STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May17, 2007
v	No. 268038 Marquette Circuit Court
STUART EDWARD MAKI, Defendant-Appellant.	LC No. 05-042710-FH

Before: Schuette, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(c). He was sentenced to a term of 5 to 15 years' imprisonment. He appeals as of right. We affirm.

Following a New Year's Eve party at his wife's cousin's home, defendant fell asleep, fully dressed, in a reclining chair while his wife fell asleep in a child's vacant bedroom. Eventually all the other guests went home, and the host and his girlfriend went to their bedroom at the end of the hall opposite the child's bedroom. The girlfriend awoke to an individual digitally penetrating her anus and vagina. She initially attributed the touching to her boyfriend, but soon realized that he was asleep in front of her. She tried to wake her boyfriend discreetly by scratching him, but defendant would stop moving every time the boyfriend stirred and resumed his hand's motion when the boyfriend drifted off again. Eventually, the girlfriend scratched her boyfriend's stomach hard enough that he awoke and said "ouch." At this, defendant slipped quietly from the room, and the girlfriend saw a shadow move down the hall and toward the nearby bathroom. She heard the sound of washing hands and saw a shadow reappear and head toward the living room. When she saw the shadow appear again and head back toward her bedroom, she woke her boyfriend, had him shut the bedroom door, and told him what had happened. The boyfriend went to the living room, where defendant was now in his underwear on a couch. Defendant acted oblivious to the boyfriend's questions, so the boyfriend went and woke his cousin, who went out to the living room and stirred defendant by screaming threats that she would either kill him or call the police. Defendant's wife retrieved his pants from the bathroom and drove him home. Defendant's sole defense at trial was that his complete intoxication made it impossible for him to perform the alleged acts undetected. However, defendant admitted that several years earlier, while married to another woman, he had sneaked into a bedroom where his wife's friend was sleeping and performed cunnilingus on her. He admitted that he pleaded no-contest to charges that arose from that incident.

Defendant does not challenge the admissibility of the cunnilingus evidence and acknowledges that the evidence was admissible to show that he used a common "scheme, plan, or system" in committing the two crimes. MRE 404(b)(1). However, he asserts that the prosecutor impermissibly used the evidence to argue that defendant's previous sexual conduct meant that he probably violated the victim in this case. Although some of the prosecutor's arguments were inappropriate and merited correction, defendant never objected to the statements. Because defendant never objected, "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

Defendant first challenges the prosecutor's reference to the adage that lightning does not strike in the same place twice. Although the comment somewhat insinuates that defendant's propensity increased the likelihood that he committed the charged crime, the comment could just as easily be understood as a permissible reference to defendant's common scheme or system. The comment suggests that a proposed set of circumstances might, in isolation, appear unlikely or implausible, but a substantially similar crime against another victim indicates that the events were actually the product of criminal design. If proven, the existence of the designed scheme, plan, or system justifies the inference that the defendant committed the charged crimes in accordance with his criminal design, and evidence of human design substantially undermines notions of randomness and chance. *People v Sabin* (*After Remand*), 463 Mich 43, 63-64 n 10; 614 NW2d 888 (2000). In the end, the prosecutor's vague allusion to the familiar adage did not unduly prejudice defendant, so defendant's argument fails.

Defendant also accuses the prosecutor of misconduct for indicating that defendant committed a similar crime before, so he could have committed the crime at issue. We disagree with defendant's characterization of the prosecutor's comment. The prosecutor was clearly referring to defendant's argument that he was a "big guy" who had drunk far too much alcohol to be stable, so he could not have sneaked into and out of the victim's bedroom undetected. In context, the prosecutor was not impermissibly pointing to defendant's character, but to his capacity to execute the crime. Therefore, the reference was not directed at defendant's character, but his physical ability under similar circumstances, and the prosecutor did not commit misconduct by this reference to the earlier sexual assault. MRE 404(b)(1).

Defendant's final claim of prosecutorial misconduct arises from the prosecutor telling the jurors that their "job as a jury is to tell [defendant,] . . . you did this once, you should have known better. You sure don't get to do this twice and get away with it." We agree with defendant that this argument was impermissible. Not only did the argument erroneously imply that defendant "got away with" the first sexual assault, it further implied that the jury should take the mere occurrence of the first assault into consideration when evaluating whether it should punish him with a guilty verdict. A jury's tendency to punish a defendant's residual guilt for an uncharged act is one of the primary reasons commonly cited for excluding entirely evidence of a defendant's other acts. *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998). However, we are not persuaded that this isolated comment prejudiced defendant. In context, the argument was intended to defray sympathy that the jury might show defendant for his family situation and potential prison term. Moreover, both attorneys and the judge clearly explained to

the jury that other-acts evidence should never be used, in the prosecutor's words "to convict somebody because they were bad once and say, therefore, they're bad again." Because the judge and both attorneys reiterated that the evidence could not be considered for character purposes, an immediate objection would have cured any incidental prejudice that the remark caused. Therefore, we will not reverse on these grounds. *Leshaj*, *supra*.

Although defendant also challenges the trial court's instructions to the jury regarding the other-acts evidence, his attorney approved the instructions on the record, so he has waived their review. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Moreover, defendant fails to demonstrate any misstatement of the law in the instructions provided. Although the instructions did not directly limit the jury's consideration of the evidence to defendant's scheme, plan, or system, the trial court redundantly directed the jury that it was prohibited from considering the other-acts testimony as evidence of defendant's bad character or his propensity to commit sex crimes. Because this is the only limitation that the rules place on the use of the evidence, defendant fails to demonstrate any legal error in the trial court's instructions. MRE 404(b). Contrary to defendant's argument, the trial court did not erroneously instruct the jury that it could use the evidence to determine the victim's credibility. See *Sabin*, *supra* at 69-70. Instead, the court's "believability" comments were directed at both defendant and the victim and impressed upon the jury its limited role of determining the evidence's bearing on the relevant issues in the case before it. Under the circumstances, the trial court's instructions properly reflected the limitations that the rules of evidence placed on the jury's use of the evidence.

Finally, defendant raises the alternative argument that his counsel was ineffective for failing to object to the trial court's instructions and alleged prosecutorial misconduct with regard to the other acts evidence. We disagree.

> To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. [*People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003), citations omitted.]

Defendant has failed to overcome the presumption of strategy in this case and has not established any actual prejudice from his counsel's performance. Defendant has only demonstrated one legitimately disconcerting statement by the prosecutor, and that statement, taken in context, was relatively minor. Under the circumstances, an objection to it would only have reiterated what the prosecutor and judge had already told the jury about the limitations of the other-acts evidence, and an objection would have risked calling even more attention to the damaging evidence. As it was, defense counsel also wisely refrained from arguing how the evidence could legitimately be used, and he only vaguely explained that the judge would later instruct the jury. Defense counsel then argued, "It's for a very limited purpose. It's not to prove that he did it this time." This argument demonstrated that defense counsel did not want the jury ruminating on the similarities between the crimes or imagining how the first incident demonstrated a scheme or system of victimization. It also explains trial counsel's satisfaction with the judge's vague instructions on the proper use of the other-acts evidence. Counsel's

strategy very nearly obtained a hung jury for defendant in what appears to us to be a straightforward, clear-cut case, so we are not at all persuaded that trial counsel performed deficiently.

Affirmed.

/s/ Bill Schuette
/s/ Peter D. O'Connell
/s/ Alton T. Davis