STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2008
v	No. 275561 Grand Traverse Circuit Court
HARRY HENRY MCSAUBY, Defendant-Appellant.	LC No. 06-010090-FH

Before: Jansen, P.J., and Zahra and Gleicher, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of attempted photographing or capturing the image of an unclothed person, MCL 750.539j(2)(b). He was sentenced as a second habitual offender, MCL 769.10, to 28 to 84 months' imprisonment. He appeals as of right. We affirm.

I. Basic Facts

On April 23, 2006, Joshua Schmittner, a loss prevention agent at a Traverse City Target store, observed defendant via closed circuit camera as he followed a young girl around the store. After observing defendant for a short period of time, Schmittner left his office to observe defendant live. It appeared to Schmittner that defendant was taking pictures of the girl with his cell phone. Schmittner was about to call 911 for assistance when he noticed Kyle Egelski, an off-duty sheriff's deputy, shopping in the store. Schmittner apprised Egelski of the situation. Egelski then followed defendant and observed him kneeling down and holding his cell phone underneath the girl's skirt as she was bending over to try on a pair of shoes. It appeared to Egelski that defendant took a picture of the girl with his phone. When Egelski intervened, defendant claimed to be the girl's father, which the girl, age 11, denied. Egelski testified that defendant started pressing buttons on the phone in an apparent attempt to delete pictures from the phone's memory. Defendant claimed that he had been crouched down to look at shoes on a lower rack when Egelski grabbed him. According to defendant, his cell phone inadvertently created the picture of the girl's undergarments as defendant attempted to call 911 and then his mother.

II. Analysis

A. MRE 404(b) Evidence

Defendant first argues that the trial court abused its discretion by admitting under MRE 404(b) two photographs seized from his cell phone. Both photographs depicted the body of a young woman standing at a counter in a Staples store.

This Court reviews the admission of other acts evidence for an abuse of discretion. *People v Johnigan*, 265 Mich App 463, 466-467; 696 NW2d 724 (2005). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MRE 404(b)(1) governs the admission of evidence of other "crimes, wrongs or acts." Whether this evidence is admissible under MRE 404(b)(1) depends on four factors. First, the evidence must be offered for a permissible purpose, i.e., one other than proving character or a propensity to commit the charged crime. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Second, the evidence must be relevant under MRE 402. *Id*. Third, unfair prejudice must not substantially outweigh the probative value of the evidence under MRE 403. *Id*. Fourth, the trial court, if requested, may provide a limiting instruction to the jury under MRE 105. *Id*.

Defendant argues that the photographs were not admissible to show a common plan or scheme to violate the law because the photos did not establish any violation of the law. According to defendant, the fact that his cell phone contained photos of a young woman standing at a checkout counter at a Staples store did not tend to prove that he committed the charged offense. Moreover, defendant contends that there was insufficient evidence that he was the person who took the photos.

"[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). "'To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . [I]t need only exist to support the inference that the defendant employed that plan in committing the charged offense.'" *Id.* at 65-66, quoting *People v Ewoldt*, 7 Cal 4th 380, 403; 867 P2d 757 (1994). Further, in order to be admissible, there need not exist a high level of similarity between proffered other acts evidence and the charged acts as long as the evidence is probative of something other than the defendant's character or propensity to commit the charged offense. *Knox, supra* at 511.

The trial court did not abuse its discretion by admitting the photographs, which tended to rebut defendant's claim that the photographs of the girl's undergarments were taken by accident,

as he tried to push other buttons on the phone. Although taking the photographs of the young woman at Staples did not violate the statute at issue in this case,[1] admissibility of other act evidence is not contingent upon the other act being criminal. Here, the fact that defendant's cell phone contained other photos of the backs of young women shopping in stores tended to establish that defendant deliberately photographed the girl he had followed in the Target store.

That the other photographs depict a young woman rather than a little girl did not render them too dissimilar to show defendant's intent, or his plan to take furtive photos of young women. Contrary to defendant's argument, the evidence was probative of "'the existence of a plan rather than a series of similar spontaneous acts . . . .'" *Sabin, supra* at 65-66, quoting *Ewoldt, supra* at 403. The photographs evidenced defendant's plan to surreptitiously photograph young girls or young women wearing short skirts. Similar to the photos sought to be taken in the instant case, the photographs of the young woman at Staples did not depict her face, but rather, her body. Thus, they sufficiently similar to the charged offense to be admissible under MRE 404(b).

Defendant also argues that the photographs were inadmissible because no evidence showed that he took the photos. Defendant's argument pertains to the weight of the evidence rather than its admissibility. See *People v Punga*, 186 Mich App 671, 672-673; 465 NW2d 53 (1991). The evidence showed that defendant activated the phone on March 7, 2006, approximately six or seven weeks before the incident giving rise to this case, and it was undisputed that he regularly used the phone. He testified, however, that he did not take the pictures of the young woman. The credibility of defendant's testimony was for the jury to determine.

Defendant further contends that the prejudicial effect of the photographs far outweighed their probative value. "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 Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems from the crime itself. *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998).

The photos were relevant to show defendant's plan and to rebut his assertion that he was not deliberately attempting to photograph the young girl, but rather, pushed buttons on his phone

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[1] MCL 750.539j provides, in relevant part:

> (1) A person shall not do any of the following:
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> * * *
>
> (b) Photograph, or otherwise capture or record, the visual image of the undergarments worn by another individual, the unclad genitalia or buttocks of another individual, or the unclad breasts of a female individual under circumstances in which the individual would have a reasonable expectation of privacy.

for another purpose. *Sabin, supra* at 71; *People v Layher*, 238 Mich App 573, 586; 607 NW2d 91 (1999), aff'd on other grounds 464 Mich 756 (2001). Thus, the evidence was probative of the ultimate issue, i.e., whether defendant committed the offense alleged. See *Sabin, supra* at 71. Further, the trial court's limiting instruction directed the jury not to consider the evidence as showing that defendant is a bad person or likely to commit crimes. Accordingly, the trial court did not abuse its discretion by admitting the other acts evidence under MRE 404(b). *Johnigan, supra* at 466-467.

III. Prosecutorial Misconduct

Defendant next argues that the trial court committed error requiring reversal by overruling defense counsel's objection to comments made during the prosecutor's rebuttal closing argument. We disagree. We review for clear error a trial court's ruling on an objection to allegedly improper prosecutorial conduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

Defendant argues that the following remarks during the prosecutor's rebuttal closing argument were improper:

> In fairness to [defense counsel], you know, I mean, this was Mr. McSauby's phone. While we were – while [defense counsel] was talking I went to options for the phone and there is one down here, you scroll down, Number Seven is shutter speed, shutter sound.
>
> *DEFENSE COUNSEL:* Your Honor, I object to this. Your Honor, we're at a closing argument, new evidence is being presented with this phone.
>
> *THE COURT*: The phone is in evidence you can do whatever you want with the phone.
>
> *DEFENSE COUNSEL*: This has not been mentioned before.
>
> *THE COURT*: But the phone itself is in evidence, it's an exhibit.
>
> *PROSECUTOR*: I switched it to the silent shutter speed, you can't hear the shutter. If you want, you can switch it back. So that point is – I switched it back. It's not a point. The shutter sound wasn't heard either because they didn't hear it or there was no shut tear [sic] sound, it was on the silent mode. And, then, I think, there is enough evidence to suggest that maybe that's how Mr. McSauby programmed it, to be silent.

Defendant contends that the prosecutor's argument injected evidence into the case in violation of his right to cross-examination and that the prosecutor's suggestion that the jury experiment with the phone was improper.

"A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but . . . is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). As the trial court determined, the prosecutor's argument did not constitute new evidence. Rather, the fact that the shutter could be silenced was a fact supported by the evidence, i.e., the phone itself. Because the phone was admitted as evidence, the jurors were free to confirm for themselves whether the shutter could be silenced. The prosecutor's argument was not improper.

Moreover, the prosecutor's argument responded to defense counsel's argument that the phone makes a noise every time a picture is taken, and Egelski testified that he did not hear such a noise. A prosecutor may respond to defense counsel's closing argument, and his remarks will be considered in light of those of defense counsel. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). Here, the prosecutor was relying on the phone itself to explain why Egelski may not have heard the shutter while defendant appeared to be taking pictures of the girl. The prosecutor's remarks responded to defense counsel's argument and were not improper. *Id.*

IV. Sentencing

Defendant next argues that he is entitled to resentencing because offense variable (OV) 10 was incorrectly scored. A sentencing court has discretion in determining the number of points to be assessed for each variable, provided that record evidence adequately supports a given score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*

MCL 777.40, regarding exploitation of a vulnerable victim, directs a sentencing court to score 15 points under OV 10 if "[p]redatory conduct was involved." MCL 777.40(3)(a) defines "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization." Here, the evidence supported the sentencing court's scoring of OV 10. Schmittner observed defendant following the young girl around the store and apparently taking pictures of her with his camera phone. He never put the phone to his ear, never spoke into it, and did not appear to be shopping. Egelski also observed defendant following the girl before he saw defendant hold his phone under her skirt and take a picture of her as she was bending over to try on a pair of shoes. Therefore, the evidence supported the sentencing court's scoring of 15 points under OV 10.

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher