she ran into defendant at church one Sunday, after which they "rode around," had Kentucky Fried Chicken, and then went to a hotel and had consensual sex.

Defendant testified at trial that although he and complainant argued during their relationship, there had been no physical altercations, and that complainant would become intoxicated and call the police, but later she would come back to him. Defendant categorically

[1] "Perineum" is defined as "the area in front of the anus extending to the fourchette of the vulva in the female . . ." *Random House Webster's College Dictionary* (1991).

[2] The medical records are not in the lower court record.

denied ever threatening complainant or her family members, and denied ever displaying violence toward complainant. Defendant testified that he and complainant had argued on the night of the incident, but that they had made up by the time they went to bed, and that the sex had been consensual, as always.

Defendant testified that the next morning, he and complainant worked together and that the next thing he knew, the police were looking for him. He testified he did not want to go to jail, as he had in the past when complainant had called the police, so he made the false 911 call. Defendant testified that one of the hotel employees told him the police were there about his woman claiming he had a knife. Defendant denied at trial that he hid in the linen closet, contrary to what he told police the morning of the incident. Defendant admitted placing plastic bags in the door to the hotel room where he and complainant lived, but testified that it was because other hotel employees committed theft, not to dominate or control complainant's movements.

II

Defendant argues that he was denied due process when the trial court reversibly erred in admitting evidence of his prior violent acts against complainant and members of her family.

Two days before trial, the prosecution filed a notice of intent to introduce evidence of prior violent acts toward complainant and her family under MRE 404(b). Over defense objection, the prosecutor was permitted to elicit testimony at trial that defendant had threatened complainant, and complainant's mother, sister and daughter. Defendant contends the testimony was not relevant under MRE 401, was unfairly prejudicial under MRE 403, and violated his right to due process.

This Court reviews the trial court's decision to admit evidence under MRE 404(b) for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). MRE 404(b) provides in pertinent part:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as 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, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Use of prior acts evidence is excluded, except as allowed by MRE 404(b), to avoid the danger of convicting based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). To be admissible under MRE 404(b), prior acts evidence must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Whether the probative value of the evidence was substantially outweighed by its prejudicial effect is best determined through contemporaneous assessment of the presentation, credibility and effect of the testimony. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).

Preserved error in the admission of prior acts evidence does not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). The defendant bears the burden of establishing that more probably than not a miscarriage of justice occurred. *Id.*

We conclude that defendant has not shown that a miscarriage of justice occurred by admission of the challenged evidence. Even if the challenged evidence did constitute prior bad acts, it "could be admitted if it was probative of an issue raised at trial." *People v Flaherty*, 165 Mich App 113, 120; 418 NW2d 695 (1987). This Court has held that evidence of a defendant's prior bad acts was relevant to explain a victim's delay in reporting the alleged abuse. *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996); see also *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995) (defendant's violent temper held relevant to explain victim's delay in reporting alleged sexual abuse). In the instant case, defendant's prior conduct toward complainant and her family was relevant to explain why complainant did not report the alleged rape immediately after it occurred, but instead went to sleep with defendant, and also to explain why complainant resumed her relationship with defendant after the alleged rape.

We further note that, after defendant testified, the court cautioned the jury that counsel's questions regarding defendant's prior acts were not evidence.[3] The danger of confusion and misuse of the evidence did not substantially outweigh its probative value, given that the prosecution did not delve unnecessarily into the details of the prior acts, and given that in closing argument the prosecution linked the prior acts to complainant's conduct during (i.e., her not resisting) and following the alleged rape.

III

Next, defendant asserts that the trial court erred reversibly when, in the guise of character evidence, it permitted complainant's sister, Lesley Johnson, to testify on rebuttal, over defense objection, that defendant was a violent person and that complainant's testimony was truthful. Defendant argues that the error unfairly prejudiced him by tarnishing his character, while bolstering complainant's testimony beyond the permissible limit of MRE 608, that Johnson's testimony compounded the erroneous admission of complainant's prior violent acts testimony under MRE 404(b), and that it is more probable than not that the inadmissible testimony contributed decisively to the verdict.

This Court reviews the trial court's admission of evidence for an abuse of discretion. *Crawford, supra.* A preserved, nonconstitutional error is not ground for reversal unless "after an examination of the entire cause, it shall affirmatively appear" that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999) (admission of evidence bolstering complainant's character for truthfulness was error, but did not result in miscarriage of justice, thus did not warrant reversal, given untainted evidence). For unpreserved claims of error, a defendant must show a plain error that affected substantial

[3] There is no indication in the record that defense counsel requested a limiting instruction, nor does defendant's appellate brief argue that he requested a curative instruction.

rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). "The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*

MRE 608 provides:

> (a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

During opening statement, defense counsel questioned complainant's veracity:

> [Y]ou are going to hear the complainant testify about what happened. Now you just heard the prosecutor tell you what she thinks the testimony is going to be. The truth in this case is that everything she told you about what happened to Lisa Thomas is Lisa Thomas's version, and you will have to make a determination as to whether or not Lisa Thomas is being honest.
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> * * *
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> So my function here is to make sure that the Defendant gets a fair trial, that his version is given to you and that the complainant is questioned as to her truthfulness, her veracity, how reasonable she was, and whether or not you should buy everything she tells you, hook, line and sinker.

Defense counsel's cross-examination of complainant included whether she accused defendant of rape because of his relationship with another woman, and implied that complainant would have escaped from defendant immediately after the incident were her testimony truthful. Defendant also challenged complainant's motive and truthfulness during his testimony.

