STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE LAMONT GIBSON,

Defendant-Appellant.

UNPUBLISHED
December 2, 1997

No. 193354
Calhoun Circuit Court
LC No. 95-001071

Before: White, P. J., and Cavanagh and Reilly,* JJ

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit criminal sexual conduct involving sexual penetration. MCL 750.520g(1); MSA 28.788(7)(1). The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to ten to twenty years' imprisonment, to be served consecutively to the sentence he is currently serving for another conviction. Defendant now appeals his conviction and sentence as of right. We affirm.

The prosecution presented two witnesses at trial. First, the victim testified that defendant came to her door at 2:00 a.m. on March 27, 1995. The victim was alone with her five-year-old daughter who was sleeping. When she opened the door, defendant told her he was having car trouble and asked if he could use her telephone. The victim knew who defendant was, but had never formally met or socialized with him. She permitted him to come into the kitchen to use the telephone. Defendant made a call, but said that the line was busy and asked if he could wait for a few minutes to try again. The victim consented and invited defendant to sit down in the living room while he was waiting. After a brief conversation in which defendant asked the victim if she lived alone, he went to use her telephone a second time. When defendant appeared to finish with his call, he thanked the victim by hugging her and giving her a kiss on the neck. The victim testified that she did not want to be kissed and hugged, so she put her arms up between them. As the victim tried to push defendant away, he grabbed her right arm. According to the victim, defendant then looked at her "up and down from head to toe" and said, "let me have some of that." After the victim pulled her arm away, defendant grabbed her and attempted to wrestle her down onto the floor. Ultimately, the victim was able to break free and frighten defendant away with a kitchen knife.

A second witness testified that on March 26, 1995, at about 11:00 a.m., defendant knocked on her door while she was home alone. According to the witness, defendant told her that he was having car trouble and asked to use her telephone. The witness brought a cordless telephone to the door and handed it to defendant, leaving the door partially open. The witness then went into the kitchen to fix something to eat. While she was in the kitchen, defendant walked into the house and told her that the person he was trying to call was not there, and that he was going to wait a few minutes before trying again. Defendant sat in a chair in the kitchen near the witness and began to talk to her. The witness testified that the next thing she knew, defendant grabbed her from behind and ran her into the side of the couch. Defendant then pushed her up against the door and demanded that she take her clothing off. The witness did not remove her clothing. Eventually, she was able to get away from defendant and escape through a bedroom window.

On appeal, defendant first challenges the sufficiency of the evidence. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The elements of assault with intent to commit criminal sexual conduct involving sexual penetration are as follows: (1) There must be an assault, (2) defendant must have intended to commit an act involving some sexually improper purpose, (3) the defendant must intend a sexual act involving some actual entry of another person's anal or genital openings or some oral sexual act, and (4) there must be some aggravating circumstances, e.g., the use of force or coercion. See *People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 750 (1982). However, the prosecution need not prove that the sexual act was started or completed. *Id.* at 755. Defendant does not challenge the sufficiency with regard to the assault element. Nor does defendant claim that there was insufficient evidence of his use of force or coercion. Those elements are clearly established by the victim's testimony that defendant repeatedly grabbed her and wrestled with her. Specifically, defendant contends that the prosecution failed to prove beyond a reasonable doubt that defendant intended to sexually penetrate the victim. We disagree.

Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of an offense. *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991). Thus, the element of intent may be inferred from the facts and circumstances. *Id.* Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. See *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). In this case, a rational trier of fact could have inferred defendant's intent to commit an act of sexual penetration from evidence of (1) defendant's conduct of hugging the victim, kissing her on the neck, and then attempting to physically force her down onto the floor while she struggled to get away, and (2) defendant's statement, "let me have some of that," which he made to the victim immediately after gazing at her body "up and down from head to toe" and immediately before attempting to wrestle her down onto the floor. Although there was not overwhelming evidence that defendant intended to commit sexual penetration as opposed to sexual contact,[1] the victim's testimony that defendant tried to wrestle her down onto the floor

combined with the other witness' testimony that, less than twenty four hours earlier, defendant had asked her to remove her clothing during a nearly identical assault, suggested that defendant intended to go beyond some sort of inappropriate touching when he assaulted the victim. Accordingly, we hold that when viewed in the light most favorable to the prosecution, the evidence was sufficient to find defendant guilty of assault with intent to commit criminal sexual conduct involving sexual penetration.

Defendant next argues that the trial court erred in admitting evidence of defendant's prior bad acts when it allowed the witness to testify about being assaulted by defendant on the day before the charged incident. We disagree. The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

The admissibility of a defendant's other crimes, wrongs or acts is governed by MRE 404(b). Other acts evidence is admissible under 404 (b) if (1) the evidence is offered for a proper purpose, which means that it must be offered for some purpose other than to show the character of a person in an effort to prove conduct in conformity therewith, (2) the evidence is relevant to an issue or fact of consequence at trial (other than by way of a showing of mere propensity), and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. See *People v VanderVliet*, 444 Mich 52, 64, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Upon request, the trial court may provide an appropriate limiting instruction to the jury. *Id*. at 75. In application, the admissibility of such evidence under MRE 404(b) hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *Id*.

In this case, the prosecution offered the evidence to show a scheme or plan. This was a proper purpose under MRE 404(b). See *People v Miller (On Remand)*, 186 Mich App 660, 664; 465 NW2d 47 (1991). However, a showing that defendant engaged in a scheme or plan is not an end in itself. Such evidence is only relevant if it tends to make the existence of a fact of consequence more or less probable. See MRE 401. Although defendant is correct in contending that the prosecution did not, in offering the evidence, specifically argue that it would be relevant to the issue of intent, the evidence of defendant's "scheme or plan" was clearly used toward this end. As such, it was offered for a proper purpose and was relevant to an issue or fact of consequence at trial other than by way of a showing of mere propensity. *VanderVliet*, *supra* at 74-75.

Finally, the danger of undue prejudice in admitting the other acts testimony did not substantially outweigh its probative value. Unfair prejudice exists when it is probable that marginally probative evidence will be given undue or preemptive weight by the jury and where admission of the evidence would be inequitable under the circumstances. See *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, modified 450 Mich 1212; 539 NW2d 504 (1995). In this case, the great degree of similarity between the prior assault and the charged offense and the fact that the evidence was highly probative of defendant's intent, leads us to the conclusion that the danger of unfair prejudice was not so great as to substantially outweigh its probative value. Although the trial court did not make this finding on the record, it was not required to do so. *People v Vesnaugh*, 128 Mich App 440, 448; 340 NW2d 651

(1983). Accordingly, we hold that the trial court did not abuse its discretion in admitting the challenged evidence.

Defendant next argues that he was denied a fair trial as the result of two instances of prosecutorial misconduct. When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* Because defendant did not object to these remarks below, appellate review is precluded unless a curative instruction could not have removed any prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v Nantelle,* 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

First, defendant contends that the prosecutor's argument that the other acts evidence could be used to prove defendant's intent was improper when the evidence was only offered and admitted for the limited purpose of establishing defendant's scheme or plan. We disagree. While it is improper for a prosecutor to argue that other acts evidence should be considered for a purpose different than that for which it was admitted, *People v Haines*, 105 Mich App 213, 218; 306 NW2d 455 (1981), in this case, the evidence of defendant's scheme or plan was not restricted to the issue of identity, which was not in dispute, and fairly included the issue of defendant's intent. Therefore, the prosecutor's argument was not improper.

Second, defendant claims that the prosecutor improperly asked the jurors to put themselves in the victim's position. Prosecutors are generally prohibited from putting the jurors in the position of the victim. *People v Leverette*, 112 Mich App 142, 151; 315 NW2d 876 (1982). By doing so, the prosecutor may evoke sympathy for the victim, or elicit the jurors' fears of being victimized themselves. In this case, the prosecutor asked the jurors to put themselves in the shoes of the victim for purposes of establishing the intent element of the crime. The prosecutor's comments were not emotionally charged and were not the sort of remarks that would be likely to elicit sympathy or fear from the jurors. Therefore, even though the prosecutor should not have asked the jurors to put themselves in the shoes of the victim, the result was not manifestly unjust. Moreover, any unfair prejudicial effect could have been removed by a prompt curative instruction. *Nantelle, supra* at 87.

Finally, defendant claims that his sentence as an habitual offender was disproportionately severe. We disagree. Sentencing decisions are subject to review by this Court on an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of the trial court's discretion if it violates the principle of proportionality. The principle of proportionality requires sentences to be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 636. In this case, because defendant failed to provide this Court with a copy of his presentence investigation report as required under MCR 7.212(C)(7), he has waived this issue. *People v Rodriguez*, 212 Mich App 351, 355; 538 NW2d 42 (1995). However, even if the issue had been properly preserved, we would find defendant's sentence proportionate. The purpose of habitual offender sentence enhancements is to deter recidivism by increasing the punishment for subsequent offenders. *People v Hendrick*, 398 Mich 410, 416-417; 247 NW2d 840 (1976). Prior to sentencing in this case, defendant had already been convicted of three

other felonies, including criminal sexual conduct in the first degree, MCL 750.5206; MSA 28.788(2). Defendant also has several misdemeanor convictions. Thus, defendant's prior record reflects the need for such deterrence. Moreover, although defendant was frightened away before the victim received any physical injuries or sexual penetration, the jury found that defendant calculated and executed a violent attack for purposes of achieving sexual penetration. Accordingly, we find the sentence to be proportionate to the offense and the offender. *Milbourn, supra* at 635-636.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly

[1] The jury was also instructed on the lesser offense of assault with intent to commit criminal sexual conduct in the second degree, MCL 750.520g(2); MSA 28.788(7)(2), which differs from assault with intent to commit criminal sexual conduct involving sexual penetration in two respects: (1) The defendant must only have intended "sexual contact" as opposed to penetration, and (2) the defendant must have intended to do the act for the purpose of sexual arousal or sexual gratification, as opposed to merely intending some sexually improper purpose. See *Snell, supra* at 754-755.