STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 21, 2013
v	No. 306589 Wayne Circuit Court
TARQUINIS LOUIS HEARD, Defendant-Appellant.	LC No. 11-004194-FC

Before: MURRAY, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(d), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(d). Defendant was sentenced to 22 to 80 years' imprisonment for each first-degree criminal sexual conduct conviction and 5 to 15 years' imprisonment for the second-degree criminal sexual conduct conviction. We affirm.

Defendant argues that his convictions should be reversed because the trial court erred in admitting evidence of a previous sexual assault under MRE 404(b). Defendant also argues that, assuming the validity of his conviction, resentencing is required because the trial court erred in scoring his sentencing guidelines range. We disagree on both points.

OTHER ACTS EVIDENCE

Defendant first challenges the trial court's determination that the evidence of his prior sexual assault was relevant to issues of consequence at trial and its probative value was not substantially outweighed by its danger of unfair prejudice. The admission of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when the trial court abuses that discretion. *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). An abuse of discretion occurs when the trial court chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). We review preliminary questions of law de novo. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

To be admissible under MRE 404(b), generally other acts evidence must (1) be offered for a proper purpose, (2) be relevant, and (3) not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614

NW2d 888 (2000). The trial court admitted the evidence of defendant's prior sexual assault for the purpose of showing a common plan, scheme, or system and defendant's identity. Defendant does not dispute that these are proper purposes under MRE 404(b), but argues that the evidence was not relevant to any issues of consequence at trial and was unfairly prejudicial.

The trial court did not abuse its discretion in concluding that evidence of defendant's prior sexual assault was relevant for the purpose of showing that defendant employed a common plan to forcibly abduct and sexually assault females while he was with other males. Relevance is assessed by determining whether the evidence, under a proper theory, has any tendency to make the existence of a fact of consequence in the case more or less probable than it would be without the evidence. See MRE 401, 402; *Sabin*, 463 Mich at 57. The relevance element includes two inquiries: materiality and probativeness. *Sabin*, 463 Mich at 57. "Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case." *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998) (quotation marks and citation omitted). The probative force inquiry requires that the evidence have "any tendency to make the existence of any [consequential] fact . . . more probable or less probable than it would be without the evidence." MRE 401. This is a low threshold. *Crawford*, 458 Mich at 390.

Regarding the theory of common plan, scheme, or system, the relevance of other acts evidence is established "through the similarities between the charged and uncharged acts, rather than on defendant's character, as shown by the uncharged acts[.]" *Sabin*, 463 Mich at 63-64 n 10. Under this theory, "the jury is asked to infer the existence of a common system and consider evidence that the defendant used that system in committing the charged act as proof that the charged act occurred." *Id*. Evidence of a common plan or system is admissible under MRE 404(b) when it is marked by "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." *Sabin*, 463 Mich at 64-65 (quotation marks and citation omitted). (Emphasis deleted.)

Here, the common features and similarities between both incidents evidence a common plan: defendant did not act alone, he forced his victims to a secluded area, and performed a nonconsensual sexual act on them. On the basis of these common features, a jury may reasonably infer that defendant employed a common plan to forcibly abduct and sexually assault females while he was with other males. Given the similarities between the two incidents, and the fact that defendant denied his involvement in the charged act, the other acts evidence was material to whether defendant, in fact, committed the charged offense. See *Crawford*, 458 Mich at 389. Contrary to defendant's assertion, this materiality goes beyond establishing defendant's identity; instead, it aids a jury in determining whether, assuming defendant was present during the incident, he participated in the crime in the manner that the victim alleged. The other acts evidence is also probative because it tends to make the fact of defendant's involvement more probable than it would be without the evidence. Although the acts are dissimilar in certain respects (e.g., the prior incident involved vaginal penetration in a basement of a house; the present case involved oral penetration in an apartment stairwell), the acts need not be identical to be admissible under a theory of a common plan or scheme. *Sabin*, 463 Mich at 67 ("Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive[.]") (citation omitted). Rather, to be relevant, the evidence need only demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he used in

committing the previous acts. *Id*. The trial court did not abuse its discretion in finding that defendant's repeated participation in group sexual assaults was a sufficient commonality that indicated a common plan or scheme.[1]

Defendant also argues that the probative value of the evidence was substantially outweighed by its potential for unfair prejudice. Evidence is unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2002). As with the determination of relevance, the determination of the evidence's prejudicial effect is "best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony." *Sabin*, 463 Mich at 71 (quotation marks and citation omitted).

