STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 26, 2012
v	No. 303552 Wayne Circuit Court
KIRK BERNARD HENDEN, Defendant-Appellant.	LC No. 10-003956-FC

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b, and kidnapping, MCL 750.349. Defendant was sentenced to concurrent prison terms of 15 to 30 years for the two convictions. We affirm.

On January 4, 2007, defendant approached the young female victim from behind as she was walking alone. Defendant pointed what appeared to be a black handgun at her head and instructed the victim to walk with him on threat of being shot if she did not heed his demands. Defendant ordered the victim to turn over her cell phone and proceeded to march her into an alley where he forced her to perform fellatio at gunpoint until he ejaculated. A semen sample procured from the victim's coat that was later analyzed under the direction of the Michigan State Police generated a DNA profile that matched defendant's DNA, with a statistical probability of one in 13.8 quadrillion that the DNA belonged to someone other than defendant.[1] On the basis of defendant's actions, he was charged with CSC I and kidnapping. Additionally, defendant was identified as being involved in two similar assaults six days later on January 10, 2007. In one assault, defendant approached a young woman from behind as she was walking alone, he pointed what appeared to be a black handgun at her and demanded money, he instructed her to walk with him after she indicated that she had no money, and he abruptly left the scene when the woman refused to walk with him and pushed the gun away. In the second assault, defendant approached a young woman from behind as she was walking alone, he pointed what appeared to be a black

[1] An oral swab taken from the victim's mouth produced only a partial DNA profile, yet it also matched defendant's DNA, although the forensic biologist could only state that the probability that the DNA belonged to someone other than defendant was 1 in 147.1 given the partial profile.

handgun at her and demanded money, he successfully ordered her to give him her cell phone after she indicated that she had no money, he forced her to start walking with him, and soon thereafter he ran away when the woman signaled to a passing motorist and the motorist stopped and made an inquiry as to what was occurring.

Defendant first argues that the trial court abused its discretion when it admitted evidence of the other two assaults under MRE 404(b). We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). We review de novo preliminary questions of law associated with a decision to admit or exclude evidence, such as whether a rule of evidence precludes admission. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). With respect to preserved, nonconstitutional error, reversal is unwarranted unless, after examination of the entire record, it shall affirmatively appear that it is more probable than not that the error was outcome determinative. *Lukity*, 460 Mich at 495-496.

Pursuant to MRE 404(b)(1), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, such evidence may "be admissible for other purposes, such as proof of . . . [a] scheme, plan, or system in doing an act" or "identity." In this case, the trial court admitted evidence of defendant's two other assaults to show identity and common plan or scheme.

In order for evidence to be admitted as proof of a defendant's identity through modus operandi, a trial court must find that: "(1) there is substantial evidence that the defendant committed the similar act[,] (2) there is some special quality of the act that tends to prove the defendant's identity[,] (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice." *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998); see also *People v Waclawski*, 286 Mich App 634, 673; 780 NW2d 321 (2009). Additionally, the manner and circumstances in which the two crimes were committed should be so nearly identical in method as to earmark the offense charged as the handiwork of the accused defendant. *People v Golochowicz*, 413 Mich 298, 310; 319 NW2d 518 (1982). "'[M]uch more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts.'" *Id.* (citation omitted). Rather, the commonality of circumstances must be so distinctive and unusual as to equate to a signature. *Id.* at 310-311.

In order for evidence to be admitted as proof of a defendant's common plan or scheme, "the necessary degree of similarity is . . . less than that needed to prove identity." *People v Sabin (After Remand)*, 463 Mich 43, 65; 614 NW2d 888 (2000). "'To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual.'" *Id.* at 65-66 (citation omitted). In *People v Hine*, 467 Mich 242, 251-253; 650 NW2d 659 (2002), our Supreme Court observed:

> [E]vidence of similar misconduct is logically relevant to show that the charged act occurred where 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. For other acts evidence to be admissible there must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan. . . .
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> As we stated in *Sabin*, distinctive and unusual features are not required to establish the existence of a common design or plan. The evidence of uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense. [Citations omitted.]

Defendant argues that evidence of the other two assaults should not have been admitted to show identity or common plan or scheme because they were not sufficiently similar to the assault in this case. Defendant is correct that there were some differences. The other assaults occurred in the afternoon in Redford, Michigan, with females walking home from school. In contrast, the victim here was attacked in an alley in Detroit at midnight and was sexually assaulted. However, there were also compelling similarities. As the trial court noted, the crimes all involved young women walking alone. All three women were approached from behind, with defendant brandishing what appeared to be a black handgun on each occasion. Defendant attempted to or actually robbed all three women, twice specifically ordering the victims to turn over their cell phones. Defendant ordered each of the three victims to walk with him in an attempt to move them to a different location; he was only successful in the case at bar in forcing the victim to move to a more secluded area. We give little weight to the fact that a sexual assault only took place relative to the instant prosecution, given that, with respect to the other two assaults, defendant was unsuccessful in moving the women to a more private area. These facts support a conclusion that the three assaults were nearly identical. Accordingly, it was not outside the range of reasoned and principled outcomes for the trial court to find that the similarities earmarked the charged offenses as the handiwork of the accused for purposes of identity, or to find that the "common features" were indicative of a common plan and scheme. Moreover, even if the question was close regarding whether there was a sufficient degree of similarity on the matter of identity, this Court has held that "there is no abuse of discretion if an evidentiary question is a close one[.]" *People v Smith*, 282 Mich App 191, 197; 772 NW2d 428 (2009).[2]

[2] We do not find that the issue was close in regard to using the bad-acts evidence to show a common plan, scheme, or system in doing an act. The *Sabin* Court held that there was no abuse of discretion by the trial court in admitting evidence under MRE 404b(1) to show a common plan or scheme even though "the uncharged and charged acts were dissimilar in many respects." *Sabin*, 463 Mich at 67 (uncharged acts occurred at night and charged act occurred during the day; uncharged acts involved oral sex and charged act involved intercourse; uncharged acts did not entail the defendant physically striking the victim as he did in the charged act).

Also, the probative value of the bad-acts evidence was not substantially outweighed by the danger of unfair prejudice. All relevant evidence is inherently prejudicial, and it is only *unfairly* prejudicial evidence that *substantially outweighs* the evidence's probative value that needs to be excluded under MRE 403. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). Evidence is considered "unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Here, the bad-acts evidence was more than marginally probative, and considering the definitiveness of the DNA evidence found on the victim's coat, we highly doubt that the evidence introduced under MRE 404(b) was given undue or preemptive weight. Additionally, the trial court instructed the jury about the limited purpose of the bad-acts evidence, which further minimized the danger of any unfair prejudice. See *People v Starr*, 457 Mich 490, 503; 577 NW2d 673 (1998).

Lastly, even if we assumed that the trial court abused its discretion in admitting the evidence, defendant has failed to satisfy his burden to show that the error was outcome determinative; there was no prejudice, nor was there a miscarriage of justice, as the result of any presumed error. *Lukity*, 460 Mich at 495-496. The fact remains that defendant's semen was found on the victim. Again, testimony revealed that the probability that the semen collected from the victim's coat belonged to someone other than defendant was 1 in 13.8 quadrillion. The DNA evidence is especially overwhelming considering that defendant never took the position that he was with the victim and engaged in consensual sex. Reversal is unwarranted.

Defendant next argues that his punishment of 15 to 30 years' imprisonment was cruel and/or unusual in violation of the federal and state constitutions. US Const, Am VIII; Const 1963, art 1, § 16. We disagree.

Defendant argues that even though his minimum sentence fell within the recommended sentencing guideline range, his punishment still constituted cruel and unusual punishment. This argument lacks merit for numerous reasons. First, "a sentence within the guidelines range is presumptively proportionate." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (citation omitted). Moreover, "a sentence that is proportionate is not cruel or unusual punishment." *Id.* While this presumption may be overcome, "a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).

Defendant has not met his burden to overcome the presumption. While defendant was relatively young at the time of sentencing, 22 years old, he was not a minor nor was there any suggestion that due to his young age, defendant failed to understand the implications of his behavior. Moreover, the court specifically referenced defendant's age in sentencing him and ordered defendant's sentences to run concurrently despite the prosecutor's request for consecutive sentences, which was an option under MCL 750.520b(3).[3] Defendant's presentence

[3] MCL 750.520b is the CSC I statute and subsection (3) of the statute provides that "[t]he court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction."

investigation report (PSIR) does reveal that he suffers from depression, and defendant argues that he has mental health and emotional issues that must be considered. However, these arguments do not serve as a reasonable or justifiable excuse for defendant's actions, and there is no indication that defendant's mental health or emotional problems precluded him from appreciating the wrongfulness of his crimes.

"In deciding if punishment is cruel or unusual, this Court looks to the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in this state, as well as the penalty imposed for the same crime in other states." *People v Brown*, 294 Mich App 377, __; __NW2d__ (2011), slip op at 6. Here, given the nature of the sexual act, the use of a gun that was pointed at the victim's head, the verbalized threat of being shot, and the other surrounding facts, the gravity of the crime was extremely serious and horrific; it was a terrifying ordeal for the young female victim. CSC I is a life offense under MCL 750.520b(2)(a) for good reason, as it is a grave crime, *id.*, slip op at 6-8, and a minimum sentence of 15 years is not unduly harsh under the circumstances presented. Indeed, one could argue that it is not sufficiently harsh in light of the facts in this case and defendant's extensive and violent criminal history.

Defendant's reliance on *Solem v Helm*, 463 US 277; 103 S Ct 3001; 77 L Ed 2d 637 (1983), is misplaced, as *Solem* is easily distinguishable where it involved a mandatory life sentence without the possibility of parole for the nonviolent felony of uttering a no-account check in the amount of $100. Here, the punishment was much less harsh, even though the crime was brutal and violent. Defendant also relies on *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992), in which our Supreme Court held that Michigan's mandatory penalty of life in prison absent the possibility of parole for possession of 650 grams or more of cocaine constituted cruel or unusual punishment under the state constitution. *Bullock* is also easily distinguishable, where here we are not addressing a mandatory life sentence and defendant's actions entailed a violent sexual assault, not a nonviolent crime. Defendant also fails to cite statutes from other states showing less harsh punishment for CSC I, nor does he cite any relevant Michigan statutes that actually show that equally serious crimes are punished less harshly.

Finally, in a Standard 4 brief, defendant argues that the trial court lacked subject-matter jurisdiction because there is not a proper enacting clause or title for kidnapping and CSC I. We disagree. These arguments were not preserved for appellate review; therefore, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant argues that there is no enacting clause for the kidnapping statute, MCL 750.349, and the CSC I statute, MCL 750.520b. The Michigan Constitution provides that "[t]he style of the laws shall be: The People of the State of Michigan enact." Const 1963, art 4, § 23. Contrary to defendant's assertions, an enacting clause identical to that recited in our Constitution prefaces the Michigan Penal Code, MCL 750.1 *et seq.*, wherein the kidnapping and CSC I are contained. Moreover, with respect to kidnapping, 2006 PA 159, which reflects the most recent amendment of the kidnapping statute, as well as all previous public acts concerning kidnapping,

contained enacting clauses. With respect to CSC I, 2007 PA 163, which reflects the most recent amendment of the CSC I statute, as well as all previous public acts concerning CSC I, contained enacting clauses. Defendant's argument is entirely without merit.

Defendant also argues that the crimes for which he was convicted lack a constitutionally valid title. The "Title-Object Clause, Const 1963, art 4, § 24 . . . provides: 'No law shall embrace more than one object, which shall be expressed in its title.'" *People v Cynar*, 252 Mich App 82, 84; 651 NW2d 136 (2002). "[T]he 'purpose of the clause is to prevent the Legislature from passing laws not fully understood, to ensure that both the legislators and the public have proper notice of legislative content, and to prevent deceit and subterfuge.'" *Id.* (citation omitted). The title of an act must express the object or the general purpose of the act. *Id.* The title to the The Michigan Penal Code, 1931 PA 328, provides:

> An act to revise, consolidate, codify, and add to the statutes relating to crimes; to define crimes and prescribe the penalties and remedies; to provide for restitution under certain circumstances; to provide for the competency of evidence at the trial of persons accused of crime; to provide immunity from prosecution for certain witnesses appearing at criminal trials; to provide for liability for damages; and to repeal certain acts and parts of acts inconsistent with or contravening any of the provisions of this act. [See also 2006 PA 159 (kidnapping) and 2007 PA 163 (CSC I), amending 1931 PA 328.]

We fail to see any violation of the Title-Object Clause; the purposes behind the clause are fully satisfied by the title quoted above.

We have reviewed all of defendant's pro per arguments in his Standard 4 brief and find no basis for reversal.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Riordan