STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 29, 2004
v	No. 248236 Muskegon Circuit Court
MICHAEL PAUL PARNELL, Defendant-Appellant.	LC No. 02-047123-FC

Before: Fort Hood, P.J., and Borrello and Donofrio, JJ.

PER CURIAM.

Defendant appeals by right from the trial court's order sentencing him to 45 to 100 years' imprisonment. A jury found defendant guilty of armed robbery, MCL 750.529, and he was sentenced as a fourth habitual offender, MCL 769.12. This case arose when defendant held a twelve-year-old girl at knifepoint in a Kmart bathroom stall and ordered her to remove her underwear. We disagree with defendant that the trial court erroneously admitted 404(b) evidence where the evidence was probative of defendant's motive and intent. We also disagree that the trial court erroneously qualified a latent fingerprint specialist and that defense counsel was ineffective for not moving to suppress identification testimony. Last, although we agree with defendant that the trial court should not have assigned 50 points for offense variable 10, because correcting the mistake would not change defendant's sentence, we affirm.

Defendant first argues that the trial court improperly allowed testimony that in 1994, defendant stole underwear from a relative's drawer and used them to masturbate on. We disagree. A trial court has discretion regarding the admissibility of bad acts evidence. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998), citing *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995). This Court may only reverse a trial court's decision when it finds a clear abuse of discretion. *Id.* "An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999), citing *People v Underwood*, 184 Mich App 784, 786; 459 NW2d 106 (1990).

MRE 404(b) prohibits using evidence for the sole purpose of showing defendant's character or propensity to commit a crime. Three requirements must be satisfied before bad acts evidence may be admitted. See *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004),

citing *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). The evidence must be offered for a proper purpose, the evidence must be relevant, and the probative value of the evidence must not be substantially outweighed by its potential for unfair prejudice. *Id.* All evidence must be viewed in the light most favorable to the prosecutor. *Id.* at 511 n 3.

In this case, the contested 404(b) evidence was testimony that defendant stole three pairs of a relative's underwear in 1994 and used them for sexual gratification. Defendant argued below that the 404(b) evidence was highly prejudicial and would only enflame the jury. Further, the defense argued that the mere fact – standing alone – that defendant took the underwear was sufficient to prove armed robbery. Thus, counsel stated, testimony regarding the previous underwear theft was irrelevant, offered for an improper purpose, and substantially more prejudicial than probative.

Armed robbery is a specific intent crime. *People v Karasek*, 63 Mich App 706; 234 NW2d 761 (1975), *People v Locke*, 275 Mich 333, 337; 266 NW 370 (1936). Inherent in the crime of armed robbery is the crime of larceny, so because larceny is a specific intent crime, armed robbery is as well. *Id.* Thus, "if the specific intent to steal of larceny is lacking, there can be no armed robbery." *Id.* at 710-711, citing *People v Kelley*, 21 Mich App 612; 176 NW2d 435 (1970), *People v Ramsey*, 23 Mich App 11; 178 NW2d 105 (1970), *People v Stoner*, 23 Mich App 598; 179 NW2d 217 (1970), and *People v Royce Alexander*, 17 Mich App 30; 169 NW2d 190 (1969).

Where a defendant denies a crime entirely, as did defendant here, all elements of the crime are at issue. *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998). In the present case, the prosecutor could easily show that defendant committed an assault and that he was armed. But to show that defendant had the specific intent to steal the victim's underwear, the 404(b) evidence was illustrative. The 404(b) witnesses testified that defendant stole three pairs of underwear and used them to masturbate on, and the prosecutor offered the evidence to show that defendant had a specific motive and specific intent to steal the victim's underwear. Although motive is not an element of robbery, it can be useful in showing the intent element of a crime. See *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001) (holding that in a murder case, motive was relevant to the issue of intent despite that motive was not an element). Thus, the evidence was offered for a proper purpose. See MRE 404(b)(1). The next inquiry, then, is whether the evidence was actually relevant to show motive and the alleged intent. *People v Sabin*, 463 Mich 43, 60 n 6; 614 NW2d 888 (2000).

To conclude that the evidence was relevant, one must accept that defendant's past act of stealing underwear for sexual gratification was probative of his intent in the instant crime. "'Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence.'" *Knox*, *supra* at 509-510, quoting *Crawford*, *supra* at 387. Here, there was a logical relationship between the prior act of stealing underwear – the evidence – and defendant's intent during the armed robbery – the material fact – despite the fact that the prior theft was not an armed robbery.

Despite defendant's contentions, there is no rule that for prior acts to be relevant, an

identical crime must be at issue. Using reasonable inferences, the prior act evidence made the fact that defendant had intent to steal the victim's underwear more probable than it was without the evidence. Thus, the evidence was relevant.

Regarding the last element of the analysis that concerns whether the evidence was substantially more prejudicial than probative, all evidence against a defendant is of course prejudicial. But *unfair* prejudice will be found where 404(b) evidence is only marginally probative, and where "there exists a danger that [the] marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

Here, the evidence was more than marginally probative because without the evidence, there was a great likelihood that the jury would have been confused regarding why defendant took the underwear. Consequently, there was a high probability that the jury would have had enough reasonable doubt regarding whether defendant's crime was actually one of armed robbery to cause an acquittal. Without the evidence, the jury could have easily found that defendant was attempting to sexually assault the victim, and for whatever reason abandoned the attempt and fled, coincidentally, with the underwear. Thus, the evidence, though prejudicial, was not more prejudicial than probative, and the trial court did not err by allowing the contested testimony.

Defendant next argues that his counsel was ineffective for failing to move to suppress the victim's identification testimony, claiming that the identification testimony was the "result of unduly suggestive identification procedures." We disagree. The lower court record indicates that the first time the victim saw the photograph of defendant was on the witness stand at trial. Thus, counsel for defendant could not have moved to suppress the victim's identification testimony "as a result of unduly suggestive identification procedures" because there were no pretrial identification procedures. Counsel will not be found ineffective for failing to file a frivolous motion or make a frivolous objection. See *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

With respect to the in-court identification, the jury was entirely privy to the victim's identification and her inability to say for sure whether defendant was the person who assaulted her. A trial court must only determine whether an independent basis for an in-court identification exists where a defendant asserts that the pretrial identification was tainted. *People v Laidlaw*, 169 Mich App 84, 92-93; 425 NW2d 738 (1988). Because there was no pretrial identification here, the victim's identification testimony was fully admissible, and the jury was correctly permitted to assess the credibility of her identification based on her very equivocal testimony. Therefore, there was no error.

Next, defendant argues that the trial court should not have qualified Trooper David Caswell of the Michigan State Police as an expert in latent fingerprint identification. This Court reviews de novo the question whether a trial court correctly decided to qualify a witness as an expert. *People v Moye*, 194 Mich App 373, 378; 487 NW2d 777, rev'd on other grds 441 Mich 864 (1992). "An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification for the ruling made." *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999), citing *People v Beckley*, 434 Mich 691, 711; 456 NW2d 391 (1990).

The preliminary determination whether an expert is qualified is an issue for the court to decide. *Shinholster v Annapolis Hosp*, 255 Mich App 339, 349; 660 NW2d 361, lv gtd 469 Mich 957 (2003). But "[w]hether a witness'[s] expertise is as great as that of others in the field is relevant to the weight rather than the admissibility of the testimony and is a question for the jury." *Moye, supra* at 378, citing *People v Whitfield*, 425 Mich 116, 122-124; 388 NW2d 206 (1986).

One need not have a license to be considered qualified. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 403-404; 443 NW2d 340 (1989). And although a court may consider a witness's prior trial experience in determining qualification, *People v Lewis*, 160 Mich App 20, 28; 408 NW2d 94 (1987), there is no rule that a witness must have prior court experience.

Here, Trooper Caswell testified that he was approved as a latent fingerprint specialist through the Michigan State Police, that he was employed as a latent fingerprint specialist, that he was retested each year, and that he had taken many courses in the field from a certified institute. He also testified that he had examined tens of thousands of prints. He had been in his current position for sixteen months and was still under the supervision of a senior examiner.[1]

To support his contention that Caswell was not qualified, defendant relies on *Zyskowski v Habelmann*, 150 Mich App 230; 388 NW2d 315 (1986), vacated in part on other grds, 429 Mich 873 (1987), in which this Court upheld a trial court's refusal to qualify a police officer as an expert in accident reconstruction. In that case, a police officer who had only occasionally investigated accidents and never investigated an accident with a fatality was offered to testify regarding the speed of a vehicle that hit a pedestrian. *Id.* at 249. The officer would have testified that he estimated the distance from the car to items of clothing, and from that estimate, he believed the car was traveling at 45-50 miles an hour. *Id.* This Court affirmed the trial court's ruling, in which the trial court held that the officer had neither the training or experience to estimate the speed of the vehicle "*on the facts available to him.*" *Id.* at 249-250.

In the same case, this Court also rejected the trial court's decision to refuse to qualify a different officer as an expert regarding the speed of the vehicle. *Id.* at 247-249. That officer had actually performed tests related to vehicle speed on cadavers and had assessed the damage done to cadavers at different speeds of impact. *Id.* at 247. This Court found that the officer had both the necessary experience and the necessary factual foundation to make a conclusion. *Id.* at 248.

Here, Trooper Caswell's testimony is more akin to the qualified officer in the *Zyskowski* case than the unqualified officer. Like the qualified officer in *Zyskowski*, Caswell had experience and a factual foundation for his testimony. There is a great difference between someone who walks onto an accident scene and purports to know the speed of the vehicle after guessing the distance from the car to items of clothing and someone who has trained and worked in the field of latent fingerprints purporting to identify a print. In the *Zyskowski* case, there was a

[1] Neither party inquired regarding how long Caswell was to remain under supervision. Thus, on the record presented, we can find no support for defendant's contention that Caswell was unqualified merely because he was under supervision.

significant gap between the conclusion (the speed of the vehicle) and the unqualified officer's basis for making the conclusion (little to no experience, no scientific testing, no methodology other than guessing). Here, though, there was not a similar gap – Trooper Caswell was both trained and experienced, just not as experienced as defendant would have liked him to be. Additionally, Caswell had a factual foundation from which to base his opinion, unlike the officer in *Zyskowski*.

Defendant also relies on *Jackson v Trogan*, 364 Mich 148; 110 NW2d 612 (1961), another accident reconstruction case in which speed of the vehicle was an issue. There, this Court rejected the trial court's qualification of a witness as an expert where the witness's training and experience was not clear from the record and where the witness conceded that he reached his conclusion not by mathematical computation but by his "own reasoning." *Id.* at 156. Clearly, that case too is distinguishable from the case at hand wherein Caswell's experience and scientific methodology are both apparent from the record.

Because there was a factual foundation for Caswell's testimony and because Caswell presented with training and experience that appears sufficient, we cannot conclude that the trial court abused its discretion by qualifying Caswell as an expert. Further, as noted, "[w]hether a witness'[s] expertise is as great as that of others in the field is relevant to the weight rather than the admissibility of the testimony and is a question for the jury." *Moye*, *supra* at 378, citing *People v Whitfield*, 425 Mich 116, 122-124; 388 NW2d 206 (1986). Thus, we affirm the trial court.

Defendant last raises two sentencing issues. The first pertains to the trial court's assessment of 50 points for offense variable (OV) 7. This Court reviews a trial court's factual findings at sentencing for clear error. MCR 2.613(C). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000); *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993).

Before an amendment that occurred after the crime at issue, the statute instructed to score 50 points where "[a] victim was treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(1)(a), amended 2002 PA 137. The statute defined terrorism as follows:

> "Terrorism" means conduct designed to substantially increase the fear and anxiety a victim suffers during the offense. [MCL 777.37(2)(a), amended 2002 PA 137.]

In this case, defendant forced himself into the victim's bathroom stall, held her at knifepoint throughout the entire crime to the point of causing injury, threatened to kill her once when she started screaming and again when another patron entered the restroom, pressed his body against hers, and forced his tongue in her mouth. Although defendant claims these actions were not enough to support terrorism, we find this Court's decision in *Hornsby*, *supra*, dispositive. There, an armed robber held a store manager at gunpoint, threatened to kill her and the others if she did not give him what he wanted, and cocked the gun. *Id.* at 468-469. This Court held that "[d]efendant did more than simply produce a weapon and demand money," and that "[d]efendant's actions in cocking the weapon and repeatedly threatening the life of the shift

supervisor and the other employees supported the court's finding that he deliberately engaged in 'conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.'" *Id.* at 469, quoting *People v Johnson*, 202 Mich App 281, 289; 508 NW2d 509 (1993).

Similarly here, we cannot find clear error where the trial court held that defendant's act of twice threatening the victim's life, holding her at knifepoint to the point of cutting her, and physically forcing his body onto hers was conduct designed to substantially increase the victim's fear and anxiety during the offense.

Defendant also takes issue with the trial court's assignment of 15 points under OV 10, which reads in pertinent part:

> (1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Predatory conduct was involved: 15 points
>
> * * *
>
> (3) As used in this section:
>
> (a) "Predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization. [MCL 777.40.]

Concluding that 15 points were justified, the trial court stated:

> I think defendant's conduct does constitute predatory conduct for these reasons: He committed this offense the day he got out of prison. He's at the K-Mart store. He has a knife. He's wearing a mask which covers part of his face. He has all of these implements available. He goes into the women's rest room when a 12-year-old girl is in the rest room. I think one can make a reasonable inference that he engaged in preoffense conduct directed at that victim for the purpose of victimization – that is, to commit this armed robbery and take her undergarments.

We agree with defendant that the trial court committed clear error by finding that defendant engaged in predatory conduct. Although case law addressing this variable is sparse, the two cases that have interpreted this statute have a common thread in that both have found 15 points justifiable where a defendant targeted a *specific* victim and engaged in some preoffense conduct that indicated that the defendant was following or waiting for that victim. See *People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002), lv gtd 468 Mich 870 (2003) (finding preoffense predatory conduct when the defendant spotted a woman in a car, followed her to her home, and shot her after she pulled into her driveway so that he could steal her car's expensive rims) and *People v Witherspoon*, 257 Mich App 329; 670 NW2d 434 (2003) (finding preoffense predatory conduct where the victim's mother's boyfriend waited until the young victim went into

the basement, then followed her downstairs and sexually assaulted her).

The testimony here showed only that defendant was in a restroom stall when the victim entered the bathroom. Nothing in the record supports the trial court's conclusion that defendant followed this particular victim into the restroom or that he in any way targeted this specific victim. In fact, there is no evidence that he chose the victim for any particular reason other than that she walked into the restroom. Although it is plausible that defendant waited through several adults until he spotted a child, it is equally plausible that he chose the first woman to come along.

Further, we cannot subscribe to the trial court's conclusion that defendant's possession of a mask and a knife supported preoffense predatory conduct. Anyone committing an armed robbery will naturally have a weapon before committing the offense, so possession of a weapon cannot be used to score this offense variable. See *People v Hauser*, 468 Mich 861, 861-862; 657 NW2d 121 (2003). Likewise, defendant's possession of a mask does not support any element of OV 10 in that it was not "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Defendant did not possess the mask for the purpose of victimizing the victim; rather, he most likely possessed it to hide his identity.

We also can conceive of no connection between the fact that defendant had just been released from prison and preoffense predatory conduct addressed by this variable.

Thus, the only way to find that 15 points were proper for this variable would be to conclude that defendant's preoffense conduct was directed at this victim for the primary purpose of victimization *solely* on the basis that defendant was in a bathroom stall when the victim entered the restroom. But without pure speculation, there is no way to conclude that this victim was anything other than a random victim. Thus, we hold that the evidence on the record did not "adequately support" the score given for OV 10, see *Leversee*, *supra* at 349, and that the trial court clearly erred.

Nonetheless, even if defendant's score for this variable was reduced to zero, the ultimate outcome would not change. Defendant's total points for offense variables would remain in the Level VI category. Thus, neither resentencing nor recalculation is required. *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello