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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2010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.

BECKERING, J. (*concurring*).

While I agree with the majority's decision to affirm defendant's bench trial conviction and sentence, I write separately to articulate my disagreement on several constitutional and evidentiary issues.

I. DEFENDANT'S STATEMENTS TO THE POLICE

Before his arrest, defendant made a number of potentially incriminating statements to the police in response to the police officers' questions. Defendant argues that when he made the statements, he was subject to custodial interrogation, triggering his right to receive *Miranda*[1] warnings. Because no warnings were given, the statements were inadmissible. The majority disagrees, holding that defendant was not in custody for purposes of *Miranda*. I agree with defendant.

Both the United States and Michigan Constitutions guarantee the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. Generally, statements of an accused made during custodial interrogation are inadmissible unless, prior to any questioning, the accused was warned that he had a right to remain silent, that his statements could be used against him, and that he had the right to counsel, and that the accused voluntarily, knowingly and intelligently waived his rights. *Miranda*, 384 US at 444; *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000); *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). A police

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

"officer's obligation to give *Miranda* warnings to a person attaches only when the person is in custody," i.e., in situations involving a custodial interrogation. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001); *People v Peerenboom*, 224 Mich App 195, 197; 568 NW2d 153 (1997). As indicated by the majority,

> [t]he 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. 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. [*Coomer*, 245 Mich App at 219 (internal quotation marks and citations omitted).]

Considering the totality of the circumstances in this case, I must conclude that defendant was subjected to custodial interrogation. I find this case materially distinguishable from cases in which a defendant permits police officers to enter his or her home, submits to questioning, and is assured by the officers that he or she is not in custody or under arrest, and under those circumstances, is deemed not to have been in police custody. See, e.g., *id*. at 216-220, and *People v Zahn*, 234 Mich App 438, 443-444, 449-450; 594 NW2d 120 (1999). Here, six police officers confronted defendant on the driveway of his home at 2:30 a.m. At the time, defendant was just returning home and was knowingly in violation of his parole curfew, and the officers were authorized to arrest him for the violation. See MCL 791.239. Although the officers did not handcuff defendant or have weapons drawn, they ordered him to place his hands behind his back as they searched his pockets. They were visibly armed and shining flashlights on him. The officers questioned defendant about where he had been and what he had been doing, and when defendant responded, they said that his response could not possibly be true because they had been surveilling him and that they knew he was in violation of his curfew. They also asked to search his bicycle and camera. The officers then questioned him about the images on the camera. Importantly, the officers never informed defendant that he was not under arrest or that he was free to leave. Under these circumstances, defendant "reasonably could have believed that [he] was not free to leave." *Coomer*, 245 Mich App at 219. Defendant was subjected to more than mere investigatory questioning. See *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002). He was subject to custodial interrogation and, therefore, entitled to *Miranda* warnings.

While I believe the trial court erred in considering the statements defendant made to the police during the interrogation, his statements were primarily sarcastic, rather than directly incriminating, and there was sufficient additional evidence to support defendant's conviction, as discussed below. Thus, the error was harmless. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999) (holding that preserved constitutional error that is not a structural defect requires reversal unless the error is shown to be harmless beyond a reasonable doubt).

II. THE PHOTOGRAPHS AND MOVIES ON DEFENDANT'S CAMERA

Defendant next argues that the trial court abused its discretion in considering the photographs and movies contained on his camera because they were not properly authenticated and were irrelevant and unfairly prejudicial. As described by the majority, the images were of

three different women, only one of which was clearly undressed. Several of the images depicted one of the women behind a set of blinds and apparently sitting on a toilet.

I agree with the majority that the images were properly authenticated under MRE 901. I must note, however, that I question the relevance of the images. Defendant was convicted of unlawful manufacture, possession, or transfer of an eavesdropping device under MCL 750.539f, which provides:

> 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.]

"Eavesdropping" is defined as "to overhear, record, amplify or transmit any part of *the private discourse of others* without the permission of all persons engaged in the discourse." MCL 750.539a (emphasis added). While "discourse" is not defined in Michigan's penal code, it is commonly defined as "communication of thought by words; talk; conversation." Random House Webster's College Dictionary (2005), p 352. Given this definition, it is highly questionable whether the still photographs and silent video images[2] from defendant's camera were relevant to establishing that he possessed an eavesdropping device that he intended to use for eavesdropping, i.e., overhearing, recording, amplifying, or transmitting any part of the private discourse of others without permission. See MCL 750.539a. But, because this issue was not addressed below or raised by the parties on appeal, I will not address it any further. Assuming, as the majority concludes, that defendant's camera could be used for eavesdropping because it was capable of taking movies and that images taken from such a camera are "relevant to proving the possession and use elements of MCL 750.539f," as the majority states, I agree that the nature of the images at issue suggest that they were taken without permission and that the images were not unfairly prejudicial.

III. THE EVIDENCE SEIZED FROM DEFENDANT'S HOUSE

After the police questioned defendant on his driveway, they conducted a search of his bedroom and recovered an external hard drive containing downloaded images taken by his camera approximately two days before. Defendant argues that the evidence should have been suppressed because it was unconstitutionally seized. The majority disagrees, as do I.

Defendant first argues that the evidence was unconstitutionally seized because the police officers failed to obtain consent to enter defendant's house or bedroom. But, as the majority points out, the officers searched defendant's bedroom pursuant to a search warrant, and even if it was improper for the officers to initially enter the house without consent, evidence seized after an illegal entry need not be suppressed if the police had an independent source for discovery of

[2] There is no indication in the record that there was any sound associated with the video images.

the evidence, as did the police officers in this case. See *People v Smith*, 191 Mich App 644, 648-649; 478 NW2d 741 (1991).

Defendant next argues that the evidence should have been suppressed because the affidavit submitted in support of the search warrant was based on his statements to the police, which were taken in violation of *Miranda*. Although I agree with defendant that he was entitled to *Miranda* warnings and, therefore, that the trial court wrongfully considered defendant's statements in his case-in-chief, this Court has stated that "*Miranda* violations do not abridge the Fifth Amendment constitutional privilege against self-incrimination, but instead involve prophylactic standards laid down to safeguard that privilege." *People v Melotik*, 221 Mich App 190, 199; 561 NW2d 453 (1997), quoting *United States v Patterson*, 812 F2d 1188, 1193 (CA 9, 1987). The "*Miranda* presumption," accordingly, does not require that statements taken in violation of *Miranda* are "inherently tainted" for all purposes. *Id*. Regardless, even if defendant's statements should not have been included in the affidavit, I believe the affidavit was still sufficient to support issuance of the search warrant. If material is excised from a supporting affidavit, the remaining allegations may still support a finding of probable cause. See *Franks v Delaware*, 438 US 154, 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978). The affidavit stated, among other things, that defendant was under investigation for surveilling individuals without their consent, that officers had observed him riding his bicycle after dark between houses in various subdivisions and then to his own house, that defendant had a bag on his bicycle, and that officers recovered "images of women in varying states of undress" from the camera found inside defendant's bag. This information, in and of itself, was sufficient to support a finding of probable cause to search the computer and camera equipment in defendant's house. Therefore, the trial court did not err in considering the evidence seized pursuant to the search.

IV. THE MRE 404(b) EVIDENCE

Defendant finally argues that the trial court abused its discretion in considering evidence that in a 2005 case, he was charged with and pleaded no contest to two counts of eavesdropping and two counts of capturing an image of an unclothed person. The court in this case admitted the evidence under MRE 404(b) for the purpose of establishing a common plan or scheme, as well as a lack of consent by the women depicted in the images at issue in this case. Defendant argues that the evidence was both irrelevant and unfairly prejudicial.

I agree with the majority that the other-acts evidence was relevant to establishing a common plan, scheme, or system under MRE 404(b). In the previous case, defendant used a video camera to record women undressing at night by a window. Police officers arrested defendant in someone's backyard, and he had the camera on his person. The officers later located the women depicted in the images on the camera's memory stick, and they testified that they did not consent to being recorded. Although no bicycle was involved in the previous case, and defendant apparently used a different type of camera, the facts in that case and the case before us are sufficiently similar to establish a common plan, scheme, or system. Furthermore, the evidence was not unfairly prejudicial, particularly considering that defendant was convicted following a bench trial. See *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

I disagree, however, that establishing a lack of consent was a proper purpose for admitting the evidence. While the women in the previous case testified that they did not consent

to being recorded, I am not persuaded that such evidence is relevant to establishing that the women in the case before us also did not consent. The prosecution has not presented any authority supporting such a conclusion. But, because there was additional evidence establishing a lack of consent in this case—namely, the nature of the images themselves—and the other-acts evidence was considered by the trial court for another proper purpose, defendant cannot establish that it is more probable than not that the error was outcome determinative. See *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

V. RESPONSE TO JUDGE SERVITTO'S CONCURRENCE

I agree with Judge Servitto that the procedural irregularities in this case are concerning and would likely warrant thorough review in another case. However, because the parties have not raised the issue on appeal, I decline to address it further.

Despite my disagreement with the majority on a number of issues and limiting my review to the issues raised on appeal, I agree that defendant's conviction and sentence should be affirmed.

/s/ Jane M. Beckering