STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 31, 2011
v	No. 297255 Grand Traverse Circuit Court
CHARLES ELMER KOVARY, Defendant-Appellant.	LC No. 09-010913-FC

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b), and first-degree home invasion, MCL 750.110a(2). We affirm.

Defendant argues that the Confrontation Clause, Const 1963, art 1, § 13; US Const, Ams VI, XIV, was violated because defendant did not have an opportunity to cross-examine Lynn Moore, whose preliminary examination testimony from a 1995 case against defendant was admitted in the case at bar. In addition, defendant argues that the admission of Moore's testimony in this case was contrary to the plain language of MRE 804(b)(1) because defendant's motive when cross-examining Moore in 1995 was different from what defendant's motive would have been when cross-examining Moore in this case. We review these unpreserved issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A defendant has a right under the state and federal constitutions to confront witnesses against him. *People v Whitfield*, 425 Mich 116, 124 n 1; 388 NW2d 206 (1986); *People v Ramsey*, 385 Mich 221, 224-225; 187 NW2d 887 (1971). Essentially, the Confrontation Clause bars the admission of testimonial hearsay of a witness who did not appear at trial unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination. *People v Payne*, 285 Mich App 181, 197; 774 NW2d 714 (2009), citing *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004) and *People v Walker*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006). Testimonial statements cover, at a minimum, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Crawford*, 541 US at 68.

The record reflects that Moore was deceased at the time of the trial in the case at bar. Hence, defendant concedes that Moore was unavailable as a witness. See MRE 804(a)(4). Defendant also concedes that Moore's preliminary examination testimony in defendant's previous case was testimonial. We note that defendant cites no applicable authority to support his proposition that the cross-examination of Moore needed to occur in conjunction with the case at bar. An appellant is required to cite authority in support of propositions. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Thus, this issue has not been properly presented for appellate review. *Id*. at 640. Nevertheless, the Confrontation Clause merely requires that defendant have the opportunity to cross-examine the witness and, here, defendant had the opportunity and did cross-examine Moore during the preliminary examination in the previous case. *Crawford*, 541 US at 53-54. Thus, defendant's argument that the Confrontation Clause was violated has no merit; there was no plain error. *Carines*, 460 Mich at 763.

In addition, with regard to MRE 804(b)(1), we conclude that defendant had a similar motive in questioning Moore during the previous case, which was to establish that defendant was the perpetrator in the previous case, and clearly exercised his opportunity to develop Moore's testimony through cross-examination. MRE 804(b)(1); *People v Farquharson*, 274 Mich App 268, 278; 731 NW2d 797 (2007). Thus, Moore's hearsay statements were admissible pursuant to MRE 804(b)(1). There was no plain error. *Carines*, 460 Mich at 763. In addition, defendant's substantial rights were not affected because there was overwhelming evidence of defendant's guilt. *Id*. Indeed, co-defendant Corey Riggs pleaded guilty and testified against defendant, identifying defendant as the assailant.

Defendant also argues that defense counsel was ineffective for failing to object to the admission of Moore's testimony on the basis that it violated the Confrontation Clause and was not consistent with MRE 804(b)(1). Because the Confrontation Clause was not violated and Moore's hearsay statements were admissible pursuant to MRE 804(b)(1), defense counsel was not ineffective for failing to object to Moore's testimony on those grounds because such an objection would have been futile. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant next argues that the facts underlying the 1995 incident and the facts in the case at bar are very different and, thus, do not establish a common plan or scheme. Moreover, even if a common plan or scheme were established, the probative value of Moore's testimony did not outweigh the danger of unfair prejudice. Accordingly, defendant argues that his convictions should be reversed because of the improper admission of other-acts evidence. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Preliminary questions of law related to the admissibility of evidence are reviewed de novo. *Id.*

MRE 404(b)(1) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Evidence of other crimes, wrongs, or acts is admissible, however, under the following circumstances: (1) the evidence is offered for a proper purpose under MRE 404(b)(1); (2) the evidence is relevant; and (3) the evidence is not substantially outweighed by unfair prejudice. *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003).

In this case, the prosecutor offered Moore's testimony for a proper purpose because the prosecutor sought to admit Moore's testimony in order to prove that defendant had a scheme, plan or system in doing the act. MRE 404(b). Moreover, the evidence was relevant because the facts surrounding the 1995 incident were sufficiently similar to the facts surrounding the crimes in the case at bar to infer the existence of a common scheme, plan, or system, as well as identity or absence of mistake. *People v Sabin* (*After Remand*), 463 Mich 43, 63; 614 NW2d 888 (2000). In the previous case, Moore testified that the man who assaulted her said something to the effect of, "God, I got the wrong house." In the instant case, the victim testified that the attacker said, "I'm so sorry. I'm sorry for this . . . this is the second time I've had a mistaken identity." Thus, the evidence was relevant because it had a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In addition, the danger of undue prejudice did not substantially outweigh the probative value of the evidence. *People v Pesquera*, 244 Mich App 305, 320; 625 NW2d 407 (2001). "While the danger of prejudice was real, the tendency of the evidence to establish a common plan, scheme, or system was significant." *Id*. "The limiting instruction given to the jury also served to limit the danger of unfair prejudice by restricting use of the evidence." *Id*. Consequently, the trial court did not abuse its discretion in finding that the danger of undue prejudice did not substantially outweigh the probative value of the evidence. *Id*.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro