STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 12, 2008
v	Nos. 277294; 277295; 277296 Wayne Circuit Court
DENNIS DANELL WHITSETT, Defendant-Appellant.	LC Nos. 06-009944-01; 06-009943-01; 06-009942-01

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Defendant was charged in eight different cases stemming from allegations of criminal sexual conduct involving eight different complainants. Three of those cases, the ones at issue here, were consolidated below because of their similarity. In these consolidated appeals, defendant appeals as of right from various convictions following a jury trial of consolidated cases. In Docket No. 277294, defendant appeals his conviction for attempted kidnapping, MCL 750.349, for which he was sentenced, as a second offense habitual offender, MCL 769.10, to three to five years' imprisonment. In Docket No. 277295, defendant appeals his convictions for two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(c) and (f), kidnapping, MCL 750.349, and second-degree CSC, MCL 750.520c(1)(c). Defendant was sentenced as a second offense habitual offender, MCL 769.10, to 29 to 50 years' imprisonment for each first-degree CSC conviction, 29 to 50 years' imprisonment for the kidnapping conviction, and 10 to 15 years' imprisonment for the second-degree CSC conviction. In Docket No. 277296, defendant appeals his convictions for three counts of first-degree CSC, MCL 750.520b(1)(c) and (e), and kidnapping, MCL 750.349. Defendant was sentenced as a second offense habitual offender, MCL 769.10, to 29 to 50 years' imprisonment for each count of first-degree CSC, and 29 to 50 years' imprisonment for the kidnapping conviction. We affirm.

Defendant first argues that the trial court erred in consolidating three cases into one trial. We disagree. We review de novo the question of whether the offenses are related, but a trial court's decision to join related offenses into one proceeding is reviewed for an abuse of discretion. *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *People v Babcock*, 469 Mich 247, 274; 666 NW2d 231 (2003).

Under MCR 6.120(B), "the court may join offenses charged in two or more informations or indictments against a single defendant." MCR 6.120(C) provides for severance for separate

trials if the offenses "are not related as defined in subrule (B)(1)." Related offenses are those based on: "a) the same conduct or transaction, or b) a series of connected acts, or c) a series of acts constituting parts of a single scheme or plan." MCR 6.120(B)(1). A series of acts constituting parts of a single scheme or plan is established where there is "such a concurrence of common factors that the various acts are naturally to be explained as caused by a general plan." *People v Sabin* (*After Remand*), 463 Mich 43, 63-65; 614 NW2d 888 (2000) (citation and emphasis omitted). The various acts need not be part of a single continuing conception or plot. *Id.*

At the pretrial hearing on the prosecution's motion for joinder, the trial court analyzed the above court rule and correctly concluded that the offenses constituting each case can be viewed as a series of acts constituting parts of a single scheme or plan. In all three cases, defendant approached a young female victim who was walking down the street in Detroit in the morning. In TG's[1] case, defendant asked her out to breakfast, then, after she declined, put a knife to her throat. In CD's case, defendant pushed her to the ground and held a screwdriver to her forehead, then asked her if she wanted to go out to eat. After defendant assaulted TG and CD (separate incidents), he forced them into his car and drove them to a remote location. Defendant then rubbed TG's and CD's vaginas, instructed them to "get it hard," a directive for them to perform oral sex on him, and forced them to have sexual intercourse with him. Thereafter, defendant spoke to them as though their interactions were consensual (telling TG that he did not do anything to her and telling CD that he would pick her up from school), and dropped them off at a location of their choice. With respect to AP, defendant pulled up alongside her and asked her out to breakfast. When AP declined, defendant got out of his car and attacked her, punching her in the face several times. He then attempted to drag her into his car, but AP was able to get up and run away. A rather reasonable inference could be made that defendant intended to do to AP what he had done to his earlier victims. The similarities in all three cases are not only numerous, they are also meaningful in that they evidence defendant's plan, scheme or system for perpetrating sexual assaults. *Sabin, supra* at 63-64.

Next, the court considered the additional factors in MCR 6.120(B)(2) and noted that the prosecution's motion for joinder was timely, the factor considering the drain on the parties' resources would weigh in favor of joinder, the nature of the evidence was not unduly complex, and, significantly, defendant was not unfairly prejudiced by joinder because, had the cases been tried separately, the court would have nevertheless admitted evidence of the related offenses as MRE 404(b) evidence to negate defendant's claim of consent. Where evidence of one offense would have been admissible to prove intent in a trial for another offense, a trial court's decision not to sever the two offenses is not an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). The trial court's analysis of the various factors enumerated in MCR 6.120(B) was sound and its conclusion is supported by the facts. Accordingly, the decision falls within the range of principled outcomes, and the trial court did not abuse its discretion in granting the prosecution's motion for joinder. *Babcock, supra*.

[1] In the interest of privacy, the victims' initials are used.

Next, defendant argues that the trial court erred in admitting irrelevant and unduly prejudicial MRE 404(b) evidence. We disagree. We review a trial court's decision to admit other-acts evidence for an abuse of discretion, but preliminary decisions regarding admissibility that involve questions of law are reviewed de novo. *People v Dobek*, 274 Mich App 58, 84-85; 732 NW2d 546 (2007). To be admissible under MRE 404(b), other acts evidence generally 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. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). Where the charged act and other acts are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system, evidence of the other acts is logically relevant to show that the charged act occurred; the other acts need not be part of a single continuing conception or plot. *Sabin, supra* at 63-64. Although general similarity alone does not establish a plan, scheme or system, where the common features among the various acts are so similar that it is natural to find they are caused by a general plan, the evidence is properly admitted. *Id.* at 64-65.

The facts of the instant cases suggest that defendant had a plan, scheme or system for perpetrating sexual assaults. As noted above, in each case, defendant would approach his young female victim, who was walking alone in Detroit in the morning, ask them if they wanted to eat, and force them into his vehicle with a weapon. Although one victim was able to escape at that point, the other two victims reported nearly identical sexual assaults including the order of events and defendant's commands during the assault.

CY, the MRE 404(b) witness, testified that while walking to the bus stop in Detroit one afternoon, defendant pulled up alongside her and asked for her phone number. CY provided it, and the two arranged to go out to breakfast a few days later, at defendant's request. When defendant picked up CY, he indicated that he needed to stop by his house first before going out to breakfast. Once at his house, he forced CY out of the car and pushed her into his house. Defendant kept CY in his house against her will until eventually permitting her to leave. Defendant later caught up with CY down the street and forced her into his car, brought her inside his house once more and sexually assaulted her by taking off her shirt, pushing her onto a bed and holding her down, attempting to put his hand down her pants, licking her face, and trying to take off her pants. Defendant also slapped CY in the face as she cried. After letting her leave, he once again followed her down the street and attempted to force her into his car.

That there were dissimilarities between CY's incident and those involved in the consolidated cases does not preclude a finding of a common scheme or plan. All of the incidents have meaningfully similar features, including: (1) defendant approached the young women who were walking alone in Detroit, (2) defendant asked all four women to go out to breakfast, (3) defendant either forced or attempted to force all four women into his black Lexus, and (4) defendant sexually assaulted the three victims that he was able to force into his car. These features evidence a common scheme, involving the luring or forceful taking of young women into his car to perpetrate violent sexual abuse.

In addition to showing a common scheme or plan, the evidence was also relevant in rebutting defendant's consent defense. Defendant argued that all of the sex was consensual and

that "these weren't abductions at all" but merely "business deals gone bad." Because defendant interjected consent as a defense, CY's testimony was admissible to show that none of the victims consented. "In a sexual assault prosecution, evidence of other acts is admissible under MRE 404(b) if it 'tend[s] to show a plan or scheme to orchestrate the events surrounding the rape of complainant so that she could not show nonconsent.'" *People v Gibson*, 219 Mich App 530, 533; 557 NW2d 141 (1996), quoting *People v Oliphant*, 399 Mich 472, 488; 250 NW2d 443 (1976). We find that the other acts evidence in this case shows such a scheme. Based on the similarities, the probative value of the MRE 404(b) evidence was not substantially outweighed by the possibility of unfair prejudice.

Moreover, to ensure that the jury did not improperly consider the MRE 404(b) evidence, the trial court gave a limiting instruction cautioning the jury not to use the other acts evidence as evidence of character or propensity, and jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The other acts evidence was offered for a proper purpose, was relevant, and the probative value of the testimony was not substantially outweighed by its potential for unfair prejudice. Accordingly, the evidence was properly admitted pursuant to MRE 404(b).

Next, defendant claims that the trial court erred in denying his motion for a mistrial. We disagree. Because defendant's sole basis for moving for a mistrial was his contention that the trial court improperly admitted MRE 404(b) evidence, and we find that the trial court properly admitted the evidence, we find no abuse of discretion in the trial court's denial of the motion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). Additionally, the court's instruction directing the jury to disregard all references to the two MRE 404(b) witnesses mentioned in the prosecution's opening statement, but who did not ultimately testify, was sufficient to dispel any potential for prejudice. See *Graves*, *supra*. Accordingly, defendant's mistrial argument is without merit.

Defendant also claims that there was insufficient evidence to support his nine convictions. We disagree. Defendant was convicted of five counts of first-degree CSC (three counts relating to TG, two counts relating to CD), one count of second-degree CSC (relating to CD), two counts of kidnapping (relating to TG and CD), and one count of attempted kidnapping (relating to AP). When reviewing a claim of insufficient evidence, we review the record de novo and take the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

Kidnapping occurs when a person knowingly restrains another person with the intent to "[e]ngage in criminal sexual penetration or criminal sexual conduct with that person." MCL 750.349(1)(c). Regarding attempted kidnapping, "an 'attempt' consists of (1) an attempt to commit an offense prohibited by law, and (2) any overt act towards the commission of the intended offense" which goes beyond mere preparation. *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001).

To prove the crime of first-degree CSC under the theories asserted by the prosecutor in this case, the prosecutor had to establish that: (1) the defendant committed sexual penetration with another person; and (2) (a) the penetration occurred under circumstances involving the commission of any other felony; (b) the defendant was armed with a weapon or any article used

or fashioned in a manner to lead the victim to reasonably believe it to be a weapon; or (c) the defendant caused personal injury to the victim and force or coercion is used to accomplish sexual penetration. MCL 750.520b(1)(c), (e), and (f). "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL 750.520a(p).

A person is guilty of CSC in the second degree, MCL 750.520c(1)(a), if the person engages in sexual contact with another person and the contact occurs under circumstances involving the commission of any other felony. MCL 750.520c(1)(c). "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for revenge, to inflict humiliation, or out of anger. MCL 750.520a(o). The testimony of the victim alone can constitute sufficient evidence to establish a defendant's guilt. MCL 750.520h; *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

TG testified that defendant approached her when she was walking down the street and asked her out to breakfast. After she declined, he put a knife to her throat and forced her into his car. Defendant threatened that if she attempted to escape, he would shoot her in the back. Defendant drove to a remote location, put his hands down TG's pants and rubbed her vagina. He then directed her to take off her pants, perform oral sex upon him, and have sexual intercourse with him. TG testified that she complied out of fear for her life. The sperm sample from TG's rape kit matched defendant. Based on the foregoing, there was sufficient evidence from which a rational jury could find that defendant kidnapped TG and committed three counts of first-degree CSC upon her.

CD testified that, as she was walking down the street, defendant came up from behind her and pushed her to the ground. He held a screwdriver to her forehead and threatened that if she yelled, he would kill her. He forced her into his car and drove off. Eventually, defendant parked, covered his hands in baby oil, and rubbed CD's vagina. Defendant then forced her to perform oral sex upon him and have intercourse with him. CD's testimony was corroborated by an onlooker, who testified that she witnessed CD being knocked to the ground and dragged away by a man. Additionally, the rape kit performed on CD established that the sperm collected from CD matched defendant. Consequently, a rational jury could readily find that defendant committed kidnapping, two counts of first-degree CSC, and one count of second-degree CSC in relation to CD.

AP testified that as she was walking to her cousin's house in Detroit, defendant pulled up alongside her and asked her out to breakfast. AP declined, and defendant got out of his car and attacked her, punching her in the face several times. He then attempted to drag her into his car, but AP was able to escape. AP's treating physician confirmed that AP suffered injury to her eye consistent with having been punched. Based on this testimony and the similarity to the other victims, a rational jury could find that defendant intended to restrain AP in order to engage in criminal sexual conduct and, thus, attempted to kidnap AP. In sum, reviewing the evidence in the light most favorable to the prosecutor, there was ample evidence upon which a rational trier

of fact could find that the essential elements of each of the nine charged crimes were proven beyond a reasonable doubt. *Wilkens, supra*.

Finally, defendant argues that his seven sentences of 29 to 50 years' imprisonment constitute cruel and unusual punishment. Because defendant raises this issue for the first time on appeal, his sentences are within the appropriate guidelines range, and he cannot demonstrate that the trial court engaged in incorrect scoring or relied on inaccurate information to determine his sentence, defendant is precluded from raising this issue on appeal. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). In any event, sentences falling within the recommended guidelines range are presumptively proportionate, and proportionate sentences do not constitute cruel and unusual punishment. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004).

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly