

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY HAROLD COMBS,

Defendant-Appellant.

UNPUBLISHED

November 16, 2006

No. 262695

Oakland Circuit Court

LC No. 2004-197050-FC

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f), and the trial court sentenced defendant as an habitual offender, second offense, MCL 760.10, to prison terms of 23 to 36 years for each conviction. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erroneously admitted testimony regarding defendant's prior assault on another woman that occurred on the same day as the present offense. A challenge to a trial court's evidentiary ruling is reviewed for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000).

Other acts evidence may be admitted pursuant to MRE 404(b) where: (1) the evidence is offered for some purpose other than under a character-to-conduct theory, or a propensity theory, (2) the evidence is relevant to a fact of consequence at the trial, and (3) the trial court determines under MRE 403 that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. If requested, the trial court may provide a limiting instruction under MRE 105. *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003).

Here, the prosecution properly sought to use the evidence to establish defendant's scheme, plan, or system in assaulting the victim. The incidents were sufficiently similar to support the inference that they were manifestations of a common plan, scheme, or system. Both incidents occurred at the Eddie Money concert and both involved defendant silently grabbing a woman from behind. The evidence is therefore logically relevant. *Sabin, supra* at 63. While defendant's plan was not particularly complex, it need not be unusual or distinctive to support the admission of the other acts evidence. *Ackerman, supra* at 440-441. Additionally, nothing indicates that the jury would give the other act evidence undue weight, especially in light of the testimony of the victim and defendant regarding their versions of the incident and the

corroborating testimony of the other prosecution witnesses. The trial court gave a limiting instruction on the use of the evidence and jurors are presumed to follow their instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in admitting the evidence of the prior assault.

Defendant also argues that he was denied a fair trial by improper prosecutorial remarks during closing arguments. Because defendant failed to object to the alleged improper remarks, the issue is reviewed for plain error affecting defendant's rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

Appeals to the jury to sympathize with the victim are improper. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Here, the prosecutor appealed for sympathy for the victim. However, reversal is not warranted because a cautionary instruction could have cured any perceived prejudice had one been requested. *Id.* at 586. In fact, the trial court later instructed the jury that "you must not let sympathy or prejudice influence your decision in any way." This instruction was sufficient to cure any perceived prejudice.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot