# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD MICHAEL PHILLIPS,

Defendant-Appellant.

UNPUBLISHED
January 10, 1997

No. 176569

Macomb Circuit Court
LC No. 93-002237

Before: Smolenski, P.J., and Holbrook, Jr., and F.D. Brouillette,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(b); MSA 28.788(3)(1)(b). The jury acquitted defendant of a second count of first-degree criminal sexual conduct. Defendant thereafter pleaded guilty of being an habitual offender, second offense, MCL 769.10; MSA 28.1082, and was sentenced to serve an enhanced prison term of thirty to sixty years. He appeals as of right and we affirm his convictions but remand for resentencing.

Defendant first argues that the trial court abused its discretion in prohibiting defense counsel from reviewing a Department of Social Services file because the file could have contained information relevant to defendant's defense. Defendant states that he wanted to ascertain the names of the complaining witnesses in the DSS reports, determine the nature of the complaints, and use the content of the complaints for impeachment purposes. Defendant requests this Court to obtain the DSS file and conduct its own in-camera review. Defendant fails to refer this Court to any authority to support its position that this Court should conduct an in-camera review of the DSS file and has effectively abandoned the issue on appeal. *People v Piotrowski,* 211 Mich App 527, 530; 49 NW2d 89 (1995). Moreover, the trial court did not abuse its discretion by denying defense counsel's request to review the

* Circuit judge, sitting on the Court of Appeals by assignment.

records. *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994). Defendant's claim of right to the file is no more than a general assertion that the records contain evidence that is useful for impeachment. *Id* at 681. This need might exist in every case involving criminal sexual conduct. *Id*. Without more, defendant's claim is without merit.

Defendant next argues that the trial court abused its discretion by allowing the prosecutor to cross-examine him regarding certain prior convictions that were time-barred under MRE 609(c). Evidence of a prior conviction is inadmissible if "more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." MRE 609(c); *People v Coddington*, 188 Mich App 584, 569; 470 NW2d 478 (1991). We agree that admission of these prior convictions was error. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). However, we find the error to be harmless because minimal, if any, prejudice resulted from their admission. Whether preserved evidentiary error was prejudicial focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996); MRE 103(a). Here, several reasons justify a finding of harmless error. First, the prosecutor impeached defendant on cross-examination with a total of ten prior convictions, of which six or seven were time-barred. *People v Worden*, 91 Mich App 666; 284 NW2d 159 (1979). Thus, defendant was properly impeached with at least three prior convictions, thereby lessening any potential prejudice because of the admission of the time-barred convictions. Second, the inadmissible convictions were wholly dissimilar (e.g., property offenses) from the criminal sexual conduct offenses for which he was charged in this case. *People v Allen*, 429 Mich 558; 420 NW2d 499 (1988). Finally, we are confident that the jury convicted defendant because of offenses he committed against the complainant in this case and not because of the jury's knowledge that he had committed prior property offenses. See *Coddington, supra*. Accordingly, we find the error to be harmless.

Defendant next argues that he was denied a fair and impartial trial because of prosecutorial misconduct. We disagree. Review of an issue of prosecutorial misconduct is done on a case-by-case basis. *People v Legrone* 205 Mich App 77, 82; 517 NW2d 270 (1994). This Court examines the pertinent lower court record to determine whether the prosecutor's remarks in context denied the defendant a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

Defendant argues that the court should have sustained his objection to the prosecutor's questioning of Corporal David Marker regarding the factors he used in evaluating whether to seek a warrant in a criminal sexual conduct case. When asked this question, Corporal Marker replied that "[w]e look at the believability of the witness, believability of the victim, background of defendant, that sort of thing." Defendant objected at trial and now argues on appeal that the witness' answer constituted improper bolstering of the victim's testimony. We disagree. While it is improper for a prosecutor to ask a witness to comment concerning the credibility of a prosecution witness, *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995), that is not what occurred here. Corporal Marker's response referred to his general knowledge of police procedures and did not specifically relate this knowledge to the facts of this case, nor did he indicate that he believed any particular

prosecution witness. Accordingly, the line of questioning was not improper. See *Bahoda*, *supra* at 281-282. Consequently, defendant was not denied a fair trial because of the trial court's refusal to allow cross-examination of Corporal Marker regarding whether Marker had ever authorized the issuance of a warrant in a case where a defendant was later acquitted.

Defendant next argues that the trial court abused its discretion in limiting defense counsel's cross-examination of the complainant's sister. We find no abuse of discretion because the fact that defendant helped the complainant's sister achieve good grades in school several years earlier or whether she had ever stayed out all night was irrelevant to the issue of defendant's guilt of the charges. MRE 401. Accordingly, the trial court did not abuse its broad discretion in limiting the scope of cross-examination. See *People v Lucas*, 188 Mich App 554, 572; 470 NW2d 460 (1991).

Defendant next argues that the trial court abused its discretion in allowing testimony of other bad acts committed by defendant against three other girls. We disagree. Character evidence cannot be used to show action in conformity therewith. *People v VanderVliet*, 444 Mich 52, 61-62; 508 NW2d 114 (1993). However, other acts evidence may be admissible where it is offered for a proper purpose under 404(b), it is relevant under MRE 402, and the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Id.* Here, the testimony of the three girls was admitted to show defendant's intent, a proper purpose where as here the defendant has answered the charges with a general denial. See *People v Biggs*, 202 Mich App 450, 452; 509 NW2d 803 (1983). Because defendant acted in a similar manner toward the three other girls, it is less probable that he acted with innocent intent toward the complainant in this case. See *VanderVliet*, *supra*, at 79. Moreover, we note that the trial court gave a limiting instruction to the jury. *Id.* at 61-62. Accordingly, no error occurred.

Defendant next argues that he was denied the effective assistance of counsel because his counsel failed to represent him at sentencing. To address the merits of this issue adequately, a full exposition of what transpired at the sentencing hearing is necessary. At the outset of the hearing, defense counsel indicated that he had not reviewed defendant's presentence investigation report and that he could not continue to represent defendant in any manner because the attorney-client relationship between them had been "destroyed." Counsel explained that defendant had filed an attorney grievance against him following the trial as well as an in pro per motion to remove him from the case. Counsel further explained that the sheriff's department had informed him that two days earlier a package addressed to defendant at the jail, and falsely using counsel's return address, had been intercepted and found to contain contraband. The court indicated that it had not received a copy of defendant's motion to remove counsel and asked the prosecutor for his response. The prosecutor argued against substitution of counsel because defendant's motion for removal was frivolous and a purposeful attempt to delay the proceedings. At that point, defense counsel again indicated that he wanted to be removed from the case. The court ruled:

> The record should reflect that I wasn't aware of any of this. Nothing was in the file. I read each probationary file and nothing was in that file. And what I'm going to do is this. I want Mr. Hannick [defense counsel], who is familiar to the case, to read the case and see whether or not it is factually accurate. He should be familiar with his

client and so forth. If Mr. Hannick wants to comment on Mr. Phillips, he may or may not. I am not going to delay this any longer. And what Mr. Kaplan [the prosecutor] says, if we get you a new attorney, the new attorney has to become familiar with the case and so forth. Mr. Hannick is familiar with the case. So, we are going to take some time out so that Mr. Hannick can read the [PSIR] and the court is going to continue with this case. What's done is done already. And I'm sure if Mr. Hannick needs a letter from this court indicating that he was the attorney representing Mr. Phillips in the trial, I shall give him a letter as such and also I shall expound upon how well Mr. Hannick did with regard to the evidence that he had at hand. I don't know if the prosecuting attorney will give him a letter along with mine, that is up to the prosecuting attorney. But I sat as the judge in this particular case. I feel to appoint another attorney would just delay justice.

I am asking Mr. Hannick to review the [PSIR]. If he wishes to confer with his client, that's up to him and I will hear from Mr. Hannick shortly.

Defendant then requested a "Ginther Hearing" regarding counsel's ineffectiveness and the court stated that sentencing was not the appropriate time for such a hearing. The court further stated:

Today is the date set for sentencing. I am going to sentence you one way or the other, that is what we are here for.

You may bring your motion [for new trial]. You have every right to do that, but that is at a different time. Take the next half hour, either confer with your attorney or not confer with him. I want Mr. Hannick to read over the [PSIR].

When the case was recalled following a one-half hour adjournment, defendant pointed to an inaccuracy in the PSIR, and the court agreed to correct it. The court then asked defense counsel if he wished to allocute on behalf of defendant and counsel stated: "In view of what has transpired, your Honor, I don't have any comments." After the probation officer and the prosecutor offered their recommendations to the court, defendant allocuted on his own behalf, again proclaiming his innocence of the charges and alleging that the prosecutor had lied for political purposes. The following then occurred:

MR. KAPLAN [prosecutor]: Your Honor, may I just for one second say that you ordered Mr. Hannick to continue on this case. His refusal to allocate [sic] certainly will result in a remand for resentencing. He is the attorney. You ordered him to be the attorney. He needs to exercise his allocution rights. He said, your Honor, I can't say anything in light of what happened. You have ordered him to remain on this case. It will be ineffective assistance of counsel at sentencing for him not to offer anything on behalf of his client.

THE COURT: Mr. Hannick, would you like to allocute?

MR. HANNICK: I put my statement on the record. I'm not running for anything this year. I stand by what I said on the record.

THE COURT: Did you state that you're not running for anything this year?

THE DEFENDANT [sic, MR. HANNICK]: I'm not running for anything this year. I'm not running for any position this year, next year or the following year. I have no reference to the court. I have reference to other people, political speeches.

MR. KAPLAN: It's interesting, political speeches, there is nobody here other than the victim and the police officer. I'm not running for anything. He is the attorney representing Mr. Phillips. He has a duty to allocute and you ordered him to do so.

MR. HANNICK: I stand by the record. What I said is what I said.

After defendant made further allegations regarding the "grandstanding" of the court and the prosecutor, the court proceeded to impose sentence:

Let the record show the court has had an opportunity to review the [PSIR]. The court has asked the attorney for Mr. Phillips to allocute[,] however, he refuses to do so. However, he did review the [PSIR]. There were a couple of errors, one error that was presented to the court and the court made that correction of the error in this matter. The defendant also allocuted in this matter and, accordingly the court is going to sentence the defendant.

A criminal defendant is entitled to the effective assistance of counsel at sentencing, a critical stage of the prosecution. *People v Dye*, 6 Mich App 217; 148 NW2d 501 (1967). Although defendant frames this issue as one of ineffective assistance of counsel, we find that defendant's request for resentencing must be granted on other grounds. First, because of counsel's failure to represent defendant at the sentencing hearing—which we are hard pressed to criticize under the circumstances—defendant was rendered counselless at a critical stage of his prosecution. Second, although the court ordered counsel to review the PSIR, the record is unclear whether in fact this occurred or whether counsel conferred with defendant during the short adjournment. Third, and most important, however, was the court's failure to grant a continuance of the hearing until substitute counsel could be appointed. Appointment of substitute counsel is warranted where good cause is shown and where substitution will not unreasonably disrupt the judicial process. See *People v Ginther*, 390 Mich 436, 441-442; 412 NW2d 922 (1973). Here, the court was made aware of the fact that defendant had filed a grievance against counsel and had drafted a motion for the appointment of substitute counsel well in advance of the date set for sentencing. (Apparently, the pro se motion was served on the prosecutor but not on the court.) Based on defendant's derogatory comments regarding counsel's alleged ineffective assistance during trial and the complete deterioration of the attorney-client relationship, we believe that good cause was shown to warrant a continuance of the sentencing proceeding. While some delay would have been inevitable because of the appointment of substitute counsel to review the record and consult with defendant, we do not believe that the delay would have resulted in a significant disruption of the judicial

process. Accordingly, we remand for resentencing, which is to be conducted in accordance with MCR 6.425, including the preparation of a reasonably updated presentence report.[1] To ensure the appearance of justice and fairness, resentencing shall be conducted before a different judge. *People v LeMarbe (After Remand)*, 201 Mich App 45, 49; 505 NW2d 879 (1993); *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986).

Because we have ordered a remand for resentencing, we need not address defendant's claim that his sentence violates the principle of proportionality as stated in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

We affirm defendant's convictions but remand for resentencing before a different judge.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.

[1] We also note that the judgment of sentence incorrectly states that defendant was convicted of Counts I and II (for separate acts of first degree criminal sexual conduct), when in fact defendant was acquitted of Count II. We therefore direct the trial court on remand to amend the judgment of sentence accordingly to reflect defendant's acquittal of Count II.