# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 27, 2011 |
| v | No. 299130<br>Crawford Circuit Court |
| JOE E HARDY II,<br><br>Defendant-Appellant. | LC No. 09-002934-FH |

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Defendant was charged with nine counts of fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e, and three counts of assault and battery, MCL 750.81. Following a jury trial, defendant was convicted of three counts of CSC-IV and one count of assault and battery. Defendant was sentenced to concurrent jail terms of nine months for each of the three CSC-IV counts, to be served concurrent to a 93-day jail term for the assault and battery. Defendant appeals as of right and we affirm. The charges arose out of events during a training for United States forest service workers. Specifically, it was alleged that defendant improperly touched three female workers during an evening social campfire event.

On appeal, defendant asserts that he is entitled to a new trial for two reasons. First he asserts that evidence was improperly admitted that he had been previously accused of rape. Second, he asserts there was reversible error because the jury was not instructed that it had to reach a unanimous conclusion with respect to the factual basis of the assault and battery conviction.

We turn first to defendant's contention that the evidence that he had been previously accused of rape was improperly admitted. The arresting officer testified that when he arrested defendant, defendant stated:

> ["]I can't believe this guys, this is the second time something like this has happened to me.["] And he went on to describe how he attended high school in Chicago – or while attending high school in Chicago, he was accused and arrested for his role – alleged role in a gang rape and that the victim of this gang rape, changed her story recanted her story and the charges were dismissed.

Defense counsel did not move to exclude or strike this testimony.

Later in the trial, defendant testified in his own defense. He denied the instant charges, stating that the complaining witnesses were not being truthful and that the only touching occurred when he, once, accidentally touched one of the complainant's breasts while making a hand gesture, for which he immediately apologized. On cross-examination, defendant was asked whether he had made the unsolicited statement to the arresting officer about having been once accused of a gang rape in Chicago. He agreed that he had been so accused and went on to testify that what he told the arresting officer was:

> "I can't believe all this." You know, "This is like the second time something like this has happened to me." . . . And I was just like, this just reminds me of when I was in high school and I had this—it was a female, which was my girlfriend at the time, that we all went to high school together and we came—we cut school one day, went to my home, you know, we did have sexual intercourse. We went—she went back and then the next day, she claimed that eight people raped her and that I was the lookout at the greenhouse. So—that I never touched her, but I was the lookout. So she named me as the lookout while eight other individuals were trying to sexually accuse (sic) her. Law enforcement from Chicago Police Department came to my high school. They wanted to talk to me and bring me in on questioning. I wasn't—you know, they just wanted to questions [sic] me and see what had happened. When I got there, her mother was there, she was there, and the officer sat me down and said, "Hey, what's going on with this." I said, "I can't believe this. Can I talk to her mother?" He said, "Yes." So I talked to her mother and informed her—I said, "Well, Ms. Turner, are you aware of your daughter's sexually activity?" And she said, "No." I said, "Well, let me inform you of something." And while I was doing that, Ms.—my girlfriend at the time, Angela Turner, she was in the other room telling officers that it was a lie, it wasn't true. So when they came back in, they was like, "Well, Mr. Hardy, you're free to go," you know, "she basically told us what the truth was." And I left. . . . That's the clarification.

No other witnesses mentioned or discussed the incident, and it was not referenced in either party's closing arguments.

We are asked to determine whether the admission of the evidence was erroneous and, if so, whether defense counsel was ineffective for failing to object to it. As an initial matter, we disagree with defendant that the evidence constituted "other acts" evidence under MRE 404(b). MRE 404(b) involves "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." Here, the prosecution's evidence was that defendant told the investigating agent that he had previously been falsely accused of gang rape, but that the victim had recanted and the charges dropped. Outside of the fact that it was defendant making a statement, there is simply no act, crime, or wrong—indeed no action at all—by defendant in this evidence. Accordingly, MRE 404(b) is inapplicable.

We are uncertain, however, of any relevance that this evidence has to the case at bar, as it does not appear to make the existence of any fact of consequence more or less probable, MRE

401, and the prosecution has provided no explanation. Thus, we conclude that the evidence was not admissible. However, absent an objection, reversal may be ordered only in the case of "plain error," *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), which we do not find in this case. As noted, the nature of the error was complicated due to the possible application of MRE 404(b) and so was not obvious. Moreover, we do not conclude that the admission of the subject evidence affected the outcome of the trial. Defendant was charged with a total of nine counts of CSC-IV and three counts of assault and battery against three different complainants. The jury acquitted defendant of all charges against him as to one complainant, three of four charges of CSC-IV and the assault and battery charge as against the second complainant, and two of four CSC-IV charges against the third complainant. Had the jury improperly used the erroneous evidence to infer that defendant had the propensity to commit sexual assault, they would have been more likely to convict him on all CSC counts.[1] In light of the fact that the jury acquitted defendant of six CSC counts and two assault and battery counts, it is not more probable than not that the admission of the evidence affected the outcome to defendant's detriment. See *id.* We reject the claim of ineffective assistance of counsel for similar reasons. In order to prevail, defendant must show that, had counsel made the objection, the outcome of the proceedings would have been different, *People v Sabin* (*On Second Remand*), 242 Mich App 656, 659; 620 NW2d 19 (2000), and, after a review of the entire record, we cannot conclude that the outcome would likely have been any different had the evidence been objected to and excluded.

We now turn to defendant's assertion that he is entitled to a new trial because the jury was not instructed that it had to reach a unanimous conclusion with respect to the factual basis of the assault and battery conviction. After the jury had begun to deliberate, it sent several notes, two of which related to the charges of assault and battery that defendant allegedly committed against two of the complainants. In both instances, there were multiple alleged actions that could have formed the basis of the count. Accordingly, in both cases, the trial court informed the jury that any of the incidents was sufficient. Specifically, with regard to the only assault and battery count for which defendant was found guilty, and about which he appeals, the trial court informed the jury:

> The first question: The assault and assault [sic] and battery charge regarding [the third complainant] is for what act? And that would be either picking her up and carrying her off to the picnic table or slapping her in the face, which she took as meaning what he penis would do, or grabbing her hand and pulling her off into the woods—or attempting to pull her off to the woods. Does everybody get that?

Defendant's counsel did not object and, prior to the court calling the jury back in, indicated that she had no disagreement with what would be presented to answer the question. Due to the lack of objection, this issued is waived in terms of whether it was error, but we must address it

[1] Indeed, it appears that the jury relied on corroborative evidence from additional witnesses in determining which counts defendant had committed.

because defendant has alleged that counsel was ineffective for failing to seek a unanimity instruction.

In *People v Van Dorsten*, 441 Mich 540; 494 NW2d 737 (1993), the defendant was found guilty of one count of first-degree criminal sexual conduct, although the evidence was that there were multiple, different penetrations—some fellatio and others intercourse. *Id*. at 542. This Court reversed, concluding that the failure to provide a unanimity instruction resulted in manifest injustice. *Id.* at 543. Our Supreme Court reversed this Court, noting that:

> The United States Supreme Court has . . . stated that "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v Kibbe*, 431 US 145, 154; 97 S Ct 1730; 52 L Ed 2d 203 (1976). Relief will be given only when necessary to avoid manifest injustice to the defendant. [*Id.* at 545, quoting from *People v Kelly*, 423 Mich 261, 271-272; 378 NW2d 365 (1985).]

It then reasoned that there was no manifest injustice because:

> [t]he number or specific identification of acts of sexual penetration was not in dispute in this case. The defendant's position was simply that there was no sexual assault committed. It was obvious to the participants in the trial that the verdict turned on whether the jury believed the testimony of the complainant and [other witnesses] on the one hand, or found reasonable doubt that any sexual assault occurred, as claimed by defendant. Given that posture of the case, there was no reason for the parties to focus on the specifics of individual penetrations. In this context, the failure to give an instruction requiring unanimity on a particular act in no way impeded the defense or denied the defendant a fair trial. [*Id.*]

Although the charged conduct is different (multiple penetrations versus multiple assaults), the circumstances and reasoning from *Van Dorsten* are on point. Accordingly, we find no prejudice to defendant for his counsel's failure to request the unanimity instruction.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray