STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID KIRK SHELTON,

Defendant-Appellant.

UNPUBLISHED
July 12, 1996

No. 184031
LC No. 93-125154 FC

Before: Murphy, P.J., and O'Connell and M.J. Matuzak,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), and one count each of assault with intent to commit criminal sexual conduct, MCL 750.520g(1); MSA 28.788(7)(1), and breaking and entering an occupied dwelling, MCL 750.110; MSA 28.305. The trial court sentenced defendant to forty to sixty years' imprisonment for each of the first-degree criminal sexual conduct convictions, 7½ to 10 years for the assault conviction and ten to fifteen years for the breaking and entering conviction. Defendant subsequently pleaded guilty to three counts of habitual offender, third offense, MCL 769.11; MSA 28.1083. At the habitual offender portion of defendant's sentencing, the sentence for the criminal sexual conduct convictions remained unchanged. However, the court vacated the other sentences and increased the assault sentence to 7½ to 20 years' imprisonment and imposed a ten- to thirty-year sentence for defendant's habitual offender plea corresponding to the breaking and entering conviction. He appeals as of right. We affirm.

Defendant's convictions arose out of his breaking into the victim's apartment while she lay sleeping in her bedroom. The victim awoke from hearing noises and defendant thereafter climbed onto her bed and, while raising a steak knife, repeatedly sexually assaulted her. Defendant was wearing a green-haired monster mask. On appeal, he raises two evidentiary issues and challenges his sentence.

Defendant first contends that the trial court abused its discretion when admitting testimony of similar acts in connection with the alleged commission of crimes upon a different victim approximately

* Circuit judge, sitting on the Court of Appeals by assignment.

three weeks prior to the commission of the instant offenses at the same apartment complex. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v McMillan*, 213 Mich App 134, 137; 539 NW2d 533 (1995).

In general, character evidence is inadmissible to prove that a person acted in conformity with that character trait on a particular occasion. MRE 404(a). However, evidence of other crimes, wrongs, or acts may be admissible to prove motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, or knowledge, identity or absence of mistake. MRE 404(b). Furthermore, whether such acts were done prior or subsequent to, or contemporaneous with, the conduct at issue is irrelevant to admissibility. MRE 404(b). We employ the test set forth by our Supreme Court in *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982) where, as here, the proponent is utilizing a modus operandi theory as proof of the defendant's identity. *People v VanderVliet*, 444 Mich 52, 66; 508 NW2d 114 (1993). In *Golochowicz*, the Supreme Court held that before evidence of similar acts may be admitted, (1) there must be substantial evidence that the defendant actually perpetrated the bad act sought to be introduced; (2) there must be some special quality or circumstance of the bad act tending to prove the defendant's identity; (3) that the evidence is material to the issue of defendant's guilt; and (4) that the probative value of the evidence sought to be admitted must not be substantially outweighed by the danger of unfair prejudice. *Golochowicz, supra*, 309.

Specifically, defendant argues that the trial court abused its discretion in finding that the prosecution showed the existence of a special circumstance or quality linking the crimes against the previous victim and the instant offenses. We disagree. Such a link is shown where the circumstances and manner in which the two crimes were committed were "so nearly identical in method as to earmark the charged offense as the handiwork of the accused" or to be so unusual as to be like a "signature" of the accused. *Golochowicz, supra,* 310-311. Our review of the record reveals that on two occasions in February 1993, a black male wearing a green-haired monster mask assaulted both victims while holding a steak knife during early morning hours in the bedrooms of their own apartments at the same complex. These two separate incidents, aside from the end result, are nearly identical with respect to identifying defendant as the perpetrator of the crimes. Accordingly, the trial court did not err in finding that the prosecution had shown special circumstances or qualities linking these acts.

Defendant also contends that the prosecution failed to show that the probative value of the similar acts evidence was not substantially outweighed by its prejudicial effect. However, in *McMillan, supra* 139, this Court held that the prejudicial effect of similar acts evidence did not substantially outweigh its probative value where the jury was told to consider such evidence only for the specific purpose of identity and not to use it to characterize the defendant as a "bad person." In this case, the trial court similarly instructed the jury that it was to view the similar acts evidence with caution and not in relation to defendant's character. Since there is nothing in the record to indicate that the jury used this evidence for an improper purpose, the trial court properly determined that the probative value was not substantially outweighed by its prejudicial effect. Therefore, the trial court did not abuse its discretion in admitting this evidence.

Next, defendant argues that the trial court abused its discretion and infringed upon his constitutional right to remain silent when it admitted testimonial evidence of defendant's reaction to being shown the mask by the officer in charge while incarcerated in his jail cell. Again, we employ the abuse of discretion standard. *McMillan, supra*, 137. We would also note that although defendant objected to the introduction of this evidence at trial, the issue is not preserved for our review since the grounds for the objection at trial differs from that raised on appeal. *People v Lino*, 213 Mich App 89, 94; 539 NW2d 545 (1995). Nevertheless, since the alleged error involves an issue of constitutional magnitude, we will address it. *People v Schollaert*, 194 Mich App 158, 162; 486 NW2d 312 (1992).

At trial, the prosecutor questioned the investigating officer regarding his showing defendant the green-haired monster mask after finding it in a trash bin in a laundry room of the apartment complex. The officer testified that he brought the mask to defendant's jail cell and after he showed it to defendant, defendant sat down on the bench of the in the cell and buried his face in his hands. Defendant argues that the admission of this evidence infringed upon his Fifth Amendment right to remain silent. We disagree.

The federal and state constitutions provide that no person shall be compelled to be a witness against himself in a criminal trial. US Const, Am V; Const 1963, art 1, § 17; see *Schollaert, supra*, 164. In order to protect this right, silence in the face of accusation of criminal conduct cannot be used as evidence. *People Scobey*, 153 Mich App 82, 87; 395 NW2d 247 (1986). However, where the defendant has voluntarily waived his Fifth Amendment right to remain silent, the focus becomes whether, at the time of the conduct in question, the defendant has partially or totally revoked that waiver. *People v McReavy*, 436 Mich 197, 218; 462 NW2d 1 (1990). See also *People v Bushard*, 444 Mich 384, 389-390, 398 n2 (1993) (majority of Michigan Supreme Court agreed that a witnesses' testimony regarding the defendant's shaking her head in response to question regarding her guilt, was not evidence that violated the defendant's right to remain silent since the defendant chose not to remain silent). We believe that this case is controlled by *McReavy*. The record reveals that well before the investigating officer showed the mask to defendant, defendant had made other statements indicating a waiver and further voluntarily waived his *Miranda*[1] rights in writing. Defendant does not challenge the waiver of his constitutional right. Since defendant voluntarily waived his right to remain silent, the trial court did not abuse its discretion in admitting testimony regarding defendant's placing his face between his hands when shown the mask.

Finally, defendant challenges the trial court's sentence of 7 1/2 to 20 years' imprisonment for the habitual offender plea corresponding to his assault with intent to commit criminal sexual conduct conviction. Sentences imposed upon criminal defendants are reviewed for an abuse of discretion based on the proportionality standard. *People v Milbourn*, 435 Mich 630, 634, 654; 461 NW2d 1 (1990). Defendant argues that the trial court abused its discretion when it found that MCL 769.11; MSA 28.1083 "required" it to double the ten-year term for the underlying assault with intent to commit criminal sexual conduct sentence. At the habitual offender portion of defendant's sentencing, after the court said that it was imposing a fifteen-year maximum term for the habitual offender conviction corresponding to the assault conviction, the following interlude took place between the court and the prosecutor:

The Court: . . . The offense that the prosecutor is directing his attention to, the Habitual conviction for assault with the intent to commit sexual penetration, does the maximum for that offense provide for 20 or is this a life offense?

Mr. Hamilton: The maximum for that offense is ten years. Under the Habitual III, the maximum would double to 20. The court said a maximum of 15 --

The Court: So in this case, the Court would be violating the statute if it imposed a maximum of 15 --

Mr. Hamilton: Right.

The Court: -- because the statute says 20?

Mr. Hamilton: Right.

We agree that the trial court erred in finding that the statute would be "violated" if it did not impose a sentence of twenty years' imprisonment for defendant's habitual offender plea regarding the assault conviction. However, we will not remand for resentencing when the defendant will be afforded no relief. *People v Turner*, 213 Mich App 558, 584; 540 NW2d 728 (1995). We think that the trial court's error in construing the statute was harmless beyond a reasonable doubt. First, the minimum that defendant will serve for the habitual offender convictions regarding the criminal sexual conduct offenses is forty years. This minimum term is twice the maximum period of the sentence complained of. Furthermore, each of defendant's habitual offender sentences are concurrent. Therefore, since defendant is required to serve a minimum of forty years, any error in computing the maximum term for the assault offense, so long as it is less than the minimum term of his most severe sentence, is harmless. *Turner*, *supra*. Secondly, even though the trial court improperly failed to exercise its discretion when imposing this sentence, had the court properly exercised its sentencing discretion, the sentence imposed does not amount to an abuse of that discretion. The record reveals that defendant broke into the victim's locked apartment, sneaked up on her while she lay asleep and repeatedly sexually terrorized her while assaulting her with a knife. Given defendant's actions, and the fact that his crimes have escalated from property crimes to crimes against the person, we believe a sentence of 7½ to 20 years reflects the seriousness of this offense and offender. *Milbourn*, *supra*. Accordingly, even if the trial court had properly exercised its sentencing discretion, the sentence imposed would not have amounted to an abuse of that discretion.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 76 L Ed 2d 694 (1966).