STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 6, 2007
v	No. 265700 Macomb Circuit Court
PETER JAMES KELLEY, Defendant-Appellant.	LC No. 2004-001889-FH

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of communicating over the internet to solicit or to attempt to solicit a child for immoral purposes, MCL 750.145d(2)(d); communicating over the internet for purposes of committing or attempting to commit third-degree criminal sexual conduct (CSC III), MCL 750.145d(2)(f); possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(iii); and accosting a child for immoral purposes, MCL 750.145a. We affirm defendant's convictions, but remand for re-sentencing.

Defendant argues that the trial court committed reversible error in admitting other acts evidence under MRE 404(b). We disagree. Whether other acts evidence is admissible under MRE 404(b) is within the sound discretion of the trial court and will only be reversed on appeal when there has been an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

"[E]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith." MRE 404(a). However, such evidence may be admissible under MRE 404(b)(1) "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." Other acts evidence must satisfy the following three-part test before it may be admitted: "(a) there must be a reason for its admission other than to show character or propensity, (b) it must be relevant, and (c) the danger of undue prejudice cannot substantially outweigh its probative value . . . . " *People v McGhee*, 268 Mich App 600, 609-610; 709 NW2d 595 (2005).

Defendant argues that the other acts evidence was not admissible because it involved legal conduct of discussing sex with adult women, whereas the charges at issue concern the illegal conduct of propositioning an alleged female who claimed to be 15 years old. However,

other acts evidence need not be similar to the charged offense in every case to be admitted. *People v VanderVliet*, 444 Mich 52, 65 n 14, 67, 69, 81 n 34, n 36; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994). "Where the proponents' theory is not that the acts are so similar that they circumstantially indicate that they are the work of the accused, similarity between charged and uncharged conduct is not required." *Id*. at 69. "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." *Id*. at 79-80 (citation and internal quote marks omitted).[1]

Plaintiff argued below that the evidence was admissible to show motive and intent, and explained that the evidence was "relevant because the theory is that this defendant was on the Internet for several hours looking to meet somebody for sex." Thus, the evidence was admitted for a proper purpose. With respect to relevancy, the evidence that defendant contacted other females with the intent of finding a local female to meet for sex was logically relevant and highly probative to defendant's intent while he was chatting on the day at issue. Further, defendant's theory and evidence attempted to show that he was not "the person on the other end of these chats." Because the possibility that someone else could have used his chat profile when chatting with the user known as "Stephie" necessarily decreased with the evidence of more chats during the day at issue, the evidence was logically relevant to show identity, and this relevance was independent of the tendency of the evidence to show defendant acted in conformity with his character.

With respect to the final requirement in *McGhee*, that the danger of undue prejudice cannot substantially outweigh the probative value of the evidence, prejudice to defendant is not enough to exclude evidence. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). "What is meant [under MRE 403] is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *Id*. However, some danger of unfair prejudice to defendant is not enough to exclude the evidence; defendant must show that the probative value is substantially outweighed by the danger of unfair prejudice. *Id*. Here, the trial court minimized the danger of undue prejudice by striking some of the most vulgar questions posed by kellyslawn, and therefore did not abuse its discretion.

Moreover, even if the trial court had erred in admitting the other acts evidence, such error was harmless and not outcome determinative given the overwhelming evidence against defendant. See *People v Albers*, 258 Mich App 578, 589-590; 672 NW2d 336 (2003). Kellyslawn claimed to work in landscaping for a casino, have a red truck, identified himself as Pete, and said he would bring two marijuana cigarettes to meet the victim at 6:00 p.m. at a specific park. The kellyslawn user name admittedly belonged to defendant and contained a picture of defendant in the profile, which kellyslawn directed the victim to when the victim asked for a photo, and defendant worked in landscaping for a casino and arrived 500 feet from the meeting place in a red truck at the prearranged time, carrying two marijuana cigarettes. Officers

[1] With respect to defendant's argument that the other acts evidence constituted legal conduct, there is no requirement under MRE 404(b) that other acts evidence only concern illegal conduct. See also *VanderVliet*, *supra* at 65 n 14.

also testified that defendant admitted that he was there to meet a fifteen year old for sex but that he claimed he did not intend to go through with it.

We also reject defendant's next argument that the trial court committed reversible error in finding that he was not entrapped.

"Whether entrapment occurred must be determined by considering the facts of each case and is a question of law for the court to decide." *People v Milstead*, 250 Mich App 391, 397; 648 NW2d 648 (2002), citing *People v Patrick*, 178 Mich App 152, 154; 443 NW2d 499 (1989). A trial court's findings of facts regarding entrapment are reviewed under the clearly erroneous standard and will be upheld unless this Court is left with a definite and firm conviction that a mistake was made. *Id*.

Milstead, supra at 397, explained the test for entrapment as follows:

> Entrapment occurs if (1) the police engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances, or (2) the police engage in conduct so reprehensible that it cannot be tolerated by the court. The defendant bears the burden of proving entrapment by a preponderance of the evidence. The test for entrapment is objective and focuses on the propriety of the government's conduct that resulted in the charges against the defendant rather than on the defendant's predisposition to commit the crime. Entrapment will not be found where the police did nothing more than present the defendant with the opportunity to commit the crime of which he was convicted. [Citations and internal quote marks omitted].

Defendant argues that the police entrapped him because he had no prior criminal history, no history of engaging in chats with minors, and the undercover officer designed "Stephie" to be "enticing and attractive." "[U]nder the objective test, the readiness or willingness of . . . defendant[] to commit the crime is irrelevant; the objective test instead focuses on the effect of the police conduct at issue on a hypothetical person not ready and willing to commit the crime." *People v Reynolds*, 139 Mich App 471, 476-477; 362 NW2d 763 (1984). The trial court did not err in finding that the undercover officer merely afforded defendant an opportunity to commit the crime because defendant knew from the beginning of the conversation that the victim claimed to be 15, and defendant continued the conversation, offered to smoke marijuana with the victim, and directed the conversation toward sex before asking the victim for sex. Defendant's allegation that the officer responded to defendant's claim that she was too young for him by describing the physical appearance of the "Stephie" persona is misleading. Although defendant initially said that the victim was too young for him, he then stated he wished to continue chatting, *asked* the victim what she looked like, and later indicated that he was not too old for the victim. Because defendant knew the victim's age immediately and directed the conversation to and suggested sex, defendant has not shown that a hypothetical law abiding citizen would have been ready and willing to commit the crime under the circumstances, or that such a person would find a 15-year old to be enticing, as defendant suggests.

As to defendant's argument that the undercover officer engaged in reprehensible conduct in creating a persona of a 15-year old who likes to use marijuana and who entered a chat room

reserved for those over 16 years old, we hold that the trial court did not err in finding that the officer's conduct was not so reprehensible as to warrant dismissal. *People v Connolly*, 232 Mich App 425, 429; 591 NW2d 340 (1998) (recognizing that drug sales by officers is not entrapment per se). Further, even assuming that the officer breached a rule of the chat provider in entering a chat room reserved for those over 16 years old,[2] such a breach would not constitute conduct so reprehensible that it cannot be tolerated. *People v Reynolds*, 139 Mich App 471, 476; 362 NW2d 763 (1984) (this Court held that the purchase of alcohol by a minor working for police does not constitute entrapment). Even assuming that defendant entered the chat room believing it would contain only persons 16 or older, the officer's conduct would still not be so reprehensible that it could not be tolerated because defendant, or anyone in the chat room, remained free to end the chat at any time after learning the victim's age or to not ask the victim about or for sex.[3]

Defendant additionally argues in his standard 4 supplemental brief that defense counsel was ineffective for failing to file a pretrial motion to suppress evidence obtained at his residence through the improper execution of an unsigned search warrant that was improperly based on a "falsified affidavit."[4] Defendant specifically alleges that the warrant was improperly executed both because (1) it was utilized before it was signed by the magistrate in violation of MCL 780.651(4), and (2) the executing officers failed to leave a copy of the warrant with defendant's wife, who was present when the warrant was executed, MCL 780.655(1). Defendant further alleges that appellate counsel was ineffective for failing to raise these issues on appeal. When reviewing a claim of ineffective assistance of counsel without the benefit of a *Ginther*[5] hearing, our review is limited to the facts contained in the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). As a matter of constitutional law, we review the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

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[2] There is no evidence that the undercover officer even broke any rules of the chat provider. The officer was over 16, and there is no indication that the chat provider prohibited users over the age of 16 (particularly law enforcement) from posing as being younger than 16.

[3] We reject defendant's argument that he was entrapped because the police brought newspaper reporters to the scene of defendant's arrest. Because this action occurred independent of defendant's criminal activity and was not known to defendant until the arrest, it cannot constitute conduct that would have induced an otherwise law abiding citizen to commit the crime charged. *Milstead, supra* at 396.

[4] Defendant's argument that the warrant was improperly obtained based on a "falsified affidavit" is no more than a generalized statement, as defendant does not indicate what information was "falsified." Defendant's standard 4 brief also makes unsupported and undeveloped generalized statements that defense counsel was "counterproductive" for questioning two officers about whether defendant consented to search his home, and that appellate counsel was ineffective for failing to communicate with defendant regarding this appeal. We conclude that defendant has failed to adequately brief the aforementioned "arguments," and thus, has abandoned them on appeal. It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Trial counsel is not ineffective for failing to make a futile motion or argument. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). The test applied to a claim of ineffective assistance of trial counsel also applies to a claim of ineffective assistance of appellate counsel. *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994).

MCL 780.651(4) provides that "[t]he peace officer or department receiving an electronically or electromagnetically issued search warrant shall receive proof that the issuing judge or district court magistrate has signed the warrant before the warrant is executed." Here, based on defendant's affidavit, defendant argues that the warrant was executed around 9:15 p.m. on March 4, 2004, but was not signed by the magistrate until 11:45 p.m. on March 4, 2004.[6] However, the record shows that the warrant was signed by the magistrate at 9:17 p.m. on March 1, 2004, and was faxed back to the police that same day at 9:26 p.m. Furthermore, the investigative report states that the executing officers did not go to defendant's residence to execute the warrant until after they received a faxed copy of a signed warrant from the magistrate. We therefore conclude that defendant has failed to establish that a motion to suppress based on a violation of MCL 780.651(4) would have been successful. Accordingly, defendant was not denied his right to the effective assistance of counsel when his trial counsel failed to file a motion to suppress based on a violation of MCL 780.651(4). *Ish*, *supra* at 118-119.

MCL 780.655(1) provides that an executing officer "taking property or other things under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant." Here, defendant argues, based on his wife's affidavit, that the executing officers never left a copy of the search warrant with his wife, who was home at the time the warrant was executed. We note that the affidavit is not a part of the lower court record and cannot be used to support defendant's claim. *Rodriguez, supra* at 38. Furthermore, even if we could consider the affidavit, it does not establish that defense counsel was aware of the asserted allegation during his representation of defendant. Moreover, the record establishes that the police, who contend that they gave a copy of the search warrant to defendant's wife at the time of execution, dispute the aforementioned allegation, and thus, even if it were established that defense counsel was aware of the allegation, defense counsel's decision not to pursue the allegation could be considered sound trial strategy. Finally, we note that even if it were

[6] Defendant's affidavit states that his residence was searched on March 1, 2004, and the search warrant attached to defendant's brief on appeal was also signed on March 1, 2004. We therefore opine that defendant's standard 4 brief mistakenly interposed March 4, 2004, with March 1, 2004.

concretely established that the police did not leave a warrant with defendant's wife, a violation of MCL 780.655(1) does not warrant a remedy of suppression because it is merely a technical violation of a state statute that does not invoke a defendant's Fourth Amendment rights, and thus, filing a motion to suppress in this instance would have been futile. *People v Sobczak-Obetts*, 463 Mich 687, 696-697; 625 NW2d 764 (2001); See also *United States v Simmons*, 206 F3d 392, 403 (CA 4, 2000) (holding that "the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment[,]" and thus, does not warrant a remedy of suppression unless the defendant is prejudiced by the violation). Accordingly, defendant was not denied his right to the effective assistance of counsel when his trial counsel failed to file a motion to suppress based on a violation of MCL 780.655(1). *Toma, supra* at 302; *Ish, supra* at 118-119.

Moreover, independent trial testimony revealed that kellyslawn had an online chat with a police officer holding herself out to be a 15 year old girl, whereby the individuals exchanged pictures, chatted about drugs and sex, and arranged to meet at a nearby park. Independent trial testimony further revealed that defendant, who admitted to using the chat name kellyslawn, arrived 500 feet from the arranged meeting place at the prearranged time, carrying two marijuana cigarettes, and when questioned admitted that he was there to meet a fifteen year old for sex but did not intend to go through with it. Therefore, even if it were established that a motion to suppress the fruits of the search[7] would have been successful, any such motion would not have affected the result of the proceedings, and accordingly, failure to file such a motion did not deny defendant his right to the effective assistance of counsel. *Effinger, supra* at 69. Additionally, since defendant raised the aforementioned argument on appeal, we fail to see how he was prejudiced by his appellate counsel's failure to raise this argument. And, given our resolution of this argument, it appears that any effort by appellate counsel to raise the same argument would have been futile. Accordingly, defendant was likewise not denied his right to the effective assistance of appellate counsel. *Ish, supra* at 118-119; *Effinger, supra* at 69.

Defendant's final challenge is to the scoring of OV 10. A sentencing court's decision in scoring OV points will not be reversed on appeal unless the decision was clearly erroneous, and scoring decisions under the sentencing guidelines are not clearly erroneous if "there is *any* evidence in support of the decision." *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003), citing *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996) (emphasis added by *Witherspoon* Court).

MCL 777.40(1)(a) authorizes the scoring of 15 points for "predatory conduct," and subsection (3)(a) defines "predatory conduct" as "pre-offense conduct directed at a victim for the primary purpose of victimization." The trial court scored OV 10 for violation of MCL 750.145d(2)(f), communicating over the internet for purposes of committing or attempting to commit CSC III. Thus, defendant must have engaged in "conduct directed at a victim for the

[7] The search produced a container of marijuana and defendant's laptop, which revealed a chat transcript between kellyslawn and the police officer holding herself out to be a 15-year-old girl.

primary purpose of victimization[,]" MCL 777.40, before communicating with the victim over the internet to commit or attempt to commit CSC III for the scoring to be justified.

The trial court did not articulate its rationale for the scoring of OV 10, and we cannot discern any facts that support the score. The relevant offenses for which defendant was convicted all entailed use of the internet to commit acts with children, and thus, the one and only "chat" that defendant engaged in over the internet could not constitute "pre-offense" conduct. Indeed, the prosecutor does not address how defendant's one internet chat constitutes pre-offense conduct, but instead only cites to two of our decisions, *People v Apgar*, 264 Mich App 321; 690 NW2d 312 (2004) and *People v Witherspoon* (*After remand*), 257 Mich App 329; 670 NW2d 434 (2003), in support of defendant's conduct being predatory. But in each of those cases there was evidence of the defendant making decisions or taking action *prior to* attacking the victim, with the attack being the crime charged. See *Apgar*, *supra* at 330; *Witherspoon*, *supra* at 336. Consequently, those decisions cannot support affirming the sentence.

In light of this conclusion that a scoring error occurred, we must remand for re-sentencing. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006). We note, however, that even without the 15 points for OV 10, this class B crime with a scoring in PRV Level C and OV Level I would be 24 to 40 months, MCL 777.63, and the 36-month sentence initially handed down clearly falls within that range. Nevertheless, in light of *Francisco*, we remand for the trial court to determine if it wants to re-impose the 36-month sentence.

Defendant's convictions are affirmed, but the case is remanded to the trial court for re-sentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Christopher M. Murray