In *People v Smith*, 90 Mich App 20; 282 NW2d 227 (1979), this Court concluded that the defendant's counsel's attack on the complainant's veracity during cross-examination rendered the admission of a character witness's testimony of the complainant's reputation for truthfulness permissible under MRE 608(a)(2), noting that the rule provided that evidence of truthful character "is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence *or otherwise*."[4] (Emphasis in original). Similarly, in *People v Matthews*, 143 Mich App 45, 59-60; 371 NW2d 887 (1985), this Court concluded that the defendant's counsel's vigorous cross-examination of a witness questioning his veracity rendered the prosecution's reputation evidence to the contrary admissible under MRE 608(a)(2).

[4] MRE 608(a)(2), quoted *supra*, was amended in 1991, after *Smith* and *Matthews* were decided, to conform to the Federal Rule by adding the language permitting opinion testimony. The language relied on in *Smith*, *supra*, remained the same.

We conclude that defendant challenged complainant's veracity, thus rendering Johnson's opinion testimony admissible under MRE 608(a)(2). *Smith, supra,* and *Matthews, supra.* To the extent Johnson expressed the opinion that defendant was violent, as well as untruthful, the testimony was cumulative and harmless.

The prosecution concedes error in Johnson's unobjected-to testimony that complainant's trial testimony was truthful, but argues it was harmless. We first observe that defense counsel vigorously cross-examined Johnson and elicited that she did not know that complainant had resumed her relationship with defendant after the alleged rape, thus demonstrating that Johnson was not fully informed regarding complainant and her relationship with defendant. Further, it is highly unlikely that the additional inadmissible testimony that Johnson would believe complainant had any effect on the jury's assessment of complainant's credibility.

IV

Defendant asserts that the trial court reversibly erred when it relied on the Rape Shield law to prevent the defense from introducing evidence of complainant's sexual conduct before and after the incident at issue (including that he and complainant regularly engaged in consensual anal intercourse), when that evidence showed a pattern of consensual sexual relations, consistent with his theory that the alleged incident was in fact consensual sex. Defendant acknowledges that he failed to give notice before trial of his intent to offer evidence of prior sexual conduct.

The rape-shield law, MCL 750.520j(1), provides in pertinent part:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> * * *
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. . . .

Defendant is correct that his failure to give the requisite notice does not, standing alone, preclude admission of the evidence he sought to introduce. *People v McLaughlin,* 258 Mich App 635, 654-655; 672 NW2d 860 (2003). The *McLaughlin* Court further noted:

> [T]he trial court must exercise its discretion, on a case-by-case basis, to determine whether the evidence should be admitted or excluded. In making this decision, the trial court should consider that the purpose of the rape-shield statute is to protect rape victims from surprise, harassment, unnecessary invasions of privacy, and undue delay. Protracted delay in raising the evidence, especially by waiting

> until the start of trial, suggests wilful misconduct to create a tactical advantage, and weighs in favor of exclusion. *People v Lucas (On Remand)*, 193 Mich App 298, 301-302; 484 NW2d 685 (1992); see also *People v Lucas (After Remand)*, 201 Mich App 717, 719; 507 NW2d 5 (1993). [*Id.*]

Balancing the factors discussed in *McLaughlin, supra*, we conclude that defendant was not unduly prejudiced by the court's exclusion of the evidence. First, the jury did hear testimony, from both defendant and complainant, that the two had sexual relations after the alleged incident in January 2002. The jury heard that about one month after the alleged incident, defendant and complainant ran into each other one Sunday in church, left the church together, had a meal and then went to a hotel and had sexual intercourse. The jury also heard defendant's testimony, which strongly implied that the couple had had anal intercourse before, and defendant testified that their sexual activity had always been consensual. Second, defendant's failure to give notice before trial of his intent to offer evidence of prior sexual conduct between him and complainant militated against admitting the evidence. *McLaughlin, supra.* Third, given the physical evidence noted in complainant's medical records--a tear in the perineal area--and complaints of rectal pain and bleeding, defendant's claim that there was no physical evidence in this case is meritless. Under these circumstances, we conclude that *explicit* testimony that defendant and complainant had had consensual anal intercourse regularly would not have made a difference.

V

Defendant's final argument is that he was denied a fair trial when the prosecutor attempted to hand him the knife he allegedly used during the incident while he was on the witness stand. Defendant asserts that this left the jury with the impression that he would have endangered them had he picked up the knife.

Generally, a claim of prosecutorial misconduct is a constitutional issue that is reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

The colloquy regarding the knife immediately followed the prosecutor's questioning of defendant regarding his alleged threats to complainant and complainant's family members, and regarding family members obtaining PPO's against defendant. Defendant denied threatening any of the family members and responded that anyone can get a PPO. The record is clear that defendant declined to pick up or touch the knife, even though the prosecutor persisted. As she did so, a deputy and the trial judge ordered defendant not to pick up the knife. Further, a court officer approached the stand, and directed defendant not to touch the weapon.

We conclude that although the prosecutor's conduct with the knife was highly improper, that conduct did not deny defendant a fair trial under the circumstances that defendant's trial testimony made clear to the jury that he denied using the very knife the prosecutor offered him, defendant did not actually pick up the knife, and the court officer's conduct in ordering defendant not to pick up the knife was as likely to appear to the jury as an admonishment of the

prosecutor as it was to appear that defendant's possible picking up of the knife would endanger those present. Further, given the trial judge's verbal admonition, made in the jury's presence after the prosecutor tried to get defendant to pick up the knife, that it (the court) controlled the courtroom, the jury likely understood that no one should be holding a knife in a courtroom. We conclude that defendant was not denied a fair trial.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White