

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLAUDE ARTHUR GREEN,

Defendant-Appellant.

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UNPUBLISHED

February 13, 2007

No. 266030

St. Clair Circuit Court

LC No. 05-000719-FC

Before: Kelly, P.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct (CSC I), MCL 750.520b, and two counts of kidnapping, MCL 750.349. He was sentenced, as a habitual second offender, MCL 769.10, to concurrent prison terms of 39 to 60 years for each conviction. Defendant accosted the victims, a mother and her daughter, in the basement computer lab of a library, threatened them with a knife, moved them to a more secluded area of the basement, ordered the daughter to tie up her mother, and forced the daughter to perform oral sex on him. Defendant was apprehended when the mother freed herself, saw defendant exiting the library, and chased him; police arrived and apprehended defendant. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion when it admitted evidence of a sexual assault by defendant that occurred in 1990. We disagree. Whether to admit evidence under MRE 404(b) is within the sound discretion of the trial court. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). “[E]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith.” MRE 404(a). However, evidence of prior crimes may be admissible for other reasons under MRE 404(b), such as to show a defendant’s scheme, plan, or system in doing an act. Here, the charged assault and the prior assault involved defendant using an edged weapon, sexually assaulting a teenage victim in public, telling the victims that they would not get hurt if they did what they were told, and ordering them to take off their clothes. Sufficiently similar misconduct to suggest a common plan, scheme, or system is relevant to show that the charged act occurred. *People v Ackerman*, 257 Mich App 434, 440; 669 NW2d (2003). Defendant distinguishes the prior assault because it involved an accomplice, a white woman outdoors at night, and a different sex act, but those differences do not negate the substantial similarities and may, in any event, be viewed as the result of acting opportunistically upon finding a teenaged female victim in a public place where discovery would have been unlikely. Defendant also argues that the prior assault

took place fifteen years ago and was therefore too remote in time. However, there is no set time limit for admitting prior acts evidence. The trial court did not abuse its discretion in admitting the other acts evidence at issue.

Defendant also argues that the trial court erred in admitting the evidence because it was unduly prejudicial under MRE 403. Prejudice to defendant is not enough to exclude evidence because all relevant evidence presented by an opponent is necessarily prejudicial. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Under MRE 403, evidence should be excluded if its probative value is substantially outweighed by a danger that the trier of fact would be induced to afford it excessive weight or otherwise decide the matter “on an improper basis, commonly, though not always, an emotional one.” *Id.*, 501. The other acts evidence here may have posed some risk of unfair prejudice, but it was also highly probative. We do not find that the trial court abused its discretion by admitting the evidence.

Defendant next argues that the evidence was insufficient to prove kidnapping because there was no evidence that defendant secretly confined either victim, and any forcible confinement was merely incidental to the sexual assault. We disagree.

We review an insufficiency of evidence claim de novo to determine whether the evidence, when viewed in the light most favorable to the prosecution, would justify a rational trier of fact in finding that all the elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Defendant was charged with forcibly or secretly confining both victims. He argues that the evidence does not show that he secretly confined either of them or that any force he used was independent of the sexual assault. Our Supreme Court has defined “secret confinement” under MCL 750.349<sup>1</sup> as follows:

. . . . [T]he essence of “secret confinement” . . . is deprivation of the assistance of others by virtue of the victim’s inability to communicate his predicament. “Secret confinement” is not predicated solely on the existence or nonexistence of a single factor. Rather, consideration of the totality of the circumstances is required when determining whether the confinement itself or the location of confinement was secret, thereby depriving the victim of the assistance of others. That others may be suspicious or aware of the confinement is relevant to the determination, but is not always dispositive. [*People v Barker*, 411 Mich 291, 300, 309; 307 NW2d 61 (1981)].

Defendant moved the mother from an area visible from the stairway entrance to an area that could not be seen from the stairway entrance and directed the daughter to tie her mother to a chair. Thus, defendant hid her from any potential immediate view and made it less likely that she could communicate her predicament to anyone entering the basement. Because the daughter testified that defendant went looking for the mother as footsteps were heard in the stairwell, the

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<sup>1</sup> MCL 750.349 was substantially changed by 2006 PA 159, but the charged crimes occurred before the effective date of the change. We do not address the current version of MCL 750.349.

jury could have properly inferred that defendant moved the mother from the stairwell because he believed that the stairway entrance could lead to discovery.

Although there was some evidence that the cubicle where defendant moved the daughter was visible from the stairway entrance, the jury heard evidence that he moved her out of sight of her obvious companion after he paced in the basement while the two spoke with each other.<sup>2</sup> Defendant not only removed the daughter from any assistance or ability to communicate with her companion, see *People v Jaffray*, 445 Mich 287, 309; 519 NW2d 108 (1994), the evidence shows that he succeeded in hiding her because her mother testified that as soon as she freed herself, she immediately searched for her daughter in the direction where defendant had gone with her and could not find her. Defendant does not argue that he took the daughter from the mother's view for any purpose other than hiding her from the mother. Although he *might* have moved the daughter merely for privacy unrelated to hiding her, "[t]he prosecution is not required to rule out every arguable theory of innocence, but is only required to prove its theory beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant argues that neither victim could have been secretly confined because the assault took place in a public location. We have been provided no authority to show that someone cannot be secretly confined in a public place, and "[n]othing may be read into a statute that is not found in the clear intent of the Legislature, based on the text of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2004). Moving a victim out of a location likely to be easily viewed and away from potential assistance rationally constitutes secret confinement, even if there might theoretically have been better hiding places. There was sufficient evidence of secret confinement kidnapping of both victims to support defendant's kidnapping convictions.

Defendant next argues that the trial court improperly considered his failure to admit guilt in sentencing. Again, we disagree. MCL 769.34(10) requires us to affirm a sentence that is within the statutory guidelines, as defendant's sentence is, but not in the face of claims that the trial court erroneously considered a defendant's refusal to admit guilt in violation of the defendant's constitutional right against self-incrimination. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). A sentencing court may not consider a defendant's refusal to admit guilt in imposing a sentence. *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). "Resentencing is required only if it is apparent that the court erroneously considered the defendant's failure to admit guilt, as indicated by action such as asking the defendant to admit his guilt or offering him a lesser sentence if he did." *Id.*

Here, the trial court inquired whether defendant committed the crime in the context of defendant's argument that certain prosecution witnesses were not credible. The trial court apparently was trying to determine why, in light of defendant's videotaped confession that was played to the jury, credibility was an issue of concern. Defendant explained that he had not meant the videotaped statement to be a confession, which the trial court apparently accepted. The trial court did not ask defendant to admit guilt. Before sentencing, the trial court observed

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<sup>2</sup> There is no evidence that defendant knew the victims to be mother and daughter.

that defendant “has continually denied any culpability,” but in context this appears to have been merely a statement of fact in the case. We see nothing that suggests that defendant’s refusal to admit guilt affected the sentence, nor did the trial court state that it justified the sentence imposed. See *Spanke, supra* at 650.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Alton T. Davis

/s/ Deborah A. Servitto