Here, the other acts evidence was probative to show that defendant employed a common plan in sexually assaulting young females, and, as a consequence, in rebutting defendant's denial that he was involved in the charged offense at all. While evidence of another instance of criminal sexual conduct is prejudicial, given the high probative value of the evidence, this prejudice is not "unfair." MRE 403; *Ortiz*, 249 Mich App at 306. And any danger of unfair prejudice was minimized by the fact that the trial court gave a limiting instruction regarding the jury's use of the other acts evidence. *People v Martzke*, 251 Mich App 282, 295; 651 NW2d 490 (2002) ("A carefully constructed limiting instruction rendered by the trial court would be sufficient to counterbalance any potential for prejudice spawned by the other acts evidence."). Because we presume jurors follow their instructions, there is no reason to believe that the jury was prejudiced by the evidence or considered it for improper purposes. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

SCORING OF SENTENCING GUIDELINES RANGE

Defendant argues the trial court erred in assessing 15 points under Offense Variable 8 (OV 8) and 50 points under Offense Variable 7 (OV 7). In reviewing a challenge to a criminal defendant's sentence, this Court must affirm a sentence falling within the appropriate sentencing guidelines range unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence. *People v Kegler*, 268 Mich App 187, 189-190; 706 NW2d 744 (2005). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *Id*. at 190 (quotation marks and citation omitted). Scoring decisions for which there is any supporting evidence will be upheld on appeal. *Id.* On appeal, this Court reviews the trial court's findings of fact for clear error, which exists if "the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002). Interpretation and application of the sentencing guidelines is a question of law, reviewed de novo. *People v Hunt*, 290 Mich App 317, 323; 810 NW2d 588 (2010).

[1] Because the evidence was relevant to show a common plan, scheme, or system, we decline to address the trial court's second basis for admitting the evidence: defendant's identity.

MCL 777.38(1)(a) provides that OV 8 is to be scored at 15 points if "[a] victim was asported to another place of greater danger or to a situation of greater danger . . . ." In interpreting the phrase, "asport[ation] to another place of greater danger[,]" this Court has upheld 15-point assessments under OV 8 where the victim was taken to a place where it was less likely that others would see the defendant committing the crime. See, e.g., *People v Steele*, 283 Mich App 472, 491; 769 NW2d 256 (2009) ("The trailer, the tree stand, and the dirt-bike destination are all places or situations of greater danger because they are places where others were less likely to see defendant committing crimes."). Here, the victim was standing in the lobby of an apartment building when she was pushed into a stairwell. This was asportation to a place of greater danger because defendant was less likely to be observed committing the sexual assault than if he remained in the apartment lobby. Therefore, the trial court properly assessed 15 points under OV 8.

MCL 777.37(1)(a) provides that OV 7 is to be scored at 50 points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." In assessing points for OV 7, only the defendant's actual conduct and participation should be scored. *Hunt*, 290 Mich App at 326; see also *Kegler*, 268 Mich App at 191 ("The focus of OV 7 is defendant's conduct and purpose . . . ."). Circumstances inherent in the crime must be discounted for purposes of scoring an OV. *People v Glenn*, 295 Mich App 529, 535; 814 NW2d 686 (2012).

The trial court based its decision to assess 50 points on the "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense" element of the statute. The prosecution argues on appeal that defendant's conduct amounts to sadism. Therefore, the question is whether (1) the trial court properly determined that defendant's conduct was "designed to substantially increase the fear and anxiety a victim suffered during the offense" or (2) defendant's conduct amounts to sadism as defined by the statute. Although the trial court erred in assessing 50 points on the basis that defendant's conduct was designed to substantially increase the victim's fear, we affirm the trial court's assessment of 50 points under OV 7 because defendant's conduct nonetheless amounted to sadism.

This Court has recently acknowledged the high threshold OV 7 poses in cases involving conduct designed to substantially increase the victim's fear and anxiety. In *Glenn*, we stated that "OV 7 is designed to respond to particularly heinous instances in which the criminal acted to increase that fear by a substantial or considerable amount," 295 Mich App at 536, and that "[the] defendant's conduct would have substantially increased the victims' fear only if the conduct was designed to cause copious or plentiful amounts of additional fear," *id*. at 533-534. This Court stated further:

> [W]hen construing a series of terms . . . we are guided by the principle that words grouped in a list should be given related meaning. That is, while the term at issue must have a meaning independent of sadism, torture, and excessive brutality, it should nonetheless be construed to cover similarly egregious conduct. The conclusion that the Legislature intended OV 7 to apply only in egregious cases is also supported by the fact that assessing 50 points under OV 7, on its own, is enough to raise an offender's OV level to III, considerably increasing a

criminal's minimum-sentence range. [*Glen*, 295 Mich App at 534 (quotations marks, citations, and footnote omitted).]

Here, the trial court made the following statement in assessing 50 points under OV 7:

> It is true, Mr. Finn [attorney for defendant], that the court has to score each defendant separately. As the court, however, has previously stated on this record, OV-7 also addresses or [sic] conduct designed to substantially increase the fear and anxiety that the victim suffered during the offense. There's no question the testimony elicited during the course of the trial indicated that there were three individuals who in some form or fashion attacked the victim in this case against her will. In particular, your client is one of the two that [sic] physically assaulted her while a third unknown person, unknown male, had held her down against her will while the attack occurred. There's no question that this conduct was designed to substantially increase, or at least the actions [sic] to increase the fear and anxiety of the victim. And so the court is going to score OV-7 at fifty points. And that's not taking into account, quite frankly, the quote that keeps being bantered about. *It's the totality of the conduct engaged [sic] here by both defendants*. [Emphasis added.]

The trial court erred in not limiting its focus to *defendant's* conduct and purpose. See *Kegler*, 268 Mich App at 191 ("The focus of OV 7 is defendant's conduct and purpose . . . ."). Although the trial court correctly excluded from consideration the vulgar statement made by codefendant Steven Milner, the trial court's basis for assessing 50 points focused on the conduct of the group, not solely defendant. The only conduct of defendant that the trial court relied on in assessing 50 points was his sexual assault of the victim. Specifically, defendant masturbated near the victim's face, forced her to perform oral sex several times during the incident, and ejaculated on her face. Yet, first-degree criminal sexual conduct, by its nature, involves some fear and anxiety in the victim. Defendant did touch the victim's belt in an attempt to remove it, which did make the victim "nervous." However, defendant did not punch the victim, nor is there any record evidence that he was the person who pushed the victim into the stairwell. There is no evidence he threatened the victim with a weapon or said something during the incident to increase the victim's fear. While certainly deplorable, nothing in the record shows that defendant's actions during the assault were designed to substantially increase the victim's fear and anxiety.

The prosecution argues that defendant's conduct alternatively qualifies as "sadism" under the statute. "Sadism" is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). The facts in this case demonstrate that defendant's conduct amounts to "sadism." After masturbating near the victim's face, defendant ejaculated on her face. Each time the victim attempted to scream for help, defendant stopped her by inserting his penis into her mouth. After the incident ended, the victim was forced to go in public with defendant's ejaculate still on her face. Defendant's repeated penetrations every time the victim attempted to scream and the ejaculation on the victim's face, which considerably prolonged the humiliation of the incident, indicate sadistic behavior on the part of defendant above and beyond that which is inherent in first-degree criminal sexual conduct offenses. Taken in totality, this conduct subjected the

victim to extreme humiliation and was done for defendant's own gratification. OV 7 was therefore properly scored at 50 points.

Affirmed.

/s/ Christopher M. Murray
/s/ Kurtis T. Wilder
/s/ Donald S. Owens