STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK NIPPA,

Defendant-Appellant.

UNPUBLISHED
November 19, 2002

No. 235371
Mason Circuit Court
LC No. 00-015717-FH

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for carrying a concealed weapon, MCL 750.227, possession of an open container of alcohol in a motor vehicle, MCL 257.624a, and using indecent language in the presence of a woman or child, MCL 750.337. We affirm defendant's convictions for carrying a concealed weapon and possession of an open container of alcohol in a motor vehicle. However, we reverse defendant's conviction for using indecent language in the presence of a woman or child. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The concealed weapons charge was based on a knife found in defendant's van. On appeal, he asserts that the trial court erred in failing to give an instruction regarding the hunting knife exclusion, CJI2d 11.9. When a jury instruction is requested on any theory or defense, and is supported by the evidence, it must be given by the trial court. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995). The determination whether an instruction is applicable to the facts of the case rests within the sound discretion of the trial court. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

Defendant failed to offer any evidence that the knife was being used for hunting purposes. Where defendant failed to meet his burden, the trial court did not err in refusing to give the instruction. *People v Zysk*, 149 Mich App 452, 460; 386 NW2d 213 (1986).

Defendant also asserts that the trial court improperly admitted bad acts evidence under MRE 404(b)(1). A trial court's decision to admit evidence is reviewed for abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Bad acts evidence may not be offered solely to prove character, the evidence must be relevant, and it must be excluded when the danger of undue prejudice outweighs the probative value of the evidence. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

The bad acts evidence that was admitted consisted of testimony that as a condition of bond in an unrelated matter, the nature of which was not disclosed, defendant was precluded from possessing any weapon, and that the arresting officer conducted a LEIN check that showed prior involvement with law enforcement. Where the court gave a limiting instruction, this evidence had minor prejudicial effect that did not outweigh its probative value. It is improbable that the jury convicted defendant based on his unspecified prior contacts with law enforcement in face of the unrefuted evidence of his guilt. *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

Recently, our Court held MCL 750.337 to be unconstitutional. *People v Boomer*, 250 Mich 534; ____NW2d___(2002).[1] Although the unconstitutionality of the statute was not raised or preserved by defendant,[2] we apply the plain error doctrine of *People v Carines*, 460 Mich 750, 761-768; 597 NW2d 130 (1999), and reverse defendant's conviction for using indecent language in the presence of a woman or child, MCL 750.337.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter

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[1] MCR 7.215(I)(1) provides:

> Precedential Effect of Published Decisions. A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

[2] Normally, we would hesitate to raise an issue sua sponte. See *Burns v City of Detroit*, ___ Mich App ___; ___ NW2d ___ (Docket No. 213029, issued 11/1/02), slip op, pp 3-4. However, this Court's recent decision in *Boomer*, which is binding precedent, convinces us to raise and address this issue. Indeed, the existence of the *Boomer* decision is an "exigent circumstance" requiring us to address the issue. *Id.* at 4. We note that the Michigan Supreme Court denied leave to appeal in *Boomer* on October 22, 2002.