STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 27, 2008
v	No. 269683 Washtenaw Circuit Court
LARRY TARONE HARRISON, JR., Defendant-Appellant.	LC No. 05-000005-FC

Before: Whitbeck, C.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following separate jury trials, of indecent exposure, MCL 750.335a, and being a sexually delinquent person, MCL 750.10a. He was sentenced to five years' probation.[1] Defendant appeals as of right, and we affirm.

After a series of indecent exposures took place in Ann Arbor, Michigan, a task force was formed to catch the perpetrator. Police testified that most indecent exposures were random events that were induced by fraternity antics or excessive alcohol consumption. However, the series of indecent exposures that initiated the creation of a task force involved the act of masturbation, the perpetrator approached his victims while committing this act, and the perpetrator attempted to get the victims' attention during the act. Defendant became a person of interest when he was seen in the vicinity of an indecent exposure and matched the stature and build of the perpetrator as described by the victims.

On December 6, 2004, Erin Sorenson, a student at the University of Michigan, lived at 1322 Minerva Street with three female roommates. That evening, the women were trying to move their vehicles into the driveway, but one of the cars would not start. They were outside when they noticed a man standing down the street. The women went inside their home to decide how to handle the disabled vehicle. Sorenson heard one of her roommates scream. She proceeded to the front door of the home. There, Sorenson saw a man standing on the doormat at the front door masturbating. It was the same man who had been standing down the street when the women were outside. The man's genitals were visible, his sweatpants were at his knees, and

[1] The sentence also included the provision that the last year of probation would be served in jail, but was subject to waiver upon "exemplary performance" of the terms of probation.

the man was using his right hand to masturbate. The perpetrator was wearing gray sweatpants and a navy turtleneck. Sorenson screamed and hid behind a wall of the home while a roommate called the police. She was unable to identify the facial features of the man at her front door. However, she described the perpetrator as 6'2" tall with very broad shoulders. Sorenson characterized the man as having a muscular build or a "football type" structure.

Laura Thome, Sorenson's roommate, testified that she was outside with her roommates moving their cars off the street. One of the vehicles would not start, and the roommates went into their home to discuss the situation. Thome began to collect the trash to take it to the curb. When she opened the front door, she was startled by a man walking toward the front door. She screamed, but the man came closer to the porch. Thome had difficulty seeing the man because the porch light was burned out and there was a glare from the interior lighting. Despite her problems with visibility, Thome observed an African-American male with a football-type build wearing his gray sweatpants at his knees.

Ann Arbor Police Officer Craig Lee was a member of the task force created to apprehend the perpetrator of indecent exposures that involved the act of masturbation. After receiving the report of the indecent exposure on Minerva Street, police conducted surveillance of the area. Officer Lee observed defendant driving his vehicle. Defendant's vehicle came to a complete stop when there were no traffic signals or pedestrians in the roadway. Defendant left his vehicle in a parking lot and proceeded to walk on South Division Street. Officer Lee parked his unmarked vehicle in front of 730 South Division Street. This location was consistent with the pattern of prior indecent exposures. There was a home with a large picture window with the blinds open, and the lights on inside. Three females were visible through the picture window sitting inside the house. Officer Lee saw defendant approach the home, pull his sweatpants down with his left hand, and begin to masturbate with his right hand. Defendant walked away from the residence into the street, and his acts were illuminated by the street lights. Officer Lee and Sergeant Brian Jatczak, another member of the task force, identified themselves as police officers. Defendant pulled shorts that he was wearing under his sweatpants up to his waist. However, his sweatpants were still at his knees when he was placed under arrest. Defendant told officers that he was searching for his identification and that his hands were cold.

Defendant was convicted, following a jury trial, of indecent exposure, MCL 750.335a. After the indecent exposure decision was rendered, the trial court instructed the parties that it would immediately proceed to trial on the charge of being a sexually delinquent person, MCL 750.10a. A new jury was impaneled. At the conclusion of this trial, defendant was convicted as charged. Defendant appeals as of right.

I. Preliminary Examination Bindover

Defendant first alleges that insufficient evidence was presented at the preliminary examination to support the bindover, and therefore, the circuit court erred in failing to quash the information. Appellate review of an issue is limited to the record created in the lower court, *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999), and it is the obligation of the appellant to ensure that the record on appeal is complete. See *Band v Livonia Associates*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). Appellate review is limited to what is presented on appeal, and we cannot consider evidence or testimony offered by a party for which there is no record support. *Id*. at 104. Review of the lower court record reveals that the

transcript from the preliminary examination was not provided in the record on appeal. Accordingly, we cannot review any claimed deficiency within the proofs presented to the district court to support the bindover. In any event, we note that any deficiency at the preliminary examination stage will not warrant reversal on appeal absent a showing of prejudice at trial. *People v Hall*, 435 Mich 599, 602-603; 460 NW2d 520 (1990). See also *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003) ("If defendant went to trial and were found guilty, any subsequent appeal would not consider whether the evidence adduced at the preliminary examination was sufficient to warrant a bindover."). Therefore, this challenge does not provide defendant with any relief.

II. Improper Admission of MRE 404(b) Evidence

Defendant next alleges that the trial court erred in admitting other bad acts evidence. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). If the admission of evidence involves a preliminary question of law, the issue is reviewed de novo. *Id.* at 670-671. The core of the abuse of discretion standard is the acknowledgment that there will be circumstances in which there will be no single correct outcome, but rather there can be more than one reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes." *Id.*[2] A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

A. Violation of the Notice of Intent to Introduce MRE 404(b) Evidence

With regard to this issue, defendant first asserts that the prosecutor violated the notice of intent to introduce six incidents of MRE 404(b) evidence by improperly introducing sixteen acts of indecent exposure and attributing all acts to defendant. We disagree. The record provides that the prosecutor filed a notice of intent to introduce other acts evidence, and defendant objected to the admission of other acts evidence. The trial court ruled in favor of admission despite defendant's objections.

However, during the cross-examination of Detective Fitzpatrick at trial, defense counsel introduced the issue of the number of indecent exposures that had occurred in the area as well as the characteristics of the perpetrator. Specifically, defense counsel asserted that there were over one hundred indecent exposures in the area, and the only common characteristic of the charged offense to prior exposures was the involvement of a large African-American male. Initially,

[2] Although the abuse of discretion standard has been examined in terms of whether the decision was grossly violative of fact and logic or whether there was no justification for the ruling, *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996), the standard articulated in *Babcock, supra*, is the preferred and default abuse of discretion standard. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Detective Fitzpatrick testified that he was not in a position to dispute that statistic. Following a recess, Detective Fitzpatrick testified on redirect examination that he checked the statistics for indecent exposures. He learned that there were approximately forty incidents of indecent exposure in 2004. Of the forty, Detective Fitzpatrick had investigated sixteen incidents with common factors. The common factors included: (1) an African-American male; (2) a man with a large build; (3) exposures to groups of women; (4) when the weather was warm, the women were on their porches; (5) the women were studying, talking, or smoking when approached; (6) the perpetrator would attempt to attract the attention of the females; (7) the act of masturbation occurred with the use of the right hand; and (8) the incidents occurred within a couple of square miles. When the weather turned, the common factors varied slightly. During the winter, the women were in their homes, the home interior was visible from the outside, and the perpetrator would try and get the women's attention.

The detective proceeded to testify that the most common form of indecent exposure involved a "Peeping Tom" scenario. That scenario occurred when an individual peered inside a home while performing a sexual act. A "Peeping Tom" did not generally attempt to alert the victims of his presence and was generally discovered by a passerby. Additionally, he testified that indecent exposures were generally the result of fraternity pranks or alcohol use and were not a priority for law enforcement. However, because the indecent exposures utilized a distinct, unique method of operation, a plainclothes task force was formed to catch the perpetrator.

It is clear from the record that defendant opened the door to this line of questioning. Once questioning on a subject has occurred, that is, once the door has been opened, further examination on the subject is proper. See *People v Bettistea*, 173 Mich App 106, 116; 434 NW2d 138 (1988). Specifically, defense counsel introduced this area on cross-examination when he inquired about the specific number of incidents and the common factors reported. Thus, the detective clarified that the exposures were problematic because of the large number of cases with similar factors. In light of the defense introduction of this issue, the prosecutor did not violate the trial court's ruling regarding the admission of six incidents cited in the notice of intent. Accordingly, the challenge to the violation of the notice of intent is without merit.

B. Incidents at Michigan Avenue and South Division Street

Defendant next asserts that the victims who testified regarding indecent exposures on two other occasions were improperly admitted. We disagree.

In August 2004, Kathrine Karlson, a college student, was on the porch with her friends and her sister at approximately 8:30 p.m. at 1033 Michigan Avenue. She testified that she saw a large African-American male with his sweatpants at his knees and a t-shirt covering his head. The man was masturbating with his right hand. The perpetrator shuffled toward the women, but was traveling slowly because his lowered pants limited his mobility. The women screamed, ran into their home, and telephoned police. Six days later, on the same porch at 9:45 p.m., Karlson was with friends when the "same thing" occurred. Specifically, she saw a man masturbating at the end of her driveway with his shirt pulled up to his chin. Once again, the women fled into the home and called police. Karlson was able to identify defendant as the perpetrator of the indecent exposures that she observed while on her porch.

The female occupants of 730 South Division on December 7, 2004, were seated in the living room with the blinds up and the lights on. Anyone that approached the residence from outside could see into the home. The women were unaware of any activity that occurred outside their residence that night until they spoke to police. The occupants did not know defendant, and he had never been to their home. However, police officers testified that defendant was in the vicinity of 730 South Division, and as he crossed the street away from the residence, his pants were at his knees and he was masturbating.

Defendant contends that the admission of this testimony of other acts evidence was improper because Karlson had difficulty with her identification of defendant and the incident occurring at 730 South Division was dissimilar to the other acts of indecent exposure. We disagree. The rules of evidence prohibit the use of character evidence to prove action in conformity therewith. MRE 404. The purpose of the rule is to prevent an individual from being convicted based upon a history of other misconduct rather than the evidence of the conduct in the case at issue. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). In the present case, other acts evidence was not offered for the improper purpose of demonstrating other misconduct, but rather was offered for the proper purpose of establishing identification as well as scheme, plan, or system. Under MRE 404(b), other acts evidence is logically relevant when the similar acts evidence is offered to show identification through modus operandi. *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998). To allow for the admission of other acts evidence, there must be (1) substantial evidence that the defendant committed the similar act; (2) the act involves a special quality that tends to prove the defendant's identity; (3) the evidence is material to the defendant's guilt; and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Id*.

Additionally, pursuant to MRE 404(b), evidence to establish a scheme, plan, or system is admissible. That is, evidence of similar misconduct is logically relevant to demonstrate that the charged act occurred when the uncharged act of misconduct and the charged crime are "'sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.'" *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004), quoting *Sabin, supra* at 63. An impermissibly high level of similarity between the proffered other acts evidence and the charged acts will not be required. *Knox, supra* at 511. Logical relevance between the uncharged and charged acts need not be limited to a single continuing conception of plot. *Id*. at 510. Moreover, a mere general similarity between the uncharged and charged acts does not, by itself, establish a plan, scheme, or system used to commit the acts. *Id*.

In the present case, the testimony of Karlson was admitted to show identification as well as common plan. Defendant was charged with the indecent exposure that occurred at 1322 Minerva Street in December 2004. However, the residents of the home were unable to identify defendant because there was insufficient lighting on the porch and a glare from the interior lighting in the home. Consequently, Karlson's testimony was admitted to demonstrate that defendant had committed similar acts in August 2004. The acts were sufficiently similar where it involved a large African-American male masturbating with his right hand with his pants at his knees. The man did not remain hidden from view, but approached the women to get their attention. Karlson was able to identify defendant as the perpetrator of the indecent exposure, and defendant was able to attack the credibility of her identification. The act performed occurred in a common manner by an individual with a particular stature and build. The evidence was material

to the guilt of defendant, and the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. *Ho, supra*. Consequently, the trial court did not abuse its discretion by admitting this evidence. *Washington, supra*.

Moreover, the facts and circumstances were sufficiently similar to the charged event. *Knox, supra*. We acknowledge that there was a difference between the charged event and the misconduct that occurred in August 2004. However, the police explained that any disparity in the method of operation was attributed to the cold weather; women were no longer gathered on their porches and were observed in their homes through unobstructed windows. Therefore, the trial court did not abuse its discretion by admitting this testimony. *Washington, supra*.

With regard to the admission of the testimony of the occupants of South Division Street, defendant contends that it was excludable because the women did not observe anything improper, and police did not observe defendant on the porch of the residence. However, the admission of this testimony cannot be examined in isolation. Rather, the prosecutor proffered evidence regarding the events of that evening to demonstrate identity through circumstantial evidence. Specifically, police had a report of an indecent exposure that occurred on Minerva Street, but the occupants provided a general physical description because of insufficient lighting and limited observation time. Later that evening in the same area, defendant was observed and matched the general physical characteristics. Consequently, police began surveillance of defendant. He approached the South Division residence with his pants at his knees and was masturbating. Although defendant did not approach the porch or alert the occupants of his presence, police opined that he learned of their presence and was leaving the scene while masturbating. Specifically, Sergeant Jatczak testified that he was approximately fifty feet away from defendant when defendant turned toward him. Believing that he had been detected, the sergeant began to jog in defendant's direction. Even though the South Division incident was not identical to the Minerva Street incident, an exact similarity is not required for admission. *Knox, supra*. Under the circumstances, the admission of this testimony was not an abuse of discretion. *Washington, supra*.

C. Propensity Evidence

Defendant also asserts that the admission of the MRE 404(b) evidence was merely improper propensity evidence for which the probative value substantially outweighed the danger of unfair prejudice. We disagree.

In *People v Sholl*, 453 Mich 730, 731-732; 556 NW2d 851 (1996), the defendant and the complainant were involved in a dating relationship. In January 1992, the couple had sexual intercourse, but the complainant asserted that the sexual acts were the result of force or coercion while the defendant asserted that the relations were consensual. The defendant was charged with one count of third degree criminal sexual conduct, MCL 750.520d(1)(b). Although the first trial ended in a mistrial, defendant was found guilty as charged after the second trial. The Court of Appeal reversed the conviction, citing three claims of error, one of which addressed MRE 404(b) evidence. The Supreme Court reversed the judgment of the Court of Appeals and reinstated the conviction. *Id.*

With regard to the bad acts evidence, the defendant asserted that the prosecutor improperly introduced evidence that he had used marijuana on the evening that he had sexual

relations with the complainant. *Id*. at 740. The Court of Appeals held that reversal was appropriate particularly when the jury was not advised that the evidence was admissible for the limited purposes of assessing the defendant's memory. *Id*. The Supreme Court held:

> As this Court has frequently explained, there are substantial limits on the admissibility of evidence concerning other bad acts. MRE 404(b); *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993).
>
> Nevertheless, it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place. The presence or absence of marijuana could have affected more than the defendant's memory. It could have affected the behavior of anyone who used the drug. Further, inferences made by a person about the intended conduct of another might have been affected by the person's knowledge that the other's conduct was taking place in a setting where illegal drugs were being used.
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> In this case, a jury was called upon to decide what happened during a private event between two persons. The more the jurors knew about the full transaction, the better equipped they were to perform their sworn duty. In this regard, we offer again the analysis found in *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978):
>
> It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence. *State v Villavicencio*, 95 Ariz 199; 388 P2d 245 (1964); *People v Wardwell*, 167 Cal App 2d 560; 334 P2d 641 (1959); McCormick on Evidence (2d ed), § 190.
>
> Stated differently,
>
> "Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *State v Willavicencio, supra* at 201. [*Id*. at 741-742.]

Contrary to the assertion of the defense, this case did not present the circumstance where other acts evidence was introduced to demonstrate that defendant was a bad person who engaged in a pattern of improper acts. Rather, the evidence was introduced to "give the jury an intelligible presentation of the full context in which disputed events took place." *Id*. at 741. Also, the admission of a number of other acts of indecent exposure was in response to the questioning by defense counsel. Moreover, the evidence also served to establish the background for why police acted as they did and the ultimate apprehension of defendant. Police testified that indecent exposure was a low priority crime because it was generally isolated acts of displays of body parts. However, the officers at trial testified that organization of a task force to apprehend the perpetrator of the indecent exposures was warranted because it involved a sexual act, an

approach of victims, and the desire to have the victims see the act in progress. Thus, the testimony of similar exposures was introduced to explain why a task force was formed and how many of the indecent exposures in a given year were similar. This was permissible. *Sholl, supra*.

It should also be noted that the defense theory of the case relied on the introduction of the number of indecent exposures that were occurring in Ann Arbor. Specifically, it was the defense theory of the case that there was a public outcry to apprehend the perpetrator in light of the large number of incidents. Consequently, it was alleged that police erroneously focused on defendant despite limited and uncertain identifications by victims in order to ease public fear. When evidence becomes relevant because of the cross-examination by the defense and the evidence is expanded upon in redirect examination, the probative value of the testimony is not outweighed by the prejudicial effect. *People v Yarger*, 193 Mich App 532, 538-539; 485 NW2d 119 (1992). Accordingly, the record does not support the defense assertion that the purpose of the reference to the number of incidents of indecent exposure was merely improper propensity evidence.[3]

III. Sufficiency of the Evidence to Support the Indecent Exposure Conviction[4]

Defendant contends that there was insufficient evidence to support his conviction for indecent exposure. We disagree. When the sufficiency of the evidence to sustain a conviction is questioned, we review the evidence in the light most favorable to the prosecution to determine if a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). It is acceptable for the elements of the crime to be proven by circumstantial evidence and reasonable inferences that arise from the evidence. *Id*. Moreover, the standard of review defers to the determination rendered by the jury. That is, we must draw all reasonable inferences and make credibility assessments in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). To obtain a conviction, it is sufficient for the prosecutor to prove the elements of the crime beyond a reasonable doubt; it is unnecessary for the prosecutor to disprove every reasonable theory consistent with innocence. *Id*. That is, the prosecutor need only convince the jury in light of whatever contradictory evidence that is presented by the defense. *Id*.

At the time of the offense, MCL 750.335a[5] governed indecent exposure and provided:

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[3] Although not raised in the statement of questions presented, defendant refers to the jury instruction governing MRE 404(b). However, defendant failed to make any argument or cite any authority to raise an issue with regard to the instruction. Consequently, the issue is deemed abandoned, and we cannot address it. *People v Huffman*, 266 Mich App 354, 371; 702 NW2d 621 (2005).

[4] Defendant contends that the challenge to the sufficiency of the evidence must be examined both with and without the improper MRE 404(b) evidence. In light of our conclusion that the admission of evidence was proper and to an extent precipitated by defendant, we need not conduct a two-fold analysis.

[5] MCL 750.335a was amended to modify the penalty when fondling is involved. This (continued…)

> Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or by a fine of not more than $1,000.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life: Provided, That any other provision of any other statute notwithstanding, said offense shall be triable only in a court of record.

With regard to the elements of the offense, defendant does not dispute that an open or indecent exposure of a person to another took place. Rather, defendant takes issue with the assertion that *he* was the person who committed the open or indecent exposure.

Viewing the evidence in the light most favorable to the prosecutor, *Taylor, supra*, there was sufficient evidence that defendant committed the charged offense, the indecent exposure to females located on Minerva Street on December 6, 2004. Police provided background information with regard to how defendant came to their attention. They received reports that an African-American male with a large build was approaching females with his genitals exposed, and he was masturbating with his right hand. In the summer, the women were approached on their porches, and the perpetrator did not perform the acts in hidden view, but out in the open. In the winter, the perpetrator went to homes where groups of females were visible, the same descript male would try to get the attention of the occupants of the home by banging on the window or throwing pebbles.

A task force was formed to address this problem. Defendant came to the attention of police officers because they found him driving a vehicle aimlessly about the city. That is, he would drive his vehicle around neighborhoods and stop or slow down near homes where lights were on and blinds were not drawn. As a result of this action, police recorded the license plate number of his vehicle and learned defendant's identity.

Approximately a week after defendant became a person of interest, four women were working on a car on Minerva Street. They went in the home, but found a man masturbating with his right hand on their porch. They could not facially identify him because of the lack of lighting. However, the description provided matched prior reports of indecent exposure. This man was wearing a dark shirt and gray sweatpants. Later that evening, police observed defendant's vehicle driving around the city and began to follow the vehicle. When defendant parked the vehicle and went on foot, police officers followed him. Defendant approached 730 South Division Street, a residence where women were readily observable because of the lighting and open blinds, and Officer Lee observed defendant masturbating near the residence. Police arrested defendant at the scene. Although defendant was wearing dark sweatpants and a dark sweatshirt at the time of his arrest, gray sweatpants were found in his vehicle. Additionally, when interviewed by police, defendant admitted that he was wearing gray sweatpants earlier in the evening, but changed his pants because they were wet.

(…continued)

amendment became effective February 1, 2006.

In the present case, there is no positive identification with regard to the Minerva Street incident because of the lack of lighting and the fact that the victims slammed the door shut on defendant. However, identity may be established by circumstantial evidence alone and is sufficient proof to deliver the case to the trier of fact. See *People v Sullivan*, 290 Mich 414, 418-419; 287 NW 567 (1939). Although the issue of the accuracy of an identification may cast doubt on the credibility of the witness, it is the province of the jury to determine whether an identification is accurate. See *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000). The jury is the finder of fact and determines the credibility of witnesses. *People v Layher*, 464 Mich 756, 763; 631 NW2d 281 (2001). Thus, the officers' testimony that defendant was masturbating as he left 730 South Division Street and the circumstantial evidence that he was the perpetrator of the charged offense on Minerva Street presented issues for the trier of fact to resolve.

In this case, although defendant's face was not visible to the victims, they described his build and his clothing. Police found defendant masturbating in a location near the charged indecent exposure. Defendant was found with the clothing later that evening, and his physical characteristics matched the victims' description. There was sufficient evidence to convict defendant of the charged offense. Defendant contends that the identification by Karlson was equivocal, and therefore, her testimony was "entitled to very little weight." However, as previously stated, the resolution of her credibility was for the trier of fact. Accordingly, this issue is without merit.

IV. Sufficient Evidence to Support the Sexually Delinquent Person Conviction

Defendant next contends that there was insufficient evidence to convict him of being a sexually delinquent person. We disagree.

MCL 750.10a entitled "Sexually delinquent persons; definition" provides in relevant part:

> The term "sexually delinquent person" when used in this act shall mean any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16.

As an initial matter, we note that defendant fails to cite any authority in support of what evidence is required to convict an individual of sexual delinquency. Where a defendant fails to present authority in support of an issue, it is abandoned. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Nonetheless, we will address the issue.

In this case, defendant was charged with indecent exposure, MCL 750.335a. However, that statute also allows for consideration of whether an individual is a sexually delinquent person at the time of the indecent exposure. Conviction of sexual delinquency can be obtained only in conjunction with conviction on the principal charge. *People v Helzer*, 404 Mich 410, 417; 273 NW2d 44 (1978). The principal charge may include gross indecency, sodomy, and indecent exposure. *Id*. at 417-420. The sexual delinquency trial must establish that the defendant committed repetitive or compulsive acts that demonstrate a disregard of consequences or the

recognized rights of others. *Id*. The sexual delinquency trial immediately follows the trial on the principal charge, but is conducted before a separate jury. *Id*. "[T]he role of the fact finder [is] highly discretionary in deciding the delinquency question." *Id*. at 419-420.

As previously stated, the sexually delinquent person statute defines "sexually delinquent person" as "any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others …." MCL 750.10a. Based on the evidence presented in this case and viewing the evidence in the light most favorable to the prosecution, *Taylor, supra*, there was sufficient evidence of repetitive and compulsive acts without regard to consequences or the rights of others for the jury to determine that defendant was a sexually delinquent person. The testimony was clear that indecent exposures were part of college life and could be as basic as "mooning" or public urination, but the indecent exposure in this case involved factors that caused public concern: the approach of groups of females, the attempt to get the attention of the victims, and the act of masturbation during the approach. The commission of four similar events caused police to form a task force for a crime that otherwise did not receive much attention.

Although there was testimony that there were four acts in August 2004, and sixteen similar acts between August 2004 and December 2004, the prosecutor did not bring in witnesses to describe the similar details of each offense. Rather, the prosecutor focused the testimony on the events of December 6-7, 2004, when defendant committed the act of indecent exposure on Minerva Street before a group of women who had been outside moving cars. The second act involved the police catching the suspect in the act of masturbation on South Division Street. Police utilized this act not to demonstrate that defendant was a bad person, but as circumstantial evidence of identification in the earlier incident because the victims could not identify defendant's face due to inadequate lighting and limited viewing. The two acts offered by the prosecutor on the evening of December 6-7, 2004, were sufficient for the jury to conclude that defendant engaged in repetitive or compulsive acts that presented a disregard for consequences or others. The acts that fulfill this statutory requirement fall within the jury's discretion. *Helzer, supra*. In light of the case law, this issue is without merit.

The prosecutor also presented the testimony of Karlson because she was the only victim of an indecent exposure who was able to identify defendant. Although her testimony in the first trial was limited to aiding in determining the identity of the perpetrator of the indecent exposures, her testimony in the second trial was further proof that defendant satisfied the definition for sexually delinquent person because he committed repetitive sexual acts by appearing before her twice in a one week period in August 2004, masturbating in her presence. In light of the four acts of indecent exposure, there was sufficient evidence for the jury, in its discretion, to conclude that defendant was a sexually delinquent person.

Additionally, the *Helzer* decision provided that proof of sexual delinquency involved more than ministerial considerations, and defendant could present psychiatric or expert testimony on the question. In the present case, defendant presented no proofs in opposition to the indecent exposure charge, but proceeded on the theory that the identification was flawed and that police acted rashly by arresting defendant in an attempt to ease public concerns. The jury had the discretion to reject defendant's theory of the case. Under the circumstances, defendant is not entitled to relief.

V. Prosecutorial Misconduct

Defendant asserts that the prosecutor engaged in misconduct and inserted the prestige of his office into the case by advising the jury that the series of indecent exposures ended upon defendant's arrest. We disagree. The duty of the prosecutor is to seek justice and not to simply act as a advocate to convict a defendant. See *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A claim of prosecutorial misconduct is reviewed on a case by case basis, with the remarks examined in context to determine whether the defendant was denied a fair and impartial trial. *Id*. If a defendant fails to object to a claim of prosecutorial misconduct, the claim is reviewed for plain error that was outcome determinative. *Id*. Error requiring reversal will not be found where the prejudicial effect of the prosecutor's remarks could have been remedied by a timely instruction. *Id*. A prosecutor is entitled to argue the evidence and reasonable inferences arising from the evidence. *People v Schumacher*, 276 Mich App 165, 178-179; 740 NW2d 534 (2007). Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

During closing argument, the prosecutor described the pattern of how the incidents occurred, the dates they occurred in relationship to the football season, and the statistics for indecent exposures in 2004. There was no objection to the prosecutor's closing argument. On this record, we cannot conclude that error or outcome determinative error occurred. There is no indication that the prosecutor attempted to inject the prestige of his office into the case. Rather, the prosecutor was arguing the evidence and reasonable inferences arising from the evidence. *Schumacher, supra*. The defense injected the issues of the characteristics of the perpetrator and the number of indecent exposures that occur in the area in a given year. Defense counsel inquired of Detective Fitzgerald whether 106 acts of indecent exposure had occurred in 2004. During the break, Detective Fitzgerald reviewed the crime statistics and learned that there were thirty-nine indecent exposures in 2004. Approximately sixteen exposures involved the act of masturbation, an approach of victims, and an attempt to get the attention of the victims. According to the testimony regarding the crime reports, this specific type of indecent exposure ceased after defendant's arrest. Thus, the prosecutor submitted to the jury that defendant was the perpetrator because this specific exposure act ended after defendant's arrest. This was argument based on reasonable inferences from the evidence. Moreover, the jury was advised that the prosecutor's argument was not evidence, and jurors are presumed to follow the instructions. *Graves, supra*. Accordingly, this issue is without merit.

VI. Unanimous Verdict

Defendant contends that he was deprived of the right to a unanimous verdict when the jury instructions with regard to the charge of sexually delinquent person failed to identify which incident formed the basis of the conviction. We disagree. "A party must object or request a given jury instruction to preserve the issue for review." *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000); see also MCL 768.29. Defense counsel's

express approval of the jury instructions constitutes a waiver that extinguishes any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). In light of counsel's satisfaction with the jury instructions at trial, defendant waived any claim of error.[6]

VII. Defense Request to Adjourn the Second Trial

Defendant next asserts that trial court erred in refusing to allow an adjournment of the second trial for the charge of being a sexually delinquent person, MCL 750.10a, to allow the defense to obtain the transcripts of the first trial. He also alleges that the failure to grant an adjournment deprived him of due process of law and the effective assistance of counsel. We disagree. A trial court's decision to grant or deny a continuance is reviewed for an abuse of discretion. *People v Pena*, 224 Mich App 650, 660; 569 NW2d 871 (1997), mod in part on other grounds 457 Mich 885 (1998). There is an "additional requirement that a defendant must be able to demonstrate prejudice as a result of the trial court's abuse of discretion." *Id*. at 661.

In the present case, the trial court scheduled the criminal trials in accordance with the procedure set forth in *Helzer, supra* at 424. If charged with sexually delinquent person, the principal charge is tried first. Once the first trial is complete, a second jury is impaneled to decide the sexual delinquency charge before the same trial judge "immediately after conviction on the principal charge." *Id*. The trial court complied with the direction of the *Helzer* Court regarding the procedure for addressing the charge of sexually delinquent person following a conviction of the principal charge. Accordingly, the trial court's denial of the request for a continuance to obtain the transcripts of the first trial does not constitute an abuse of discretion. More importantly, defendant failed to demonstrate any prejudice as a result of this ruling. *Pena, supra*. Defendant now has the benefit of the transcripts from both trials and does not identify any testimony that could have been impeached if the transcripts had been produced before the commencement of the second trial.

Furthermore, this argument does not recognize the distinction between the charges at issue. The charge of indecent exposure requires proof that the defendant committed repetitive or compulsive acts that demonstrate a disregard for the consequences or the recognized rights of others. MCL 750.10a. Defendant's challenge to the sexually delinquent person charge continued to focus on the identification and credibility of witnesses. Defendant could have presented psychiatric or expert testimony on the issue of whether the prosecutor's proofs

[6] Defendant cites to *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994) and *People v Yarger*, 193 Mich App 532; 485 NW2d 119 (1992), for the proposition that he had a right to a unanimous verdict that was violated in this case where there was testimony regarding multiple instances of indecent exposure, and the jury was not specifically advised that they had to agree on a particular instance to convict. Defendant's argument ignores the elements of the statute at issue. To satisfy the charge of sexually delinquent person, an individual must engage in sexual behavior that is "characterized by repetitive or compulsive acts." MCL 750.10a. Accordingly, the language of the statute allows for consideration of multiple acts. Thus, the case law cited by defendant is not implicated.

satisfied the statutory definition. *Helzer, supra*. Therefore, this issue and the challenge to the representation of trial counsel are without merit.

VIII. Constitutional Challenges

First, defendant challenges the constitutionality of the indecent exposure statute, MCL 750.335a, asserting that statute is unconstitutionally vague and deprives defendant of due process of law. However, as defendant acknowledges, this challenge was rejected in *People v Vronko*, 228 Mich App 649, 652-654; 579 NW2d 138 (1998). With regard to the constitutionality of the sexually delinquent person statute, MCL 750.10a, defendant contends that the statute is unconstitutionally vague, violates his right to notice, and criminalizes his status as a sex offender. However, defendant concedes that these challenges were rejected in *People v Murphy*, 203 Mich App 738, 745-748; 513 NW2d 451 (1994). Both decisions were issued after November 1, 1990, and must be followed unless reversed or modified by the Supreme Court. MCR 7.215(J)(1). Accordingly, these issues do not entitle defendant to any form of relief.

IX. Cumulative Error

Lastly, defendant contends that the cumulative effect of errors warrants reversal of his convictions. Where no error was found with regard to defendant's issues raised on appeal, a cumulative effect of errors cannot be found. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood