STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DALE ANTHONY TAYLOR,

Defendant-Appellant.

UNPUBLISHED
April 3, 1998

No. 199852
Washtenaw Circuit Court
LC No. 95-004659

Before: O'Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b; MSA 28.788(2), and first-degree home invasion, MCL 750.110a(2)(b); MSA 28.305(a)(2)(b). Defendant was sentenced as an habitual offender to three concurrent prison terms of forty to sixty years for the CSC convictions, and a concurrent term of twelve to twenty years for the home invasion conviction. We affirm.

Defendant first argues that the trial court abused its discretion when it allowed for the admission of bad acts evidence relating to a 1987 conviction. We disagree. Other acts evidence may be admitted if it is offered for a proper purpose, even if its use for a different purpose, such as character evidence, is precluded. *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205; 520 NW2d 338 (1994).

MRE 404(b) governs the 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 that he acted 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 crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In a sexual assault prosecution, evidence of prior acts is admissible under MRE 404(b) if it "tend[s] to show a plan or scheme to orchestrate the events surrounding the rape of complainant so that she could not show nonconsent." *People v Gibson*, 219 Mich App 530, 533; 557 NW2d 141 (1996).

At trial, defendant claimed that the victim invited him into her apartment, and then engaged in consensual sexual intercourse with him. The victim, however, testified that defendant forced his way into her apartment after lying to her in order to get her to open her door, and then repeatedly assaulted her. The challenged testimony concerning similar bad acts committed by defendant, although admittedly prejudicial, was nonetheless extremely probative of the issue of consent in that it showed that defendant had also used trickery to gain access to the apartment of another female victim, and that once inside, he sexually assaulted her, as he did the victim in this case.

We find that the evidence in question established a common scheme or plan employed by defendant, and was admitted for those reasons rather than merely to make the "character to conduct" inference forbidden by MRE 404 and *VanderVliet*. Therefore, the rule excluding the evidence is inapplicable. *VanderVliet, supra* at 64; *People v Flynn*, 93 Mich App 713, 718; 287 NW2d 329 (1979). In addition, we note that any prejudice that may have resulted from its admission was minimized when both the prosecutor and the trial judge specifically warned the jury that the evidence was to be used only to establish a scheme or plan used by defendant, rather than evidence of defendant's guilt. Accordingly, the admission of the bad acts testimony did not amount to an abuse of discretion. *People v Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993).

Defendant next argues that he was denied a fair trial when the trial court allowed the prosecution to admit the testimony of a police officer that defendant refused to participate in a corporeal lineup at the police station following his arrest. Defendant claims that he was entitled to the presence of an attorney of his choice, and that the testimony was admitted merely to show that he was a "bad" person. We disagree.

Following defendant's arrest, the police twice attempted to arrange a physical lineup in an effort to secure an identification from the victim before a significant amount of time had passed since the alleged assault. Defendant refused to participate on both occasions, indicating that he had his own attorney and would not stand in the lineup unless his attorney was present. Defendant, however, never identified his attorney, and the record reflects that an appearance of an attorney on defendant's behalf was not made until nearly a week after the lineup was arranged.

In *People v Benson*, 180 Mich App 433, 437; 447 NW2d 755 (1989), rev'd in part on other grounds, 434 Mich 903 (1990), we held that no error resulted where a police officer was allowed to testify that the defendant refused to attend a lineup. We noted that a defendant has the right to be represented by counsel at a police lineup, but held that evidence of the refusal did not violate a defendant's right against self-incrimination and that there is no authority requiring the police to make endless efforts to attempt to arrange a lineup. *Id*. at 437-438.

Here, the record establishes that contrary to defendant's claims, he did not have his own attorney at the time the lineup was arranged, that the police made an effort to fulfill defendant's wishes by attempting to secure information concerning the supposed attorney, and that at both times, a public defender was present to make certain that defendant's rights were not violated. Moreover, even if the evidence was improperly admitted, we find that it had no impact on the outcome of defendant's trial considering the overwhelming evidence presented against him, as well as the other police testimony of defendant's uncooperative behavior, including his flight from police, the hiding of his underwear, and the fact that he purposely avoided being identified by giving the police a false name. Hence, the admission of the complained-of evidence did not violate defendant's right to a fair trial.

Last, defendant argues that a manifest injustice resulted when the trial court failed to sua sponte instruct the jury concerning the weight to be given to the evidence concerning his failure to participate in the physical lineup, his alleged removal and hiding of his underwear, and his fleeing from the scene. Defendant contends that such evidence is subject to contradictory interpretations, and that the jury should have been instructed that his noncooperation with authorities was not necessarily evidence of his guilt. We find that defendant's argument is without merit.

Defendant failed to request an instruction at trial and the absence of such an instruction was harmless considering the court's instructions as a whole. At trial, both parties presented their version of the facts. Although the prosecution argued that the evidence established defendant's guilt, the trial court instructed the jurors to weigh the evidence, determine which witnesses were credible and decide the ultimate question in this case. We find no manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael R. Smolenski