# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARLES EUGENE STELLER,

Defendant-Appellant.

UNPUBLISHED
October 19, 2001

No. 223404
Livingston Circuit Court
LC No. 99-011008-FH

Before: K. F. Kelly, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a), and indecent exposure, MCL 750.335a. He was sentenced to thirty-six month's probation with the first six months to be spent in jail for the CSC conviction and to ninety days' incarceration for the indecent exposure conviction. Defendant appeals as of right. We affirm.

The complainant testified that, during a high school debate class, defendant pulled out his penis and exposed it to the class. She further testified that, in an attempt to get her attention during the act, defendant reached over and grabbed her breast. A classmate's testimony confirmed complainant's testimony that defendant exposed himself, but the classmate testified that he did not see defendant grab the complainant's breast. Other witnesses also testified that defendant had exposed himself during school in classroom settings on previous occasions and that he thought it was funny and enjoyed getting attention for such conduct.

I

Defendant first argues that the trial court abused its discretion when it allowed into evidence improper character testimony. Because defendant did not object to the testimony, this issue is not properly preserved for appeal. *People v Hannold*, 217 Mich App 382, 391; 551 NW2d 710 (1996). In order to avoid forfeiture of an unpreserved issue on appeal, an appellant must show (1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Although the challenged testimony is prior acts evidence, such evidence may be admissible for a noncharacter purpose, such as to prove motive, intent, scheme, plan or system. MRE 404(b)(1). Prior acts evidence is still admissible if (1) it is relevant, (2) it is introduced for

a proper purpose, and (3) the danger of undue prejudice does not substantially outweigh the probative value of the evidence. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993).

In this case, the challenged testimony is relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Moreover, evidence of a defendant's uncharged prior similar act is relevant to rebut a defendant's claim of fabrication. *People v Starr*, 457 Mich 490, 502; 577 NW2d 673 (1998).

Here, the prior acts testimony rebuts defendant's theory that the complainant contrived these allegations because defendant hurt her feelings. The veracity of the complainant's testimony was a central issue in this case. According to police testimony, defendant denied ever exposing himself. In addition, the complainant testified that she did not report defendant's conduct until after a teacher approached her concerning rumors the teacher had heard. In light of defendant's theory that the complainant contrived the allegations against him, the prior acts testimony was relevant to rebut defendant's claims of fabrication.

In addition, the prior acts evidence must be offered for a proper purpose. *VanderVliet*, *supra* at 74. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id*. As noted above, one proper noncharacter purpose for the prior acts testimony is to rebut defendant's claims that the acts never occurred and that, therefore, the complainant fabricated her testimony. *Starr*, *supra* at 502. Another noncharacter purpose would be to show that defendant was willing to exhibit such conduct at school in a classroom full of his peers. Yet a third purpose would be to establish that defendant knowingly, and not accidentally, engaged in such conduct. Thus, the evidence was introduced for a noncharacter purpose.

Nevertheless, if the danger of unfair prejudice substantially outweighs the probative value of the challenged bad acts evidence, it is inadmissible. *VanderVliet*, *supra* at 74. "Unfair prejudice" exists when there is a danger that the jury will give marginally probative evidence undue weight and it would be inequitable to allow the proponent of the evidence to use it. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995).

Here, the prior acts evidence is not merely "marginally probative." On the contrary, the evidence establishes that defendant's conduct was not accidental, that the complainant did not fabricate the allegations, and that defendant was willing to expose himself at school, during class, and in front of his peers. Furthermore, there is little danger that the jury gave this contested evidence undue or preemptive weight. This evidence does not have the potential to inflame the passion or bias of any jury to such an extent that the jurors would feel compelled to find defendant guilty of indecent exposure on the basis of this evidence. Rather, irrespective of defendant's past conduct, the complainant's direct testimony that these acts occurred is the most telling evidence upon which the jury could rest its guilty verdict.

Likewise, it would not be unfair or inequitable to allow the prosecution to introduce the contested evidence. Defendant had adequate notice that the prosecutor intended to use the prior acts evidence and had ample opportunity to formulate a strategy to deal with the evidence. Accordingly, the danger of unfair prejudice does not substantially outweigh the probative value of this evidence. Moreover, the trial court specifically instructed the jury not to convict

defendant because of other bad conduct. Thus, we conclude that the trial court did not err in admitting the prior acts testimony.

