

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY JOVAN ADAMS,

Defendant-Appellant.

UNPUBLISHED

August 8, 2000

No. 218903

Saginaw Circuit Court

LC No. 98-015095-FH

Before: Murphy, P.J., and Kelly and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a), extortion, MCL 750.213; MSA 28.410, and assault with intent to commit sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged in a five-count information with first-degree home invasion (Count I), second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3) (Count II), assault with intent to commit sexual penetration (Count III), first-degree home invasion (Count IV), and extortion (Count V). Counts I-III involved complainant Dawn Dickinson. Counts IV-V involved complainant Kimberly Ovalle. The trial court severed Counts I-III, and defendant was tried separately on those counts. The jury convicted defendant as charged. In *People v Adams*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 2000 (Docket No. 213141), another panel of this Court affirmed defendant's convictions, and rejected his argument that the trial court abused its discretion by admitting similar acts evidence.

After the trial the prosecution moved to add Count VI, assault with intent to commit sexual penetration. The trial court remanded the case for a second preliminary examination. Defendant was bound over on the charge. The prosecution filed an amended information charging defendant with Counts IV-VI, and a supplemental information charging him as a second habitual offender, MCL 769.10; MSA 28.1082.

At trial on Counts IV-VI, Ovalle testified that she learned that on the evening of December 7, 1997, her daughter Alexandra had observed a person looking in the window at her while she bathed. Ovalle stated that the next morning she awoke to find a man choking her. He told her that if she did not let him rape her, he would rape and kill her daughter. Ovalle and her children escaped from the house. She indicated that when shown photographs by the police, she chose two subjects as possible assailants. One choice was defendant. Alexandra testified that she viewed photographs and identified defendant as the assailant. Dawn Dickinson gave similar acts testimony, indicating that on November 30, 1997, she awoke to find a man attempting to rape her. He fled when she screamed. She stated that a number of items, including two rings, were taken from her home. Plastic had been removed from her bedroom window. She acknowledged that she was unable to identify her assailant from photographs. Jolyn Thies testified that on one occasion she heard a noise outside her window. When she went to investigate, a man outside the window made a vulgar comment. She could not identify her assailant. Edgar Thies testified that a storm window was removed from his daughter's bedroom window. Defendant's former girlfriend testified that defendant gave her two rings that he said he had purchased from a friend. Defendant's mother testified that defendant had been with her when the incidents involving Dickinson and Ovalle were alleged to have occurred. Defendant gave similar testimony.

The jury convicted defendant as charged. The trial court sentenced defendant as an habitual offender to concurrent terms of twenty to thirty years for the convictions of first-degree home invasion and extortion, and ten to fifteen years for the conviction of assault with intent to commit sexual penetration, with credit for 461 days.

Evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show conformity therewith. Such evidence may be admissible to show motive, opportunity, intent, preparation, scheme, plan, or system in doing an act. MRE 404(b). To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show a propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). We review a trial court's decision to admit other acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Defendant argues that the trial court abused its discretion by admitting other acts testimony from Dickinson, Jolyn Thies, and Edgar Thies. We disagree. Other acts evidence is admissible to prove identity if the defendant raises an alibi defense. *People v Lee*, 434 Mich 59, 95; 450 NW2d 883 (1990). The evidence was offered for the proper purposes of proving identity and to demonstrate defendant's plan or scheme. Defendant offered an alibi defense, i.e., that he was with his mother when the incidents involving Dickinson and Ovalle occurred. The evidence was relevant, *Crawford, supra*, 388-390, particularly as it concerned defendant's plan or scheme. The evidence showed that the homes occupied by Dickinson, Ovalle, and Thies were in the same neighborhood. In each case, defendant looked through or gained entry by a window. The evidence had significant probative value in light of defendant's alibi defense, in that it made defendant's identity as the perpetrator in each case

more likely than it would have been without the testimony. The probative value of the evidence was not outweighed by the danger of unfair prejudice. MRE 403. The jury received an appropriate limiting instruction regarding use of the evidence. *People v Gibson*, 219 Mich App 530, 534; 557 NW2d 141 (1996). Admission of the evidence did not constitute an abuse of discretion.

Defendant also argues that he was denied due process when the trial court remanded the case for a second preliminary examination at which no new evidence was presented, and when a supplemental information applying to Counts IV-VI was filed. We disagree. A trial court has no jurisdiction over a new offense if the defendant has not had a preliminary examination on that offense. MCL 767.42(1); MSA 28.982(1); *People v Price*, 126 Mich App 647, 653; 337 NW2d 614 (1983). When the prosecution sought to amend the information to add Count VI, the prosecution properly remanded the matter for a preliminary examination on that charge. The evidence presented at the second preliminary examination was the same as that which was presented at the first examination; however, this matter was not remanded for the purpose of rearguing it in order to enhance the offense on which defendant was bound over for trial. Cf. *People v Stafford*, 168 Mich App 247; 423 NW2d 634 (1988), *aff'd* 434 Mich 125; 450 NW2d 559 (1990). Moreover, plaintiff was not seeking to reprosecute defendant on a charge that had been dismissed for lack of probable cause. Cf. MCR 6.110(F); *People v Robbins*, 223 Mich App 355, 361-363; 566 NW2d 49 (1997).

Finally, we note that defendant's assertion that plaintiff violated his right to due process by including Counts IV-V in the amended information and charging him as an habitual offender with respect to all three counts is unsupported by any citation to authority. For that reason, we decline to consider the issue further. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999).

Affirmed.

/s/ William B. Murphy

/s/ Michael J. Kelly

/s/ Michael J. Talbot