

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE HILL,

Defendant-Appellant.

UNPUBLISHED

March 22, 2002

No. 227591

Ingham Circuit Court

LC No. 00-075424-FC

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

PER CURIAM.

Defendant appeals as of right from his conviction for first-degree criminal sexual conduct, MCL 750.520b. He was sentenced as a third felony offender, MCL 769.11, of 480 to 720 months' incarceration. We affirm.

I. Basic Facts and Procedural History

On December 13, 1999, the ten year old victim was abducted as she waited for the school bus. The victim is of Vietnamese descent and has difficulty communicating in the English language. As she stood at the bus stop, defendant drove up, identified himself as a teacher and offered the victim a ride to school. When the victim tried to run away, defendant forced her into his vehicle, detained her on the floor, covered her mouth with his hand and sexually assaulted her. The victim sustained blunt force injury to the vaginal area, was in physical pain and very upset.

After notifying the police, the victim participated in two pre-custodial photographic lineups. She did not identify her attacker in the first lineup. However, when the victim viewed the second lineup, she identified defendant as her attacker within one or two minutes.

The victim also participated in a corporeal lineup. In an attempt to ensure that the victim could identify and communicate the numbers on the form, the prosecutor inquired whether the victim could identify the number four. The prosecutor then uttered "oh oh" realizing that defendant was fourth in the lineup. Immediately thereafter, a detective asked the victim if she could identify another number and the prosecutor followed up with another, similar inquiry. Counsel present at the corporeal lineup did not object as he did not want to call unnecessary attention to the error thus prejudicing defendant. The victim reviewed the lineup and promptly identified defendant once again as the perpetrator.

On the first day of trial, anticipating an alibi defense, the prosecutor sought to introduce testimony to establish that on the morning of the attack, defendant, while in the vicinity of the victim's neighborhood broke into another family's home, fondled their little girl's breasts and inquired whether she liked "kinky sex." Trial counsel objected that this evidence was improper character evidence and that the probative value of the testimony was substantially outweighed by the potential for unfair prejudice. The trial court allowed the other acts testimony for purposes of establishing opportunity and ability.

The jury convicted defendant as charged. Defendant appeals as of right. We affirm.

II. The Corporeal and Pre-Custodial Photographic Lineups

Defendant first takes issue with his pretrial photographic and corporeal lineups, arguing that the trial court should have excluded evidence of these identifications as being unduly suggestive. We disagree.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000). Such an abuse of discretionary authority obtains where "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.* To establish that a trial court abused its discretion in admitting identification evidence, "a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). A photo spread is generally not suggestive as long as photos are fairly representative of a defendant's physical features and therefore reasonably test the identification. *Id.* at 304.

Defendant argues that the photographic lineup procedure was unduly suggestive because the size of his head in the photograph was larger than others but does not contend that the photograph was not representative of his physical features. Beyond this mere assertion, defendant does not otherwise demonstrate how that alone renders his photographic lineup unduly suggestive. Defendant may not simply state his position, and then leave it us to discover and rationalize a basis for his claim. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). We find that the trial court did not abuse its discretionary authority by admitting this identification evidence.

Next, defendant argues that his corporeal lineup was also unduly suggestive because the prosecutor, in instructing the victim as to the identification procedure, inadvertently asked if the victim could recognize the number four, which was the defendant's position. We note that the victim of this crime was ten years old at the time of the offense, and spoke little English. There was no evidence to indicate that the prosecutor's comment was even translated to the victim. Additionally, evidence adduced at trial suggested that neither the victim nor her interpreter had any unusual reaction to the prosecutor's question. Moreover, after the prosecutor's comment, the victim was immediately asked if she could recognize other numbers, attempting to minimize the effect of mentioning the number four. Indeed, everyone present, including defendant's attorney, agreed that the comment did not appear to affect the victim. Defendant fails to demonstrate how the prosecutor's comment, standing alone, renders his corporeal lineup unduly suggestive and thus invalid.

Accordingly, we find the trial court's decision to admit evidence of the identification did not constitute an abuse of its discretionary authority.

IV. MRE 404(b) Other Crimes, Wrongs, or Acts

Next, defendant quarrels with the trial court's decision to admit other acts evidence under MRE 404(b). The decision whether to admit evidence lies within the trial court's sound discretion and will not be disturbed absent an abuse of that discretionary authority. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). However, an issue concerning the proper construction of a rule of evidence presents a question of law which this Court reviews de novo. *People v Stevens*, 236 Mich App 294, 299; 599 NW2d 789 (1999) rev'd in part on other grounds in *People v Stevens*, 461 Mich 655; 610 NW2d 881 (2000).

MRE 404(b) is a rule of inclusion, allowing relevant other acts evidence as long as it is not being admitted solely to demonstrate criminal propensity. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993). In *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), our Supreme Court reaffirmed a four step approach to the admissibility of other acts evidence initially set forth in *VanderVliet*:

First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact or consequence at trial. Third, under MRE 403, a “determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403.” (Citations omitted.) Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. *VanderVliet*, *supra* at 74-75.

In the case at bar, two witnesses testified that on the morning before the instant attack, defendant broke into their house, approached one of the witnesses and fondled her. This event occurred less than a half-mile from the crime scene. Defendant offered the alibi that he was not the perpetrator of the charged offense because according to defendant, he was at his house some miles away from the crime scene when it occurred. The prosecutor, therefore, offered the evidence to show that defendant was in the vicinity when the crime occurred. Thus, this testimony addresses a purpose other than defendant's propensity for committing crimes; it establishes that defendant had opportunity to commit the offense thus satisfying the first part of the *VanderVliet* test.

Regarding the second part of the test, evidence is relevant if it has any tendency to make the existence of a fact which is of consequence more probable or less probable than it would be without the evidence. MRE 401; *Crawford*, *supra* at 388. In accord with this broad definition, evidence is admissible if it helps “throw light on” any material point. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). A general denial of guilt places all elements of a charged offense at issue, regardless of whether any of them are specifically disputed or are stipulated. *Sabin*, *supra* at 60. In this case, the proffered testimony makes it more probable that defendant was in the area on the morning of the assault than it would be without the testimony.

Thus, the proffered testimony is relevant for that purpose thus satisfying the second element of the *VanderVliet* test.

The third part of the test requires that the probative value of the proffered evidence outweigh the potential for unfair prejudice. Indeed, “unfair prejudice” does not mean “damaging.” *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995) mod *People v Mills*, 450 Mich 1212 (1995) (citation omitted.) Any relevant evidence will be damaging to some extent. Rather, as our Supreme Court directed, “[e]vidence is unfairly prejudicial where there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *Crawford, supra* at 398.

In the instant matter, defendant contends that admission of the testimony was so prejudicial that it effectively deprived him of a fair trial. We disagree. The probative nature of this evidence prevents it from being characterized as marginal, or insignificant. To be sure, testimony placing defendant within less than a mile of where the crime occurred has a tendency to make it more probable that defendant had the ability and opportunity to commit the offense than it would be without that testimony. A review of the record reveals that any potential prejudicial effect brought about by this testimony did not substantially outweigh its probative value especially considering defendant’s alibi defense. In addition, the trial court appropriately provided a limiting instruction regarding the use of this testimony thus further reducing the potential for prejudice. Accordingly, we find that the trial court’s decision to allow this evidence did not constitute an abuse of its discretionary authority.

V. Ineffective Assistance of Counsel

Defendant next contends that the representation of his pretrial and trial counsel amounted to ineffective assistance of counsel. We disagree.

Pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), claims for ineffective assistance of counsel should be raised by a motion for a new trial or evidentiary hearing. Since defendant did not procure a ruling by the trial court on this issue, defendant’s claim for the ineffective assistance of counsel is forfeited save for a review of the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To set forth a viable claim for the ineffective assistance of counsel, defendant must establish deficient performance by counsel and a reasonable probability that but for that deficiency, the result would have been different. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) citing *People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996); *Snider, supra* at 423-424. Indeed, to prevail on a claim for the ineffective assistance of counsel, a defendant must overcome the strong presumption that his attorney’s actions constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) citing *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Defendant first argues that his legal representation at the pretrial corporeal lineup was ineffective for counsel’s failure to reposition him within the lineup after the prosecutor’s comment. Defendant also cites trial counsel’s failure to cross-examine a witness as ineffective assistance of counsel.

A review of the record reveals that the prosecution's case did not solely rely upon the victim's identification. Rather, other evidence introduced at trial established that semen samples removed from the victim's jeans matched defendant's DNA, that sperm discovered on the driver's seat of defendant's vehicle and the DNA profile matched defendant, three hairs discovered in defendant's car matched reference sample profiles obtained from the victim, and the victim's physical injuries were indicative of vaginal penetration. Even assuming, *arguendo*, that the lineups did not pass constitutional muster, and trial counsel's failure to cross examine the witness was something other than sound trial strategy, on the record here before us, defendant nevertheless fails to demonstrate the requisite "reasonable probability" that but for those deficiencies, the jury would have returned a different verdict. *Hoag, supra* at 6. Accordingly, we decline to find ineffective assistance of counsel.

IV. The Trial Court's Upward Departure from the Sentencing Guidelines

Finally, defendant argues the trial court abused its discretion in sentencing by considering inappropriate factors in departing from the guidelines¹. Whether objective and verifiable factors constitute substantial and compelling reasons to depart from the sentencing guidelines is an inquiry considered as a matter of law. *People v Fields*, 448 Mich 58, 78; 528 NW2d 176 (1995). However, we review whether a trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the established guidelines for an abuse of discretion. *Id.*

The sentencing guidelines promulgated by the Legislature only permit a departure when a trial court has a "substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). Moreover, the statute further restricts the trial court's ability to depart from the guidelines:

The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight. [MCL 769.34(3)(b).]

This Court has explained the terms "substantially and compelling" as constituting strong language intended only to exist in exceptional cases. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). To that end, the *Babcock* court continued, "[t]he reasons justifying departure should 'keenly' or 'irresistibly' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of a sentence." *Id.* (Citation omitted.)

During defendant's sentencing, the trial court identified several different reasons for departing from the guidelines. First, the trial court stated that the guidelines do not adequately consider the nature of the attack. As the trial court stated, the victim has been "severely damaged, and that needs to be taken into account." The trial court also noted that defendant's

¹ The Sentencing Information Report establishes that the applicable guidelines would be 126 to 315 months' imprisonment.

prior felonies contained some of the same elements as the offense for which he now stands convicted, to wit; breaking into and entering another individual's home. As a third reason for departing, the trial court considered the "extraordinary vulnerability of the victim, in that she was new to this country and unable to communicate with her countrymen in order to get help." Moreover, the trial court stated that the guidelines do not adequately consider the offense committed against one of the witnesses preceding this offense and the seriousness of those "charges." Finally, the trial court noted that this crime has made an impact on an immigrant family and also profoundly affected the community at large. Indeed, parents were afraid to permit their children to walk to school or stand at the bus stop lest their children experience the terror of being forcibly abducted and raped.

The objective and verifiable facts cited by the trial court at sentencing "keenly" and "irresistibly" grab our attention, and are "of considerable worth" in deciding the length of defendant's sentence. The terror inflicted upon this community by having one of their children abducted while waiting for the school bus is, without a doubt, significant and compelling. Furthermore, the victim's status as an immigrant and her concomitant inability to effectively communicate in the English language, along with the profound impact upon the community at large and the effect on the other parents in the neighborhood are not adequately represented by the guidelines. Also not represented in the guidelines is the psychological devastation inflicted upon a ten-year old girl having to learn about sexual intercourse through a forcible rape. See *People v Armstrong*, 247 Mich App 423, 425-426; 636 NW2d 785 (2001) (finding that the sentencing guidelines do not take into consideration the "effect on the victim . . . from having to learn about sexual matters at such a young age.").

For these reasons, we also find that the sentence imposed upon defendant was proportionate to the seriousness of the circumstances surrounding the offense² and the offender. To be sure, the substantial and compelling reasons relied upon by the trial court justified *this particular* departure, in *this particular* case, on *these particular* facts. See *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001).

Accordingly, upon the record here before us, we find that defendant's sentence was proportionate and that the trial court's determination that the objective and verifiable factors constituted substantial and compelling reasons in this case to justify an upward departure from the sentencing guidelines was not an abuse of its discretionary authority. *Fields, supra* at 78.

Affirmed.

/s/ E.Thomas Fitzgerald
/s/ Kirsten Frank Kelly

² MCL 750.520b(2) states that first-degree criminal sexual conduct "is a felony punishable by imprisonment . . . for life or for any term of years." (Emphasis added.)