# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 19, 2000 |
| v | No. 216970<br>Saginaw Circuit Court |
| SAMUEL ISAAC STEAD,<br><br>Defendant-Appellant. | LC No. 97-014897-FH |

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

A jury convicted defendant of one count of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), one count of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1); MSA 28.788(7)(1), and one count of assault with intent to rob, MCL 750.88; MSA 28.283. Defendant was sentenced to concurrent terms of six to twenty years' imprisonment for the home invasion conviction, six to ten years' imprisonment for the assault with intent to commit sexual penetration conviction, and six to fifteen years' imprisonment for the assault with intent to rob conviction. Defendant appeals by right. We affirm.

First, defendant argues that the trial court erred by denying his motion to quash the charge of assault with intent to commit criminal sexual penetration based on the lack of evidence of his intent. We disagree. We review de novo a circuit court's determination on a motion to quash based on an insufficiency of the evidence claim to determine whether the district court abused its discretion. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). An abuse of discretion occurs where "an unprejudiced person, considering the facts upon which the court acted, would say there was no justification or excuse for the ruling." *Id.*

"The primary function of the preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it." *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993). If the magistrate concludes that probable cause supports these propositions, then the magistrate must bind over the defendant for trial. MCL 766.13; MSA 28.931, MCR 6.110(E); *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). Probable cause in this context is established by evidence "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable

belief of [the defendant's] guilt . . . ." *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997), quoting *Coleman v Burnett*, 155 US App DC 302, 317; 477 F2d 1187 (1973). The prosecution need not prove each element beyond a reasonable doubt, but it must present some evidence of each element. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). Circumstantial evidence and reasonable inferences from the evidence can be sufficient. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997).

MCL 750.520g; MSA 28.788(7) provides in part:

> (1) Assault with intent to commit criminal sexual conduct involving sexual penetration shall be a felony punishable by imprisonment for not more than 10 years.

Pursuant to the plain language of the statute, the prosecution had to produce evidence at the preliminary examination that defendant had the specific intent to commit an act of sexual penetration on the complainant. *People v Snell*, 118 Mich App 750, 755; 325 NW2d 563 (1982). However, it was not necessary to show that a sex act was started or completed. *Id*. The evidence presented at the preliminary examination that could support a reasonable belief that defendant assaulted the complainant with intent to commit a sexual penetration included (1) the complainant's allegation that she caught him peeping in her window the year before, (2) the noise she heard at the back of the house that suggested someone was there that morning, (3) the detective's testimony that defendant told him he had "no intentions when he went in the house but that the victim made him have intentions by the way she was dressed," and that he entered the closed house because the complainant was naked from the waist down, (4) the complainant's testimony that defendant, whom she discovered in her kitchen, continuously attempted to physically restrain by pinning her hands behind her back with handcuffs and to control her by pushing her into the wall, into the bathroom, face down on the bedroom floor, and frustrating her first escape, pushed her face down on the bed and got on top of her, and (5) her testimony that defendant attempted to push her further up onto the bed. While the complainant's belief that defendant was trying to rape her is not independent evidence of defendant's intent, it is logically relevant to understanding the totality of the circumstances that she faced.

Circumstantial evidence and reasonable inferences may be sufficient to support the district court's determination to bind over defendant. *Terry, supra*. The court was not required to dismiss charges against defendant even if the evidence presented at the preliminary examination raised a reasonable doubt of his guilt. Reasonable doubt is to be determined by a jury, where, of course, the prosecutor must present some evidence on each element of the charge and prove defendant's guilt beyond a reasonable doubt. *Goecke, supra* at 469-470. We here conclude that the district court did not abuse its discretion in binding defendant over on this charge.

In denying defendant's motion to quash, the circuit court stated:

> [T]he testimony indicated that [defendant] then laid hands and a struggle ensued into the bathroom and ultimately into the bedroom and with the intent being expressed of the desire for sexual penetration – complete with the struggle of the bed scenario and – and her escape out into the street.

Defendant now argues that the circuit court's use of the word "expressed" indicated that the court failed to read the preliminary examination transcript. While the court's use of the word might suggest an oral statement, and the complainant clearly testified that defendant did not state an intention to rape her, it is more likely that the court meant that through the totality of defendant's actions in the complainant's house, he expressed an intent to sexually penetrate the complainant. We find no error.

Finally, a magistrate's erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict. *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989). The admission at trial of defendant's statement that he intended to rape the complainant after he saw her naked provided sufficient evidence for a jury to find beyond a reasonable doubt that his assault was with the intent to commit criminal sexual penetration.

Next, defendant argues that the trial court erred by denying his motion for a directed verdict at the close of proofs. In particular, defendant argues that insufficient evidence supported finding beyond a reasonable doubt that he possessed the requisite specific intent to support finding him guilty of the charges against him. We review de novo a claim of insufficient evidence. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

Due process requires that the prosecution introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998), aff'd in part and rev'd in part on other grds 462 Mich 415; 615 NW2d 691 (2000). In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Mayhew, supra*. However, we will not interfere with the jury's role of determining the weight of evidence and the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 478, amended 441 Mich 1201 (1992). Intent and premeditation may be inferred from all the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987); *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 282 (1987), and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence may suffice, *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Circumstantial evidence and reasonable inferences that arise from the evidence may constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

As discussed above, to support a conviction under MCL 750.520g; MSA 28.788(7), the prosecution had to provide sufficient evidence to support a jury's finding beyond a reasonable doubt that defendant committed the assault with the intent to commit sexual penetration. *People v McFall*, 224 Mich App 403, 411-412; 569 NW2d 828 (1997). In addition to the testimony presented at the preliminary examination, the complainant testified that defendant touched her inner thighs as they struggled on the bed. The court admitted defendant's statement to the police, given after he received the *Miranda*[1] warnings and waived his rights, in which he admitted that he intended to rape the complainant after he saw her naked. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the elements of the crime, including intent, were proven beyond a reasonable doubt. *Mayhew*, *supra*.

To support the submission of the charge of assault with intent to rob to the jury under MCL 750.88; MSA 28.283, the prosecution had to produce evidence of defendant's specific intent to rob. *People v Chandler*, 201 Mich App 611, 614; 506 NW2d 882 (1993). Defendant argues that his assault on the complainant was over by the time he instructed her to go and get him some money and that he only formed the idea after she repeatedly offered him money if he would not hurt her. While we have applied the general rule that the assault must be concomitant with the robbery to support a charge of assault with intent to rob, *People v Sanders*, 28 Mich App 274, 276-277; 184 NW2d 269 (1970), our careful review of the record leaves us convinced that the testimony supported a finding that the assault was ongoing at the time of defendant's demand. The complainant testified "he still had ahold [sic] of me with his – with one hand, and he said you're gonna get me some money. He reached down and tried to pull the phone out of the wall." Later, she stated that he "had one hand off me to pull the phone out and that's when I ran." Still later, she clarified that defendant demanded money "when we were in the bedroom when he was reaching down to pull the phone out. Right before I got away from him is when he said that to me."

We conclude that this testimony supported a jury's finding beyond a reasonable doubt that defendant assaulted the complainant with the intent to rob her. *Mayhew*, *supra*. We will not interfere with the jury's role of determining the weight of evidence and the credibility of witnesses. *Wolfe, supra.*

Defendant also argues that the prosecution failed to present sufficient evidence that he broke into the home with the intent to rob or commit criminal sexual conduct involving penetration. Under the applicable version of MCL 750.110a(2); MSA 28.305(a)(2), the intent to commit the listed offense must have existed when the defendant entered the home. *Warren, supra* at 349. Jurors may consider the time, place, and nature of the defendant's acts before and during the breaking in evaluating the evidence for the minimal basis necessary to prove his intent. *Bowers*, *supra* at 298; *People v Saunders*, 25 Mich App 149, 150; 181 NW2d 4 (1970). Even assuming that insufficient evidence existed to support a finding that defendant had the intent to rob when he broke and entered the complainant's home, we conclude that sufficient evidence was presented that defendant had the intent to commit criminal sexual conduct involving penetration when he entered the home. Defendant's previous window peeping at the

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

complainant's home and the noise from the back of her home on the morning of the assault supported an inference that he was window peeping on that morning as well. He entered the home when the complainant was naked from the waist down; he carried a pair of handcuffs and a condom. These facts, coupled with his conduct inside the home, provided the minimal basis necessary for the jury to reasonably find that he broke in with the intent to commit sexual penetration.

Next, defendant argues that the trial court erred by admitting evidence of defendant's prior window peeping at the complainant's home. The trial court had the discretion to determine whether the evidence was admissible; we will only reverse its decision if it clearly abused that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). A decision on a close evidentiary question cannot ordinarily be an abuse of discretion. *Bahoda, supra*, quoting *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982). An abuse of discretion exists if an unprejudiced person, after considering the facts on which the trial court acted, would say that there was no justification for the ruling. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

MRE 404(b) governs the admission of similar acts evidence. The rule provides:

> 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 . . . .

The use of other acts as evidence of a defendant's character is excluded except as authorized by this rule to avoid the danger of conviction based on a defendant's history of misconduct. *Starr, supra* at 495, quoting *Golochowicz, supra* at 308. Evidence is admissible under MRE 404(b) if it is (1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The rule provides a nonexclusive list of situations in which the general rule excluding character evidence, MRE 404(a), is not offended because the evidence is probative of some fact other than the defendant's criminal propensity. *People v Engelman*, 434 Mich 204, 212; 453 NW2d 656 (1990). Furthermore, upon request, the trial court may provide a limiting instruction to the jury. *VanderVliet, supra* at 75.

Here, the prosecution offered the evidence of the prior window peeping to show defendant's identity, a common plan or scheme, and his intent to engage in a sexual act when he entered the house after watching the complainant undress. The court denied its admission for proving defendant's identity, but admitted it for the other purposes. In admitting it, the court misstated that the probative value was outweighed by the danger of unfair prejudice. However, the court twice stated the governing standard correctly, and later clarified that it intended to admit the evidence.

Defendant argues that the window peeping was too dissimilar to be relevant to a common plan, scheme or intent in the charges against him in this case, because the prior acts did not involve breaking into homes. However, to be admissible under MRE 404(b), the prior conduct need only be similar to the charged conduct if the prosecutor's basis for seeking its admission and its relevance depends on its similarity. *VanderVliet, supra* at 67. "When other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts 'are of the same general category.'" *VanderVliet, supra* at 79-80, quoting Imwinkelried, Uncharged Misconduct Evidence, § 3:11, p 23.

Under the analytical framework of *VanderVliet, supra* at 60-65, the evidence of defendant's previous window peeping was relevant because it makes it more probable that defendant entered the complainant's house and assaulted her with a sexual intent. MRE 401. It was also logically relevant to his specific intent on this occasion because it provided a context for evaluating his conduct in this case. *Warren, supra* at 342. The probative value of the window peeping to proving defendant's intent appears to be high, particularly to prove first-degree home invasion. Defendant's intent in invading the home must be inferred from the circumstances of the crime, and he only admitted that he intended to rape the complainant after he saw her naked from the kitchen. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The complainant's testimony of defendant's previous window peeping is not the sort of evidence that would "'weigh too much with the jury and . . . so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.'" *Id.* at 384, quoting *Old Chief v United States*, 519 US 172, 181; 117 S Ct 644; 136 L Ed 2d 574 (1997), quoting *Michelson v United States*, 335 US 469, 476; 69 S Ct 213; 93 L Ed 168 (1948). We conclude that the trial court did not abuse its discretion in admitting this evidence for the purpose of proving defendant's intent, especially when the court provided a limiting instruction to the jury before its deliberations.

While the same reasoning would not support the admission of a neighbor's testimony that defendant was rumored to be a window peeper, we note that defense counsel elicited this testimony, so it does not warrant reversal. *People v Beckley*, 434 Mich 691, 731-732 (Brickley, J.); 456 NW2d 391 (1990). Additionally, defendant has not alleged, nor could he show, that the admission of this testimony led to his conviction. Any error was therefore harmless. *Carines, supra* at 774; *People v Lukity*, 460 Mich 484, 495-497; 596 NW2d 607 (1999).

Finally, defendant argues that his sentence for his conviction of assault with intent to rob, the only one of his convictions that was scored under the guidelines, was disproportionate. Our review of a sentencing decision is limited to whether the court abused its discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998).

A sentencing court abuses its discretion when it violates the principle of proportionality. A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *Milbourn, supra*; *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). In imposing sentence, the trial court should tailor each sentence to the circumstances of the case and the offender in an effort to balance society's need for protection against its interest

in rehabilitating the offender. *People v Van Etten*, 163 Mich App 593, 595; 415 NW2d 215 (1987).

Although the guidelines' range for defendant's conviction of assault with intent to rob was twelve to forty-eight months, the trial court departed above that range and imposed a term of six to fifteen years (or a seventy-two month minimum term). In departing from the guidelines' recommended range, the sentencing court should consider (1) where the sentence should fall if it is to be within the guidelines, (2) any unique facts that are not already adequately reflected in the guidelines and why they might justify a departure, and (3) if there is to be a departure, what should be its magnitude and justification. *People v Harris*, 190 Mich App 652, 668-669; 476 NW2d 767 (1991). Sentences that depart from the guidelines because of particularly egregious circumstances are not to be assessed for proportionality based upon arithmetical measurements. *People v Merriweather*, 447 Mich 799, 807-808; 527 NW2d 460 (1994).

In this case, the court noted defendant's lack of prior criminal history and balanced that against the egregious nature of the offense and the harm suffered by the complainant, who was attacked in front of her small children and forced to flee the home leaving the children alone, to conclude that the guidelines did not adequately encompass those facts. *Harris, supra* at 668-669. Additionally, the court noted that the guidelines did not provide a range for the most serious conviction of first-degree home invasion. We conclude that the trial court did not abuse its discretion in sentencing defendant. *Milbourn, supra.* Additionally, we note that the court did not apply the enhancement provided by the Legislature of consecutive sentencing for a first-degree home invasion conviction and a conviction for any other criminal offense arising from the same transaction, MCL 750.110a(8); MSA 28.305(a)(8)[2]; *People v Hill*, 221 Mich App 391, 394; 561 NW2d 862 (1997). Certainly the availability of this enhancement signals the Legislature's recognition of the grave danger inherent in any first-degree home invasion.

We affirm.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

[2] At the time of defendant's sentencing, the citation of this statutory section was MCL 750.110a(6); MSA 28.305(a)(6).