STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2010
v	No. 288869 Clinton Circuit Court
DAVID ALLEN PALMER, Defendant-Appellant.	LC No. 08-008294-FH

Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

A jury found defendant guilty of aggravated stalking, MCL 750.411i, and the trial court sentenced him as an habitual offender, third offense, MCL 769.11, to a prison term of three to ten years. Defendant appeals as of right. We affirm.

The complainant testified that defendant stalked her from March to April 2008 when she worked at a K-Mart store. The complainant and others testified that defendant repeatedly followed the complainant around the store while she was working. On one occasion, defendant walked up behind the complainant and stood very close to her, breathing on her neck and "sniffing" her. On several occasions, defendant was observed in the employee and customer parking areas until the complainant finished her shifts. Defendant would rev his moped's motor, wave, or beep his horn at the complainant when she exited the store. The complainant believed defendant was taunting her. At some point, the complainant learned that defendant had prior convictions for stalking and assault with intent to commit second-degree criminal sexual conduct, causing her to be even more fearful of his contacts.

Defendant counsel stipulated before trial that several of defendant's prior convictions, as well as the terms of his probation, would be admitted into evidence. In return, the prosecutor refrained from calling defendant's prior stalking victims to testify before the jury. Throughout the trial, defendant maintained his innocence, testifying that he never acted in a frightening or intimidating manner toward the complainant.

Defendant first argues defense counsel was ineffective when he stipulated to the admission of defendant's prior convictions because the convictions were either inadmissible or their probative value was outweighed by the risk of unfair prejudice. We disagree.

Defendant failed to preserve the issue of whether he was denied the effective assistance of counsel for review because he did not move in the lower court for a new trial or an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). This Court's review is therefore limited to mistakes apparent on the record. *Id.* "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

In order to demonstrate that he was denied the effective assistance of counsel a defendant must first show that trial counsel's performance was "deficient," and second, a defendant must show that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Whether defense counsel's performance was deficient is measured against an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To prove prejudice, the defendant must demonstrate the existence of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 302-303.

Defendant argues that evidence of his prior convictions and probation violations was inadmissible under MRE 404(b) because it was used to prove he had an intrinsic propensity to commit the crime charged and because the evidence was highly prejudicial. "Relevant evidence" is "evidence having any 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. Generally speaking, relevant evidence is admissible unless otherwise precluded by constitution, statute, or rule, and irrelevant evidence is never admissible. MRE 402. Rules 401 and 402 make up "logical relevance." *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993).

Rules 403 and 404 deal with "legal relevance." The two rules limit the use of logically relevant evidence. See *Huddleston v US*, 485 US 681, 687; 108 S Ct 1496; 99 L Ed 2d 771 (1988). Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." MRE 403. Additionally, evidence of previous or subsequent crimes, wrongs, or acts is not admissible to prove an intrinsic propensity to commit a specific crime. MRE 404(b)(1). However, evidence of a defendant's prior convictions or other bad acts that are material to an issue at bar may be admissible if offered to prove "other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system of doing an act, knowledge, identity, or absence of mistake or accident." MRE 404(b)(1). MRE 404(b) is an inclusory rule; that is, it does not limit admissibility to the exceptions explicitly listed. *VanderVliet*, *supra* at 63-65. Rather, the rule merely prohibits using bad acts to "show the criminal propensity of an individual to establish that he acted in conformity therewith." *Id.* at 63-65; MRE 404(b)(1).

To be admissible, evidence of prior bad acts must: 1) be offered for a proper purpose, that is, for a purpose other than to show propensity or to utilize character-to-conduct reasoning; 2) the evidence must pass the relevancy requirement delineated by MRE 402 as enforced via MRE 104(b), and it must be material to fact "in issue" at trial; 3) the evidence must fulfill the requirements of MRE 403, that the evidence's probative value is not "substantially outweighed" by the risk of unfair prejudice; and 4) upon request, the trial court may offer a limiting

instruction to the jury via MRE 105. *VanderVliet*, *supra* at 55-56; See also *People v Sabin*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

Here, two of the essential elements of defendant's aggravated stalking charge were that the "contact would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually cause[d] the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." For the jury to make an intelligible determination regarding the complainant's subjective and objective fear, it was necessary for the jurors to understand her knowledge of defendant's criminal background. See *People v Aguwa*, 245 Mich App 1; 626 NW2d 176 (2001). Thus, defendant's bad acts were offered for a proper purpose—to prove an essential element of the aggravated stalking charge.

Under part 2 of the test, defendant's bad acts must be relevant. That is, the offered evidence must be material and probative of facts of consequence to the determination of the case. MRE 401. Here, the impact that the knowledge of defendant's prior convictions had upon the complainant was material and probative as it dealt directly with the essential elements of the aggravated stalking charge—subjective and objective fear. MRE 401; *People v Crawford*, 458 Mich 376, 388-389; 582 NW2d 785 (1998).

Part 3 of the 404(b) analysis focuses on whether the probative value of the evidence was substantially outweighed by the risk of unfair prejudice. MRE 403 seeks to circumvent two problems prejudicial evidence may have. First, that the jury may give the evidence too much probative force, essentially deciding the case on only marginally probative evidence. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Second, that where the possibility of substantial prejudice exists, it would be unfair to allow the proponent to utilize the evidence. *Id*. at 75-76. Here, the jury was able to hear about every one of defendant's prior convictions. To show the complainant's subjective and objective fear of defendant, it was not necessary to disclose defendant's previous bad acts of drunk driving. But counsel allowed those convictions into evidence as a matter of trial strategy to show that, because defendant was completely forthright about his prior criminal record, the jury should believe his denials of stalking the complainant in this case. The fact that the strategy did not ultimately succeed does not establish that defendant was denied the effective assistance of counsel. See *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The fourth and final step of the 404(b) analysis states that, upon request, the trial court may offer a limiting instruction to the jury via MRE 105. *Sabin*, *supra* at 55-56. There is a strong presumption that jurors follow the instructions of the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Further, a limiting instructing detailing the proper utilization of 404(b) bad acts evidence "protects a defendant's right to a fair trial." See *People v Kahley*, 277 Mich App 182, 185; 744 NW2d 194 (2007). Here, the trial court gave the jury a limiting instruction stating that evidence of defendant's prior bad acts could only be used for proper purposes. The court explained these purposes in detail. Thus, the limiting instruction prevented any prejudicial repercussions accompanying defendant's bad acts evidence.

Additionally, defendant argues that the prosecutor improperly elicited evidence of defendant's previous DUI and prowling conviction during the cross-examination of defendant. Under MRE 404(a)(1), evidence relating to character or trait of character is admissible where evidence of the pertinent trait of character is offered by the accused or offered by the prosecution

to rebut the same. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). In the present case, defense counsel asked defendant whether he had prior convictions in an apparent attempt to display defendant's pertinent trait for honesty. However, defendant failed to include his previous DUI and prowling convictions. Thus, it was fair game for the prosecutor to question defendant about those two previous specific instances of conduct since the testimony was elicited to show defendant's lack of credibility as opposed to prove his propensity to commit a specific crime. *Id*. at 499-500; MRE 404(a)(1).

To establish his claim of ineffective representation, defendant has to demonstrate that counsel's assistance was so egregious that he was prohibited from obtaining a fair trial and that there exists a reasonable likelihood that but for counsel's incompetent behavior a different trial outcome would have occurred. *Pickens, supra* at 314. The trial court properly instructed the jury of the elements of aggravated stalking and defined the meaning of "unconsented contact." In establishing the elements of the offense, the prosecutor offered the testimonies of the complainant and others to prove that defendant regularly showed up at the K-Mart where the complainant worked, followed the complainant around the store, waited for her in the parking lot, and attempted to get her attention when she left the store. The complainant also testified that she suffered emotional distress from defendant's conduct and that she was frightened of him, especially after finding out he was previously convicted of stalking and a sexual misconduct offense. Essentially, the prosecutor's proffered testimony was substantial while defendant's was minimal and consisted almost entirely of contradictions. Credibility determinations are to be determined solely by the jury. *People v Odom*, 276 Mich App 407, 419; 740 NW2d 557 (2007). Here, it is clear that the jury found the complainant to be more credible than defendant, and that defendant would have been convicted regardless of his counsel's stipulation and failure to object. Therefore, defendant has not shown he was denied the effective assistance of counsel.

Defendant next argues there was insufficient evidence to support his conviction of aggravated stalking. Specifically, defendant asserts that his contacts with the complainant did not rise to the level of "unconsented contact," as that term is defined in the aggravated stalking statute. We disagree.

Statutory language must be construed to give effect to the Legislature's intent. *People v McCullough*, 221 Mich App 253, 255; 561 NW2d 114 (1997). A criminal statute must be construed strictly, "with each word interpreted according to its ordinary usage and common meaning." *Id*. Here, the trial court instructed the jury as to the elements of aggravated stalking using the statutory language. The court also gave a limiting instruction to the jury, detailing how to properly consider the evidence relating to defendant's prior bad acts. There is a strong presumption that jurors follow the instructions of the court. *Graves, supra* at 486. Further, a limiting instruction detailing the proper utilization of 404(b) bad acts protects a defendant's right to a fair trial. *Kahley*, 277 Mich App at 185. Thus, absent proof by defendant, we will not presume that the jurors disregarded the trial court's limiting instructions or its instructions defining the elements of aggravated stalking. *Graves, supra* at 486; *Kahley*, *supra* at 185.

The complainant and others testified that defendant repeatedly followed the complainant and appeared within the sight of her, as described by MCL 750.411i(1)(f)(i), and appeared at the complainant's workplace, as described by MCL 740.411i(1)(f)(iii). Although neither the complainant nor other employees of K-Mart told defendant to stop his behavior, the statute provides, and the jury was instructed, that unconsented contact is simply continued contact

without the victim's consent. MCL 740.411i(1)(f). Contrary to what defendant claims, the proofs established multiple incidents in which he had unconsented contact with the complainant.

Thus, "when view[ing] the evidence in the light most favorable to the people" and "draw[ing] all reasonable inferences" to support the jury verdict, we hold that the evidence adduced at trial was sufficient for a rational jury to determine beyond a reasonable doubt that defendant was guilty of aggravated stalking. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald