STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2008
v	No. 276204 Kent Circuit Court
JOHNNY FRANK ADAMS, Defendant-Appellant.	LC No. 05-010514-FC

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

PER CURIAM.

Defendant appeals as of right his convictions for kidnapping, MCL 750.349, and first-degree criminal sexual conduct, MCL 750.520b(1)(c). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to life imprisonment for each offense, consecutive to parole. Because we conclude that the trial court did not abuse its discretion in admitting the bad-acts evidence and did not err in holding that defendant, if he testified, waived his right against self-incrimination as to the charged and uncharged acts, we affirm.

I

Defendant argues on appeal that he was denied a fair trial by the admission of MRE 404(b) evidence. Defendant claims the evidence was not admitted for a proper purpose and that it was unduly prejudicial. We disagree. We review the admission of bad-acts evidence for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). A trial court abuses its discretion when it fails to select a principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"[E]vidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, such evidence may 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); *Crawford, supra*. Three factors determine the admissibility of prior bad-acts evidence: (1) whether the bad-acts evidence is offered for a proper purpose; (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is not substantially

outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

The prosecution offered the bad-acts evidence for the purpose of showing a common plan or scheme in doing an act, a proper purpose under MRE 404(b). An uncharged act may be admissible to show that the charged act occurred if the uncharged and charged acts are sufficiently similar to support an inference that they are manifestations of a common plan or scheme. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). "[D]istinctive and unusual features are not required to establish the existence of a common design or plan." *People v Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002).

The prosecution presented a witness who complained that defendant sexually assaulted her on September 26, 2005. According to the witness, defendant arrived at her house, and spent some time conversing with her and a neighbor. The witness left defendant with the neighbor, as the two men discussed defendant's automobile, outside of her house. Later, the witness discovered defendant, holding a crack cocaine pipe, in her kitchen. She told defendant to leave, but he refused and told her that he wanted to perform oral sex on her. The witness rejected his advances, but defendant forced her into her bedroom, threw her onto her bed, pulled off her pants, and performed oral sex on her. Defendant thereafter smoked crack cocaine, and ordered the witness to do so as well. Defendant forced the witness back down on the bed, and performed oral sex on her again. After several minutes, defendant returned to his crack cocaine pipe, and he forced the witness to smoke crack cocaine. Defendant threw the witness onto the bed, as he undid his pants. Defendant digitally penetrated the witness's vagina while he masturbated, but he did not achieve an erection. Defendant then began dressing "like nothing happened." The witness also got dressed before she grabbed a portable telephone and ran outside. Defendant followed the witness outside, apologizing and begging her not to call the police. At trial, defendant portrayed a somewhat different series of events; however, he ultimately confirmed that he sexually assaulted the witness.

The victim testified that defendant befriended her and her mother in late September 2005. On September 28, 2005, defendant borrowed, but did not return, the cellular telephone of the victim's mother. Defendant returned to the victim's room at the Grand Rapids Inn, which she shared with her mother, at approximately 4:00 a.m. on September 29, 2005. Defendant claimed that the cellular telephone was in his car, and he coaxed the victim to get into his car to look for it. As the victim looked for the cellular telephone, defendant started the engine, and then he reversed his car out of a parking space, and drove away from the Grand Rapids Inn with the victim. Defendant drove to what appeared to be a scrap yard, where he told the victim to get into the backseat. Defendant then removed the victim's pants, forced her to smoke crack cocaine, and performed oral sex on her. Defendant then lowered his trousers, and he forced the victim to perform oral sex on him. The victim noted that defendant was unable to achieve an erection during this encounter. Defendant thereafter drove to another desolate area, where he ordered the victim to remove her pants. Defendant again performed oral sex on her. During this encounter, defendant masturbated, but he was unable to achieve an erection. Later, the victim testified that defendant, as he drove around, apologized to her. At trial, defendant denied that he engaged in any sexual contact with the victim.

Here, the charged act and the uncharged act share sufficient similarities to support an inference that defendant engaged in a common plan or scheme. *Sabin, supra*. Defendant exerted

control over both women, and forced the women to smoke crack cocaine. He repeatedly performed oral sex on the women. In addition, defendant was unable to achieve an erection in either case. Defendant also expressed remorse to both women afterwards. There are dissimilarities, i.e., defendant did not keep the witness captive for several hours in his car, nor did he force the witness to perform oral sex on him. However, these dissimilarities do not outweigh the similarities between the instant case and the uncharged act. The charged and uncharged acts contain common features beyond similarity as mere sexual assaults. *Hine, supra* at 253.

Because the circumstances of the uncharged act support an inference that defendant acted in accordance with a common plan or scheme, the evidence was relevant to whether defendant committed the charged act. See *People v Drohan*, 264 Mich App 77, 87; 689 NW2d 750 (2004). Also, the probative value of the uncharged act was not substantially outweighed by the danger of unfair prejudice. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford, supra* at 398. The record demonstrates that the testimony regarding the uncharged act was not so inflammatory that the jury would afford it undue or preemptive weight. Moreover, the probative value of the uncharged act was significant in light of defendant's denial of the victim's allegations at trial. In addition, the trial court provided an adequate limiting instruction, which informed the jury that the uncharged act could not be used as propensity evidence. See *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002) (a limiting instruction that cautions a jury not to infer that a defendant had a bad character and acted in accordance with that character can protect the defendant's right to a fair trial). Jurors are presumed to follow a trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, we conclude that the trial court did not abuse its discretion in admitting evidence that defendant sexually assaulted the witness. *McGhee, supra*.

II

Defendant also asserts that, when he took the stand to testify in his own defense, he should have been allowed to invoke his right against self-incrimination when questioned about the uncharged act because the uncharged act was a collateral matter. We disagree. We review constitutional issues de novo. *People v Bassage*, 274 Mich App 321, 324; 733 NW2d 398 (2007).

Both the United States Constitution and the Michigan Constitution guarantee the right against self-incrimination. US Const, Am. V; Const 1963, Art 1, § 17; *Bassage, supra* at 324. "A defendant waives his privilege against self-incrimination when he takes the stand and testifies." *People v Dixon*, 217 Mich App 400, 405; 552 NW2d 663 (1996). Our Supreme Court explained:

> One who is on trial for a crime cannot be compelled to testify, either on his own behalf or for the people. However, if he elects to do so, he is held to have waived his constitutional right of refusing to answer any question material to the case, even though the answer tends to prove him guilty of some other crime than that for which he is on trial. [*People v Robinson*, 306 Mich 167, 176; 10 NW2d 817 (1943).]

In the instant case, defendant testified in his own defense. By doing so, defendant waived his privilege against self-incrimination. *Dixon, supra* at 405. He waived his "right of refusing to answer any question material to the case, even though the answer tends to prove him guilty of some other charge." *Robinson, supra* at 176. In addition, we reject defendant's contention that evidence of the uncharged act was not material to the present case. Because the uncharged and charged acts were sufficiently similar to support an inference that defendant acted in accordance with a common scheme or plan, the evidence was highly probative as to whether defendant committed the charged act. We find no error in the trial court's holding that, if defendant elected to testify, he waived his right against self-incrimination as to the charged and uncharged acts.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot