

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLINTON R. BORDERS,

Defendant-Appellant.

UNPUBLISHED

December 11, 2003

No. 242734

Wayne Circuit Court

LC No. 02-001640

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of indecent exposure, MCL 750.335a. He subsequently pleaded guilty to being a sexually delinquent person, MCL 750.10a; MCL 767.61a. He was sentenced as a fourth habitual offender, MCL 769.12, to seven to fifteen years' imprisonment. He appeals as of right. We affirm.

Defendant was convicted of an incident on June 20, 2001, wherein he allegedly approached two teenage girls in his car as they crossed a street. The girls testified that defendant showed his exposed penis to them and asked whether they "wanted" some of "this." The girls ran to a nearby porch, and defendant drove away.

At trial, the prosecution presented another witness, an adult woman, who testified about an unrelated incident on August 29, 2001. The witness testified that defendant, while in his car, called her over, telling her that he had something to show her. As she approached, she saw that defendant was holding his exposed penis in his hand. She told defendant that she worked for the police so that he would leave; as he drove off, the woman wrote down his license plate number. The number corresponded with a car that was registered to defendant's sister.

The two teenage girls identified defendant at a police lineup. The witness from the August 2001 exposure incident also attended a police lineup, but did not identify defendant, picking a different person instead, although she identified defendant at trial as the person who exposed himself to her.

Defendant presented an alibi defense, asserting that he was with his girlfriend at her hair salon and at a restaurant at the time of the June 2001 incident. Defendant also challenged the identifications of the perpetrator and the perpetrator's car that were given to the police after the two incidents, arguing that they did not match his hair color, his facial hair, or his vehicle.

On appeal, defendant argues that the testimony concerning the August 2001 exposure incident was improper under MRE 404(b). Because defendant failed to object to this testimony at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Under MRE 404(b)(1), evidence of other crimes, wrongs, or acts may be admissible to show motive, opportunity, intent, preparation, scheme, plan, system, knowledge, identity, or absence of mistake or accident. Here, the evidence of the August 2001 incident was probative of defendant's identification, a proper purpose under MRE 404(b)(1), because the witness provided the key link to the license plate, which led to defendant, who was subsequently identified as the perpetrator by the teenage victims.

Defendant also argues that the prosecution failed to provide notice of its intent to use other acts evidence, as required by MRE 404(b)(2). Although the lower court file does not contain a written notice of the prosecution's intent to use "other acts" evidence, the rule does not specifically require written notice. Moreover, we note that the MRE 404(b) witness was listed on the prosecution's witness list filed in advance of trial, and defendant has not affirmatively demonstrated that trial counsel was not on notice of the prosecution's intention to use evidence of other acts.

Nor are we persuaded that the probative value of the evidence was substantially outweighed by its prejudicial effect, MRE 403, particularly considering that defendant attempted to use the "other acts" evidence to buttress his defense of misidentification. See *People v Sabin (After Remand)*, 463 Mich 43, 58-59; 614 NW2d 888 (2000) (weighing the relative probative value and prejudicial effect of evidence requires the flexible exercise of discretion).

For these reasons, we conclude that defendant has not shown that the admission of evidence concerning the August 2001 exposure incident was plain error. He has not met his burden for reversal under *Carines*, *supra* at 763.

Defendant also argues that trial counsel was ineffective for not objecting to the evidence of the August 2001 exposure incident. Because defendant did not raise this issue in an appropriate motion in the trial court, our review is limited to mistakes apparent on the record. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987).

Defendant has not shown that trial counsel's performance was deficient or prejudicial. *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). As previously discussed, it is not apparent that the evidence concerning the August 2001 exposure incident was not admissible under MRE 404(b). Further, counsel's reasons for not challenging this evidence are unknown. The record discloses that defense counsel used the evidence to help support his defense of misidentification, eliciting that at a police lineup, the witness identified a different person as the perpetrator. Defendant has not overcome the presumption that counsel engaged in sound trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Affirmed.

/s/ Henry William Saad

/s/ Jane E. Markey

/s/ Patrick M. Meter