STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 7, 2012
v	No. 300190 Ingham Circuit Court
MARIANO GUTIERREZ, Defendant-Appellant.	LC No. 09-001015-FC

Before: CAVANAGH, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of two counts of criminal sexual conduct in the third degree, MCL 750.520d(1)(b) (force or coercion), stemming from a sexual assault of a young woman to whom he had given a ride. Defendant was sentenced to concurrent terms of 10 years' to 15 years' imprisonment, with credit for 372 days served. We affirm.

The complainant was on her way home from a bar in East Lansing when she "flagged down" a car for a ride to her residence. Defendant, who was driving past, picked her up. The complainant testified that defendant drove to a secluded area, choked her, and threatened to use a gun from the glove compartment. He then drove to a parking lot, turned off the car, climbed on top of her, and penetrated her vagina with his penis and finger, despite her repeated requests for him to stop.

Defendant first argues that testimony by another woman whom he had sexually assaulted was improperly admitted under MRE 404(b). We disagree. MRE 404(b)(1) provides:

> 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.

Michigan courts follow a four-part test to determine the admissibility of evidence under MRE 404(b). *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended on other

grounds 445 Mich 1205 (1994). First, the evidence must be admissible "under something other than a character or propensity theory." *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Second, the evidence must be relevant under MRE 402. *Id*. Third, "the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403." *Id*. Fourth, the trial court may provide a limiting instruction to the jury upon request. *Id*. "Evidence is *inadmissible* under [MRE 404(b)] *only* if it is relevant *solely* to the defendant's character or criminal propensity." *People v Mardlin*, 487 Mich 609, 615-616; 790 NW2d 607 (2010) (emphases in original). "Stated another way, the rule is not exclusionary, but is inclusionary, because it provides a nonexhaustive list of reasons to properly admit evidence that may nonetheless also give rise to an inference about the defendant's character." *Id*. at 616.

Evidence of the other sexual assault was admitted as evidence of a common scheme, plan, or system used to commit the charged assault. This is a proper purpose under MRE 404(b). *People v Sabin* (*On Remand*), 463 Mich 43, 63; 614 NW2d 888 (2000).

Additionally, there are sufficient facts on the record to support the trial court's conclusion that the prior incident evinced such a common scheme, plan, or system. "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the [similar] misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Sabin* (*On Remand*), 463 Mich at 63. "General similarity" between the two acts is not sufficient to satisfy MRE 404(b). *Id*. at 64. Instead, there must be "'*such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations*.'" *Id*. at 64-65, quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249 (emphasis in original).

Defendant lied to each woman about his identity. Defendant told the other-acts witness he was an assistant manager of the bar they were in, and he told the complainant in the case at hand he was studying criminal justice at Lansing Community College. In both instances, defendant devised a story that was contextually relevant. Defendant also lied to each woman about where he was moving her. Defendant told the other-acts witness that he would lead her to an area with better telephone reception, and he told the complainant that he would drive her home. Thus, defendant used a fictitious identity to lure his victims to a secluded area where the assault could take place undetected. Additionally, both assaults occurred late at night, and both victims had just met defendant and both were subdued by defendant's weight. These were sufficient common features to "support an inference that [both assaults] are manifestations of a common plan, scheme, or system." *Sabin* (*On Remand*), 463 Mich at 63. Even if this were considered a close question, reversal would not be warranted. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001) ("[a] decision on a close evidentiary question ordinarily cannot be an abuse of discretion").

Defendant also argues that evidence of the prior assault was unfairly prejudicial. MRE 403. Defendant's argument amounts to nothing more than a broad assertion that evidence of a previous sexual assault unfairly prejudices a defendant in a criminal sexual conduct trial.

However, Michigan courts have repeatedly affirmed that this type of evidence is admissible under the proper circumstances. See, generally, *People v Layher*, 464 Mich 756; 631 NW2d 281 (2001), and *People v Drohan*, 264 Mich App 77; 689 NW2d 750 (2004). The circumstances here lead us to conclude that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Moreover, the trial court's cautionary instruction to the jury limited the danger of unfair prejudice. *People v Pesquera*, 244 Mich App 305, 320; 625 NW2d 407 (2001). "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that he was denied a reasonable opportunity to allocute at sentencing. We disagree. MCR 6.425(E)(1)(c) mandates that the trial court "give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence . . . ." Because the Supreme Court requires "strict compliance with this rule," failure to comply with this rule compels resentencing. *People v Wells*, 238 Mich App 383, 392; 605 NW2d 374 (1999).

However, a trial court is not required to specifically address a defendant during sentencing to comply with MCR 6.425(E)(1)(c). *People v Petit*, 466 Mich 624, 631-633; 648 NW2d 193 (2002). Rather, the court rule "merely requires that the defendant be presented with an opportunity to allocute." *Id*. at 633. Here, the trial court asked defendant, "Sir, do you have any other corrections you'd like to make?" Defendant replied, "Myself, no." Although this question was asked in the context of a discussion regarding the accuracy of the presentence report, see MCR 6.425(E)(1)(b), defendant was nevertheless directly presented with an opportunity to address the court. Later, the trial court asked defense counsel, "Comment on sentence, please . . . ?" Again, MCR 6.425(E)(1)(c) does not require direct inquiry of a defendant. *Petit*, 466 Mich at 633. The trial court adequately complied with MCR 6.425(E)(1)(c), and reversal is unwarranted. See *Petit*, 466 Mich at 626, 628, 636 (the question "anything further?" held to be sufficient under the court rule, even though it was unclear to whom the question had been addressed).

In a Standard 4 Brief,[1] defendant argues that he was denied a fair trial by repeated allusions to his status as a prisoner, the court's questioning of witnesses, and trial counsel's failure to adequately address these matters. We disagree.

Defendant argues that the presence of Michigan Department of Corrections (MDOC) guards in the courtroom and the inadvertent viewing of him in shackles by two jurors during a break in the proceedings violated his due process rights. However, this issue was waived because defense counsel told the court it was not necessary to remove the guards before the jurors entered the courtroom, *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002),

[1] Administrative Order No. 2004–6.

and defendant himself agreed that the trial court should not take any action in response to the shackling incident, *People v Carter*, 462 Mich 206, 216; 612 NW2d 114 (2000).[2]

Although a trial court may question witnesses to "clarify testimony or elicit additional relevant information," the court "must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992); see also MRE 614. "The test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

Here, the trial court did not create a new issue by questioning the complainant and defendant about the whereabouts of the complainant's purse; indeed, the prosecutor had asked questions about the purse earlier in the proceedings.[3] Moreover, even assuming, arguendo, that the court did not exercise the proper restraint and caution in its questioning, defendant cannot establish the requisite prejudice in light of the evidence adduced, particularly the complainant's testimony and the earlier evidence about the purse, and in light of the court's clear and accurate jury instructions.[4] The trial court instructed the jury to reach a decision only on the basis of facts and evidence. The court instructed the jurors that the questions it asked "are not evidence," and that if they believed the court had "an opinion about how you should decide the matter, pay no attention." Again, jurors are presumed to follow their instructions. *Graves*, 458 Mich at 486. We find no basis for reversal.

Finally, we see no merit in defendant's assertion that he received ineffective assistance of counsel at trial. "To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). Defendant must also show that "the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Counsel's handling of the presence of the MDOC guards was a reasonable strategy based on an evaluation of how it would impact the case in light of the evidence expected to be

---

[2] Defendant, in the context of this issue, also mentions the admission of the MRE 404(b) evidence. We have resolved this question earlier in this opinion; the evidence was properly admitted. Defendant also mentions the admission of a jail telephone conversation. Defendant's argument with respect this conversation is insufficiently developed and has thus been waived. *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001).

[3] The complainant testified that she had left her purse in defendant's car, but defendant testified that the complainant did not have a purse.

[4] Moreover, the court also questioned the complainant about the purse; he did not "single out" defendant with regard to the issue.

admitted. Also, counsel cannot be faulted where the record shows that defendant personally indicated that no action should be taken in response to the matter.[5] Additionally, while counsel could have reasonably objected to the court's questioning regarding the purse, counsel could just have reasonably determined to not interject an objection out of concern for the response it might elicit. In any event, in light of the evidence adduced and the instructions given, defendant cannot demonstrate the requisite prejudice. *People v Wilson*, 242 Mich App 350, 354; 619 NW2d 413 (2000).

Defendant is not entitled to reversal or remand based on ineffective assistance of counsel, nor is he entitled to reversal based on cumulative error.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Patrick M. Meter

[5] There is no basis from which to conclude that the trial court would have granted a mistrial if one had been requested.