

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOYD LEE HAMILTON, JR.,

Defendant-Appellant.

UNPUBLISHED

April 21, 2000

No. 217053

Cass Circuit Court

LC No. 98-009519-FC

Before: Meter, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and was sentenced to a prison term of fifteen to thirty years. He appeals as of right. We affirm.

Defendant argues that the trial court abused its discretion when it allowed the prosecutor to introduce other-acts evidence because the prejudicial effect of the evidence substantially outweighed its probative value. Specifically, defendant challenges the admission of testimony from defendant's son that identified specific instances of sexual assault of the victim by defendant, and testimony from police detectives concerning defendant's own statements regarding vaginal examinations that defendant performed on the victim and another minor niece, as well as statements that identified instances where defendant's penis was grabbed by the victim and other minor relatives.

The admissibility of other-acts evidence is within the trial court's discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Under MRE 404(b)(1),¹ evidence of other acts may be admitted if (1) it is offered for a proper purpose, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

Only element three is at issue in this case. Contrary to defendant's argument, we conclude that the probative value of the challenged evidence is not substantially outweighed by a danger of unfair prejudice. Prejudice inures when marginally probative evidence would be given undue weight or preemptive weight by the jury. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod on other grounds 450 Mich 121 (1995). Here, defendant advanced multiple defense theories, including that the victim's accusations of sexual assault were false and that defendant's son was the actual perpetrator of the sexual abuse. In this context, the testimony of defendant's son regarding other sexual contact between defendant and the victim bolstered the credibility of the victim and made the identification of the abuser more probable than it would have been without the testimony. *Crawford, supra* at 389-390. Likewise, by bolstering the credibility of the victim, the challenged evidence made it less probable that the victim had fabricated the allegations of sexual assault. Similarly, the testimony of the police detectives regarding defendant's admissions that he examined the vaginas of the victim and one of his minor nieces and that the girls touched his penis on several occasions made it less probable that the victim was fabricating her claims of sexual assault and more probable that defendant committed the sexual assault. Thus, the other-acts evidence was not marginally probative, it was highly probative of the identity of the abuser. Accordingly, the trial court did not abuse its discretion in admitting this evidence.

Next, defendant argues that he was denied effective assistance of counsel because his counsel failed to object to defendant's son testifying while in prison garb and failed to request that the trial court strike defendant's son's testimony that hinted at an instance of sexual assault on the son by defendant.

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Mitchell, supra*, 454 Mich 156. Because defendant failed to move in the trial court for an evidentiary hearing or a new trial on the basis of ineffective assistance of counsel, our review is limited to error apparent on the record. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998).

Defendant has failed to show that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. It would have been the height of frivolity to have required trial counsel to object to defendant's son's jail attire because the son testified that he was currently housed in the county jail and testifying pursuant to the term of a plea agreement. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Furthermore, the prosecutor and the trial court acted promptly to prevent defendant's son from volunteering irrelevant and prejudicial bad acts involving defendant and his son. An objection by defense counsel accompanied by a request to strike would have needlessly invited the jury to focus attention on it. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Rice, supra* at 445.

Affirmed.

/s/ Patrick M. Meter

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

¹ MRE 404(b)(1) provides:

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.