STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 2, 2004
v	No. 244218 Ingham Circuit Court
DAVID PHILLIP DRAHEIM, Defendant-Appellant.	LC No. 01-077257-FC

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and was sentenced to a prison term of sixty to ninety years. He appeals as of right. We affirm.

Before defendant's preliminary examination in district court, he successfully moved to have the Ingham County prosecutor's office disqualified from prosecuting the case. The motion was based on the purported existence of an immunity agreement between defendant and the prosecutor's office.[1] The district court determined that the Ingham County prosecutor's office was disqualified based on its purported agreement with defendant that defendant would not be prosecuted if he passed a polygraph examination.[2] The circuit court reversed, finding that:

> The alleged existence of an agreement not to prosecute the Defendant Draheim was not grounds for disqualifying the Ingham County Prosecutor. It was not a conflict of interest, nor was it any other impropriety.

Defendant argues that the circuit court erred by reversing the district court's disqualification of the Ingham County prosecutor's office. We disagree.

The district court did not explain how the prosecutor's purported agreement with defendant served as the basis for its decision to disqualify the prosecutor's office. However, case

[1] Defense counsel clarified at the hearing that he was not contesting the right of the Attorney General to bring the charges. In other words, defense counsel's position was not that defendant was immune from prosecution.

[2] The district court held, however, that defendant was not immune from prosecution.

law is clear that a prosecutor may be disqualified based on a conflict of interest. The determination that a prosecutor should be disqualified based on a conflict of interest is a question of fact reviewed for clear legal error. See *People v Mayhew*, 236 Mich App 112, 126; 600 NW2d 370 (1999). A conflict of interest exists where "the prosecutor has a personal, financial, or emotional interest in the litigation or a personal relationship with the accused." *Id.* at 126-127. A conflict of interest also exists where the prosecutor was privy to confidential information while in an attorney-client relationship. *People v Herrick*, 216 Mich app 594, 599; 550 NW2d 541 (1996).

In this case, neither the district court nor the trial court found a conflict of interest. Therefore, the trial court did not commit clear error in holding that the Ingham County Prosecutor's Office should not have been disqualified from prosecuting the case.

Defendant next argues that the trial court erred in admitting evidence regarding the circumstances of defendant's 1990 attempt to kidnap a woman. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998), citing *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995).

MRE 404(b) allows for the admission of other-acts evidence in limited circumstances. It provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

A three-part test applies to determine admissibility under this rule. First, the prosecutor must offer the evidence for a proper purpose – and not in furtherance of "a character to conduct or propensity theory." *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000), citing MRE 404(b). Second, the evidence must be relevant. *Id*. Third, under MRE 403, the evidence's probative value must outweigh any potential prejudice that may result from its admission. *Id.* at 55-56, quoting *People v Vandervliet*, 444 Mich 52, 75; 508 NW2d 114 (1993). See also *People v Knox*, ___ Mich ___; ___ NW2d ___ (Docket No. 123970, issued February 4, 2004).

To show a common "plan, scheme or system" – a proper purpose – the evidence proffered "needs only to support the inference that the defendant employed the common plan in committing the charged offense." *People v Hine*, 467 Mich 242; 253; 650 NW2d 659 (2002), citing *Sabin*, *supra* at 65-66. There must be "such a concurrence of common features that the uncharged and charged acts are naturally explained as the individual manifestations of a general plan." *Id.* at 251, citing *Sabin, supra* at 64-65.

The common feature of the 1990 incident and the murder at issue here is flex cuffs. Here, flex cuffs bound the victim's wrists. And a search of defendant's vehicle shortly after the earlier attempted kidnapping revealed that he had objects strongly resembling flex cuffs in his

possession. The trial court also noted that both crimes took place in isolated areas. The evidence offered demonstrated prior acts by defendant that were similar to the acts that were determined to have been used on the victim in the present case. Thus, unlike the situation in *Knox, supra*, the evidence of defendant's past acts did not serve to demonstrate only that defendant had the bad character or propensity to harm the victim.

Even if we were to find that the charged and uncharged incidents lacked shared features allowing an inference of a common plan, reversal would not be warranted. Defendant fails to show that any purported error "more probable than not" was "outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Indeed, defendant only makes the bare assertion that the testimony of the attempted kidnapping victim was outcome determinative.

Even without the prior acts evidence, there was evidence from three witnesses linking defendant with flex cuffs, including the testimony of two women who had been restrained by defendant with flex cuffs. Perhaps more significantly, testimony from defendant's former roommate and a Michigan State Police tool marks expert put defendant in possession of a flex cuff that was made "within a thousand" of the flex cuff found on the murder victim's body. There was also testimony from defendant's ex-wife regarding his possession of pornographic material depicting women in bondage and testimony from defendant's former co-worker that defendant expressed his desire to "make [a woman] hurt real bad." For these reasons, any error resulting from the admission of the attempted kidnapping victim's testimony was harmless and not a basis for reversing defendant's conviction.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot