

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FLOYD EUGENE HINE,

Defendant-Appellant.

UNPUBLISHED

September 21, 2004

No. 248238

Macomb Circuit Court

LC No. 2002-001641-FC

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of seven counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(b). He was sentenced to concurrent prison terms of 180 months to forty years for each first-degree CSC conviction and to a term of fifty-seven months to fifteen years for the second-degree CSC conviction. Defendant appeals as of right. We affirm.

Defendant's stepdaughter testified that defendant sexually assaulted her an average of two times per week from the time she was nine or ten years old until she was fifteen years of age. She explained that she did not tell anyone about the assaults because defendant had threatened to "kill everyone" if she broke up the family. She was then asked if she had ever seen defendant be violent, to which she replied, "Yes." Defense counsel objected, arguing that testimony regarding defendant's propensity for violence was improper character evidence for which the prosecutor had not provided proper notice under MRE 404(b). The prosecutor advised the court that the evidence was being offered for the limited purpose of explaining the victim's delay in reporting the alleged assaults. The trial court admitted the evidence for the limited purpose of explaining the victim's delay in reporting the assaults and provided a limiting instruction to the jury in this regard.

Defendant argues that the trial court erred in admitting evidence of defendant's propensity for violence because the prosecution failed to give notice as required by MRE 404(b)(2) of its intent to elicit testimony concerning defendant's other bad acts.¹ We disagree.

¹ Defendant does not contest the admissibility of the evidence under MRE 404(b)(1) absent the
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A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Evidence of other crimes is not admissible to show that a defendant had a propensity to commit the charged crime. However, such evidence is admissible for other purposes, such as proof of intent, motive, preparation, or a scheme or plan for doing an act. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), citing MRE 404(b)(1). The prosecution is required to give defendants notice before trial or, with good cause, during trial, of its intent to elicit testimony of other bad acts. *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001).

Here, by admitting the evidence, the trial court implicitly found that the prosecutor had good reason for not providing notice under MRE 404(b), and defendant fails to demonstrate error. Defendant does not explain how he might have reacted differently had notice been given before trial. Defense counsel asked to make a separate record as to his objection, and the trial court allowed him to do so. Nowhere in that record did defendant identify any prejudicial effect from the lack of notice. Thus, there is no basis to conclude that the prosecutor's lack of notice had any impact on defendant's trial. *Hawkins*, *supra* at 456.

Defendant also argues that offense variable 11 was improperly scored. We agree that the trial court erred in scoring OV 11 at fifty points because the evidence did not establish at least three penetrations during a single incident. *People v Matuszak*, ___ Mich App ___; ___ NW2d ___ (Docket No. 244871, issued 7/13/04). However, because the record supports a finding of two penetrations during a single incident,² a score of twenty-five points for OV 11 is appropriate. Scoring OV 11 at twenty-five points does not change the sentencing guidelines range. The scoring error was therefore harmless and resentencing is not required. *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004). Further, because scoring OV 11 at twenty-five points does not change the guidelines range, defendant cannot establish that but for his counsel's failure to object to the scoring error at sentencing the result of the sentencing proceeding would have been different. *People v Toma*, 462 Mich 281; 302-303; 613 NW2d 694 (2000).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey

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lack of notice. Indeed, 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).

² The victim's testimony regarding the first assault described both digital penetration and fellatio.