Court of Appeals, State of Michigan

ORDER

People of MI v James Franklin White Jr

Docket No. 274304

LC No. 05-009587-FH

E. Thomas Fitzgerald
Presiding Judge

Jane E. Markey

Michael R. Smolenski
Judges

The Court orders that defendant's motion for reconsideration is GRANTED.

The opinion issued on January 8, 2008, in this case is VACATED, and an amended opinion, addressing arguments raised by defendant's appointed appellate counsel and defendant, acting *in propria persona*, is being issued in conjunction with this order.

COURT OF APPEALS OF THE STATE OF MICHIGAN
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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 8, 2008
v	No. 274304 Tuscola Circuit Court
JAMES FRANKLIN WHITE, JR., Defendant-Appellant.	LC No. 05-009587-FH

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

PER CURIAM.

Defendant was found guilty by a jury of aggravated stalking of a minor, MCL 750.411i(2)(b), and aggravated stalking, MCL 750.411i, and was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of 11 to 33 years' imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant first argues that the admission of similar acts evidence constituted error requiring reversal. We disagree.

We generally review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). When the decision regarding the admission of evidence involves a preliminary question of law, we review the question of law de novo. *Id*.

Defendant's convictions arose out of his actions of stalking the two complainants by repeatedly propositioning them in notes and in phone calls to have sexual relationships with him. The notes were left on the complainants' cars while they were at work. Evidence that defendant left similar sexually suggestive notes on the cars of two other young, male employees of the same grocery store was admitted under MRE 404(b)(1). To admit such similar acts evidence, the following factors must be present: (1) the prosecutor must offer the evidence for a reason other than the character or propensity theory; (2) the evidence must be relevant under MRE 402, as enforceable through MRE 104(b); and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). At the request of counsel, the trial court may provide a limiting instruction pursuant to MRE 105. *Id*.

In *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000), our Supreme Court examined the exception in MRE 404(b) for evidence showing a "scheme, plan, or system." The Court clarified that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Id*. at 63. The Court cautioned that "[l]ogical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot," and that "[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Id*. at 64.

Here, defendant's other acts were sufficiently similar to the acts that resulted in the stalking of the complainants to justify their admission as proof of a plan, scheme or system. All of the initial contacts involved young men who worked at the same grocery store throughout the spring and summer of 2005. All of the victims received at least one note on their cars containing sexually suggestive content and defendant's contact information. The evidence of defendant's behavior was relevant to show that he used a common method or scheme of propositioning these young men by leaving notes with similar content on their cars.

Furthermore, the probative value of this evidence outweighed any undue prejudicial effect. *Knox, supra* at 509. The evidence had substantial probative value in showing a plan, scheme or system of contacting young males through letters placed on their cars to initiate sexual relationships. This common scheme spurred defendant to further harass both of the complainants through additional notes and calls. Any prejudicial effect of the evidence was reduced by a jury instruction cautioning that the evidence was to be used for the limited purpose of showing that defendant "used a plan, system or characteristic scheme," not for the purpose of demonstrating defendant's propensity to commit crimes. Accordingly, we conclude that the trial court did not abuse its discretion in allowing the similar acts evidence to prove a common scheme, plan or system.[1]

In a related argument, defendant contends that he was denied the effective assistance of counsel by defense counsel's "half-hearted opposition" to the prosecutor's motion to admit the similar acts evidence. We disagree.

Because defendant failed to timely request a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and that this deficiency resulted in prejudice so egregious that it altered the outcome of the trial. *People v Toma*, 462 Mich 281, 302-303; 613

[1] We also reject defendant's associated claim that this evidence was improperly admitted to establish his identity as the perpetrator. The record reveals that the similar acts evidence was used at trial to establish that defendant had a common plan or scheme whereby he initiated contact with the young men. Moreover, defendant's identity as the person who penned the notes attached to the cars was not in question since defense counsel asserted that defendant did not deny writing the letters.

NW2d 694 (2000). "Effective assistance of counsel is presumed. The defendant bears a heavy burden of proving otherwise." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defense counsel filed an answer to the prosecutor's motion to admit other similar acts evidence, urging the trial court to deny the motion. At the hearing on the motion, defense counsel admitted, "I don't know that there's a lot of argument to be made as to 404(b)" regarding the evidence of defendant's actions towards the other two employees. Nevertheless, she asserted that there was no foundation to identify defendant as the person who left the notes on the employees' cars. A defendant bears the burden of overcoming the presumption that counsel's performance constituted sound trial strategy given the circumstances. *Toma*, *supra* at 302. While defense counsel's objection may not have been the objection that defendant would have raised, there is no proof that it was contrary to sound trial strategy. Further, given the relevancy and probative value of the similar acts evidence, there is no proof that a different or more strongly stated objection would have changed the outcome of the proceeding. Accordingly, we conclude that defendant failed to overcome the heavy burden of proving that he received ineffective assistance of counsel.

Finally, defendant claims he should not have been convicted of "aggravated" offenses since the prosecutor failed to prove that he violated a specific term of his probation. Again, we disagree.

A prosecutor must introduce sufficient evidence to justify a conclusion that the defendant was guilty of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Defendant was convicted of aggravated stalking of a minor and aggravated stalking under MCL 750.411i(2), which provides:

> An individual who engages in stalking is guilty of aggravated stalking if the violation involves any of the following circumstances:
>
> * * *
>
> b) At least 1 of the actions constituting the offense is *in violation of a condition of probation*, a condition of parole, a condition of pretrial release, or a condition of release on bond pending appeal. [Emphasis added.]

Defendant contends that this statute required the prosecutor to demonstrate beyond a reasonable doubt that he violated a specific term of probation prohibiting contact with the complainants in order to prove an aggravated offense.

When construing a statute, a court must give effect to the intent of the Legislature. If the language of the statute is unambiguous, the words are given their plain meaning and the statute is applied as written. *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004). The plain language of the statute at issue requires that "[a]t least 1 of the actions constituting the offense is in violation of a condition of probation.…" MCL 750.411i(2)(b). Contrary to defendant's assertion, there is no language limiting the type or specificity of a condition. Rather, the language is clear that the "violation of a condition of probation," without regard to what that condition might be, converts stalking into an aggravated offense.

It is undisputed that at the time that defendant contacted the complainants he was on probation. As defendant notes, the order of probation effective at the time of the unwanted contacts did not include a condition specifically prohibiting him from approaching or contacting the complainants. Nonetheless, the order contained a broad condition that prohibited defendant from "violating any criminal law of any unit of Government." According to MCL 750.411h, stalking is "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested," and stalking constitutes a crime in Michigan. Thus, when defendant repeatedly harassed and intimidated the complainants through notes and phone calls, he violated Michigan's anti-stalking law and, consequently, a condition of his probation. According to the plain language of the statute, the violation of a condition of defendant's probation, regardless of the breadth or specificity of that condition, subjected him to convictions of aggravated stalking. Therefore, we conclude that there was sufficient evidence to support defendant's convictions of aggravated stalking of a minor and aggravated stalking.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael R. Smolenski