STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN DEAN DIMKOFF,

Defendant-Appellant.

UNPUBLISHED
October 31, 1997

No. 196950
Calhoun Circuit Court
LC No. 96-000543

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

PER CURIAM.

Defendant appeals as of right his conviction by jury of armed robbery, MCL 750.529; MSA 28.797, first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(c); MSA 28.788(3)(1)(c). We affirm.

On January 9, 1996 at 12:45 a.m., defendant entered the victim's apartment using a master key. Defendant acquired the master key through his position as the grounds supervisor for the apartment complex where both he and the victim lived. The victim first noticed defendant as he startled her from her sleep. Brandishing a knife, defendant instructed the victim to remove her nightgown and underwear, which defendant kept. Defendant next ordered the victim to give him money, which she did. With knife in hand, defendant then fondled the victim's breast, covered her face with some material, ordered her not to look up and then left the apartment.

I

Defendant contends that the trial court abused its discretion by admitting evidence that defendant had attempted to enter another woman's apartment in the same apartment complex using his master key and evidence that boxes of women's undergarments were found in a tool shed to which defendant had access with keys.

As to bad acts evidence, MRE 404(b) provides:

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

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, 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.

A

The trial court found that evidence that defendant tried to enter another apartment using his master key was admissible under MRE 404(b) to show identity and scheme in carrying out a course of conduct. With regard to identity evidence from prior similar acts, *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), sets forth a test which identifies the requirements of logical relevance when the proponent of the evidence is utilizing a modus operandi theory to prove identity. *People v McMillan*, 213 Mich App 134, 138; 539 NW2d 553 (1995). To be admissible under *Golochowicz*, modus operandi evidence to show identity must meet four requirements: 1) there must be substantial proof that the defendant committed one of the similar acts; 2) the other acts must possess a special circumstance or quality which assures that the evidence is probative of some fact other than the defendant's bad character; 3) the proffered evidence must be relevant to some matter in issue; and 4) the prejudicial value of such evidence must not outweigh the probative value. *People v VanderVliet*, 444 Mich 52, 68-72; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205; 520 NW2d 338 (1994).

Defendant challenges the first prong of the *Golochowicz* test, arguing that the prosecutor was required to establish that defendant "actually committed" the similar act. However, proof of a defendant's similar act need only be sufficient to convince the trier of fact of the *probability* of defendant's actions as opposed to proof *beyond a reasonable doubt*. *People v Sorscher*, 151 Mich App 122, 135; 391 NW2d 365 (1986). The prosecution need not offer evidence corroborating the 'similar-act' witness' testimony when that witness testifies from personal knowledge, because credibility of a witness is a question for the trier of fact. *Id.* Here, the second victim's testimony (i.e. about another, unrelated act) that a man was standing outside her apartment door at approximately 3:30 a.m. and again at 4:00 a.m. on October 15, 1995 (three months before the crime at issue), attempting to use a key to enter her apartment. She identified defendant at trial. This second victim's boyfriend testified that he had been with defendant in defendant's apartment on October 15, 1995 from approximately 12:30 a.m. to 4:00 a.m., and that defendant left the apartment at 3:30 a.m. and again at 4:00 a.m. for about ten or fifteen minutes. Leaving the credibility of the witnesses to the jury, the second female victim's identification of defendant as the perpetrator of the similar act, and the boyfriend's corroborating testimony provides substantial evidence that defendant committed the similar act three months prior to the act at issue here.

We therefore conclude that the evidence that defendant attempted to enter another apartment using his master key and without permission was admissible under MRE 404(b) and the trial court did not abuse its discretion in admitting such evidence.

B

While defendant also objected to the admission of testimony regarding boxes of women's undergarments which were found in a shed at the apartments, his objection was as to the prejudicial effect of such evidence. All evidence offered by the parties is prejudicial to some extent, but the evidence is only excluded when the danger of unfair prejudice substantially outweighs the probative value of the evidence. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified 450 Mich 1212; 539 NW2d 504 (1995). Evidence that boxes of women's undergarments were hidden at the grounds barn or shed at defendant's apartment complex is probative because it makes it more probable that someone with access to the grounds barn was in some way acquiring women's undergarments, which corroborates the victim's testimony. While evidence that women's undergarments were hidden in a building to which defendant had access is prejudicial because the victim testified that defendant had taken her undergarments, the probative value of such evidence is not outweighed by its prejudicial effect.

II

Next, defendant argues that insufficient evidence was presented at trial to establish defendant's identity as the perpetrator of the charged crimes. We find no merit to this contention.

The victim's description of her assailant at trial is corroborated by the description she made to the police immediately after the incident. She identified defendant in a lineup and again at trial. Other than the victim's failure to tell the police that defendant had a mustache and defendant's testimony at trial that he is 5' 10" tall (rather than 5' 7" tall as the victim estimated), no evidence was presented that defendant did not possess the physical characteristics described by the victim. Viewed most favorably to the prosecution and leaving the issue of credibility to the jury, the evidence presented at trial was clearly sufficient to establish defendant's identity beyond a reasonable doubt.

III

Defendant also alleges that the trial court abused its discretion by allowing the victim to testify in rebuttal after remaining in the courtroom during defendant's testimony. At the beginning of the trial, the trial court granted the prosecutor's motion to sequester all witnesses. However, with the trial court's permission, the victim remained in the courtroom during most of defendant's testimony. The victim then testified as a rebuttal witness, stating that while defendant was testifying she recognized his voice as the man who had entered her apartment. The record does not reveal how much of defendant's testimony the victim heard or the content of that testimony.

A defendant who complains on appeal that a witness violated the lower court's sequestration order must demonstrate that prejudice has resulted. *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985). Here, defendant has failed to show that he was prejudiced by such testimony. The victim had already provided a detailed description of her assailant and had identified defendant in a lineup and again in court as her assailant. The similar act witness had also identified defendant as the man who had attempted to enter her apartment without her permission, using a key. Because

substantial evidence identifying defendant as the victim's assailant had been presented before the victim's testimony that she recognized defendant's voice in the courtroom, the trial court did not abuse its discretion in allowing the victim to testify.

IV

Finally, defendant argues that his sentences for armed robbery and CSC are disproportionate. We disagree.

Here, defendant was sentenced to a minimum of twenty years' imprisonment for the armed robbery conviction; this exceeds the sentencing guidelines range of three to ten years. The sentencing judge justified the upward departure on the basis of the escalating nature of defendant's serious prior assaultive record and the need to protect both the victim and society from defendant. The relationship between the defendant and the victim is an important factor not included in the guidelines calculations. *People v Milbourn,* 435 Mich 630, 661; 461 NW2d 1 (1990). Also, the escalating nature of a defendant's aggressiveness and assaultiveness may justify upward departure from a guidelines sentence. *People v Milton,* 186 Mich App 574, 580-581; 465 NW2d 371 (1990), remanded in part, 438 Mich 852; 473 NW2d 310 (1991). Here, the sentencing court properly considered facts not addressed in the guidelines in imposing sentence and did not abuse its discretion in sentencing defendant; his sentence for armed robbery is proportionate.

Defendant also appeals his sentence for the CSC conviction, which was within the sentencing guidelines. Defendant received a minimum sentence of ten to fifteen years' imprisonment for the CSC conviction, which is at the top of the sentencing guidelines range of ten to fifteen years. A sentence imposed within an applicable sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Broden,* 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has failed to present sufficiently unusual circumstances to overcome the presumption of proportionality. *Milbourn,* 435 Mich at 656-657. The sentence is proportionate.

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak