STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE CITY OF WARREN,

Plaintiff-Appellant/Cross-Appellee,

v

JOSEPH ANTHONY NYILOS,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
January 22, 2008

No. 271008
Macomb Circuit Court
LC No. 05-003758-AR

Before: Talbot, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Following a district court jury trial, defendant was convicted of misdemeanor stalking, in violation of City of Warren Ordinances, § 22-44. Defendant appealed his conviction to the Macomb Circuit Court, which reversed the conviction. Thereafter, this Court granted plaintiff's application for leave to appeal. Defendant cross-appeals. We reverse the ruling of the circuit court and reinstate defendant's conviction for the reasons set forth in this opinion.

Defendant was convicted of stalking his former girlfriend Jennifer Vogt. Defendant's conviction arose out of three incidents in April 2004 when he encountered Vogt leaving her workplace. According to Vogt, the three incidents at issue were part of a pattern of harassment perpetrated against her by defendant. After Vogt ended her relationship with defendant in May 2000, she asked defendant to stay away from her. Defendant continued to contact Vogt, however, forcing her to obtain multiple personal protection orders (PPOs) against him. Vogt testified that she does not know what to expect from defendant, that he has tried to ruin her relationships with other men, and that she is afraid he will hurt her. Following his jury trial, defendant was convicted of misdemeanor stalking. Thereafter, the circuit court reversed the conviction, finding that the district court abused its discretion in admitting evidence of defendant's prior unconsented contact with Vogt. This appeal followed.

Plaintiff argues that the district court properly admitted evidence of defendant's prior unconsented contact with Vogt. We agree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). If the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Pursuant to MRE 404(b), evidence of an individual's crimes, wrongs, or bad acts is inadmissible to show a propensity to commit such acts. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, the evidence may 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 . . . ." MRE 404(b)(1). In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), our Supreme Court clarified the test to determine the admissibility of other-acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

MRE 403 provides that even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *People v Layher*, 464 Mich 756, 769; 631 NW2d 281 (2001).

We agree with plaintiff that the challenged evidence was offered for a proper purpose under MRE 404(b). Plaintiff offered the evidence to show a common scheme, plan, or system.

> [E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. [*People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000).]

Defendant's prior unconsented-to contact with Vogt and the contact at issue shared sufficient common features to infer a plan, scheme, or system with regard to the acts. Defendant previously contacted Vogt by telephoning her, leaving her letters and gifts, following her in his vehicle, and appearing at her home and workplace. Defendant contacted Vogt more frequently after each PPO against him expired. In April 2004, defendant contacted Vogt by appearing near her workplace in his vehicle. These incidents occurred almost immediately after the third PPO against defendant expired. It is apparent that the contact at issue fits into defendant's pattern of appearing at the places Vogt frequented, especially after the PPOs against him expired. Further, while defendant's prior contact with Vogt occurred approximately two years before the incidents at issue, the "remoteness of an act only affects the weight of the evidence rather than its admissibility." *People v McGhee*, 268 Mich App 600, 611-612; 709 NW2d 595 (2005).

Plaintiff also offered the challenged evidence to show intent.[1] Under City of Warren Ordinances, § 22-44(1)(d), stalking refers to "a *willful* course of conduct involving repeated or

[1] Plaintiff also mentions defendant's "handiwork" and, in doing so, implies on appeal that the challenged evidence was admissible to prove identity. We need not reach this issue because other bases for admitting the evidence were valid and because the district court did not give a

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continuing harassment of another individual" (emphasis added). Defendant raised the issue of intent or willfulness by testifying that, although Vogt may have seen him driving near her workplace, he did not intend to make contact with her. The fact that defendant had prior unconsented contact with Vogt makes it more likely that he intended to make contact with her in April 2004.

> The more often a defendant acts in a particular manner, the less likely it is that the defendant acted accidentally or innocently, and conversely, the more likely it is that the defendant's act is intentional. Where other-acts evidence is offered to show intent, the acts must only be of the same general category to be relevant. [*McGhee*, *supra* at 611 (internal citation omitted).]

Plaintiff additionally argues that the challenged evidence was relevant. We agree. The prosecutor initially bears the burden of establishing relevance. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). To be relevant, evidence must be material to a fact of consequence in the proceedings. *People v Ackerman*, 257 Mich App 434, 439; 669 NW2d 818 (2003). Plaintiff offered the challenged evidence to show a common scheme or plan and to show intent, and, for the reasons indicated above, these were issues of consequence at trial. The evidence was also relevant to explain why Vogt felt frightened upon seeing defendant in April 2004. Under City of Warren Ordinances, § 22-44(1)(d), a stalking victim must feel "terrorized, frightened, intimidated, threatened, harassed, or molested" as a result of the perpetrator's conduct. Evidence that defendant's previous contact with Vogt caused her to fear him and to obtain multiple PPOs against him explains Vogt's fear upon seeing defendant near her workplace on the three occasions at issue.

Further, we agree with plaintiff that the evidence was not unfairly prejudicial to defendant. "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 Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Although the challenged evidence was damaging to defendant's position, it was highly probative with regard to issues of consequence at trial. Moreover, the district court offered cautionary instructions to the jury. The district court instructed the jury that it must only consider the challenged evidence to determine whether defendant had a reason to commit the crime, whether he specifically meant to stalk Vogt, whether he acted purposefully, and whether he used a plan, system or scheme in committing the crime. The court further cautioned the jury not to convict defendant "because you think he is guilty of other bad conduct." The district court's instructions eliminated any unfair prejudice to defendant.

The district court did not abuse its discretion in admitting the challenged evidence because it was offered for a proper purpose, it was relevant, and it was not unduly prejudicial. Accordingly, we reverse the circuit court's order and reinstate defendant's conviction.

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jury instruction specifically directing the jurors that they could use the evidence for "identity" purposes.

On cross-appeal, defendant argues that the evidence presented at trial was insufficient to convict him of stalking. We disagree. We review sufficiency of the evidence claims de novo, determining whether the evidence, viewed in the light most favorable to the prosecution, would allow a rational trier of fact to find that all the elements of the charged crime have been proven beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

City of Warren Ordinances, § 22-44(1)(d), defines stalking as

> a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

The term "course of conduct" refers to "a series of two (2) or more separate noncontinuous acts, evidencing a continuity of purpose," and "harassment" means conduct directed toward the victim, including "repeated or continuing unconsented contact." § 22-44(1)(a) and (c). The ordinance defines "unconsented contact" as "any contact with another individual that is initiated or continued without the individual's consent, or in disregard of that individual's expressed desire that the contact be avoided or discontinued." § 22-44(1)(e).

Defendant argues that his alleged contact with Vogt did not constitute a "willful course of conduct." Specifically, defendant argues that, even if Vogt saw him near her workplace in April 2004, he did not initiate the contact or intend to make contact with her. Because of the difficulty of "proving an actor's state of mind, minimal circumstantial evidence is sufficient to sustain a conclusion that a defendant entertained" the intent to commit the crime. *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985). According to Vogt, in April 2004, defendant stopped his vehicle next to her twice in traffic and then parked across the street from her workplace. Defendant stared, waved, and shook his head and finger at Vogt.[2] This evidence was sufficient to find that defendant intended to make contact with Vogt. Moreover, as discussed *infra*, the fact that defendant had prior unconsented contact with Vogt makes it even more likely that he intended to make contact with her in April 2004. See *McGhee*, *supra* at 611. While defendant disputes Vogt's testimony and claims that he did not intend to contact her, questions of credibility and intent are properly resolved by the trier of fact, to whom we must give deference on such issues. *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998).

Defendant further argues that his alleged contact with Vogt would not cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested. We agree with defendant that, *viewed in isolation*, defendant's contact with Vogt in April 2004 may not

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[2] We reject defendant's argument that the evidence of his staring during the first incident is untenable because Vogt answered "[n]o" when asked whether she was "looking at [defendant]" during the time it took for a traffic light to turn green. Just because Vogt was not "looking at" defendant during this period does necessarily mean that she could not perceive, perhaps with her peripheral vision, that defendant was staring at her. Moreover, Vogt testified that defendant could have moved his vehicle forward but instead stopped it alongside her vehicle.

have caused a reasonable person to suffer any emotional distress. We find, however, that the incidents at issue should not be viewed in isolation. As discussed *infra*, defendant's previous contact with Vogt caused her to fear him and to obtain multiple PPOs against him. In light of the history of the parties in this case, a reasonable person could feel harassed simply by seeing the perpetrator near his or her workplace, staring or waving in his or her direction. Accordingly, we find that, viewed in the light most favorable to the prosecution, the evidence presented at trial was sufficient to convict defendant of stalking.

Defendant next argues on cross-appeal that the district court improperly instructed the jury. We review unpreserved claims of instructional error for plain error affecting a defendant's substantial rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499, disapproved of in part on other grounds 469 Mich 966 (2003). Reversal is warranted only if a plain error resulted in the conviction of an innocent defendant or "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Carines*, *supra* at 763-764 (internal citation and quotation marks omitted).

First, defendant argues that the district court gave an inadequate intent instruction. Specifically, defendant argues that the term "willful" in City of Warren Ordinances, § 22-44, demonstrates that stalking is a specific intent crime and that the district court's instruction was inadequate because it did not require a showing of specific intent. We disagree.

The district court instructed the jury that "stalking means a *willful* course of conduct involving repeated or continuing harassment of another individual" (emphasis added), in accordance with City of Warren Ordinances, § 22-44(1)(d). We disagree with defendant that the term "willful" in City of Warren Ordinances, § 22-44, makes stalking a specific intent crime. Specific intent crimes require a showing of "a particular criminal intent beyond the act done," while general intent crimes merely require a showing of "intent to do the physical act." *People v Beaudin*, 417 Mich 570, 573-574; 339 NW2d 461 (1983). A plain reading of City of Warren Ordinances, § 22-44(1)(d), demonstrates that the term "willful" modifies the term "course of conduct." The inclusion of the term "willful" in the ordinance does not require that the perpetrator *intentionally* cause the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested, as asserted by defendant; rather, it requires that the perpetrator engage in a willful or intentional course of conduct that ultimately causes such feelings in the victim.[3] Based on the plain meaning of the ordinance,[4] the district court gave an adequate intent instruction.

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[3] Contrary to defendant's assertions on appeal, this reading of the statute comports with this Court's analyses in *People v Maynor*, 470 Mich 289, 295-296; 683 NW2d 565 (2004), and *Beaudin*, *supra* at 573-574.

[4] As noted in *Maynor*, *supra* at 295:

> When construing a statute, this Court's goal is to give effect to the intent of the Legislature. We begin by construing the language of the statute itself. Where the language is unambiguous, we give the words their plain meaning and apply the statute as written.

Second, defendant argues that the district court improperly instructed the jury regarding his prior unconsented contact with Vogt. We agree. The district court recited the standard jury instruction regarding evidence of other offenses, CJI2d 4.11, with the exception of one statement. The district court instructed the jury that it "must decide" that defendant is a bad person based on the evidence of his prior bad acts. It is apparent, however, that the court made the challenged statement unintentionally and that it intended to instruct the jury that it "must *not* decide" that defendant is a bad person, as is stated in CJI2d 4.11.

Nevertheless, we find that the district court did not commit outcome-determinative error warranting reversal. We examine instructions in their entirety, and if the instructions adequately protected the defendant's rights by fairly presenting the issues to the jury, there is no basis for reversal. *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006). The defendant bears the burden of establishing error requiring reversal. *People v Bartlett*, 231 Mich App 139, 144; 585 NW2d 341 (1998). The standard instruction given by the district court clearly stated that the jury should only consider evidence of defendant's prior bad acts for limited purposes and that it must only convict defendant if it found that he committed the alleged crime beyond a reasonable doubt. The court additionally stated, "You must not convict the defendant here because you think he is guilty of other bad conduct." There is no evidence that that the district court's single misstatement misled or confused the jury. The prosecutor stating in his opening statement, "the Judge is gonna instruct you that you can't consider this to show that . . . defendant . . . is a bad person or that he's likely to commit the crime." He made a similar statement during closing arguments. We conclude that all of the issues in the case, and the rules applicable to each issue, were adequately presented to the jury and that, viewed in their entirety, the jury instructions adequately protected defendant's rights and fairly presented the issues to be tried.

Defendant next argues on cross-appeal that the district court abused its discretion in refusing to admit a videotape depicting he and Vogt engaged in sexual intercourse. The decision whether to admit or exclude evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Lukity*, *supra* at 484.

Defendant asserts, and plaintiff concedes, that the district court erred in finding that the videotape could not be authenticated. We agree. Under MRE 901(a), authentication requires "evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(b)(1) provides, by way of illustration, that authentication may be met through testimony of a witness with knowledge that "a matter is what it is claimed to be." This Court has held that a videotape may be authenticated by a person who was present at the time it was made. See *People v Hack*, 219 Mich App 299, 308-310; 556 NW2d 187 (1996). Here, both defendant and Vogt were present when the videotape was made and could have authenticated it.

Nonetheless, we find that the district court did not abuse its discretion in excluding the videotape. Generally, all relevant evidence is admissible. MRE 402; *Crawford*, *supra* at 388. Evidence is relevant if it has a tendency to make the existence of a fact of consequence more or less probable. MRE 401. Even if evidence is otherwise admissible, it may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

The district court was correct in finding the contents of the videotape irrelevant. The parties agreed that the videotape depicted Vogt and defendant engaged in consensual sexual intercourse and that nothing on the videotape indicated when it was made. Vogt testified that she and defendant made the videotape while they were dating. On the other hand, defendant testified that they made the videotape while Vogt had a PPO against him. Clearly, the only dispute about the videotape was the date that it was made; it was undisputed that Vogt previously dated defendant and engaged in consensual sexual activities with him. The crucial question at trial was *when* Vogt consented to contact with defendant. Admitting the videotape would not help to resolve this question. Furthermore, defendant cannot establish that the exclusion of the videotape was outcome-determinative. *Lukity*, *supra* at 495-496; *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003).

Defendant finally argues on cross-appeal that the district court erred in denying his request for a pretrial evidentiary hearing. We disagree. We review a trial court's decision whether to hold an evidentiary hearing for an abuse of discretion. See *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987). We review questions of law de novo on appeal. *People v Hill*, 269 Mich App 505, 514; 715 NW2d 301 (2006).

We agree with plaintiff that defendant's request for an evidentiary hearing was, for all intents and purposes, a request for a preliminary examination. "The primary function of a preliminary examination is to determine whether a crime has been committed and, if so, if there is probable cause to believe that the defendant committed it." *People v Glass (After Remand)*, 464 Mich 266, 277; 627 NW2d 261 (2001); see also *Hill*, *supra* at 514. Preliminary examinations serve the public policy of ceasing judicial proceedings when there is a lack of evidence and they help to satisfy the constitutional requirement that the defendant be informed of the nature of the accusation against him. *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993); *People v McGee*, 258 Mich App 683, 696; 672 NW2d 191 (2003). Defendant requested that the district court hold a pretrial hearing to determine whether probable cause existed to issue the complaint. Defendant argued that there was insufficient evidence to establish that the alleged crime occurred and that he was the person who committed the crime. It is clear that defendant requested an "evidentiary hearing" for the same purpose that a preliminary examination is held.

Because it is apparent from the record that defendant's request for an evidentiary hearing was equivalent to a request for a preliminary examination, we find that the district court properly denied defendant's request for the hearing. Pursuant to MCL 600.8311(d), a district court has jurisdiction to conduct preliminary examinations for "felony cases and misdemeanor cases not cognizable by the district court," but it must not conduct preliminary examinations for "any misdemeanor to be tried in a district court." In this case, defendant was charged with misdemeanor stalking, punishable by up to 90 days in jail, and was tried in the district court. Therefore, the district court lacked the jurisdiction to conduct a preliminary examination in this case and properly denied defendant's request for the pretrial hearing.

We reverse the circuit court's order and remand for entry of an order reinstating defendant's conviction and sentence. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Patrick M. Meter