STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALLEN SABIN,

Defendant-Appellant.

UNPUBLISHED
November 21, 1997

No. 193736
Oakland Circuit Court
LC No. 95-141544-FH

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit kidnapping, MCL 750.87; MSA 28.282, and larceny of $100 or less, MCL 750.356; MSA 28.588. Defendant pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, and was sentenced to four to twenty years' imprisonment for the assault conviction and ninety days' imprisonment for the larceny conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in admitting three prior instances of bad conduct under MRE 404(b) in order to prove his intent to kidnap the complainant. The admissibility of bad acts evidence is reviewed for an abuse of discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). When reviewing evidence admitted under MRE 404(b), a four-prong standard must be used: (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) its probative value must not be substantially outweighed by unfair prejudice; and (4) the trial court may, upon request, provide a limiting instruction to the jury. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

Defendant claims that a statement he made prior to the assault was erroneously admitted because it was evidence of other bad acts. We disagree. The statement, "[F]ine, I can't get you here, I'll just wait for you in the parking lot and I'll get you outside," was offered to prove defendant's intent to kidnap complainant. It was relevant because it had a tendency to make more probable defendant's intent to kidnap complainant and, although prejudicial, the probative value was not outweighed by unfair

prejudice. Finally, a limiting instruction was given to the jury as recognized in *VanderVliet*. We find that this evidence was properly admitted.

Defendant also claims that testimony regarding telephone calls made by him to the complainant the night before the charged incident was improperly admitted. The evidence of these other acts was offered for a proper purpose, to show defendant's intent to frighten the complainant. It also tended to show that defendant wanted the complainant near him. This evidence is also relevant to prove his intent to kidnap. Again, this evidence is prejudicial because, generally, all evidence admitted by the prosecution is prejudicial. However, the test is whether the evidence's probative value is substantially outweighed by its *unfair* prejudice. This standard has not been met. This evidence is highly probative in that it makes the consequential factual proposition, defendant's intent to kidnap the following morning, much more probable than without the evidence. We find the testimony regarding the telephone calls was properly admitted.

Defendant also argues that a subsequent uncharged assault upon the victim was improperly admitted. The trial court ruled that if defendant wanted to admit evidence of the complainant's trip with defendant after the initial assault, evidence of the assault that took place on that trip would be admitted. Even assuming arguendo that this evidence was improperly admitted,[1] in light of the overwhelming untainted evidence against defendant, we find any error in the admission of this evidence to be harmless. *People v Mateo*, 453 Mich 203; 551 NW2d 891 (1996). There was no dispute that defendant assaulted the complainant in the parking lot at her place of employment. Defendant's actions and statements leading up to the assault and during the assault clearly established that he intended to kidnap the complainant at the time of the assault.

II

Defendant next argues that he was denied a fair and impartial trial as a result of prosecutorial misconduct. We disagree. Because defendant failed to object to the prosecutor's remarks at trial, review is precluded unless a miscarriage of justice will result. *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996). After a review of the prosecutor's entire closing argument, we find that a miscarriage of justice will not result if this Court declines to review this issue because the remarks were not improper.

III

Defendant next argues there was insufficient evidence to sustain his assault conviction or, in the alternative, that the trial court erred in denying his motion for a directed verdict. We disagree.

When reviewing a sufficiency of the evidence claim or a denial of directed verdict claim in a criminal case, this Court must view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Turner*, 213 Mich App 558, 565; 540 NW2d 728 (1995). The elements of assault with intent to commit a felony (kidnapping) are: (1) that the defendant committed an assault; (2) when he committed the assault, he had specific intent to commit the crime of

kidnapping; (3) completion of the crime of kidnapping is irrelevant. CJI2d 7.5. See also *People v Strand*, 213 Mich App 100, 102; 539 NW2d 739 (1995).

Defendant argues that there was no direct or circumstantial evidence that he possessed the requisite specific intent to commit the crime of assault with intent to kidnap. Defendant also claims that there was insufficient evidence to prove specific intent to kidnap because the asportation was incidental to the assault and not indicative of his intent to kidnap. Specific intent may be express or it may be inferred from the facts and circumstances by the trier of fact. *Turner*, *supra* at 567, quoting *People v Flowers*, 191 Mich App 169, 176-179; 477 NW2d 473 (1991). Here, the day prior to the assault, defendant made the following statement to the complainant at her place of employment: "[F]ine, I can't get you here, I'll just wait for you in the parking lot and I'll get you outside." Later that evening, defendant made several telephone calls to the complainant's home in which he threatened to kill complainant's birds and feed them to his dog. He also ordered complainant to "get her ass over there," which presumably was his house. Additionally, when defendant was dragging complainant toward his car he said [Y]ou're coming with me . . . ." Based upon the facts and circumstances surrounding this incident, a rational trier of fact could reasonably infer defendant's specific intent to kidnap complainant.

Moreover, defendant's argument that the asportation was incidental to the assault and, therefore, specific intent to kidnap was not proven is without merit. The essence of the charge of assault with intent to commit a felony is not completion of the felony, but the specific intent to commit the named felony. See *Strand*, *supra* at 103. Defendant's argument that the asportation element was not proven is of no consequence to his conviction, because he was not charged with kidnapping. Therefore, whether sufficient evidence was presented on the element of asportation is irrelevant.

IV

Finally, defendant argues that the cumulative effect of all the alleged errors deprived him of a fair trial. We disagree. In this case, there was, at most, only one incident of error, which was harmless. There can be no cumulative effect from one error. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Myron H. Wahls
/s/ Roman S. Gribbs

[1] Because the prosecution only sought to admit this evidence to fully establish the circumstances surrounding a trip that the complainant took with defendant after the alleged crime and not for any purpose consistent with MRE 404b, we question whether a challenge on the basis raised by defendant is appropriate. Nevertheless, we do have concerns about the trial court's admission of this evidence. Defendant introduced the fact that the complainant and he had taken a trip together after the charged incident in order to rebut the contention that the complainant feared being kidnapped by defendant. In this context, we question the relevance of an alleged attack on the complainant by defendant during the

trip and whether the prejudice flowing from such evidence would outweigh the probative value, which would be minimal at best.