

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

August 12, 2010

Plaintiff-Appellee,

v

No. 287950

JOSEPH THOMAS PAUPORE,

Wayne Circuit Court

LC No. 08-005195-FC

Defendant-Appellant.

Before: GLEICHER, P.J., and ZAHRA and K.F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of second-degree criminal sexual conduct, MCL 750.520c. The trial court sentenced him to three to 15 years' imprisonment. He appeals as of right. We affirm.

This case arises from allegations that defendant, a doctor of osteopathic medicine, inappropriately touched one of his patients. Defendant first argues that the trial court erred in admitting evidence that he had engaged in sexual misconduct with several patients other than the victim. Defense counsel did not preserve this alleged error. This Court reviews unpreserved errors for plain error affecting substantial rights. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

MRE 404(b) generally governs admission of evidence of bad acts. It provides:

(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.

To be admissible, evidence of other crimes, wrongs, or acts must satisfy the following three requirements: "(1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice." *People v Magyar*, 250 Mich App 408, 413; 648 NW2d 215 (2002), citing *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982). "A proper purpose is one other than establishing the

defendant's character to show his propensity to commit the offense." *Id.*, citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205; 520 NW2d 338 (1994). "The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized." *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Further, "to ensure the defendant's right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else." *Id.* "Mechanical recitation of 'knowledge, intent, absence of mistake, etc.,' without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b)." *Id.*, at 387.¹ However, "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." *People v Sabin*, 463 Mich 43, 63; 614 NW2d 888 (2000).

Here, the 13 year-old victim visited defendant's office for a sports physical examination. After defendant completed the exam he and the victim's mother exited the room. Defendant then returned and indicated that he needed to do one more thing. He removed the victim's garments to expose her breasts and genitalia and told her to lie down on the examination table. Defendant then with two fingers spread the victim's labia majora and rubbed her clitoris.

At trial, the prosecution presented testimony from an expert in osteopathic family medicine. He testified that it was medically unacceptable to touch the genitals of a female athlete in the manner described by the victim. He also testified that he had performed thousands of sports physicals and never had to touch the genitals of a female athlete. On cross-examination, defendant queried whether the expert had ever discovered a serious ailment after performing a "complete" physical, which is more extensive than a sports physical. Defense counsel also asked the expert whether it might be proper to examine for evidence of sexual abuse, to which the expert replied, "if there is a complaint." Defense counsel also directed attention to the sports physical form which included a box checked for a "Genital/Testicular exam." On redirect examination, the expert iterated that while a physical for a boy may include incidental touching of genitals to examine for a hernia, there is no such need in examining girls. He again stated there was no medical reason to touch the genitals of 13-year old girls during a physical. Defendant argued the examination was appropriate because the victim provided him a form to complete that indicated genital exam.

¹ In regard to one of the alleged witnesses that was minor, MCL 768.27a(1) is applicable, which provides in relevant part, that

Notwithstanding [MCL 768.27,] in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.

However, we need not address MCL 768.27a(1) because the trial court did not err in admitting the evidence under MRE 404(b).

At trial, the trial court allowed several witnesses to testify that defendant inappropriately touched each of them during office visits. One witness testified that, during a sports physical examination, defendant instructed her to lie naked on the examination table. She testified that he then touched her vagina in a “spreading motion.” Another witness testified that, during a visit for a urinary tract infection, defendant instructed her to lie naked on the examination table. She testified that he then performed a breast examination followed by an anal examination. Another witness similarly testified that she visited defendant with a sore throat but defendant performed a naked full body massage in which he touched her vagina. Another witness visited defendant for cystic acne on her face yet was instructed to lie naked on the examination table while defendant “groped” her breasts and touched her vagina.

Initially we conclude this evidence tends to establish defendant’s intent. Whether defendant intended to touch the victim in a sexual manner was at issue in this case. MCL 750.520(a)(q). That defendant touched other female patients in a sexual manner under the guise of medical necessity tends to establish that he had intent to touch the victim in a sexual manner. The evidence also tends to show an absence of mistake. Here, defendant suggests that his actions were appropriate for a “complete” physical, but the former patients had sought treatment for a wide range of ailments and also were inappropriately touched. This tends to establish that defendant touched female patients in a sexually inappropriate manner regardless of the treatment sought. In addition, the striking similarity of the other patients’ testimony to the victim’s testimony in this case in regard to the manner in which defendant touched the victim clearly tends to establish a scheme, plan, or system in doing an act. We thus conclude the other acts evidence in this case was offered for a proper purpose and highly relevant.

We also conclude that the probative value of the other acts evidence was not outweighed by the danger of unfair prejudice. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). As discussed above, the other acts evidence was more than “marginally” relevant. Further, it is unlikely the jury gave undue weight to the other acts evidence. The trial court instructed the jury immediately before the other acts evidence was presented and again in the course of the final instructions, that the jury should not consider the other-acts evidence for purposes of propensity or to convict defendant because he was of bad character. See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (jurors are presumed to follow their instructions).

Defendant next argues that he was denied the effective assistance of counsel for failing to object to the “other acts” evidence. However, because we conclude that the trial court did not err in allowing the witnesses to testify, defendant cannot establish he denied the effective assistance of counsel. Defense counsel is not ineffective for failing to make a futile objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant last argues that the prosecutor committed misconduct by showing prospective defense witnesses a videotape of defendant engaging in conduct similar to that alleged in the instant case, which caused the witnesses to become reluctant to testify in violation of MCL

750.122.² Defendant's claim lacks merit. Here, the prosecution merely showed defendant's prospective witness evidence that would be used to cross-examine her testimony should she testify. This conduct cannot reasonably be described as threatening and intimidating a witness, as there was no evidence of any harm that the witness would be subjected to if she testified.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly

² The parties argue whether the use of this videotape amounted to prosecutorial misconduct and provide this Court with virtually no information in regard to how this tape came into existence. This is defendant's second conviction for criminal sexual conduct with patients. *People v Paupore*, unpublished per curiam opinion of the Court of Appeals, issued January 12, 2010 (Docket No. 287475), appeal denied 486 Mich 1046; ___ NW2d ___ (June 28, 2010). In the prior case, the victim reported defendant's wrongful conduct to the police. The police equipped the victim with a pen-sized video camera and asked the victim to return to defendant's office for medical assistance. It was at this visit that the videotape was made. We have great reservation and find highly disturbing, the police sanctioning and encouraging a victim of an assault to submit to a subsequent assault in order to capture the assault on videotape. However, the conduct of the police in the prior case is not before us in this case.