STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 9, 2004
v	No. 247182 Calhoun Circuit Court
DOUGLAS CHARLES WOODARD, Defendant-Appellant.	LC No. 02-000035-FC

Before: Cooper, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant Douglas Charles Woodard appeals as of right his jury trial convictions for first-degree criminal sexual conduct (CSC)[1] and aggravated assault.[2] The trial court sentenced defendant to fourteen to thirty years' imprisonment for his CSC conviction and one year in jail for his assault conviction. We affirm.

The charges in the instant case arose from allegations that defendant, an employee and resident of Eagle Point Apartments, severely beat the sixteen-year-old daughter of his long-time, live-in girlfriend in a maintenance garage at the apartment complex on December 18, 2001, before taking her to a vacant apartment where he sexually assaulted her.

II. Evidentiary Issues

Defendant challenges the admission of the complainant's testimony that defendant had sexually assaulted her on previous occasions. Defendant also challenges, for the first time on appeal, the trial court's admission of evidence that defendant failed to return a truck belonging to his employer after he learned of his arrest warrant in this matter. Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion.[3] However, when a

[1] MCL 750.520b(1)(f) (force or coercion used to accomplish penetration and victim suffered personal injury).

[2] MCL 750.81a. Defendant was acquitted of assault with intent to do great bodily harm less than murder, MCL 750.84, and was convicted of the lesser included offense of aggravated assault.

[3] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

trial court's decision regarding the admission of evidence involves a preliminary question of law, this court reviews the issue de novo.[4]

A. Prior Bad Acts Under MRE 404(b)

Defendant first contends that the trial court erred when it admitted the complainant's testimony under MRE 404(b), over defendant's pretrial objection, concerning prior occasions when defendant forced the complainant to have intercourse. Evidence of other bad acts is inadmissible to prove an individual's propensity to act in conformity therewith.[5] 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. . . ."[6] 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.[7]

The Michigan Supreme Court has found the admission of a minor complainant's testimony regarding prior sexual abuse committed by a defendant, who is a member of her household, admissible in the past. In *People v Dermartzex*,[8] the defendant was charged with assault with intent to commit rape.[9] The Court found that the ten-year-old complainant's testimony was admissible to give context to her testimony regarding the current charge and was relevant to her credibility.[10] A trial court has the discretion to admit such evidence where it finds that the probative value of the evidence of other acts of sexual abuse outweighs its potential for unfair prejudice.[11]

In the instant case, the trial court admitted the complainant's testimony regarding prior instances of sexual abuse to place her testimony regarding the current CSC charge in context. The trial court also held that the probative value of this evidence outweighed its potential for unfair prejudice. Because the trial court did not admit the testimony solely for the purpose of showing defendant's propensity to engage in criminal behavior, the presentation of this evidence did not violate MRE 404(b).[12] As in *Dermartzex*, limiting the complainant's testimony to the

---

[4] *Id.*

[5] MRE 404(b)(1); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

[6] MRE 404(b)(1).

[7] *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).

[8] *People v Dermartzex*, 390 Mich 410; 213 NW2d 97 (1973).

[9] *Id.* at 412.

[10] *Id.* at 414-415.

[11] *Id.* at 415.

[12] *VanderVliet*, *supra* at 65.

acts charged would have seriously undermined her credibility in the eyes of the jury. Her testimony concerning the prior acts was relevant and the trial court properly determined that this evidence was not unduly prejudicial. Consequently, we find that the trial court properly admitted the complainant's testimony.

B. Character Trait Under 404(a)(1)

Defendant also asserts that the trial court abused its discretion in admitting testimony from his former employer, Patricia Roberts, regarding his failure to return a truck belonging to the apartment complex on December 19, 2001. As defendant failed to object to the admission of this evidence, our review is limited to plain error affecting defendant's substantial rights.[13]

Under MRE 404(a)(1), evidence of a particular character trait is not admissible to show that a person acted in conformity with the trait on a particular occasion.[14] Evidence of a pertinent character trait may be offered, however, by a criminal defendant or by the prosecution in an attempt to rebut such evidence once introduced by the defendant.[15] Pursuant to MRE 405(a), character evidence, where admissible, may be given by reputation or opinion testimony, or by the introduction on cross-examination of "relevant specific instances of conduct."[16]

During defense counsel's cross-examination of Ms. Roberts, she stated that defendant often used a truck owned by the apartment complex and that he was a "good and timely employee." On redirect, the prosecution questioned Ms. Roberts regarding defendant's conduct on December 19, 2001. Ms. Roberts testified that defendant failed to return the truck to Eagle Point on this date and that she reported it missing.

On cross-examination, defendant intentionally elicited opinion testimony from Ms. Roberts regarding his character as a good employee. Under MRE 405(a), the prosecution had the right to test the basis for her opinion by asking questions regarding specific instances of defendant's conduct. The prosecution did not initiate this line of questioning to show that defendant acted in conformity with a particular character trait in committing CSC. Furthermore, the admission of the evidence did not implicate MRE 404(b).[17] Accordingly, the trial court properly admitted Ms. Roberts's testimony regarding defendant's failure to return the truck.

---

[13] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[14] *Lukity*, *supra* at 497.

[15] *Id.*

[16] MRE 405(a).

[17] See *Lukity*, *supra*. In *Lukity*, the defendant testified that he only engaged in appropriate activities with his children. *Id.* at 498. The prosecution then asked defendant whether he ever provided marijuana to or smoked marijuana with his son. *Id.* The Court found that the defendant's testimony constituted evidence of a pertinent character trait in the context of accusations that he sexually assaulted his daughter. *Id.* Consequently, the trial court did not abuse its discretion in allowing the prosecution to question him regarding specific instances of

(continued…)

II. Ineffective Assistance of Counsel

Both appellate counsel and defendant, in propria persona, assert that defendant received ineffective assistance of counsel. Absent a *Ginther*[18] hearing, our review is limited to plain error apparent on the existing record affecting defendant's substantial rights.[19] Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.[20] To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.[21] Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.[22]

Defendant's appellate counsel asserts that trial counsel was ineffective for failing to object to the admission of prior bad act and character trait evidence. However, trial counsel *did* raise a timely objection to the admission of the complainant's testimony before the trial actually began and preserved the issue for appellate review.[23] Furthermore, the trial court properly admitted Ms. Roberts's testimony concerning defendant's failure to return the truck. As an objection to the admission of this evidence would have been meritless, counsel's failure to object did not constitute ineffective assistance.[24]

Defendant contends, in propria persona and for the first time on appeal, that the lawyer who represented him before trial, Justin D. McCarthy, ineffectively failed to communicate with defendant or to file a pretrial motion.[25] Nothing in the record supports defendant's contention

---

(…continued)

conduct pursuant to MRE 405(a). *Id.* at 499. Additionally, the Court found that the prosecution did not attempt to introduce the evidence that the defendant smoked marijuana with his son to prove that he acted in conformity with his character for marijuana use. *Id.* Therefore, the prosecution's cross-examination did not implicate MRE 404(b). *Id.* at 499-500.

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

[19] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). The lower court record is not limited to the trial transcript. Defendant also unsuccessfully moved for a new trial or *Ginther* hearing on August 28, 2003. In relevant part, defendant argued that his trial counsel was ineffective for failing to move for a directed verdict, failing to object to the admission of other acts evidence and failing to request the appointment of a defense DNA expert.

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

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

[22] *Id.* at 600.

[23] MRE 103(a)(1).

[24] *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

[25] Defendant attached various letters he sent to Mr. McCarthy to his supplemental brief on appeal. Defendant requested information regarding the court rules pertaining to arrest and arraignment. Defendant also asked Mr. McCarthy to file a pretrial motion, but failed to indicate the nature of the desired motion or the relief sought. These letters are not part of the lower court

(continued…)

that Mr. McCarthy failed to communicate with defendant. Additionally, the decision to file a pretrial motion constitutes a matter of trial strategy, which this Court will not second-guess.[26] Regardless of any potential error, Mr. McCarthy withdrew well before the start of trial and defendant had sufficient time pretrial with his substitute counsel to remedy these claimed errors.

Defendant also asserts that the attorney who actually represented him at trial was ineffective for failing to impeach the prosecution's witnesses or to present witnesses supporting defendant's testimony. Defendant initially raised his concerns at his sentencing hearing. Defendant claimed that defense counsel should have called his employers, character witnesses and individuals who witnessed an accident caused by the complainant on the day before the charged incident. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.[27] However, defense counsel did question defendant's employer. Furthermore, defendant has not established that the testimony of the remaining witnesses would have affected the outcome of his trial. Defendant also failed to indicate what actions defense counsel should have taken to impeach the prosecution witnesses. We are not required to make defendant's arguments for him and his claimed error is deemed abandoned.[28]

III. Pre-Arraignment Delay

Defendant raises several issues in propria persona. Defendant asserts that he was held in custody without bond for more than five days without having an arrest warrant executed on him and without being arraigned. Defendant asserts that this delay violated his right to be informed of the nature of the charges against him and his right to a prompt arraignment. Therefore, the charges should have been dismissed and his convictions reversed. Although this delay was excessive, defendant is past the time for a proper remedy. Defendant must have had some notice of the charges against him as he submitted to the authorities. Furthermore, the proper remedy for such a violation would have been the suppression of any evidence collected as a result of the delay.[29] As defendant has not alleged that any evidence was improperly collected during this period and has failed to request any appropriate remedy, his claim of error must fail.

IV. *Miranda* Warnings

Defendant also contends for the first time on appeal that the police violated his Fifth Amendment rights, as they failed to read him his *Miranda*[30] rights during the pre-arraignment

---

(…continued)

record. Defendant has impermissibly attempted to enlarge the record, and we may not consider these letters. *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995).

[26] *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000).

[27] *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

[28] *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

[29] *People v Harrison*, 163 Mich App 409, 421; 413 NW2d 813 (1987).

[30] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

delay. However, *Miranda* warnings "need be given only in situations involving a custodial interrogation."[31] Defendant merely asserts that police failed to read him the *Miranda* warnings while he was in custody, not that they failed to read him these rights before questioning him. As defendant failed to assert that a custodial interrogation occurred, he cannot claim that the police were required to issue *Miranda* warnings.

V. Speedy Trial

Defendant argues that he was deprived of his right to a speedy trial.[32] When determining whether a pretrial delay violated a defendant's right to a speedy trial, courts must consider: "(1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant."[33] As defendant's trial began less than one year after his arrest warrant was issued, defendant has the burden to prove that he suffered actual prejudice by the delay.[34] Although defendant's trial was adjourned on three occasions, one of the adjournments was on defendant's motion so that delay is attributable to defendant.[35] Defendant has not asserted that he suffered actual prejudice from the delay. As defendant has failed to support his argument, defendant's claim is deemed abandoned.[36]

VI. Compulsory Process Clause

Finally, defendant contends that he was denied his right to compulsory process for obtaining witnesses for his defense. Under the Compulsory Process Clause of the Sixth Amendment, every criminal defendant has the right to present witnesses in his defense.[37] The right to compulsory process is not absolute;[38] defendant must show that the potential defense witnesses would have presented testimony "favorable to the defense."[39] However, defendant does not allege that he ever made an attempt to secure witnesses or that the trial court denied a

---

[31] *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001).

[32] Defendant attached a motion dated August 2, 2002, and filed in propria persona, to his supplemental brief on appeal. Although the lower court docketed defendant's motion to dismiss, it does not appear that the motion was ever considered. As the issue was raised below, however, it is preserved regardless of the trial court's omission. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

[33] *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (2000).

[34] *Id.*

[35] *People v Hendershot*, 357 Mich 300, 304; 98 NW2d 568 (1959).

[36] *Watson, supra* at 587.

[37] *People v McFall*, 224 Mich App 403, 407; 569 NW2d 828 (1997), citing *Washington v Texas*, 388 US 14, 17-18; 87 S Ct 1920; 18 L Ed 2d 1019 (1967).

[38] *Id.* at 408.

[39] *Id.* at 408-409, citing *United States v Valenzuela-Bernal*, 458 US 858, 873; 102 S Ct 3440; 73 L Ed 2d 1193 (1982).

request to compel any witnesses to appear. As defendant never attempted to invoke the Compulsory Process Clause in the trial court and failed to establish that the use of such process would have affected the outcome of his trial, he may not assert its violation on appeal.[40]

Affirmed.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

[40] *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).