STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2010
v	No. 286324 Wayne Circuit Court
DEANDRE ANGELO MULLINS, Defendant-Appellant.	LC No. 08-000988-FC

Before: Wilder, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b (multiple variables), assault with intent to rob while armed, MCL 750.89, and first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant to concurrent terms of 285 months to 60 years for the CSC I convictions and 285 months to 50 years for the assault with intent to rob while armed conviction, as well as a consecutive 141 months to 20 year term in prison for the first-degree home invasion conviction. We affirm.

Defendant first argues that the trial court abused its discretion by allowing other acts evidence to be admitted at trial. We disagree. The admissibility of MRE 404(b) evidence is within the trial court's discretion, *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998), and will be questioned on appeal only when a trial court's evidentiary ruling "falls outside the range of reasonable and principled outcomes," *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MRE 404(b) states:

> (1) 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.

> (2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

To be admissible under MRE 404(b), other acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 266 (2004); *Lewis v Legrow*, 258 Mich App 175, 208; 670 NW2d 675 (2003). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993); *Lewis*, 258 Mich App at 208. The evidence would be unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Lastly, upon request, the trial court may provide a limiting instruction. *Knox*, 469 Mich at 509.

The prosecutor offered the other acts evidence for the proper purpose of proving a common scheme or plan. In *People v Sabin* (*After Remand*), 463 Mich 43, 63; 614 NW2d 888 (2000), our Supreme Court explained that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support and inference that they are manifestations of a common plan, scheme, or system." While "distinctive and unusual" similarities are not required, *People v Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002), general similarity is not sufficient, *Sabin*, 463 Mich at 64. However, "there must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan." *Hine*, 467 Mich at 251. In other words, the similarity is such that it naturally "support[s] the inference that the defendant employed the common plan in committing the charged offense." *Id*. at 252-253; see also *Sabin*, 463 Mich at 65-66.

Here, the circumstances of the other acts evidence and the charged crimes were sufficiently similar to establish a common scheme, plan, or system. First, the uncharged acts and the charged crimes were all committed within the same neighborhood, which was within walking distance of the homes of defendant's mother and girlfriend. Second, the manner in which defendant would enter, or attempt to enter, the home was the same in each case. Third, in the instances where defendant attempted or succeeded in sexually assaulting women inside the homes, he did so while brandishing a knife. Finally, all of the acts occurred at night. These common features support the reasonable inference that defendant acted in accordance with a common plan. Further, the evidence was relevant to negate defendant's contention that the sexual activity between himself and the victim was consensual.

We also reject the contention that the probative value of the evidence was substantially outweighed by its unfair prejudice. Again, evidence is unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *Ortiz*, 249 Mich App at 306. Here, for the reasons already noted, the evidence was highly probative,

and any potential for unfair prejudice to defendant was limited by the trial court's cautionary instruction to the jury as to the proper use of the other acts evidence. Accordingly, the trial court did not abuse its discretion in admitting the MRE 404(b) evidence.

Next, defendant argues that the trial court erred in allowing a witness to testify after the witness had violated the court's sequestration order. We disagree. We review for an abuse of discretion the trial court's action in selecting and imposing a remedy for violation of its sequestration order. See *People v Meconi*, 277 Mich App 651, 654; 746 NW2d 881 (2008). "The purposes of sequestering a witness are to 'prevent him from "coloring" his testimony to conform with the testimony of another,' and to aid 'in detecting testimony that is less than candid.'" *Id*. (internal citations omitted). Three sanctions are available to the trial court to remedy the violation of a sequestration order: "(1) holding the offending witness in contempt; (2) permitting cross-examination concerning the violation; and (3) precluding the witness from testifying." *Id*. (quotation marks and citations omitted). Precluding a witness from testifying is the most extreme sanction and should be used sparingly. *Id*.

Here, there was no real concern that the challenged witness's testimony would be influenced by the officer's because their respective testimonies were unrelated. The witness testified to defendant's attempts to break into his home, while the portion of the officer's testimony heard by the witness went to the officer's response to the dispatch to the victim's house.[1] Therefore, the trial court did not abuse its discretion by allowing the challenged witness to testify because it was unlikely that his testimony would be "colored" by the officer's testimony or that he would attempt to "conform" his testimony to the testimony given by the officer.[2]

Next, defendant argues that the trial court erred in exercising insufficient caution in voir dire of the jury venire in this highly publicized case because jurors who had seen the media coverage were not removed from the panel. We disagree. "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). When pretrial publicity creates the danger of prejudice, the trial court can question individual potential jurors in small groups or separately, allow counsel to participate in voir dire, allow submission of juror questionnaires prepared by the parties. *Id*. at 623-624. Here, the prosecutor did ask the jurors whether they had been exposed to any media coverage in the case, and while one juror responded that he had, he also stated that he could set aside anything they saw and decide the case based on

[1] The trial court also indicated that it would give defense counsel "wide latitude on cross examination," and indicated that if defense counsel was concerned after the challenged testified, counsel could "approach the bench" and the court would consider "any other remedial relief that's appropriate or . . . some kind of instruction." These additional actions further assured the fairness of the process.

[2] Defendant also argues that his counsel was ineffective for failing to request that the challenged witness's testimony be excluded due to his violation of the sequestration order. Defendant has failed to properly present this issue by raising it in his statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). In any event, the factual predicate of the argument is false, as defense counsel did raise a timely and specific objection.

the evidence presented at trial. Therefore, sufficient caution was exercised during voir dire, and defendant's argument fails.

Similarly, we reject defendant's unpreserved assertion that defense counsel was ineffective for failing to request a change of venue based on the pretrial publicity. To establish a claim of ineffective assistance of counsel, defendant bears the burden of showing that trial counsel's performance fell below an objective standard of reasonableness and that trial counsel's representation was so prejudicial that defendant was denied a fair trial. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999).

Generally, a defendant must be tried in the county where the crime is committed. MCL 600.8312; *People v Jendrzejewski*, 455 Mich 495, 499; 566 NW2d 530 (1997). However, a trial court may change venue to another county in special circumstances where justice demands or a statute so provides. MCL 762.7; *Jendrzejewski*, 455 Mich at 499-500. "[I]t may be appropriate to change venue of a criminal trial when widespread media coverage and community interest have led to actual prejudice against the defendant." *People v Unger*, 278 Mich App 210, 254; 749 NW2d 272 (2008). "Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice." *Jendrzejewski*, 455 Mich at 500-501.

Here, only one of the jurors had been exposed to the media coverage, and that juror stated that he could set aside that information and make a decision based on the evidence presented at trial. Clearly, there was no saturation of the community, no widespread prejudice, and no need for a change of venue. Defense counsel cannot be deemed ineffective for failing to bring a futile motion. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

Defendant also argues that trial counsel was ineffective for failing to seek a closed courtroom. However, defendant fails to cite any authority to support his argument, and thus has abandoned it on appeal. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).[3]

Defendant also argues that the admission of a surveillance recording of defendant attempting to break into a home was improper because the prosecutor failed to lay a proper foundation for its admission. We review this unpreserved argument for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only if the error resulted in the conviction of an innocent defendant or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

[3] In addition, a criminal defendant has a state and federal constitutional right to a public trial. US Const Am VI; Const 1963, art 1, § 20; *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). However, a defendant's right to a public trial does not vest the defendant with the "corresponding right to compel a private trial." *Detroit Free Press v Recorder's Court Judge*, 409 Mich 364, 383; 294 NW2d 827 (1980).

To support his argument, defendant refers this Court to a seven-part foundational test originally set forth by this Court in *People v Taylor*, 18 Mich App 381, 383-384; 171 NW2d 219 (1969). However, in *People v Berkey*, 437 Mich 40, 49-50; 467 NW2d 6 (1991), our Supreme Court held that the *Taylor* test had been superseded by MRE 901. MRE 901(a) provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." By way of illustration, MRE 901(b)(1) provides that MRE 901(a) is satisfied by testimony from a witness with knowledge "that a matter is what it is claimed to be."

Here, the homeowner who recorded the attempted break-in testified that he had set up the equipment that made the recording. He further testified that defendant was wearing the same clothing and acting in the same manner as he had on a recording made approximately two weeks prior. This testimony satisfied the requirement of 901(a) by providing "evidence sufficient to support a finding that the matter in question is what its proponent claims."

Defendant further argues that admission of the video was improper because it was inadmissible hearsay. See MRE 802. We disagree. "Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted." *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007); see also MRE 801(c). The first step to determine if nonverbal conduct is hearsay is to look at whether an assertion was actually intended by the conduct. *People v Watts*, 145 Mich App 760, 762; 378 NW2d 787 (1985); see MRE 801(a). Here, defendant has provided no evidence that he intended an assertion by his conduct on that was recorded. Accordingly, the recording was not a "statement" and thus was not inadmissible hearsay.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot