STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 23, 2013
v	No. 308706 Wayne Circuit Court
DARRELL MANN, Defendant-Appellant.	LC No. 11-007665-FH

Before: CAVANAGH, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of three counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(b) (use of force or coercion), and one count of fourth-degree CSC, MCL 750.520e(1)(b) (use of force or coercion). We affirm.

On July 19, 2011, the victim was walking toward a bus stop when defendant offered to give her a ride. The victim got in defendant's truck and, after they negotiated a price for oral sex, defendant drove to a parking lot. After defendant stopped the vehicle, he grabbed the victim's neck with both hands and told her he did not have any money, but to do what he said and he would not hurt her. After defendant forced the victim to perform oral sex, he penetrated her with his fingers and then his penis while she cried and asked him to stop. Eventually, defendant let the victim out of his truck and, after securing defendant's license plate number, she sought medical treatment. Prior to defendant's trial and pursuant to MRE 404(b), the prosecutor moved for the admission of evidence related to defendant's 1989 first-degree CSC conviction and the motion was granted.

On appeal, defendant argues that the trial court abused its discretion when it granted the prosecution's MRE 404(b) motion, allowing the admission of testimony from the victim of his 1989 sexual assault. We disagree.

"The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion." *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009). The trial court abuses its discretion when "it chooses an outcome that is outside the range of reasonable and principled outcomes." *Id*. at 670. We review de novo evidentiary questions that involve the interpretation of law. *People v Buie*, 298 Mich App 50, 71; 825 NW2d 361 (2012). If bad acts evidence is erroneously admitted, the "defendant has the burden of establishing that, more probably than not, a

miscarriage of justice occurred because of the error." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

MRE 404(b) provides:

> (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.

To be admissible under MRE 404(b), the proffered evidence must be offered for a proper purpose, it must be relevant to an issue at trial, and its probative value must not be substantially outweighed by the potential of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). "Relevant other acts evidence does not violate MRE 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *Id*. at 65. MRE 404(b) is an inclusive and flexible rule that provides a nonexclusive list of permissible reasons in support of admissibility of other acts evidence. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

In this case, evidence related to defendant's 1989 conviction for first-degree CSC was admitted to show defendant's plan, scheme, or system in committing sexual assaults and to rebut defendant's claim that the sexual activity was consensual. In *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000), our Supreme Court held 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 an inference that they are manifestations of a common plan, scheme, or system." *Id*. at 63. The charged act and prior bad act do not need to be "part of a single continuing conception or plot" for the prior bad act to be relevant. *Id*. at 64. The relevance of other acts evidence is established "through the similarities between the charged and uncharged acts, rather than on defendant's character, as shown by the uncharged act." *Id*. at 63-64 n 10. Thus, "the jury is asked to infer the existence of a common system and consider evidence that the defendant used that system in committing the charged act as proof that the charged act occurred." *Id*.

We agree with the trial court's conclusion that, on the basis of the common features and similarities of the 1989 incident and the charged incident, a jury could reasonably infer that defendant acted under a common plan or system of targeting young, Caucasian women with blond or light hair in the area of Fort Street and Outer Drive during the early morning hours and employing threats and physical force to sexually assault them in a vehicle parked in a deserted area. In the 1989 case, defendant physically forced himself into the victim's vehicle, grabbed her around the neck and made her drive to a deserted area, punched her in the face, made threats, grabbed her head and forced her face to his penis demanding oral sex. In the case at issue, defendant promised to give the victim a ride, negotiated a price for oral sex, drove to a deserted area, denied having any money, grabbed her around the neck, made threats, grabbed her head and forced her face to his penis demanding oral sex. He then penetrated her several times.

Although defendant's actions were dissimilar in certain respects, his actions need not be identical to be admissible under a theory of a common plan, scheme, or system. *Sabin*, 463 Mich at 67. The evidence must only demonstrate circumstantially that defendant committed the sexual assaults pursuant to a common plan or system he used in committing the previous sexual assault to be relevant. *Id*. at 66, quoting *People v Ewoldt*, 7 Cal 4th 380, 403; 867 P2d 757 (1994).

Further, the probative value of the challenged evidence was not substantially outweighed by the danger of unfair prejudice. Although evidence of another instance of criminal sexual conduct is prejudicial, in light of defendant's defense of consent and, thus, its probative value, the prejudice was not unfair. See MRE 403; *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001) (citation omitted). And any danger of such prejudice was minimized by the trial court's several instructions to the jury that it should not use the evidence to conclude that defendant had the propensity to commit the crimes charged in the instant case. See *People v Martzke*, 251 Mich App 282, 295; 651 NW2d 490 (2002). Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). However, even if this evidentiary issue presents a close question, a finding that the trial court abused its discretion is not warranted. See *Sabin*, 463 Mich at 67. Accordingly, defendant is not entitled to relief on appeal.

Next, defendant argues that his counsel was ineffective for failing to object to the court's erroneous jury instruction on fourth-degree CSC. We disagree.

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result would have been different. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Here, our review is limited to errors apparent on the record because a *Ginther*[1] hearing was not held. See *Jordan*, 275 Mich App at 667.

Defendant argues that his trial counsel should have objected to the following instruction on fourth-degree CSC:

> In order to prove [fourth-degree CSC], the Prosecutor must prove the following beyond a reasonable doubt: First, that the Defendant intentionally touched [the victim] in the breast area, *or* that second, this touching was done for sexual purposes that can be reasonably be [sic] construed as having been done for sexual purposes. And, third, that force and coercion was [sic] used to accomplish the act. [Emphasis added.]

The trial court did misstate the requirements for a conviction of fourth-degree CSC when it instructed the jury that *either* an intentional touching *or* a touching done for sexual purposes was required to convict defendant because both an intentional touching and touching done for a

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

sexual purpose are required. However, before providing the instruction set forth above, the trial court properly defined sexual contact as follows:

> Now, the last charge here is called fourth-degree criminal sexual conduct. This is contact, it's not penetration. It's just as a general rule, Sexual contact' [sic] includes the intentional touching of the victim's or actor's intimate parts . . . if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner.

Thus, read as a whole, the jury instructions "fairly presented the issues to be tried and adequately protected the defendant's rights." *People v Kowalski*, 489 Mich 488, 501-502; 803 NW2d 200 (2011). Accordingly, defendant's ineffective assistance of counsel claim does not warrant appellate relief.

Defendant also argues in his Standard 4 Brief that his counsel was ineffective for failing to impeach the victim with her prior inconsistent statements. We disagree. We have reviewed the record and conclude that the victim was extensively questioned regarding the statements she made to the authorities. In any case, counsel's decisions about what questions to ask a witness are a matter of trial strategy and will not be evaluated with the benefit of hindsight. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Accordingly, this claim of ineffective assistance of counsel is without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Michael J. Riordan