STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2010
v	No. 290796 Oakland Circuit Court
PATRICK ALAN STARK, Defendant-Appellant.	LC No. 2008-222304-FH

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant, Patrick Alan Stark, appeals as of right his bench trial conviction for one count of unlawful manufacture, possession or transfer of eavesdropping devices, MCL 750.539f. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to one to seven and a half years in prison, to be served consecutively to any term imposed for violation of parole.[1] We affirm.

Defendant first argues that he was in custody when he made certain statements to police officers, and, because the officers did not read him his *Miranda*[2] rights, the statements were inadmissible. We disagree.

> The ultimate question whether a person was 'in custody' for purposes of *Miranda* warnings is a mixed question of fact and law, which must be answered independently by the reviewing court after review de novo of the record. This is so because an 'in-custody' determination calls for application of the controlling legal standard to the historical facts. Findings concerning the circumstances surrounding the giving of a statement are factual findings that are reviewed for clear error. A finding is clearly erroneous if, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been

[1] When defendant committed the crime that is the subject of the instant appeal, defendant was on parole as a second habitual offender, MCL 769.10, for two counts of capturing/distributing an image of an unclothed person, MCL 750.539J2B.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

> made. [*People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001), (internal citations omitted).]
>
> The United States Constitution guarantees that no person 'shall be compelled in any criminal case to be a witness against himself.' US Const, Am V. *Miranda v Arizona*, 384 US 436, 444-459, 467-468; 86 S Ct 1602; 16 L Ed 2d 694 (1966), established 'guidelines for law enforcement agencies and courts to follow' in order to protect the privilege against compelled self-incrimination during custodial police interrogations. Thus, under *Miranda*, every person subject to interrogation while in police custody must be warned, among other things, that the person may choose to remain silent in response to police questioning. [*People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009).]

"The term 'custodial interrogation' means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of [his] freedom of action in any significant way.'" *Coomer*, 245 Mich App at 219, quoting *People v Hill*, 429 Mich 382, 387; 415 NW2d 193 (1987).

> To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that [he] was not free to leave. *The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned.* [*Id*. at 219-220 (emphasis added).]

In this case, six armed detectives, having conducted surveillance of defendant throughout the evening, confronted defendant in the driveway of his home at 2:30 a.m. on August 1, 2008. "Interrogation in a suspect's home is usually viewed as noncustodial." *Coomer*, 245 Mich App at 220, quoting *People v Mayes*, 202 Mich App 181, 196; 508 NW2d 161 (1993) (After Remand), (Corrigan, P.J., concurring). Defendant was not specifically told that he was under arrest or that he was free to leave. The only discussion between the officers and defendant was that defendant was in violation of his parole curfew, which he acknowledged when the officers approached him. While the detectives were authorized by statute to immediately place defendant under arrest for violation of parole, MCL 791.239, the detectives were not required to arrest defendant for a curfew violation. Rather, they could have simply made a report and notified defendant's parole officer in the morning. Although the officers testified that they would not have allowed defendant to leave had he asked, their subjective views have no bearing on whether defendant was in custody. *Id*. at 219. Furthermore, although the detectives were using flashlights when they confronted defendant, they did not have their weapons drawn. The officers may have made defendant stand with his hands behind his back while they searched his pockets, but he was not made to stand in such a position during the brief questioning, and therefore, his movements were not restrained.

Finally, the officers observed defendant in what appeared to be the perpetration of a crime, and "a police officer may ask general on-the-scene questions to investigate the facts surrounding the crime without implicating the holding in *Miranda*." *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002). After observing defendant's suspicious activities and

confronting him in his driveway, the detectives first asked defendant where he had been, and in response he claimed to have been in the area of 12 Mile and Haggerty. However, Sergeant Erik Tilli stated that this could not have been true, as the detectives had been following defendant and knew he had not been in that area that evening. The detectives then obtained defendant's consent to search his person and camera bag, which yielded a camera with incriminating photographs. It was during this time that defendant gave sarcastic, yet incriminating, statements in response to Sergeant Tilli's questions regarding what defendant was doing with the camera and whether he had downloaded any photographs to his computer. Thus, defendant was at his own home, in his driveway, was not restrained in any way nor placed under arrest, and Detective Tilli's questions were brief and investigatory in nature. Therefore, it was not error for the trial court to conclude that *Miranda* warnings were not required.

Defendant next argues that the photographs and movies contained in his camera were inadmissible because they were neither properly authenticated nor relevant. We disagree.

> The decision whether to admit evidence is within a trial court's discretion. This Court reverses it only where there has been an abuse of discretion. However, the decision frequently involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence. We review questions of law de novo. Therefore, when such preliminary questions are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. [*People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003)(internal citations omitted).]

Otherwise, "an abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

> MRE 901 states in relevant part:
>
> (a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be. . . .

Furthermore, "[i]t will be readily apparent that when real evidence is offered, an adequate foundation for admission will require testimony first that the object offered is the object which was involved in the incident, and further that the condition of the object is substantially unchanged." *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994), quoting 2 McCormick, Evidence (4th ed), § 212, pp 7-8.

Defendant argues that the photographs and movies should be suppressed. He points to Sergeant Tilli's testimony that none of the detectives saw defendant with the camera or any flashes from a camera while defendant was under surveillance. Furthermore, the sergeant admitted that it was possible that the photographs were actually taken in 2003. Detective Chad Kerr stated that the individuals in the pictures were never located, and therefore, he did not know whether they had been photographed without their consent. Defendant thus concludes that the prosecutor failed to comply with the requirements for authentication pursuant to MRE 901. We are not persuaded by defendant's arguments.

The prosecution presented evidence that Detective Gary Lavin recovered a camera from a pouch attached to the handlebars of the bicycle defendant was riding. Detective Lavin identified the camera at the evidentiary hearing. Mary Stark, defendant's mother, with whom he lived, testified that the camera looked like one that defendant owned and that she had seen him with in the past. She explained that he used such a camera to take pictures for use on ebay, beginning in September 2007. In addition, Detective Gregory Hughes of the Farmington Hills Police Department identified the prosecution's exhibit as the camera placed into evidence by the detectives and confirmed that no one had changed the date on the camera. Finally, Sergeant Tilli testified that defendant knew he had the camera in the pouch on his bicycle, because "I asked him, what are you doing with this [camera]? He was a bit sarcastic, but eventually he told me he was using it." And, when asked whether there were pictures on the camera defendant should not have possessed, defendant answered "probably." Thus, this testimony supports the conclusion that the camera belonged to defendant, and that he was using it.

Regarding *when* defendant used the camera, Detective Hughes testified that, on August 1, 2008, when officers turned the camera on, the date reference was October 14, 2003. Detective Hughes turned the camera on the morning of the evidentiary hearing, and it read February 24, 2004. The detective determined there were 133 calendar days between October 14, 2003 and February 24, 2004. The date of the evidentiary hearing was December 11, 2008, which was 133 days after August 1, 2008. Some of the photographs and movies were dated October 11, 2003, corresponding to July 29, 2008, which was the first night that the detectives followed defendant, and others were dated October 14, 2003, which would have been the early morning of August 1, 2008. This evidence supports a finding that, despite the date discrepancy, defendant used the camera on the evenings that he was under surveillance. Therefore, the photographs were properly authenticated and admitted.

Defendant also argues that the photographs were irrelevant and prejudicial because the prosecutor could not establish when the photographs were taken, the identity of the individuals in the photographs, and whether the photographs were taken without permission. We disagree.

MRE 401 provides that "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In general, "all relevant evidence is admissible, unless otherwise provided by law, and evidence that is not relevant is not admissible." *People v Fletcher*, 260 Mich App 531, 553; 679 NW2d 127 (2004), citing MRE 402. Moreover, "[p]hotographic evidence is admissible if relevant, pertinent, competent, and material to *any* issue in the case." *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991) (emphasis in original). Pursuant to MRE 403, however, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of

unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Nevertheless, "Rule 403 does not prohibit prejudicial evidence; only evidence that is unfairly so. 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 photographs and movies found on the camera were relevant to prove the elements of "unlawful manufacture, possession or transfer of eavesdropping devices." MCL 750.539f. Pursuant to MCL 750.539a(2), "'Eavesdrop' or 'eavesdropping' means to overhear, *record*, amplify or transmit any part of the *private discourse of others without the permission* of all persons engaged in the discourse." (Emphasis added.) Hence, a camera that can take still photos and videos is an eavesdropping device. MCL 750.539f states:

> Any person who manufactures, *possesses* or transfers to another any device, contrivance, machine or apparatus designed or commonly used for eavesdropping *with the intent to unlawfully use* or employ or allow the same to be so used or employed for eavesdropping, and knowing the same is intended to be so used, is guilty of a felony . . . [Emphasis added.]

Testimony supported a finding that the photographs and movies were found on a camera owned and used by defendant, which would be relevant to proving the possession and use elements of MCL 750.539f. The nature of the images found on the camera tends to make it more probable that defendant intended to use the camera unlawfully to record the women depicted without their permission. Sergeant Tilli described the images as follows:

> one was of a woman in various states of undress. She was maybe [a quarter of the way] with her bra down and she had no[] shirt on or anything like that. *Another one was through a window and it appeared that maybe somebody was in a restroom. You could see it was like through the blinds*. . . . You can see the window frame and then the blind that was dropped down; and the photo was taken partially of the person as if they maybe had just a small view and it appeared she was on the toilet.

The images were of three different women, "just the one was clearly undressed. The other ones you couldn't tell for sure. . . . The one that appeared to be going to the bathroom you can only see her upper half." In fact, there was a series of pictures of the same woman apparently sitting on a toilet.

The very nature of the images implied that they were taken without permission, and the rest of the testimony from the detectives supported this inference. On the two evenings that the detectives conducted surveillance of defendant, he was out past his curfew, riding his bicycle in residential areas. Occasionally, defendant would disappear from the roadway and travel between houses. On the first evening, after Detective Kerr observed defendant emerging from the back yard of a residence, the detective spoke with the homeowner who said he had not had any visitors at that time, nor was he expecting any. Therefore, the photographs were relevant to prove that defendant was guilty of possession of an eavesdropping device.

Defendant next argues that the evidence seized from inside defendant's residence should be suppressed because it was unconstitutionally seized. We disagree.

This Court "will not disturb a trial court's findings of fact at a suppression hearing unless they are clearly erroneous. However, the ultimate question whether evidence should be suppressed is an issue of law for the court. Questions of law relevant to a motion to suppress evidence are reviewed de novo." *People v Chowdhury*, 285 Mich App 509, 514; 775 NW2d 845 (2009)(internal citations omitted). Regarding the sufficiency of a search warrant, "this Court need only ask whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause. . . . " *People v Martin*, 271 Mich App 280, 297; 721 NW2d 815 (2006).

"The right against unreasonable searches and seizures is guaranteed by both the state and federal constitutions. The state constitutional standard is not higher than the federal standard. The constitutions do not forbid all searches and seizures, only unreasonable ones. Reasonableness depends upon the facts and circumstances of each case." *People v Wilkens*, 267 Mich App 728, 732-733; 705 NW2d 728 (2005), citing US Const, Am IV; Const 1963, art 1, §11.

> Ordinarily, searches or seizures conducted without a warrant are unreasonable per se. And, generally, when evidence has been seized in violation of the constitutional prohibition against unreasonable searches and seizures, it must be excluded from trial. There are, however, a number of recognized exceptions to the warrant requirement. Among others, these exceptions include exigent circumstances, searches incident to a lawful arrest, stop and frisk, consent, and plain view. Each of these exceptions, while not requiring a warrant, still requires reasonableness and probable cause. [*Chowdhury*, 285 Mich App at 516-517 (internal citations and punctuation omitted).]

Defendant first argues that the detectives did not obtain permission to enter defendant's residence, and therefore, any evidence gathered from the search of defendant's bedroom should be suppressed. We disagree.

Defendant lived in the home of his parents, Timothy Stark and Mary Stark. Detectives recovered an external hard drive from defendant's bedroom onto which defendant had downloaded images taken by his camera on July 29, 2008. Defendant contends that the detectives searched his residence without consent, and therefore, the search was invalid. However, the search of the residence was conducted pursuant to a search warrant; it was *not* based on consent. The officers testified that they did not search defendant's room before the warrant was issued, and further, there were no allegations that they in fact did so.

Moreover, even if it was improper to enter the Starks' home without permission[3], "an illegal entry by police officers upon private premises [does] not require suppression of evidence

[3] Both Mary Stark and Timothy Stark testified that the officers did not ask for permission before entering the home, and therefore, the Starks did not feel that they could refuse them entry.

subsequently discovered at those premises pursuant to a search warrant that [is] obtained on the basis of information wholly unconnected with the initial entry." *People v Smith*, 191 Mich App 644, 648; 478 NW2d 741 (1991), citing *Segura v United States*, 468 US 796, 805; 104 S Ct 3380; 82 L Ed 2d 599 (1984). "[E]vidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the taint. It is not to be excluded, for example, if police had an independent source for discovery of the evidence . . . ." *Id*. at 648-649, quoting *Segura*, 468 US at 805. In this case, nothing seen by the officers upon entry into the residence prompted them to seek a warrant. Rather, there was an independent source for the discovery of the evidence, namely, the detectives' observations of defendant's actions in addition to the statements he made. Based on this information, the detectives entered the Starks' home to secure defendant's bedroom to prevent the destruction of evidence while the warrant was obtained. Therefore, the trial court properly denied defendant's motion to suppress.

Defendant also argues that his statements, taken in violation of *Miranda*, are the basis of the affidavit submitted in support of the search warrant, and therefore, any evidence seized as a result of the warrant should be excluded. However, the statements did not violate *Miranda*, and therefore, this argument is without merit.

Finally, defendant contends that, even if the statements are admissible, evidence secured by the search warrant should still be excluded because the search warrant was supported by an affidavit in which the affiant, Sergeant Tilli, made gross misrepresentations. Defendant argues that, contrary to the claims in the affidavit, he did not admit that he was peering into windows of homes and photographing women who were undressed, nor did he admit that he was downloading those images onto his computer. Therefore, defendant concludes that any evidence obtained from his bedroom should be suppressed. We disagree.

"A search or seizure is considered unreasonable when it is conducted pursuant to an invalid warrant . . . ." *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004).

> Generally, in order for a search executed pursuant to a warrant to be valid, the warrant must be based on probable cause. Probable cause exists where there is a substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in a particular place. . . . A search warrant must particularly describe the place to be searched and the persons or things to be seized. [*Id*. (internal citations omitted)]

"[T]he search warrant and underlying affidavit must be read in a commonsense and realistic manner to determine whether a reasonably cautious person could have concluded that there was a substantial basis for finding probable cause." *Martin*, 271 Mich App at 298. In addition,

> [p]robable cause must be supported by oath or affirmation. . . . If the search warrant is supported by an affidavit, the affidavit must contain facts within the knowledge of the affiant and not mere conclusions or beliefs. The affiant may not draw his or her own inferences, but rather must state matters that justify the drawing of them. [*Id.*]

"[F]alse statements must be stricken from a search warrant affidavit [.]" *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008). Furthermore, if the false statements are stricken and "the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id*., quoting *Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

Defendant's argument focuses on paragraph 3(A)(7) of Sergeant Tilli's affidavit, which states: "Affiant questioned Mr. Stark and he admitted that he had been peering into the windows of homes and photographing women who were undressing. Mr. Stark admitted that he had downloaded these images on the computer in the home where he lived with his parents." At the preliminary examination, Sergeant Tilli testified that he asked defendant "'did you take any pictures you shouldn't have?' And he was like, 'probably.' And talked about the computer in the basement and again with 'what do you think is on there?'" At another point in his preliminary examination testimony, Sergeant Tilli acknowledged that he asked defendant whether he had access to a computer, and further, "I asked him if we could find more pictures [like the ones on the camera] on his computer . . . ." Sergeant Tilli could not remember defendant's exact words, but rather, "it was something a bit sarcastic, like, 'well, what do you think?' Something along those lines." At the evidentiary hearing, on cross-examination, Sergeant Tilli conceded that defendant did not admit to eavesdropping, but when asked whether defendant admitted to downloading images on his computer, Sergeant Tilli answered, "he gave sarcastic answers when I was trying to find out if he had downloaded, but eventually he indicated to me that he had put some of the pictures that he took onto his computer." Sergeant Tilli further explained that defendant did not specifically admit to looking into windows and taking photographs of unsuspecting women. However, defendant did eventually state that he downloaded photographs onto his computer.

Defendant's sarcastic responses to Sergeant Tilli's questions about using the camera and downloading the photographs are clearly not denials, and therefore, could reasonably be construed as admissions. Even if it is conceded that defendant did not specifically admit that he was "peering into the windows of homes and photographing women who were undressing," and this information was stricken from the affidavit, the affidavit also alleged that (1) defendant had previously been prosecuted for photographing women through their windows, without permission, (2) the officers had been following defendant on two different evenings, as he traveled through residential areas, often leaving the roadway, and (3) the camera in defendant's possession contained images of "woman in varying states of undress." Thus, when defendant indicated that he downloaded these images onto his computer (and Sergeant Tilli's testimony is not equivocal on this point), there was still probable cause to issue the warrant. Furthermore, even *if* probable cause was lacking for issuance of the warrant and the evidence seized from defendant's bedroom is suppressed, as discussed above, the evidence found on defendant's camera was sufficient to meet the elements of MCL 750.539f.

Defendant next argues on appeal that the trial court erred in admitting other acts evidence pursuant to MRE 404(b). We disagree.

A trial court's admission of other acts evidence is reviewed for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). An abuse of discretion occurs when the trial court "chooses an outcome falling outside the range of principled

outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "[Preliminary] questions of law are reviewed de novo." *People v Dobek*, 274 Mich App 58, 85; 732 NW2d 546 (2007). If there is an error in the admission of bad acts evidence,

> defendant has the burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error. No reversal is required . . . unless after an examination of the entire cause, it . . . affirmatively appear[s] that it is more probable than not that the error was outcome determinative. [*People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001) (internal citations omitted).]

"Use of other acts as evidence of character is generally excluded to avoid the danger of conviction based on a defendant's history of misconduct." *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). MRE 404(b)(1) provides in part:

> [e]vidence 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 . . . .

In short,

> [e]vidence of other acts may be admitted under MRE 404(b)(1) if: (1) the evidence is offered for a proper purpose, i.e., something other than a character to conduct theory, (2) the evidence is relevant . . . to an issue or fact of consequence at trial, and (3) the probative value of the evidence is not substantially outweighed by its potential for undue or unfair prejudice under MRE 403. [*Dobek*, 274 Mich App at 85.]
>
> [T]he prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. Where the only relevance of the proposed evidence is to show the defendant's character or the defendant's propensity to commit the crime, the evidence must be excluded. [*People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004).]

In this case, the prosecution filed notice that, pursuant to MRE 404(b), it planned to offer evidence that, in a 2005 case, defendant was charged with two counts of eavesdropping and two counts of capturing/distributing an image of unclothed person, MCL 750.539j. In the prior case, defendant used a video camera to record women while they were undressing at night by a window. The prosecutor explained at the evidentiary hearing that, in this prior case, defendant had been arrested in someone's backyard in West Bloomfield, with a camera. The camera did not have a memory stick in it at the time, but officers returned the next day and recovered it. The officers located the women whose images were contained therein, and they testified that they did

not consent to being videotaped. The prosecutor stated that the only difference was that defendant was not riding a bicycle on the prior occasion, and asked to be able to use this other acts evidence to show a common scheme or plan, and further, to demonstrate that the women did not consent. The court agreed and admitted testimony from two complainants in the prior case.

Defendant argues that any jury would use such prior convictions to draw the conclusion that he acted in conformity with his character and convict him on that basis. Therefore, such evidence should have been excluded pursuant to MRE 403. Further, in the previous cases, defendant pleaded no contest. Thus, there was no evidence presented to a judge or jury and there was no admission by defendant that he eavesdropped or captured images of unclothed persons. Finally, defendant did not use a bicycle on the previous occasions. Defendant concludes, therefore, that these convictions are irrelevant to the issue of intent, plan or scheme. We disagree.

In the instant case, the other acts evidence was offered to show a common plan or scheme, as well as lack of consent, which are proper purposes.[4] "[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." *Knox*, 469 Mich at 510, quoting *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). "[L]ogical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot," however, "general similarity between the charged and uncharged acts does not . . . by itself, establish a plan, scheme, or system used to commit the acts." *Id*., quoting *Sabin*, 463 Mich at 64. "[T]he plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." *People v Ackerman*, 257 Mich App 434, 440-441; 669 NW2d 818 (2003), quoting *Sabin*, 463 Mich at 65. Thus, the other acts evidence in the case at bar was relevant for the fact finder to determine whether defendant had a plan to surreptitiously enter backyards and record people without their permission, or whether he was taking a leisurely bicycle ride in the dark, albeit after his curfew.

Finally, "the third prong of this standard requires nothing more than the balancing process described in MRE 403. Rule 403 allows for the exclusion of relevant evidence if 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *People v Starr*, 457 Mich 490, 498; 577 NW2d 673 (1998). In this case, although defendant argues that this information would be highly prejudicial for a jury, the fact remains that defendant was convicted in a bench trial. "Unlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence . . . ." *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). Thus, the trial judge can be presumed to have considered

[4] Although "lack of consent" is not listed in MRE 404(b), "[t]his rule permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct." *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

the other acts evidence as evidence of a common scheme or plan, rather than as evidence that defendant acted in conformity with his character.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto