

2011 IL App (1st) 092988-U

THIRD DIVISION
October 26, 2011

No. 1-09-2988

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 10376
)	
SCOTT HILDRETH,)	Honorable
)	Timothy J. Chambers,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justice Murphy and Justice Salone concurred in the judgment.

O R D E R

¶ 1 *Held:* Where evidence of defendant's prior conduct was relevant to the charged offense of aggravated criminal sexual assault and jury was given limiting instruction, admission of that evidence did not constitute error so as to permit plain error review; therefore, defendant's convictions are affirmed.

¶ 2 Following a jury trial, the defendant, Scott Hildreth, was convicted of two counts of aggravated criminal sexual assault and one count of aggravated kidnapping. Based on a previous conviction for a similar sex offense, defendant was sentenced to natural life in prison. On appeal, defendant contends the trial court committed plain error in admitting evidence that about 11 months

before the instant offense, he was found in violation of his parole for driving in a department store parking lot with a knife and sexual bondage items in his possession. Defendant also argues the trial court failed to give the jury an accurate limiting instruction about the testimony. We affirm.

¶ 3 At about noon on April 16, 2007, M.L., the victim, was sexually assaulted while jogging in a forest preserve in Des Plaines. The victim told Cook County police her assailant threatened her with a screwdriver and led her to a wooded area away from the running path. The attacker tied the victim's hands, blindfolded her, put a ball in her mouth to gag her and forced her to have vaginal and anal sex.

¶ 4 Before trial, the State filed a motion *in limine* to admit evidence that defendant had a history of stalking women to rape them and of using bondage tools to commit sexual acts. The State sought to admit evidence that defendant had been detained in the parking lot of a Kohl's department store in Mount Prospect on May 24, 2006. A store security video depicted defendant driving in the parking lot in a white pickup truck. Kohl's security staff observed defendant change his shirt and put a black knit hat on his head in the parking lot. The security staff notified Mount Prospect police, who stopped defendant and observed a knife in the vehicle. According to the motion, a "homemade ball gag" also was recovered from the truck, and defendant told police he intended to kidnap a woman and attack her. Defendant was arrested because his possession of a knife violated a condition of his parole.

¶ 5 The motion *in limine* indicated officers investigating the instant crime were informed of the 2006 incident and that the similarities between the offenses led to defendant's arrest. The State sought to introduce video footage from the store's security camera and photographs of items recovered from defendant's vehicle. The State asserted that evidence was admissible as probative of defendant's state of mind, motive, intent, identity, and on other bases. The State also argued the

earlier incident was relevant to demonstrate the investigative process, *i.e.*, that it led Cook County police to question defendant for the instant crime.

¶ 6 The defense objected to that evidence as prejudicial because it suggested defendant's propensity to commit sex crimes. The defense asserted the earlier incident involved "ambiguous conduct" and was not proof of another crime because no conviction resulted. The trial court ruled the State could present evidence of the 2006 incident via the store security video and pictures of the items found in defendant's vehicle. The court did not specify a basis for its admission of the evidence.

¶ 7 At trial, the victim testified her assailant wore a tan stocking over his face and a black knit cap. The attacker poured a liquid on her breasts and rubbed them while she was blindfolded.

¶ 8 After having sex, the assailant removed the blindfold and ordered her to touch his penis and as she did so, she saw a tattoo on the left side of his body when his shirt lifted up slightly. She also noticed a container of motor oil nearby. The victim walked to a nearby construction site and reported the sexual assault. A man working at the construction site, at about 1 p.m., noticed a gray or white pickup truck parked on the wrong side of the road close to a forest preserve walking trail. A screwdriver, a black hat, a beer can and other items were recovered from the wooded area, and the victim identified the items as being at the scene of the assault.

¶ 9 Police interviewed the victim and showed her a photo array; however, she told police she would not be able to identify her attacker's face because his features were distorted by the stocking over his face. The victim did not identify anyone in the photo array as her attacker. The victim identified a black knit cap bearing the word "choppers" found at the scene as the hat worn by her assailant. Several photos were admitted into evidence, including a picture of a tattoo on the left side of defendant's torso that the victim identified as the mark she saw on her attacker's body.

¶ 10 Mount Prospect police detective Robert Riordan testified that the day after the instant crime, he told Cook County detectives about the 2006 incident, in which defendant drove a white pickup truck. Detective Riordan interviewed defendant at the Mount Prospect police station after the 2006 incident, and defendant admitted ownership of the items in the truck, including a butcher knife, a ball gag (which the detective described as a "deviate sexual device"), a mask and a leather strap. A black nylon mask and a black stocking cap with white writing also were found in the vehicle. Cook County authorities contacted Detective Riordan about the instant assault based on the detective's earlier report about defendant and the 2006 incident.

¶ 11 The jury then heard evidence that defendant was arrested by Cook County police on April 17, 2007, and advised of his *Miranda* rights. Cook County police detective Nicholas Ditusa testified that when he asked defendant about his activities the previous day, defendant said he was at a driver's license facility in Schaumburg from 1 to 2 p.m.

¶ 12 When the detective told defendant a woman had been sexually assaulted in the woods, defendant responded that he had been in the forest preserve on April 15, the day before the reported assault, and met a woman with whom he had consensual sex. Defendant was shown a picture of the victim and identified her as the woman he met that day. He said she had fallen down on the path and he helped her get up. He wore a black hat pulled down low over his eyes and had a screwdriver in his hand when he encountered the victim, and a container of motor oil was near the area where they had sex. Defendant took the woman's cell phone but denied using any restraints.

¶ 13 Police ascertained defendant was at the Schaumburg driver's license facility after 3 p.m. on April 16, and when given that information, defendant said he must have been mistaken and his sexual encounter must have occurred on April 16. Defendant described the encounter again, saying that he told the woman he needed to have sex and did not want to hurt her. He also admitted having

the motor oil in his truck. Chicago police sergeant Michael Anton said defendant admitted he was trying to get his "sick off" and he knew his actions were wrong.

¶ 14 Defendant gave a statement that was memorialized by an assistant State's Attorney and read to the jury in which he admitted going to the forest preserve with motor oil and bondage tools to find "any female" to have sex with. Defendant admitted to sexually assaulting the victim in a manner consistent with her testimony.

¶ 15 The defense asserted in opening statement and closing argument that defendant was not the assailant and that police focused their investigation on defendant after the 2006 incident was brought to their attention. The defense presented testimony from a Cook County officer that the department's canine unit picked up a scent in the forest preserve but did not lead to a suspect. A supervisor at the Schaumburg driver's license facility testified that defendant's permit was issued at 3:06 p.m. on the day of the assault but he had no idea when defendant entered the building.

¶ 16 On appeal, defendant contends the trial court abused its discretion in admitting evidence of the 2006 incident because that evidence was not relevant under any exception to the rule barring proof of other crimes. Defendant argues the trial court did not specify a basis for admitting the evidence, and he further contends the error was magnified when the court did not give the jury an accurate limiting instruction.

¶ 17 Defendant concedes that although his counsel objected to the admission of the evidence and the instruction as given, counsel did not include those issues in a post-trial motion, thus warranting application of the plain error doctrine. To preserve a purported error for review, a defendant must raise a timely objection at trial and also raise the error in a written post-trial motion, and the failure to perform both of these steps ordinarily results in forfeiture of the issue on appeal. *People v. Kitch*, 239 Ill. 2d 452, 460 (2011).

¶ 18 The plain error rule creates a limited exception to forfeiture to protect a defendant's substantial rights and sustain the integrity of the judicial process. *Kitch*, 239 Ill. 2d at 461 (noting the defendant bears the burden of establishing plain error). Under the plain error doctrine, an unpreserved error is reviewed when either (1) the evidence is closely balanced, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Alsup*, 241 Ill. 2d 266, 275-76 (2011).

¶ 19 Defendant invokes the second alternative of plain error, asserting the cumulative effect of the "pervasive" references to the 2006 incident and the limiting instruction undermined the fairness of his trial. By implicating his fundamental right to an unbiased jury, defendant raises the second prong of plain error, which guards against errors that erode the integrity of the judicial process. See *People v. Sargent*, 239 Ill. 2d 166, 190-91 (2010) (prejudice is presumed when invoking second prong of plain error but must be shown in arguing first prong). We first consider the admissibility of evidence of defendant's 2006 detainment in the Kohl's parking lot because if no error occurred in admitting that evidence, there can be no finding of plain error. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (first step in plain error analysis is to determine whether a "clear or obvious error" occurred).

¶ 20 While the law distrusts the inference that because a person has committed other crimes, he is more likely to have committed the crime charged, evidence of other crimes is admissible if it is relevant for a purpose other than to show the defendant's propensity to commit crimes. *People v. Wilson*, 214 Ill. 2d 127, 135 (2005); *People v. Plummer*, 318 Ill. App. 3d 268, 277 (2000). Such evidence is not admissible merely to show how an investigation unfolded unless it is also relevant to specifically connect the defendant with the crime for which he is being tried. *People v. Lewis*, 165 Ill. 2d 305, 346 (1995). For example, other-crimes evidence is admissible as proof of numerous points, including *modus operandi*, the presence of criminal intent, motive, identity, the

circumstances or context of the defendant's arrest, the identification of the weapon used in the crime, and opportunity or preparation for the offense. *Wilson*, 214 Ill. 2d at 136; *People v. Kimbrough*, 138 Ill. App. 3d 481, 484-85 (1985). The State's motion *in limine* asserted the evidence of the 2006 incident and the items recovered from defendant's truck were admissible as relevant to defendant's identity, state of mind, *modus operandi*, motive or intent.

¶ 21 The record indicates that before the jury began deliberating, the State requested and the jury was given the following instruction, over the defense's objection:

"Evidence has been received that the defendant has been involved in conduct other than that charged in the indictment.

This evidence has been received on the issues of the defendant's identification, design, knowledge and *modus operandi* and may be considered by you only for that limited purpose.

It is for you to determine whether the defendant was involved in that conduct and, if so, what weight should be given to the evidence on the issues of identification, design, knowledge and *modus operandi*."

¶ 22 Defendant first contends his actions in the Kohl's parking lot did not constitute a crime, even though they resulted in his detention on a parole violation, and therefore do not qualify as "other crimes" evidence. To review, the State presented evidence that defendant was detained in a parking lot after being observed changing his clothes and donning a black knit hat. Various items used for sexual bondage similar to those used in the instant crime, in addition to a knife, were recovered from defendant's vehicle, and defendant admitted to police he was looking for a woman to kidnap and attack.

¶ 23 This court has applied the other-crimes analysis to permit evidence of conduct that falls short of a completed criminal act, *e.g.*, that a defendant previously intended to engage in criminal activity, if that evidence was relevant to the crime for which the defendant was currently being tried. *People v. Ingram*, 389 Ill. App. 3d 897, 901 (2009); see also *People v. Williams*, 274 Ill. App. 3d 598, 607-08 (1995) (proof of wrongful conduct that does not rise to the level of a completed offense can be admitted); *Kimbrough*, 138 Ill. App. 3d at 484 n.1 (using the term "other crimes" to refer to both other crimes and wrongful conduct). Therefore, an inchoate offense can be admitted into evidence under the "other crimes" rubric. Such evidence can be admitted to show how an investigation unfolded if the evidence is also relevant to specifically connect the defendant with the crimes for which he is being tried. *People v. Lewis*, 165 Ill. 2d 305, 346 (1995). See also Committee Note to Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.14) (instruction can be used when evidence is received for limited purpose that does not technically constitute an "offense"). The instruction given, as set out above, refers to conduct and not to an offense.

¶ 24 Next, we observe that the relevance of particular evidence in a given case can depend upon the defense that is presented. During the investigation, defendant made a statement to police acknowledging he was in the woods with the victim on the day of the attack but suggested the acts were somewhat consensual. In contrast, the theory presented at trial was that defendant did not meet the description of the attacker provided by the victim and his inculpatory statement was coerced by police.

¶ 25 Under either of those conflicting theories, proof of defendant's prior conduct could be admitted as relevant. If a defendant concedes being in the victim's presence but argues he lacked the intent to assault, the prior incident can be admitted as relevant to establish his intent, *i.e.*, the absence of an innocent frame of mind. See *People v. Luczak*, 306 Ill. App. 3d 319, 324 (1999) (and

cases cited therein). In contrast, the position defendant assumed at trial was that he was not involved in any assault in the forest preserve and had been unfairly targeted by police. Defendant's trial theory forestalled the admission of evidence of the 2006 incident for purposes of establishing defendant's intent to attack the victim. See *People v. Cardamone*, 381 Ill. App. 3d 462, 489-90 (2008) (when an accused's state of mind is not at issue because he or she claims the alleged events did not occur, admission of other-crimes evidence for purposes of establishing intent is inappropriate).

¶ 26 Instead, defendant's position at trial that he was not the offender and that the police had the "wrong man" had the effect of placing the attacker's identity at issue. Cf. *People v. Boyd*, 366 Ill. App. 3d 84, 92 (2006) (identity of offender not at issue where defense theory is consent). Evidence of wrongful conduct may be admitted to help establish the identity of the perpetrator of the crime, often by some physical evidence, typically an object, from the earlier incident or crime. *People v. Martin*, 408 Ill. App. 3d 44, 48 (2011); see also *People v. Coleman*, 158 Ill. 2d 319, 333-34 (1994). Some similarity must tie the two crimes together to make the identification of the defendant as the offender in a separate case useful as evidence that he committed the offense at issue. *Martin*, 408 Ill. App. 3d at 48-49. As to the instant crime, defendant admitted he went to the forest preserve with bondage tools for the purpose of finding "any female" and having sex and that he had sex with a woman after restraining her and using a ball gag in the victim's mouth. The earlier conduct involved defendant's detention while in possession of a knife and various items used for sexual bondage, including a ball gag, and defendant told police that he was looking for a woman to kidnap and attack.

¶ 27 By a similar analysis, the evidence of defendant's prior conduct was relevant to demonstrate defendant's *modus operandi*. See *People v. Quintero*, 394 Ill. App. 3d 716, 726 (2009) (evidence of *modus operandi* and identity often are closely related because both tie defendant to the offense

at issue). In cases involving evidence of *modus operandi*, a high degree of factual similarity is required between the charged crime and the other crime because *modus operandi* "refers to a pattern of criminal behavior so distinctive that separate crimes are recognized as the handiwork of the same wrongdoer." *Quintero*, 394 Ill. App. 3d at 726, quoting *People v. Cruz*, 162 Ill. 2d 314, 349 (1994). The crimes must have a distinctive feature, or a sufficient number of common features that form a distinctive combination not common to most offenses of that type. *Quintero*, 394 Ill. App. 3d at 726; *People v. Hansen*, 313 Ill. App. 3d 491, 506 (2000).

¶ 28 Defendant argues there were not two completed sexual acts to compare in a *modus operandi* analysis. Evidence of a culpable act or an uncharged offense can be used to show *modus operandi*. *People v. Patten*, 230 Ill. App. 3d 922, 929 (1992) (evidence that on a separate occasion, defendant attempted to lure children into his car in specific manner was admissible as proof of *modus operandi* in child abduction prosecution). Even though the 2006 incident was not a completed offense, the evidence of defendant's behavior contain a number of common features so as to be relevant to show *modus operandi*. In both instances, defendant's goal was to take a woman to a secluded location for purposes of having sex. Defendant was in possession of an item that could be used as a weapon (a knife and a screwdriver) in both cases, and also had various items used in deviate sexual acts, including a ball gag and a mask. On both occasions, defendant admitted his intent to have sex with a woman against her will.

¶ 29 We note the jury instruction that was given stated the evidence could be considered on the issue of "design," presumably intended to invoke the category of common design, which refers to a larger criminal scheme where the charged crime is only a portion. See *Boyd*, 266 Ill. App. 3d at 91. It was not contended the 2006 incident and the instant crime were part of a larger common scheme or plan; they were simply two examples of defendant's behavior. Nevertheless, the evidence was relevant and properly admitted as to identity and *modus operandi* for the reasons stated above.

Therefore, the trial court did not commit error in allowing the evidence of the 2006 incident, and a plain error analysis does not aid defendant.

¶ 30 Defendant next contends the trial court erred in failing to give a limiting instruction to the jury before it heard Detective Riordan's testimony about the 2006 incident. To review the relevant facts, after Detective Riordan's testimony, court adjourned for the day. The next morning, before the jury was brought out, the State asked that the court instruct the jury as to the limited purpose for which the detective's testimony could be used. The trial court noted the instruction should have been read before the detective testified but acknowledged it also could be offered after the testimony at issue. Defense counsel objected to the reading of the instruction at that time, asserting it would "unnecessarily highlight the evidence as being the first thing today." The trial court sustained the defense's objection, and no limiting instruction was given. This issue was preserved for review.

¶ 31 We note that defense counsel objected to the reading of the instruction after the testimony and cannot now complain that the instruction was not given at that time. Defendant therefore contends the trial court was required to instruct the jury *sua sponte* before the detective's testimony. Pursuant to the committee notes to IPI Criminal 4th No. 3.14, that instruction "may be given both (1) during trial, either just before or immediately after the jury is to hear the evidence in question [citation] and (2) at the end of the trial before jury deliberations." Our supreme court has held that although the preferred practice is to offer a limiting instruction at the time of testimony, the absence of a contemporaneous instruction does not mandate reversal. *People v. Heard*, 187 Ill. 2d 36, 61 (1999); see also *People v. Butler*, 377 Ill. App. 3d 1050, 1067 (2007).

¶ 32 Defendant further argues that because the trial court did not state a basis for its admission of the 2006 incident into evidence, the instruction was inaccurate because it failed to state the actual reason or reasons for which the trial court allowed the evidence. The failure of the trial court to state a basis for its admission of the evidence does not tie the hands of this court, which reviews the

judgment of the trial court, not its reasoning, and may affirm on any grounds in the record. *People v. Johnson*, 392 Ill. App. 3d 897, 913 (2009). The instruction informed the jury that it should limit its consideration of the 2006 incident to the stated purposes, "the defendant's identification, design, knowledge and *modus operandi*." We have concluded that evidence was properly admitted as relevant to two issues: identity and *modus operandi*. Moreover, the State presented overwhelming evidence of defendant's guilt, including the victim's identification of defendant by his tattoo and defendant's admission that he sexually assaulted the victim.

¶ 33 Accordingly, for all the reasons stated above, the judgment of the trial court is affirmed.

¶ 34 Affirmed.