STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2004
v	No. 249865 Washtenaw Circuit Court
PAUL DONAT KAZARINOFF, Defendant-Appellant.	LC No. 02-000681-FC

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of kidnapping, MCL 750.349, and kidnapping – child enticement, MCL 750.350. Defendant was sentenced to life imprisonment for both counts, with credit given for 390 days. The sentences are to run concurrently. We affirm.

While the victim was walking home from school, defendant pulled a white car into her path and grabbed her as she tried to pass around it. She fought defendant while he put her in the front seat of the car. He pinned her, face up, on the passenger-side seat and floorboards, but she continued to struggle. She screamed, bit his gloved hand, and eventually escaped. She described defendant as a tall, lean, balding man with a long, squared beard. She told police he was wearing a white tank top, tan shorts, and tan work gloves. A bystander who saw her escape and run away screaming memorized the car's license plate number. Police traced the license plate number and found defendant at the registered owner's apartment. The car's owner was defendant's friend and neighbor down the hall. Defendant had borrowed the car from her that day because his was broken down. Police identified defendant by the victim's vivid description of his distinctive beard and blue eyes. Defendant also had an abrasion on his hand near his wrist, which was consistent with the victim's description of where she bit the culprit. Police immediately arrested defendant. While his clothes were different than the victim described, defendant's friend explained that defendant had changed his clothes since the time he left his apartment earlier that day. Following his arrest, defendant gave conflicting accounts of his whereabouts during the time of the kidnapping.

Five days later, the police investigation had failed to unearth the pair of tan shorts and white tank top that fit the victim's description of the culprit's clothing, despite a search of defendant's apartment. However, police had a phone conversation with one of defendant's neighbors indicating that defendant often parked his gray Mazda near the neighbor's residence.

Police discovered that this area was a few blocks away from defendant's residence. The neighbor mentioned that he occasionally saw defendant carry packages of beer from it. Another neighbor indicated that he often saw defendant going to and from the vehicle, but he also saw defendant driving a white car around the neighborhood. An officer found the gray vehicle parked where the neighbors had indicated, and police impounded the car without a warrant. Police obtained a warrant before searching the car, however, and found a sleeping bag, a blanket, and a backpack containing clothing, duct tape, drop cloths, rope, unused condoms, body lubricant, a razor, surgical gloves, and a knife.

Other witnesses identified defendant as someone who often cruised streets near the victim's school in a white car, and another neighbor later came forward to confirm that he saw defendant moving a backpack from the gray car to the white car before the incident.

Defendant first argues that the fruits of the search of his gray car (the contents of the backpack) were tainted because the seizure of the car was unreasonable under the Fourth Amendment. We disagree. When reviewing a trial court's ruling on a motion to suppress evidence, we review a trial court's findings of fact for clear error, but review the ultimate ruling de novo. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002).

The automobile exception to the Fourth Amendment's general warrant requirement allows searches or seizures of automobiles when there is probable cause to believe that contraband or evidence of a crime will be found in a lawfully stopped vehicle. *Florida v White*, 526 US 559, 564-565; 119 S Ct 1555; 143 L Ed 2d 748 (1999). As the United States Supreme Court explained in *White*, "[r]ecognition of the need to seize readily movable contraband before it is spirited away undoubtedly underlies the early federal laws relied upon in *Carroll* [*v United States*, 267 US 132; 45 S Ct 280; 69 L Ed 543 (1925)]." *Id*. at 565. The Court went on to explain that the laws addressed in *Carroll* dealt with the warrantless seizure of contraband *and* the vessels that carried it. *Id*. The automobile exception is based on the mobility of vehicles in general and a reduced expectation of privacy in vehicles, but does not depend upon the actual mobility of a particular vehicle. *People v Carter*, 250 Mich App 510, 514-518; 655 NW2d 236 (2002). The exception is so expansive that police have the utmost discretion to impound disabled or abandoned vehicles to prevent the disruption of traffic, protect the community, or even preserve evidence. *South Dakota v Opperman*, 428 US 364, 368; 96 S Ct 3092; 49 L Ed 2d 1000 (1976). The United States Supreme Court has determined that the authority of police in this regard is "beyond challenge." *Id*. at 369. In this case, defendant's disabled gray car was parked on the street, and defendant was in custody. Also, leaving the car on the street jeopardized the evidence it likely contained. Therefore, police had unquestionable authority to impound the car under *Opperman*.

Moreover, the search of defendant's apartment had failed to uncover defendant's change of clothes, and police knew that defendant kept the car near his apartment. The neighbors' accounts of defendant frequenting his disabled car made it reasonable to assume that he probably stored the change of clothes there. Therefore, police had probable cause to search the car and could have searched the car on the spot. *People v Esters*, 417 Mich 34, 51; 331 NW2d 211 (1982). Nevertheless, the method police employed in this case is actually the preferred and more conscientious method of performing a vehicular search under *Esters*. *Id*. at 50-51. Therefore, police did not violate the constitution when they impounded defendant's car.

Defendant argues that the magistrate lacked probable cause to issue the warrant for the gray car's search. We disagree. "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000) (citing *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992)). In reviewing a magistrate's decision regarding the existence of probable cause supporting a search warrant and underlying affidavit, a reviewing court should "ask only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *Russo*, *supra* at 603. In this case, the police affidavit supporting the warrant indicated that defendant likely used the car for personal storage, defendant had changed his clothes twice on the day of the crime, and police had not yet uncovered the clothing. Therefore, a reasonably cautious person would conclude that the magistrate had a substantial basis for determining that a search of the car would likely reveal the clothing, and the trial court did not err when it allowed the prosecutor to introduce the backpack and its contents as evidence.

Defendant next claims that the victim's identification of him at the preliminary examination and trial was unduly suggestive. Defendant does not dispute that his extremely long and unusually styled beard and hair made it impossible for police and prosecutors to assemble an ordinary lineup, or that the prosecution presented defendant with the option of a photographic array instead. Nevertheless, defendant argued that the photographic array assembled by police after reviewing nearly 1,000 photographs was also too suggestive because defendant stood out. Later, defendant complained that an identification in court during the preliminary examination would be unreliable as too suggestive. Because defendant was required to choose one of these methods, this boils down to a claim that the trial court erred in denying defendant's motion for a corporeal lineup. We disagree. We review for abuse of discretion a trial court's decision on a motion for a lineup. *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000), remanded on other grounds 465 Mich 884, on rem 249 Mich App 34 (2001). The trial court should grant the motion "when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification which a lineup would tend to resolve." *People v Gwinn*, 111 Mich App 223, 250; 314 NW2d 562 (1981).

In this case, defendant demonstrated some potential for misidentification given the dissimilarities between the victim's computer sketch and defendant's appearance. Despite the problems with the sketch, however, the victim's vivid description led police to immediately identify defendant and arrest him when they arrived at his neighbor's apartment. Furthermore, defendant as much as conceded that a lineup would not resolve any identification issues, because defendant's appearance was so distinctive that a photograph array gleaned from nearly 1,000 computer files failed to produce images that looked enough like defendant to satisfy him. Because police and defendant essentially agreed that a corporeal lineup under the circumstances was impossible, it follows that defendant's argument that it would provide any real assistance or that there existed any real chance of misidentification is specious.

Regarding the general fairness of the identification procedure, "to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Contrary to defendant's arguments, the photographic array was the least suggestive option given defendant's

unique appearance, and contained several photographs that more closely matched the victim's rather poor computer sketch than defendant did. Therefore, defendant's decision to take the most suggestive option and risk identification in court did not render the *process* unduly suggestive or unfair. Moreover, while defendant's unique appearance impeded the arrangement of a lineup, it also substantially diminished the likelihood of any misidentification, and the prosecution laid a solid foundation for the victim's ability to identify her assailant. *Id*. Therefore, we reject defendant's challenge to the general fairness of his identification in court.

As for trial, the record reflects that defendant had substantially changed his appearance (including shaving his beard) during his pre-trial incarceration, so any complaint about the victim's trial identification is dubious. Nevertheless, the prosecutor sufficiently established an independent basis (aside from the preliminary examination) for the victim's identification, and the preliminary examination identification process was not unduly suggestive. Therefore, defendant has not shown that the procedure in which the victim identified defendant at the preliminary examination or at trial was unduly suggestive or otherwise unfair. *Id*.

Defendant next argues that the trial court abused its discretion by allowing the admission of evidence classified as 404(b) evidence by the prosecutor. We disagree. The evidence included the contents of defendant's gray car and testimony of witnesses who saw defendant loitering around the victim's school watching the children. "The decision whether [404(b)] evidence is admissible is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Under *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), there are four factors that guide a trial court's decision to admit 404(b), or other-acts, evidence. "First, the prosecutor must offer the 'prior bad acts' evidence under something other than a character or propensity theory." *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Second, the evidence must be relevant to an issue at trial under MRE 402. *Id*. "Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105." *Id.*

The testimony from the witnesses satisfied each of the *VanderVliet* factors. The witnesses testified that defendant frequented the streets around the victim's school, both before and on the day of the offense, and that he often watched the children from his car after their dismissal. One of the witnesses was so alarmed at the odd and blatant behavior that he notified police.

The first prong of the *VanderVliet* test was met because this evidence was not offered under a character or propensity theory. Rather, it was offered to show defendant's identity as the perpetrator and to demonstrate his plan to commit the abduction. These are both listed as acceptable purposes under MRE 404(b). The second prong was also met because the evidence was relevant under MRE 402. The evidence's relevance "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." *Crawford, supra* at 387. A material fact at issue in this case was whether defendant was the one who kidnapped the victim. Identity is always an essential element of a criminal prosecution, *People v Oliphant,* 399 Mich 472, 489; 250 NW2d 443 (1976), and the fact that defendant committed the crime is more probable with the evidence than without it. Also, the

existence of a plan corroborated by several different sources tended to make the occurrence and circumstances of the crime much more likely. Therefore, the trial court correctly found the evidence relevant.

The third prong was met because the probative value of the evidence was not substantially outweighed by unfair prejudice. The proffered evidence does not pose such a danger because the testimony is highly probative of defendant's identity and plan, and it had little, if any, independent prejudicial value. The fourth prong was met because defendant did not request a limiting instruction. A trial court has no duty to give a limiting instruction absent a request or objection. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Therefore, the trial court did not err when it allowed the prosecutor to introduce the testimony.

Also admitted into evidence were the sleeping bag, blankets, and the backpack and its contents, including a change of clothes, latex gloves, lubricant gel, condoms, rope, and duct tape. In addition, a green blanket and sleeping bag were admitted. The change of clothes strongly resembled the description of the outfit defendant's friend saw him in on the morning of the crime. Although this evidence was proffered as other acts evidence, we are not persuaded that the evidence requires analysis under MRE 404(b), because the possession of these items alone does not involve an intermediate inference of character. *People v Houston*, 261 Mich App 463, 468-469; 683 NW2d 192 (2004). The items are not evidence of acts, but tangible things which were either relevant to the criminal episode or not. In this case, they were relevant to link defendant to the abduction and demonstrate his motive for kidnapping the girl. Therefore, the trial court did not abuse its discretion when it allowed these items into evidence.

Next, defendant argues that the trial court abused its discretion in denying his motion for a new trial on the ground that the prosecution failed to furnish him two laboratory reports containing exculpatory evidence in violation of *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). We disagree. A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

"In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). While police possessed evidence that defendant could not reasonably obtain, the reports only peripherally tend to support defendant's misidentification theory. For example, defendant asserts that the lab results exonerate him because they show that deoxyribonucleic acid (DNA) found on a work glove discovered at defendant's residence did not match the victim's DNA. However, the victim claimed at trial that the work gloves found at defendant's residence and tested for DNA were lighter in color than the pair defendant used during the crime. Other lab results were merely inconclusive about the victim's presence in the white car and did not provide any exculpatory evidence. Therefore, defendant has failed to demonstrate how the results would have changed the proceedings. Moreover, the prosecution did not have possession of the reports during trial, and defendant fails

to demonstrate any intentional delay in procuring the reports. Therefore, on that basis alone, *Brady* does not apply. *People v Stanaway*, 446 Mich 643, 667; 521 NW2d 557 (1994).

The next issue is whether the trial court abused its discretion by sentencing defendant to life imprisonment, a range beyond the 81 to 270 months calculated for defendant's convictions. We disagree. When reviewing the factors a trial court relied on to support its sentencing departure, "whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion." *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). A trial court abuses its discretion when the trial court's sentence falls "outside the range of principled outcomes." *Id.* at 269. A court may only depart from the guidelines range if it has a substantial and compelling reason for the departure and states the reason on the record. *Id*. at 255-256. "[O]nly those factors that are objective and verifiable may be used to judge whether substantial and compelling reasons exist" for the departure. *Id.* at 257 (quoting *People v Fields*, 448 Mich 58, 62; 528 NW2d 176 (1995)).

The trial court departed from the guidelines range and sentenced defendant to life in prison on two grounds. First, the court considered the items found in defendant's car as evidence of defendant's intent to rape and murder the victim. Second, the trial court opined that the guidelines did not adequately reflect the extent of defendant's mental illness underlying his obsession and depravity. The court concluded that the extent of his obsession resulted in "no likelihood" that defendant can be rehabilitated to the extent that he can ever be allowed to live in society. These factors are objective and verifiable, because the existence of the physical objects and defendant's history of severe mental illness were empirically supported by the record. Furthermore, these factors provided a substantial and compelling picture of a seriously dangerous and depraved individual who has not been and most likely never will be reformed or deterred by the prison system. Therefore, the trial court did not abuse its discretion when it sentenced defendant to life imprisonment.

Finally, defendant argues that the cumulative effect of these alleged errors denied him a fair trial. Defendant's allegations of error lack merit. Because errors were not present, defendant fails to demonstrate any adverse effect, cumulative or otherwise. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio