STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY PAUL HERNANDEZ,

Defendant-Appellant.

UNPUBLISHED
April 16, 1999

No. 204577
Oakland Circuit Court
LC No. 94-132905 FC

Before: Saad, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), one count of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), and one count of larceny from a person, MCL 750.357; MSA 28.589. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to forty to sixty years' imprisonment for the first-degree criminal sexual conduct convictions, ten to twenty years' imprisonment for the second-degree criminal sexual conduct conviction, and five to twenty years' imprisonment for the larceny conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in admitting evidence that defendant had committed assaults other than but similar to those for which he was on trial. "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). However, such evidence may be admissible for another purpose, "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 . . . ." *Id.* The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995).

The prosecutor offered evidence of two prior assaults. The record indicates that this evidence was offered for a proper purpose under MRE 404(b), to prove defendant's identity and plan, scheme or system in committing criminal sexual assaults upon women. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Further, the similarities between the prior assaults and the charged conduct were sufficient to make them highly probative of the issue of

identity, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *People v Starr*, 457 Mich 490, 499-501; 577 NW2d 673 (1998). Thus, we conclude that the trial court did not abuse its discretion in admitting this evidence.

Next, the trial court did not clearly err in denying defendant's motion to suppress evidence obtained as a result of a search of defendant's apartment. Our review of the record, which includes an earlier adjudication and appeal of this issue,[1] leads us to conclude that the initial search of defendant's apartment was within the scope of defendant's voluntary consent. See *City of Troy v Ohlinger*, 438 Mich 477, 485-486; 475 NW2d 54 (1991).

We reject defendant's claim that the trial court abused its discretion in admitting DNA evidence that involved the "product rule" method of computing the probability of a match. This method of developing DNA evidence is now generally accepted in the relevant scientific community. *People v Chandler*, 211 Mich App 604, 610-611; 536 NW2d 799 (1995). Challenges to statistical evidence go to the weight of the evidence, not its admissibility. *Id.* at 611, citing *People v Adams*, 195 Mich App 267, 279; 489 NW2d 192 (1992). Further, "[t]his Court does not require scientific tests to be infallible, but only that reasonable certainty follow from them." *People v Leonard*, 224 Mich App 569, 591-592; 569 NW2d 663 (1997). Because defendant has not presented any evidence to suggest that generally accepted laboratory procedures were not followed in this instance, his attempt to cast aspersions on the DNA testing used here must fail.

Next, the trial court did not abuse its discretion when it denied defendant's motion, orally made on the day scheduled for jury selection, to appoint a defense expert on eyewitness identification. "[D]ue process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, . . . a defendant must show . . . a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *Leonard, supra* at 582, quoting with approval from *Moore v Kemp*, 809 F2d 702, 712 (CA 11, 1987). We agree with the trial court that because defendant demonstrated no special need for an expert in this regard, an opinion from an expert would not have assisted the jury in determining guilt or innocence in this case. Where expert testimony would be speculative, it should be excluded under MRE 403 (probative value substantially outweighed by the danger of confusion, delay, waste of time, or presentation of cumulative evidence). *Phillips v Deihm*, 213 Mich App 389, 401-402; 541 NW2d 566 (1995).

Finally, we reject defendant's argument that he was denied the effective assistance of counsel. To prove ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to result in deprivation of a fair trial. *Strickland v Washington*, 466 US 668, 687-688, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must further show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would likely have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

In support of his argument defendant points to instances where counsel failed to object to certain testimony that suggested that defendant had broken into office buildings on various occasions. However, the testimony did not in fact add anything to what the jury already knew from properly admitted evidence. Thus an objection may have been futile, see *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989) (counsel is not obligated to raise futile objections), or strategically inopportune, see *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987) (this Court will not substitute its judgment for that of counsel regarding matters of trial strategy). Defendant has failed to demonstrate that his attorney's performance fell below an objective standard of reasonableness, or that but for the attorney's alleged errors the outcome would likely have been different.

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Peter D. O'Connell

[1] See *People v Hernandez*, unpublished opinion per curiam of the Court of Appeals, decided June 27, 1997 (Docket No. 188733).