II

Defendant also argues that he was denied his Sixth Amendment constitutional right to effective assistance of counsel. We disagree.

To establish that the defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, we must find that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deny him a fair trial. *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674, on remand 737 F2d 894 (CA 11, 1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Moreover, in cases such as this, where a hearing on the ineffective assistance of counsel claim has not been held, our review is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995), overruled in part on other grounds in *People v Kulpinski*, 243 Mich App 8, 18 (2000).

Defendant argues that he was denied effective assistance of counsel when his trial counsel failed to file the requisite alibi notice, failed to inform the trial court that an alibi witness had come forward while the jury was deliberating, and failed to request an adjournment. Defendant argues that the omitted testimony was a "substantial defense," eliminating the presumption that the failure to present the evidence and call these witnesses was sound trial strategy. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), modified 453 Mich 902 (1996). This Court must first determine whether defense counsel's alleged failures fell below an objective standard of reasonableness. *Pickens*, *supra* at 302-303.

Defense counsel cannot be faulted for failing to file an alibi notice ten days before trial when the record fails to disclose whether trial counsel was even aware that two army recruiters were potential alibi witnesses at that time, and therefore whether this failure was objectively unreasonable. During the hearing on defendant's motion for new trial, defendant's second attorney indicated that trial counsel was not aware that army recruiter Sergeant Mejia, a character witness, could also support defendant's alibi defense. Moreover, because the testimony of counsel is essential and our courts will not infer constitutional ineffectiveness without any developed record on the extent of trial counsel's preparedness, *Mitchell*, *supra* at 145, defendant has failed to overcome the presumption that his trial counsel did provide effective assistance. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999) (holding that effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.)

However, army recruiter Sergeant Mejia's affidavit does indicate that, before the jury delivered its verdict, she notified defense counsel that defendant was at the recruiting center on the date of and at the time of the alleged offense. Thus, the record indicates that while defense counsel may not have been aware of these potential alibi witnesses ten days before the start of trial, counsel did become aware of the alibi defense before the jury rendered its verdict.

As MCL 768.20(3) makes clear, a defendant has a continuing duty to disclose the name of a later discovered alibi witness. It further provides that the moving party must show that the name of the additional witness was not available before trial, and could not have been made

available by the exercise of due diligence in order for the moving party to be able to call that witness. MCL 768.20(3).

Here, defendant cannot show that the army recruiter could not have been made available by the exercise of due diligence. Therefore, his trial counsel was not ineffective for failing to move for the admission of her testimony. Because defendant knew he was at the recruiter's office rather than at debate class on the afternoon of the offense, his attorney could not have shown that an exercise of due diligence would not have disclosed the existence of this potential alibi testimony before the start of trial. Moreover, because an attorney is not ineffective for failing to bring a futile motion, *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1999), defendant has failed to establish that his trial counsel was ineffective for failing to notify the prosecutor or the court of the witness's presence, or for failing to request an adjournment in light of the potential alibi testimony.

Defendant also claims he received ineffective assistance of counsel because his trial counsel failed to confront the classmate with an alleged inconsistent statement that would have impeached the classmate's testimony that defendant exposed himself. Regardless of whether trial counsel's conduct fell below this objective standard, defendant has failed to prove that this mistake affected the outcome of trial. Even assuming the admission of the prior inconsistent statement did impeach the classmate's trial testimony that defendant exposed himself to the class, the jury still heard complainant's unassailable testimony that defendant did expose himself. The jury also heard police testimony that two of the classmates who denied that defendant exposed himself during their trial testimony told an officer during their interviews that defendant did expose himself to the class. Thus, defendant has failed to establish that trial counsel's error affected the outcome of trial.

Defendant also argues that trial counsel's failure to object to the prosecutor's notice to introduce prior acts evidence and his failure to object to its use at trial constituted ineffective assistance of counsel. Because we have concluded that the trial court's admission of the prior acts evidence was not erroneous, any objection to the introduction of the evidence would have been futile. Trial counsel is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant also argues that he was denied his right to ineffective assistance of counsel because trial counsel failed to call any witnesses. However, decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Because defendant failed to overcome the presumption that his trial counsel's failure to call any of the witnesses on his witness list was sound trial strategy, this argument lacks merit.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald