STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH EDWARD STEFANSKI,

Defendant-Appellant.

UNPUBLISHED
November 15, 2002

No. 230088
Oakland Circuit Court
LC No. 99-167686-FC

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of accosting, enticing, or soliciting a minor for immoral purposes, MCL 750.145a, and pleaded no contest to being a sexually delinquent person, MCL 750.10a, with regard to both counts. Although initially sentenced to a term of one day to life imprisonment for his plea convictions, see MCL 767.61a, defendant's convictions and sentences under MCL 750.10a were vacated by stipulation of the parties during the pendency of this appeal. Defendant was then resentenced on his jury convictions to concurrent terms of 365 days jail, with credit for 891 days served. Defendant appeals as of right. We affirm.

According to testimony offered at trial, defendant, wearing only cut-off shorts, was seen driving around several residential neighborhoods, where, after stopping, he motioned to a number of different children requesting that they come toward his truck. Although none of the children targeted by defendant responded affirmatively, defendant later admitted to police that he masturbated while watching the children.

On appeal, defendant first argues that the evidence was insufficient to bind him over for trial on the accosting, enticing, or soliciting charges. We disagree.

We review de novo the circuit court's denial of a motion to quash to determine whether the district court abused its discretion. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). A district court must bind a defendant over for trial if there is competent evidence constituting probable cause to believe that a felony was committed and that the defendant committed that felony. *Id.* Circumstantial evidence and the reasonable inferences arising therefrom are sufficient to support a bindover, and the prosecution is not required to prove each element of the crime beyond a reasonable doubt. *People v Terry*, 224 Mich App 447, 451; 569

NW2d 641 (1997). The district court's determination will not be disturbed unless it is "wholly unjustified by the record." *Northey*, *supra.*

The statute proscribing accosting, enticing, or soliciting a minor for immoral purposes, provides:

> Any person who shall accost, entice, or solicit a child under the age of 16 years with intent to induce or force said child to commit an immoral act, or to submit to an act of sexual intercourse, or an act of gross indecency, or any other act of depravity or delinquency, or shall suggest to such child any of the aforementioned acts, shall on conviction thereof be deemed guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than one [1] year. [MCL 750.145a.]

Defendant argues that there was no evidence that he tried to make the children commit or submit to any immoral act, sexual intercourse, or gross indecency, and that it is not a crime to watch children as an aid to masturbation. However, the statute does not require that a person actually attempt to make a child commit or submit to an immoral act. Rather, it prohibits a person from accosting or soliciting a minor "with [the] intent to induce or force" the child to commit or submit to a prohibited activity, including an act of gross indecency. MCL 750.145a. Evidence was presented at the preliminary examination that defendant signaled to several children to "come here," that he was observed making a motion as if he were pulling down his pants, and that he told the police that he intended to masturbate. This evidence and the reasonable inferences therefrom was sufficient to support the bindover in this case. *Terry*, *supra*. The district court's determination was not wholly unjustified by the record. *Northey*, *supra*.

Defendant also argues that the trial court improperly allowed evidence that he had previously molested a child who lived next door to him, contrary to MRE 404(b). The trial court admitted the evidence over defendant's objection, but also gave a limiting instruction both before and after the evidence was presented. We review the trial court's decision to admit this evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 491; 577 NW2d 673 (1998).

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, 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, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

"There is no policy of general exclusion relating to other acts evidence," and "no rule limiting admissibility to the specific exceptions set forth in Rule 404(b)." *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). "The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself." *Starr*, *supra* at 500. "Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that

he acted in conformity therewith." *VanderVliet*, *supra*. Here the trial court admitted the evidence because of its relevance to the question of defendant's intent in summoning the children to his truck. "[O]ther acts evidence is especially pertinent where the trial court determines that the issue 'involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.'" *Id*. at 85, quoting *Huddleston v United States*, 485 US 681, 685; 108 S Ct 1496; 99 L Ed 2d 771 (1998). The court did not abuse its discretion in admitting the evidence.

Defendant next argues that the trial court erred by denying his motions for directed verdict. Defendant moved for a directed verdict after the prosecutor's opening statement, and again at the close of the prosecutor's proofs. We review de novo a trial court's ruling on a motion for a directed verdict by reviewing the evidence presented up to the time of the motion in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

There was evidence at trial that defendant, while sitting in a truck and not wearing a shirt, motioned or otherwise called several children to "come here." Adult witnesses saw defendant make a movement as if he was pulling his pants down, and then, as the adults approached the truck, up again. There was no license plate on the truck. Although defendant told the police that he did not intend to frighten or hurt the children, he admitted that he masturbated while watching little girls. A ten-year-old girl testified that defendant held her on his lap and touched her "private parts" several times when she lived next door to him, a claim corroborated by the girl's younger brother. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have found that defendant had the requisite criminal intent when he called the children over to his truck, and that the essential elements of the charged crime were proven beyond a reasonable doubt. *Hampton*, *supra*. The trial court did not err in denying defendant's motions for a directed verdict.

Finally, defendant argues that the sentencing provision applicable to those convicted of being a sexually delinquent person statute, see MCL 767.61a, is unconstitutional. However, where a subsequent event renders it impossible for this Court to fashion a remedy, an issue becomes moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). Because defendant's convictions and sentences as a sexually delinquent person have been vacated and defendant has been resentenced on the underlying accosting and soliciting convictions, this issue is moot and we, therefore, decline to consider it.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Hilda R. Gage