STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 26, 2008
v	No. 274304 Tuscola Circuit Court
JAMES FRANKLIN WHITE, JR., Defendant-Appellant.	LC No. 05-009587-FH ON RECONSIDERATION

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Defendant, via appointed counsel and *in propria persona*,[1] appeals as of right his jury convictions of aggravated stalking of a minor, MCL 750.411i(2)(b), and aggravated stalking, MCL 750.411i, for which he was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of 11 to 33 years in prison. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged and convicted as a result of allegations that during the summer months of 2005, he left sexually suggestive notes on cars belonging to the complainants, both of whom were young male employees of a supermarket, and one of whom was under 18 years of age at the time, and that he made sexually suggestive telephone calls to the complainants. Defendant did not deny writing the notes, but contended that his actions were not illegal. The complainants testified that defendant's actions left them feeling frightened and harassed.

Issues Raised by Appellate Counsel

On appeal, defendant first argues that the admission of similar acts evidence constituted error requiring reversal. We disagree.

[1] Through inadvertence, the original opinion issued by this Court failed to address the issues raised in the brief filed by defendant *in propria persona* pursuant to Administrative Order 2004-6, Standard 4. Defendant has filed a motion for reconsideration of the original opinion due to that failure. By separate order, we grant the motion, vacate the earlier opinion, and substitute this revised opinion in its stead.

We generally review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). When the decision regarding the admission of evidence involves a preliminary question of law, we review the question of law de novo. *Id*.

Evidence that defendant left similar sexually suggestive notes on the cars of two young male employees of the same supermarket in addition to complainants was admitted under MRE 404(b)(1). To admit such similar acts evidence, the following factors must be present: (1) the prosecutor must offer the evidence for a reason other than the character or propensity theory; (2) the evidence must be relevant under MRE 402, as enforceable through MRE 104(b); and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). At the request of counsel, the trial court may provide a limiting instruction pursuant to MRE 105. *Id*.

In *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000), our Supreme Court examined the exception in MRE 404(b) for evidence showing a "scheme, plan, or system." The Court clarified that "evidence 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." *Id*. at 63. The Court cautioned that "[l]ogical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot," and that "[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Id*. at 64.

Here, defendant's other acts were sufficiently similar to the acts that resulted in the stalking of complainants to justify their admission as proof of a plan, scheme, or system. All of the initial contacts involved young men who worked at the same supermarket throughout the spring and summer of 2005. All of the victims received at least one note on their cars containing sexually suggestive content and defendant's contact information. The evidence of defendant's behavior was relevant to show that he used a common method or scheme of propositioning these young men by leaving notes with similar content on their cars.

Furthermore, the probative value of this evidence outweighed any undue prejudicial effect. *Knox*, *supra* at 509. The evidence had substantial probative value in showing a plan, scheme, or system of contacting young males through letters placed on their cars to initiate sexual relationships. This common scheme spurred defendant to further harass both complainants through additional notes and calls. Any prejudicial effect of the evidence was reduced by a jury instruction cautioning that the evidence was to be used for the limited purpose of showing that defendant "used a plan, system or characteristic scheme," not for the purpose of demonstrating defendant's propensity to commit crimes. Accordingly, we conclude that the trial court did not abuse its discretion in allowing the similar acts evidence to prove a common scheme, plan or system.[2]

[2] We also reject defendant's associated claim that this evidence was improperly admitted to establish his identity as the perpetrator. The record reveals that the similar acts evidence was
(continued…)

In a related argument, defendant contends that he was denied the effective assistance of counsel by defense counsel's "half-hearted opposition" to the prosecutor's motion to admit the similar acts evidence. We disagree.

Because defendant failed to timely request a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness, and that the deficiency resulted in prejudice so egregious that it altered the outcome of the trial. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). "Effective assistance of counsel is presumed. The defendant bears a heavy burden of proving otherwise." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defense counsel filed an answer to the prosecutor's motion to admit other similar acts evidence, urging the trial court to deny the motion. At the hearing on the motion, defense counsel admitted, "I don't know that there's a lot of argument to be made as to 404(b)" regarding the evidence of defendant's actions towards the other two employees. Nevertheless, counsel asserted that there was no foundation to identify defendant as the person who left the notes on the employees' cars. A defendant bears the burden of overcoming the presumption that counsel's performance constituted sound trial strategy given the circumstances. *Toma*, *supra* at 302. While defense counsel's objection may not have been the objection that defendant would have raised, there is no proof that it was contrary to sound trial strategy. Further, given the relevancy and probative value of the similar acts evidence, there is no proof that a different or more strongly stated objection would have changed the outcome of the proceeding. Accordingly, we conclude that defendant failed to overcome the heavy burden of proving that he received ineffective assistance of counsel.

Finally, defendant claims he should not have been convicted of "aggravated" offenses since the prosecutor failed to prove that he violated a specific term of his probation. Again, we disagree.

A prosecutor must introduce sufficient evidence to justify a conclusion that the defendant was guilty of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Defendant was convicted of aggravated stalking of a minor and aggravated stalking under MCL 750.411i(2), which provides:

> An individual who engages in stalking is guilty of aggravated stalking if the violation involves any of the following circumstances:

(…continued)

used at trial to establish that defendant had a common plan or scheme whereby he initiated contact with the young men. Moreover, defendant's identity as the person who penned the notes attached to the cars was not in question since defense counsel asserted that defendant did not deny writing the letters.

* * *

> b) At least 1 of the actions constituting the offense is *in violation of a condition of probation*, a condition of parole, a condition of pretrial release, or a condition of release on bond pending appeal. [Emphasis added.]

Defendant contends that this statute required the prosecutor to demonstrate beyond a reasonable doubt that he violated a specific term of probation prohibiting contact with complainants in order to prove an aggravated offense.

When construing a statute, a court must give effect to the intent of the Legislature. If the language of the statute is unambiguous, the words are given their plain meaning and the statute is applied as written. *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004). The plain language of the statute at issue requires that "[a]t least 1 of the actions constituting the offense is in violation of a condition of probation.…" MCL 750.411i(2)(b). Contrary to defendant's assertion, there is no language limiting the type or specificity of a condition. Rather, the language is clear that the "violation of a condition of probation," without regard to what that condition might be, converts stalking into an aggravated offense.

It is undisputed that defendant was on probation at the time he contacted complainants. Defendant correctly notes that the order of probation effective at the time of the unwanted contacts did not include a condition specifically prohibiting him from approaching or contacting complainants. Nonetheless, the order contained a broad condition that prohibited defendant from "violating any criminal law of any unit of Government." According to MCL 750.411h, stalking is "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." Stalking constitutes a crime in Michigan. Thus, when defendant repeatedly harassed and intimidated complainants through notes and phone calls, he violated Michigan's anti-stalking law and, consequently, a condition of his probation. According to the plain language of the statute, the violation of a condition of defendant's probation, regardless of the breadth or specificity of that condition, subjected him to convictions of aggravated stalking. Therefore, we conclude that there was sufficient evidence to support defendant's convictions of aggravated stalking of a minor and aggravated stalking.

Issues Raised by Defendant In Pro Per

Defendant argues that he was denied the effective assistance of counsel by the attorney who represented him during pre-trial proceedings and who withdrew the day prior to trial, thereby deriving him of the right to a fair trial, and by the attorney who represented him at trial who failed to present a viable defense. We disagree.

Defendant did not claim in the trial court that counsel's withdrawal would deny him a speedy trial; thus, this issue is not preserved. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Defendant had been incarcerated for approximately six months when counsel was granted permission to withdraw; however, defendant has not asserted, much less established, that the delay that followed counsel's withdrawal resulted in prejudice. *People v Walker*, 276 Mich App 528, 541; 741 NW2d 843 (2007), vacated in part on other grounds ___ Mich ___; ___

NW2d ___ (2008). Defendant has not overcome the presumption that counsel rendered effective assistance during the period prior to trial. *Rocky*, *supra* at 76.

Next, defendant argues that the prosecutor engaged in misconduct during closing argument by improperly vouching for the credibility of a complainant, denigrating the defense theory of the case, and urging the jurors to convict as part of their civic duty. We disagree.

Defendant failed to object to the comments about which he now complains; therefore, our review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Prosecutorial misconduct issues are decided on a case-by-case basis. This Court examines the pertinent portion of the record, and evaluates the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). No error requiring reversal will be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003); *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

In arguing that one complainant had no reason to lie, the prosecutor was responding to defense counsel's argument that questioned the witness' credibility. Similarly, the prosecutor's remarks about the defense theory were not improper in light of defense counsel's argument that defendant did nothing illegal. These comments were not improper when evaluated in light of defense counsel's argument. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The prosecutor's remark that a courtroom was one place in which persons were held responsible was arguably an improper appeal to the jury's civic duty; however, the prosecutor followed this remark by asking the jury to examine the evidence and follow the law as it would be explained to them. Any prejudice created by the arguably improper remark could have been cured by a timely instruction. *Callon*, *supra* at 329-330; *Leshaj*, *supra* at 419.

The prosecutor's remarks about which defendant complains, considered in context, were not improper or were not so prejudicial that they resulted in plain error. *Carines*, *supra* at 763-764.

Next, defendant argues that several rulings made and actions taken by the trial court denied him a fair trial. We disagree.

The decision to admit evidence is within the discretion of the trial court, and, absent an abuse of discretion, we will not disturb that decision on appeal. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). In a criminal case, an evidentiary error does not merit reversal unless, after an examination of the entire cause, it appears that it is more probable than not that the error was outcome determinative. *People v Osantowski*, 274 Mich App 593, 607; 736 NW2d 289 (2007).

Defendant's assertion that the contents of a note he wrote to one complainant constituted inadmissible testimonial hearsay under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), is without merit. The contents of the note were not offered for the truth of the matter asserted therein, i.e., that defendant found the complainant attractive and needed the complainant's assistance with a "problem," but rather were offered to illustrate the type of note

the complainant received, and why he reacted the way he did after receiving the note. The contents of the note were not hearsay. MRE 801(c).

Defendant has not cited appropriate authority to establish that the trial court abused its discretion by taking the other actions about which he complains, i.e., failing to advise the jury to disregard a comment to which an objection had been sustained, overruling a defense objection to the admission of a copy of a note, overruling a defense objection on the ground that a question had been asked and answered, and admitting photographs (of the area around the supermarket) without requiring that a proper foundation be laid. A party cannot assert a position and then expect this Court to search for authority to sustain or reject that position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Defendant has not shown that any evidentiary error occurred, or that any error that did occur was outcome determinative. *Osantowski*, *supra* at 607.

Next, defendant argues that the trial court denied him a fair trial by admitting, over objection, a copy of a note allegedly left on a car belonging to another young male employee of the supermarket.[3] Defendant asserts that the trial court should have required the prosecution to produce the actual note rather than a copy thereof, and should have required the prosecution to establish a chain of custody for the copy of the note. We disagree.

All the evidence produced at trial indicated that a photocopy was the best available evidence of the note. The photocopy was admissible under these circumstances. MRE 1004(1) and (2); see also *People v Cassadime*, 258 Mich App 395, 401; 671 NW2d 559 (2003).

The admission of evidence does not require a perfect chain of custody. If an adequate foundation for admission of the evidence has been laid under all the facts and circumstances of the case, any break in the chain of custody goes to the weight of the evidence rather than to its admissibility. *People v White*, 208 Mich App 126, 133; 527 NW2d 34 (1994). Here, the witness testified that the photocopy was an accurate representation of the note he found on his car. The photocopy was admissible; the weight to be given to it was for the jury to determine. *Id*. The trial court did not abuse its discretion by admitting the photocopy of the note.

Finally, defendant argues that the trial court erred in enhancing his sentences pursuant to MCL 769.12 because he was denied the right to appellate counsel in connection with the prior convictions on which the habitual offender conviction was based. We disagree.

Defendant did not preserve this issue; therefore, our review is for plain error. *Carines*, *supra* at 763-764.

A conviction obtained in violation of the right to counsel, as guaranteed in *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), cannot be used to enhance a criminal sentence. *United States v Tucker*, 404 US 443, 449; 92 S Ct 589; 30 L Ed 2d 592 (1972). A criminal defendant may assert a collateral challenge to a conviction used to enhance a sentence. But the defendant bears the initial burden of establishing that a conviction was

[3] Defendant was not charged with any offense in connection with this note.

obtained in violation of his right to counsel. *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994).

Defendant does not contend that the underlying plea-based convictions used to enhance his sentences were obtained in violation of his right to trial counsel. Rather, defendant seems to assert that he was denied the right to appellate counsel in connection with these convictions, contrary to *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005), and that for that reason, the convictions could not be used to enhance his sentences. Defendant's claim is unsubstantiated; moreover, any denial of counsel in connection with the appeal of a plea-based conviction has no bearing on the validity of the conviction for sentence enhancement purposes.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael R. Smolenski