STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 25, 2010
v	No. 287663 St. Joseph Circuit Court
RICHARD LEE CLARK, Defendant-Appellant.	LC No. 08-014903-FC

Before: Stephens, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

A jury convicted defendant of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim younger than 13), second or subsequent offense, MCL 750.520f; four counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a) (victim between 13 and 16), MCL 750.520d(1)(b) (penetration by force or coercion), second or subsequent offense, MCL 750.520f; three counts of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a) (victim between 13 and 16); and accosting, enticing or soliciting a child for an immoral purpose, MCL 750.145a. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent terms of 10 years and 9 months to 30 years' imprisonment for the two CSC II counts, 16 years and 3 months to 30 years' imprisonment for the four CSC III counts, 25 months to 4 years' imprisonment for the three CSC IV counts, and three to eight years' imprisonment for accosting, enticing, or soliciting a child for an immoral purpose. Defendant appeals as of right. We affirm.

Defendant contends that the trial court erroneously found that the prosecutor and police used due diligence in attempting to locate and produce witness Claire Nehring, a YWCA (Young Women's Christian Association) counselor, who drove one of the victims to the police department to report defendant's assault. Defendant insists that the failure to produce Nehring violated his right to confront a witness against him in contravention of the Confrontation Clause. Const 1963, art 1, § 13; US Const, Ams VI, XIV; *People v Whitfield*, 425 Mich 116, 124-125 n 1; 388 NW2d 206 (1986); *People v Ramsey*, 385 Mich 221, 224-225; 187 NW2d 887 (1971). We review for an abuse of discretion a trial court's decision to permit amendment to a witness list. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). We review for plain error defendant's unpreserved constitutional claim. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial. A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence." *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004) (citations omitted); see also *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988) ("[A] prosecutor may be relieved of his duty to produce a res gestae witness by showing that the res gestae witness could not be produced despite an exercise of due diligence."). "Due diligence" signifies an "attempt to do everything reasonable, not everything possible, to obtain the presence of res gestae witnesses." *Id*. (internal quotation omitted). Additionally, MCL 767.40a(4) permits a prosecutor to "add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." "The Confrontation Clause . . . bars the admission of "testimonial" statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006).

In this case, the trial court did not abuse its discretion in determining that the prosecutor had shown good cause for deleting Nehring from the people's witness list. MCL 767.40a(4); *Burwick*, 450 Mich at 291. The record reflects that the prosecutor made reasonable efforts to locate Nehring, who had moved out of state, by having police officers attempt to serve her with a subpoena at the only available address; contacting the YWCA, her former employer, on four occasions to seek forwarding information; conducting two Internet searches; and searching for information concerning Nehring in records of Michigan's department of licensing regulation. None of these efforts yielded additional information regarding Nehring's whereabouts. In moving to strike Nehring as a witness, the prosecutor expressed her view that Nehring's testimony would add little of probative value to the relevant facts at trial, primarily because of Nehring's limited involvement in the case. Had defendant viewed Nehring's testimony as having any significance to his defense at trial, as he now claims on appeal, defense counsel could have added Nehring to his witness list and sought the prosecutor's assistance in locating her. MCL 767.40a(5). The trial court expressly offered defendant this option, but defense counsel made no subsequent efforts to seek to add or present Nehring as a trial witness. In light of the evidence establishing that the prosecutor had good cause to delete Nehring from her witness list, specifically that despite the exercise of due diligence Nehring could not be produced, MCL 767.40a(4), we conclude that the trial court did not abuse its discretion when it allowed the prosecutor to delete Nehring from the people's witness list.[1]

Defendant additionally suggests that his trial counsel was ineffective for failing to object or request a mistrial in response to statements made by a deputy sheriff highlighting other acts evidence. Defendant specifically complains about testimony by Sergeant Bruce Morse that he had met defendant before this case, and that the police did not want to search defendant's property or speak to him until they possessed a search warrant and could arrest defendant, who

[1] Furthermore, because the prosecutor did not introduce at trial any out of court statement by Nehring, the Confrontation Clause was not implicated, and no constitutional error, plain or otherwise, occurred at defendant's trial. *Carines*, 460 Mich at 763-764; *Walker (On Remand)*, 273 Mich App at 60-61.

otherwise might flee. Defendant theorizes these statements by Sergeant Morse give rise to a reasonable inference that defendant had engaged in prior criminal acts.

To establish ineffective assistance of counsel, a defendant generally must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 308-327; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate the reasonable probability that but for counsel's errors the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id.* at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Id.* at 714-715. Counsel is not ineffective for failing to make futile motions or objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

"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." MRE 404(b)(1). Evidence connecting a defendant to other crimes is highly prejudicial. *People v Holly*, 129 Mich App 405, 416; 341 NW2d 823 (1983). In this case, however, the questioning by the prosecutor that prompted Sergeant Morse's recollection that he had met defendant before was not intended to, and did not, bring out or reasonably suggest that defendant had a past criminal record. Instead, "[i]t appears to have been done with good intentions to bolster proof of the officer's ability to recognize defendant." *People v Bradford*, 10 Mich App 696, 706; 160 NW2d 373 (1968). Contrary to defendant's contention, Sergeant Morse's belief that he had previously "met" defendant did not constitute other acts evidence inadmissible under MRE 404(b)(1). Given that at no time did the prosecutor or Sergeant Morse identify defendant as a perpetrator of any other offense, much less a similar offense, defense counsel need not have raised a groundless objection to Sergeant Morse's prior meeting reference. *Milstead*, 250 Mich App at 401.

Sergeant Morse's other challenged reference to the police fear that defendant might flee likewise did not give rise to a reasonable inference that defendant had a prior criminal record or that he had engaged in any prior act whatsoever. Sergeant Morse's testimony related only to a police thought process, namely that a person charged with a serious crime might flee if the police approached. Defense counsel need not have raised a meritless objection to Sergeant Morse's testimony about defendant's potential desire to flee from the police. *Milstead*, 250 Mich App at 401. Moreover, in view of the six victims' unchallenged testimony at trial substantiating defendant's sexual misconduct, any erroneous failure to object to Sergeant Morse's testimony did not affect the outcome of defendant's trial. *Pickens*, 446 Mich at 326-327; *Rodgers*, 248 Mich App at 714.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly