STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 2010
v	No. 288783 Delta Circuit Court
BRIAN JAMES MOYLE, Defendant-Appellant.	LC No. 08-007889-FH

Before: BECKERING, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim 13 to 15 years old), and sentenced to 5 to 15 years in prison. He now appeals by right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant met the victim at a music festival where both were working. She was 13, and he was 27. The relationship further developed over the phone and the Internet, and eventually progressed to sexual intercourse in his residence. Defendant implored the victim to keep the relationship a secret, but she eventually told a family friend. Members of the victim's family and others confronted defendant, and he admitted to having sex with the victim when she was 13. Evidence was admitted at trial that defendant also engaged in sexual relationships with D.R. when she was 16 years old, and with C.S. when she was 14 years old.

Defendant now argues that the evidence of these other sexual relationships was improperly admitted under MRE 404(b). Defendant did not object below to the admission of the other acts evidence on the grounds that it was improper propensity evidence. Therefore, we review the issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MRE 404(b)(1) generally governs admission of evidence of other acts. It provides as follows:

> 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.

To be admissible under MRE 404(b), evidence (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009). Further, "the trial court, upon request, may provide a limiting instruction under MRE 105." *People v Sabin* (*After Remand*), 463 Mich 43, 56, 614 NW2d 888 (2000).

"A proper purpose for admission is one that seeks to accomplish something other than the establishment of a defendant's character and his propensity to commit the offense." *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). The prosecution offered the other acts testimony in order to show defendant's motive, opportunity, intent, preparation, scheme, plan or system in doing an act. These are generally proper purposes under MRE 404(b).[1] *Sabin*, 463 Mich at 59 n 6.

We first address whether the prior bad acts evidence was properly admitted for the purpose of showing a common plan, scheme, or system, which is one of the non-character purposes for the proposed evidence that the prosecution proffered at trial. In *Sabin* our Supreme Court explained that "[g]eneral similarity between the charged and uncharged acts does not . . . by itself, establish a plan, scheme, or system used to commit the acts," *id*. at 64. Instead, what is required is "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations," *id*. at 64-65, quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249 (emphasis omitted). Further, the plan, scheme, or system, need not be unusual or distinctive. *People v Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002); *Sabin, supra* at 65-66.

As to relevance, evidence of misconduct similar to that charged is logically relevant to show that the charged act occurred if the uncharged misconduct and the charged offense are "sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Sabin*, 463 Mich at 63. The testimony of both other-acts witnesses presented a factual situation that is extremely similar to the instant offense. Defendant had a sexual relationship with all three girls when they were minors. All three stated that defendant knew that they were under the age of 18. The victim and C.S. testified about sexual encounters occurring at defendant's residence. The victim met defendant while he was working at a music festival, and the other two girls met him at the bowling alley where he worked. Defendant communicated with all three via the Internet, and defendant also communicated with the victim

[1] We note, however, that in a sex offense involving penetration, motive and intent are generally not relevant. *Sabin*, 463 Mich at 68-69. We also remind the prosecution that it is the attorney's responsibility to clearly articulate the evidentiary bases on which he or she is either seeking to introduce or preclude the admission of evidence. It is not this Court's job to ferret out such grounds.

and C.S. through text messaging and cell phone calls. As he did with the victim, defendant wanted the other two girls to keep their relationships a secret. Accordingly, the evidence was relevant to show defendant's system in meeting young girls, fostering a relationship though electronic communication that eventually resulted in sexual encounters, and then attempting to manipulate each girl into keeping the relationship a secret. In other words, the evidence was sufficient to infer the probability of "'a precedent design which in its turn is to evidence (by probability) the doing of the act designed.'" *Id*. at 64, quoting 2 Wigmore Evidence (Chadbourn rev), § 304, p 249.

Defendant also argues, as he did below, that his relationship with D.R. was not a "bad act" because it was consensual and legal given that she was 16 years old. MRE 404(b), however, explicitly states that evidence of other "acts" and "wrongs" is admissible under the rule, not merely other "crimes." Even if she were 16 years old, the circumstances of defendant's relationship with D.R. constitutes at least a relevant other act.

This other acts evidence was also not unfairly prejudicial. The danger of unfair prejudice exists where "marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). With respect to establishing defendant's plan or scheme to engage minor girls in sexual activity, the testimony of the other acts witnesses was not marginally probative. Further, there was little danger that the evidence would be given undue weight by the jury both because of the weight of the victim's testimony and the court's clear instructions as to how to consider the evidence. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). In sum, the trial court did not plainly err in admitting the other acts testimony.[2] *Carines*, 460 Mich at 763.

Defendant next argues that offense variable (OV) 8 was improperly scored because he did not asport the victim to a place of greater danger. Defendant notes that the victim testified at the preliminary examination that a friend and her mother transported her from her hometown to Escanaba, where defendant picked her up and drove her to his residence. At trial, however, she testified that defendant transported her from her hometown.

Under MCL 777.38(1)(a), 15 points is scored for OV 8 if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." This Court has held that "asportation" as used in OV 8 does not require the use of force against the victim. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

Despite the discrepancy in the victim's testimony, a preponderance of evidence still establishes that defendant asported the victim to his home, a location secreted from others and of greater danger to her. According to the victim's trial testimony, defendant picked her up in her hometown and drove to his home. At the preliminary examination, the victim clearly testified

[2] The admission of evidence with respect to C.S. was also proper under MCL 768.27a. *People v Dobek*, 274 Mich App 58, 88 n 16; 732 NW2d 546 (2007).

that defendant drove her back to his house after the two met up in his hometown. Either way, defendant ultimately secreted the victim away from observation by others. Therefore, OV 8 was properly scored. *Spanke,* 254 Mich App at 648.

We affirm.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello