STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARIN L. SHOOK,

Defendant-Appellant.

UNPUBLISHED
July 31, 1998

No. 194220
Oakland Circuit Court
LC No. 94-133617 FC

Before: Bandstra, P.J., and Griffin and Young, Jr., JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4). He was subsequently sentenced to seven to fifteen years' imprisonment. Defendant now appeals as of right. We affirm.

On appeal, defendant first argues that the trial court abused its discretion by denying his request to exclude references by the prosecution to a prior arson conviction and assault and battery charge. We disagree. This Court reviews a trial court's decision to admit or exclude particular evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Evidence regarding other bad acts of a defendant must satisfy three criteria in order to be permitted under MRE 404(b): (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 VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. *Id*. at 75.

Here, evidence of defendant's prior arson conviction, for which he was on probation, as well as the assault and battery charge that was ultimately dismissed, was relevant to show why the complainant recanted her story to the police that defendant raped her: the complainant sought to keep defendant from getting in even more trouble. This clearly was a proper purpose for introducing this evidence, and we are not persuaded that the trial court erred in concluding that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. Finally, the trial court provided a cautionary instruction to the jury, limiting the

purpose for which the prior bad acts evidence could be considered. We find no abuse of discretion. See *People v Barker*, 161 Mich App 296, 303; 409 NW2d 813 (1987).

Next, defendant claims that he was denied his constitutional right to a speedy trial by virtue of a nineteen-month delay between his arrest and trial. We disagree. Whether a defendant was denied his constitutional right to a speedy trial is a mixed question of fact and law. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). This Court reviews the trial court's factual findings under the clearly erroneous standard, and the legal constitutional questions are reviewed de novo. *Id.* In determining whether a defendant has been denied his right to a speedy trial, this Court considers (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) any prejudice to the defendant. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Hill*, 402 Mich 272, 283; 262 NW2d 641 (1978).

We are not persuaded that defendant was denied his right to a speedy trial. There is nothing in the record to indicate that the delay was attributable to anything other than court docket congestion. While such delays are generally attributable to the prosecution, they are assigned only minimal weight in determining whether a defendant was denied his right to a speedy trial. *People v Simpson*, 207 Mich App 560, 564; 526 NW2d 33 (1994). We note that at least one adjournment was caused solely by the unavailability of a defense witness, and defendant apparently stipulated to the remaining adjournments. See *Gilmore, supra* at 460-461. Moreover, defendant never asserted his right to a speedy trial below.

Finally, we fail to see how defendant was prejudiced by the delay. While we acknowledge that a delay of over eighteen months creates a presumption of prejudice, that factor must be balanced with the other relevant factors. Indeed, long delays alone do not necessarily constitute a denial of the right to a speedy trial. *Simpson, supra*. Defendant did not suffer prejudice to his person because he was out on bond for most of the time prior to trial. Moreover, we can discern no prejudice to his defense. Although defendant claims that witnesses' memories were faded, this is not a sufficient basis for finding a speedy trial violation. *Gilmore, supra* at 462.

Defendant also argues that he was denied the effective assistance of counsel at trial. He asserts five instances where defense counsel allegedly provided deficient representation, and claims that such deficiencies warrant reversal of his conviction. Defendant did not move below for either a new trial or an evidentiary hearing on this basis.[1] Therefore, our review is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995).

In order to establish a claim of ineffective assistance of counsel, a defendant must establish that his counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that the deficient performance prejudiced the defense to the extent that the defendant was deprived of a fair trial with a reliable result. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). The defendant also has the obligation to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Effective assistance of counsel is presumed, and the defendant bears the burden of proving otherwise. *Mitchell, supra*.

Defendant's first claim is that counsel was deficient in failing to call a witness that defendant alleges would have rebutted the testimony of the complainant. We disagree. The decision whether to call certain witnesses falls squarely within counsel's discretion concerning trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A defendant must show that failure to call a witness at trial deprived him of a substantial defense that would have affected the outcome of the case in order to prove a claim of ineffective assistance. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Here, other than a vague assertion that it would have rebutted the complainant's testimony, defendant does not even indicate what testimony this witness would have given, let alone explain how it would have been beneficial to the defense such that the outcome of the case would have been different.

Second, defendant claims that counsel should have called an expert witness to discuss the spousal abuse syndrome in order to rebut the prosecution's expert testimony. However, because defendant has failed to articulate how the absence of an expert witness was detrimental or prejudicial to the defense, defendant's claim is without merit.

Third, defendant claims that defense counsel was deficient for failing to file a motion to dismiss for lack of a speedy trial. However, as discussed above, defendant's claim that he was denied a speedy trial lacks merit. Thus, defendant has failed to show how he was prejudiced by counsel's failure to seek dismissal on this basis.

Fourth, defendant complains that defense counsel failed to utilize a peremptory challenge during voir dire to excuse a juror whose family had been affected by an arson fire. However, the juror stated that the incident would not affect her ability to be fair and impartial, and that she would not hold defendant's prior arson conviction against him. Thus, we conclude that counsel's decision not to excuse the challenged juror was a reasonable exercise of trial judgment and did not constitute ineffective assistance of counsel.

Finally, we reject defendant's argument that he was denied the effective assistance of counsel because of counsel's failure to investigate potential alibi witnesses, and to engage in longer discussions with defendant prior to trial. In order to successfully assert a claim that counsel's lack of preparation or failure to investigate constituted ineffective assistance of counsel, defendant must establish that he suffered prejudice as a result. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). There is no indication in the existing record that defense counsel's alleged failure to interview potential witnesses and otherwise adequately prepare for trial resulted in counsel's ignorance of evidence which would have substantially benefited the defense.[2] In sum, defendant has failed on this record to establish that he did not receive the effective assistance of counsel at trial.

Defendant next argues that the trial court erred in allowing the complainant's friend and sister to repeat statements made to them by the complainant that defendant raped her. We find no abuse of discretion in the trial court's ruling that the challenged statements were not hearsay because they were prior consistent statements used to rebut a charge of recent fabrication under MRE 801(d)(1)(B).

MRE 801 provides, in pertinent part:

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if –

> (1) *Prior Statement of Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . .

In this case, defendant's theory of the case was that the complainant was fabricating the rape allegation in order to protect herself from prosecution for filing a false police report, and out of jealousy and revenge over defendant's involvement with another woman. In response, the prosecution offered evidence of the complainant's prior statements that were consistent with her trial testimony that defendant had raped her. The complainant testified at trial and was subject to cross-examination concerning the statements, which statements were made before she had a motive to fabricate. MRE 801(d)(1)(B) expressly permits such testimony as nonhearsay. See *People v Brownridge*, 225 Mich App 291, 301; 570 NW2d 672 (1997).

Defendant next argues that the trial court erred in admitting certain testimony by Kate McNamara, a victim's advocate in the Domestic Violence Section of the Oakland County Prosecutor's Office. We agree with defendant that McNamara's qualifications, if any, to give expert testimony regarding the conduct of domestic violence victims was not sufficiently established. However, we conclude that any error in the admission of McNamara's testimony was harmlessly cumulative to that of Judy Lee, whose expert qualifications defendant did not challenge. Cf. *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996). We further reject as unfounded defendant's claim that McNamara improperly vouched for the complainant's credibility. Finally, because no objection was lodged at trial, we decline to address defendant's claim that McNamara repeated hearsay statements made to her by the complainant. *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995).

Defendant's last claim on appeal is that he was denied a fair trial because the prosecutor was allowed "to turn this case from a first degree criminal sexual conduct trial into a domestic violence case." However, because defendant provides no authority supporting his position, which we also find to be meritless, we decline to address it. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995).

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Robert P. Young, Jr.

[1] Furthermore, we note that this Court denied defendant's request to remand this matter for an evidentiary hearing.

[2] Defendant did attach to his appellate brief several unauthenticated items in support of this claim that are not part of the lower court record, nor were they attached to defendant's prior motion to remand. Therefore, we decline to consider them. MCR 7.210(A)(1).