STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 9, 2018
v	No. 335584 Grand Traverse Circuit Court
DOUGLAS CHARLES HASTINGS, Defendant-Appellant.	LC No. 16-012484-FC

Before: METER, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right his conviction, following a jury trial, of possession of an instrument adapted and designed to open or break into a device designed to receive currency or coins with the intent to steal, MCL 752.811(b). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 2½ to 15 years in prison. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

After a series of thefts from Traverse City parking meters, Detective Sergeant Keith Gillis of the Traverse City Police Department received information that defendant, who had a history of similar thefts in southern Michigan, might be in the Traverse City area. On May 27, 2016, Traverse City parking meter collection workers discovered that several parking meters located in three separate parking lots, including several of the meters located near a business called "Mode's Bum Steer," were empty. The following morning, at approximately 1:00 a.m., Officer Kurt Bazner observed a truck with two male occupants exit one parking lot and enter the lot near Mode's Bum's Steer. Officers surveilled the truck after the two men left. Shortly after 2:00 a.m., officers observed defendant and another man carrying what appeared to be a heavy bag to the truck. Officers then made an investigatory stop. Defendant declined to allow officers to search the truck. According to Gillis, officers detained defendant for "at least a couple hours" while waiting to obtain a search warrant. After obtaining the search warrant, officers recovered four parking meter keys, one of which opened a parking meter near the truck.[1] Officers also

[1] According to the parking administrator for Traverse City, parking meter locks are unique to each municipality or customer. Two different types of keys, made from two different molds,

recovered a hat that had been modified with a plastic rim, with coins stuck in the rim; Gillis opined that the hat could be used to collect falling change from a parking meter. Other items recovered included four portable radios, a large pair of bolt cutters, a black duffle bag containing only coin rolling "cardboards," and a plastic bag containing similar cardboards.

After the search, Gillis asked defendant why he continued "doing this." Defendant responded that his family was "forcing him to do this," that "this had turned into a giant mess, as far as his family goes"; and that he could earn $50 to $100 from each meter and approximately $5,000 to $6,000 per night. Defendant was free to leave at that point, and Gillis told defendant that he was going to submit the recovered evidence to the prosecutor's office and apply for an arrest warrant. Defendant was later arrested.

Before trial, defendant moved to suppress the evidence resulting from the search. First, he argued that his detention was unconstitutionally delayed because the search was conducted nearly three hours after he had been stopped. Second, he argued that the downstate task force that had been surveilling defendant had used defective global positioning system (GPS) equipment to track the truck or had used a GPS device without a warrant. Third, he maintained that the affidavit for the Traverse City search warrant was unsubstantiated and factually incorrect. The trial court denied defendant's motion.

One week before trial, the prosecution moved, under MRE 404(b), to admit evidence of defendant's five prior convictions related to breaking and entering coin-operated devices, as well as a similar pending charge in another county. The prosecution argued that any delay in bringing the motion was the result of defendant's recent decision to call a witness who allegedly would testify that he had placed the parking meter keys in defendant's truck without defendant's knowledge. The trial court granted the prosecution's motion on the first day of trial. Thereafter, defendant attempted to accept the prosecution's pretrial plea offer, which had included a sentencing agreement to treat defendant as a third-offense habitual offender instead of a fourth-offense habitual offender. The trial court stated that it would not allow defendant to resurrect the plea offer.

On the second day of trial, defense counsel alerted the court that a newspaper had reported defendant's willingness to accept a plea offer. Counsel argued that jurors would be prejudiced if they read the newspaper. The trial court declined to grant a mistrial or otherwise alter the proceedings in response to this information.

Defendant was convicted as described. This appeal followed.

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unlock all of the meters in Traverse City. Employees authorized by the city can order keys and the purchase order must go through the city manager's office. Official keys are stored in a safe and only a key administrator can distribute the keys to employees for use in collecting revenue from meters. Employees return the keys to the safe when collection is complete.

II. MOTION TO SUPPRESS

Defendant argues that the trial court erred by denying his motion to suppress on the basis that the initial investigatory stop lacked probable cause, or alternatively because he was unconstitutionally detained while officers obtained a search warrant. We disagree. In considering a motion to suppress evidence, we review for clear error a trial court's factual findings and we review de novo the trial court's conclusions of law. *Snider*, 239 Mich App at 406. "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *In re Townsend Conservatorship*, 293 Mich App 182, 186; 809 NW2d 424 (2011).

The Fourth Amendment to the United States Constitution, and its counterpart in the Michigan Constitution, guarantees the right of persons to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11.

> The right to be secure against unreasonable searches and seizures absent a warrant based upon probable cause is subject to several specifically established and well-delineated exceptions. Probable cause to issue a search warrant 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. Generally, evidence obtained in violation of the Fourth Amendment is inadmissible as substantive evidence in criminal proceedings. [*People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000) (citations and footnote omitted).]

"[C]ertain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime." *Florida v Royer*, 460 US 491, 498; 103 S Ct 1319; 75 L Ed 2d 229 (1983). Therefore, a citizen may be briefly stopped if a police officer has a "reasonable suspicion that criminal activity" may be taking place. *People v Oliver*, 464 Mich 184, 193; 627 NW2d 297 (2001). An investigatory stop "constitutes a seizure and requires specific and articulable facts" demonstrating "a reasonable suspicion" that the person under investigation "has committed or is committing a crime." *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). To evaluate whether an officer had reasonable suspicion to make an investigatory stop, a court must consider the "totality of the facts and circumstances" on a case by case basis. *People v Horton*, 283 Mich App 105, 109; 767 NW2d 672 (2009). "[A] reasonable suspicion should be based on "commonsense judgments and inferences about human behavior." *Id*. "It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Royer*, 460 US at 500.

> To determine whether a stop is "so minimally intrusive as to be justifiable on reasonable suspicion" courts must consider a number of factors including: (1) the duration of the stop; (2) the purposes justifying the investigatory detention; (3) whether the police acted diligently to confirm or dispel their suspicions; and (4) any reasonable alternatives the police could have employed to serve their purposes. [*United States v Fraguela-Casanova*, 858 F Supp 2d 432, 442 (MD Pa, 2012), citing *United States v Sharpe*, 470 US 675, 686; 105 S Ct 1568; 84 L Ed 2d 605 (1985).]

The totality of the facts and circumstances supports the conclusion that Gillis had reasonable suspicion that defendant had committed or was currently committing criminal activity related to parking meters when he initiated the investigatory stop. A parking meter head can be used to mold a homemade key, which in turn can be used to open other meters in a locality without damaging them, and to collect the change inside. According to Gillis, making a homemade key from a parking meter head would require 1½ to 2 hours of time with the meter head. Therefore, a perpetrator could not easily create the mold from a parking meter in a parking lot without being detected. In 2010 and 2016, parking meter heads were stolen in Traverse City. Later, change was stolen from other meters without any damage to the meters. In 2012, Gillis arrested defendant for stealing change from parking meters with a homemade key and defendant entered a guilty plea for that offense. In 2016, defendant was the suspect in several similar parking meter thefts in various counties in southern Michigan. Gillis could have reasonably suspected that defendant was the perpetrator in the instant case when he observed defendant entering, late at night, the same parking lot that contained meters that had been discovered empty by collection workers the previous night.

Further, Gillis testified that an officer surveilling defendant as a suspect in similar crimes in southern Michigan had informed Gillis that he thought defendant was "heading north." Gillis advised patrol officers to be on the lookout for defendant and his truck. On the same day Gillis received this information, Traverse City parking meter collection workers discovered three lots with undamaged parking meters missing change. Early the next morning, defendant parked his truck near Mode's Bum's Steer, and an officer later observed him carrying what appeared to be a heavy bag to his truck. In sum, Gillis could have had a reasonable suspicion that defendant was engaged in criminal activity related to parking meter thefts. *Horton*, 283 Mich App at 109.

Nonetheless, defendant argues that Gillis's suspicion was not reasonable, because it in part relied on the information about his location from the investigating officer in southern Michigan. But defendant conceded below, and the record reflects, that it was unclear how the downstate officer knew that defendant was heading north. Moreover, at a hearing held on August 30, 2016, defense counsel conceded that the existence of the Jackson County search warrant nullified the portion of the motion to suppress that challenged the constitutionality of the downstate GPS tracking. Defendant thus arguably waived this issue. *Hoffenblum v Hoffenblum*, 308 Mich App 102, 117; 863 NW2d 352 (2014) (citation omitted). Regardless, although defendant argues that the downstate warrant had expired (and that the tracking thus was unconstitutional), nothing in the record supports the assertion that the downstate GPS device was still active after the expiration of the warrant. Moreover, the record shows that Jackson County police had also obtained a warrant for GPS tracking of defendant's truck on May 23, 2016, although they had not yet installed the tracking device. Defendant simply has not established that Gillis relied on any unconstitutionally obtained evidence in forming his reasonable suspicion of defendant's behavior such that the stop was "the fruit of the poisonous tree." See *People v Stevens*, 460 Mich 626, 634; 597 NW2d 53 (1999), citing *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963).

Relatedly, defendant argues that even if the investigatory stop did not violate his constitutional rights, the duration of the seizure while obtaining the search warrant was unconstitutional. We disagree. The duration of the stop here was between two and three hours long. As discussed, officers suspected that defendant was stealing from parking meters. During

the stop, defendant refused to consent to a search of the truck, so the stop was delayed to obtain a search warrant. The ease of exchanging currency gave the officers good reason to believe that, unless detained while the warrant was sought, defendant could conceal evidence of any theft. There is nothing in the record demonstrating that the officers failed to act diligently to confirm their suspicions. See *Sharpe*, 470 US at 686.

Further, as the trial court noted, the request for the search warrant occurred during the night when judicial officers are not readily available for consideration of warrant requests. See *Segura v United States*, 468 US 796, 812-813; 104 S Ct 3380; 82 L Ed 2d 599 (1984) (plurality opinion) (a 19-hour delay, including nighttime hours, was not unreasonable because judicial officers were not readily available at that time). Defendant argues, with the benefit of hindsight, that Gillis should have obtained a search warrant earlier in the day when he was informed that defendant was heading north. But Gillis could reasonably have believed that defendant's criminal history and unconfirmed presence in his jurisdiction, without more, would be insufficient grounds for obtaining a search warrant. We are not left with a definite and firm conviction that the trial court made a mistake in its factual findings, and conclude that the trial court did not err by holding that the duration of the detention was not unreasonable. *Snider*, 239 Mich App at 406. The trial court therefore did not err by denying the motion to suppress. *Id*.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that defense counsel was ineffective for failing to move to suppress statements that he made to Gillis during the stop because he was not provided with *Miranda*[2] warnings. We disagree. Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*[3] hearing, review of the issue is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

The United States and Michigan Constitutions guarantee a defendant the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 US at 694.

Miranda warnings are not required unless a suspect is subject to a custodial interrogation. *People v Hill*, 429 Mich 382, 385; 415 NW2d 193 (1987); *People v Vaughn*, 291 Mich App 183,

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

[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

188; 804 NW2d 764 (2010), vacated in part on other grounds 491 Mich 642 (2012). Generally, a custodial interrogation is a questioning initiated by law enforcement officers after the suspect has been taken into custody or otherwise deprived of freedom of action in any significant way. *Yarborough v Alvarado*, 541 US 652, 661; 124 S Ct 2140; 158 L Ed 2d 938 (2004); *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Whether a suspect was in custody depends on the totality of the circumstances. The key question is whether the suspect could have reasonably believed that he or she was not free to leave. *Yarborough*, 541 US at 663; *Vaughn*, 291 Mich App at 188.

"[A] motorist detained for a routine traffic stop or investigative stop is ordinarily not in custody within the meaning of *Miranda*." *People v Steele*, 292 Mich App 308, 317; 806 NW2d 753 (2011). This Court has stated:

> Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to "investigate the circumstances that provoke suspicion." "[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' " Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry*[4] stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of *Miranda*. [*Steele*, 292 Mich App at 318, quoting *Berkemer v McCarty*, 468 US 420, 440; 104 S Ct 3138; 82 LEd2d 317 (1984) (citations omitted); see also *People v Burton*, 252 Mich App 130, 139-141; 651 NW2d 143 (2002).]

In *Burton*, 252 Mich App at 130, the questioning of the defendant was brief, and he was not handcuffed or confined during the questioning. The defendant was told that he could not leave the scene because the police were concluding their investigation, not because he was going to be arrested. *Id*. We concluded that a reasonable person in the defendant's place would have felt that he was seized under the Fourth Amendment, but not in custody "to the degree associated with a formal arrest." *Id*. at 140.

Similarly, a reasonable person in defendant's place would have felt seized but not in custody. Like the defendant in *Burton*, there is no evidence that defendant was handcuffed or confined in the detective's patrol car. Rather, defendant and Gillis sat on the curb. This Court has stated that such "exposure to public view both reduces the ability of an unscrupulous

[4] *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

policeman to use illegitimate means to elicit self-incriminating statements and diminishes the [suspect's] fear that, if he does not cooperate, he will be subjected to abuse." *Steele*, 292 Mich App at 318. Although defendant was not free to go and his keys were collected by officers, he was being detained for further investigation and a search of the truck, not arrest. After the search, officers did not arrest defendant. Because a reasonable person in defendant's position would believe that he or she was seized, but not arrested, *Miranda* warnings were not required. Therefore, defense counsel was not ineffective for failing to raise this argument in a motion to suppress defendant's statements because any such motion would have been futile. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) ("counsel is not ineffective for failing to make a futile objection"). Moreover, given that the homemade parking meter keys were recovered from defendant's truck, and evidence was admitted that he had previously used similar homemade keys to steal money from parking meters, defendant cannot establish a reasonable probability that, but for defense counsel's failure to move to suppress the statements, the outcome of the trial would have been different.

Defendant also argues that defense counsel should have moved to suppress his statements as the fruit of the poisonous tree based on his argument that the stop was unlawfully based on ill-gotten GPS information. See *Stevens*, 460 Mich at 634. For the reasons stated earlier, a motion to suppress his statements on this basis would have been futile. *Thomas*, 260 Mich App at 457.

III. OTHER-ACTS EVIDENCE

Defendant also challenges the admission of other-acts evidence under MRE 404(b) at trial. We find no error in its admission. We review a trial court's decision to admit evidence for an abuse of discretion.[5] *People v Chelmicki*, 305 Mich App 58, 62; 850 NW2d 612, 615 (2014).

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, plan, knowledge, identity, or absence of mistake or accident, provided, that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Relevant other-acts evidence is admissible under this rule unless the proponent's sole theory of relevance is to show the defendant's criminal propensity to prove that he committed the charged offenses. *People v VanderVliet*, 444 Mich 52, 63; 508 NW2d 114 (1993), amended 445 Mich

[5] Defendant has characterized his evidentiary challenges as due process violations. But defendant alleges a violation of a state evidentiary rule and "[m]erely framing an issue as constitutional does not make it so." *People v Blackmon*, 280 Mich App 253, 261; 761 NW2d 172 (2008).

1205 (1994). Accordingly, MRE 404(b)(1) is inclusionary rather than exclusionary. *Id*. at 64 (citation omitted). In *People v Smith*, 282 Mich App 191, 194; 772 NW2d 428 (2009), this Court explained:

> In deciding whether to admit evidence of other bad acts, a trial court must decide: first, whether the evidence is being offered for a proper purpose, not to show the defendant's propensity to act in conformance with a given character trait; second, whether the evidence is relevant to an issue of fact of consequence at trial; third, [under MRE 403] whether its probative value is substantially outweighed by the danger of unfair prejudice in light of the availability of other means of proof; and fourth, whether a cautionary instruction is appropriate.

In *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994), our Supreme Court explained unfair prejudice under MRE 403 as follows

> Obviously, evidence is offered by an advocate for the always clear, if seldom stated, purpose of "prejudicing" the adverse party. Recognizing this, the Supreme Court in adopting MRE 403 identified only unfair prejudice as a factor to be weighed against probative value. This unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock. [Citation and quotation omitted.]

Defendant first argues that the prosecution did not offer the evidence for a proper purpose, but rather to show his propensity to commit the crimes, and that the evidence was not relevant to any material issue at trial. We disagree.

The prosecution offered the evidence to show the existence of a common scheme, plan, or system. The trial court admitted the evidence for that purpose. "[E]vidence of sufficiently similar prior bad acts can be used to establish a definite prior design or system which included the doing of the act charged as part of its consummation." *Smith*, 282 Mich App at 196 (quotation marks and citation omitted). "[T]he result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed." *Id*. (quotation marks and citation omitted). "A high degree of similarity is required . . . but the plan itself need not be unusual or distinctive." *Id*. "[R]elevant evidence" is evidence that has "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." MRE 401.

The record demonstrates that defendant had a unique area of criminal expertise—breaking into parking meters—which he had learned on a work release program with the city of Petoskey as a teenager. He was charged in this case with possessing keys adapted and designed to open or break into parking meters with the intent to steal. His five prior convictions from 2006 to 2013, and the pending case in another county, involved breaking and entering a coin-operated device and similarly capitalized on defendant's unique skill. Further, Detective Joshua Husted of the Troy Special Investigative Unit testified that he had observed defendant open a parking meter in Mount Clemens in 2016, and that the keys he recovered after defendant's arrest in that case were almost identical to the keys recovered by Gillis in the charged offense. Husted

saw defendant collect the coins with an oil can, whereas Detective Gillis recovered a hat that had been modified with a plastic brim (which, when found, had coins stuck in the brim) that he opined similarly could have been used to collect coins. It was not outside the range of principled outcomes for the trial court to conclude that these common features indicated the existence of a common plan.

Defendant argues that his other acts were not sufficiently similar to the instant case, because his conviction here was for possession of homemade parking meter keys, not actually breaking and entering into a parking meter. Defendant's argument is unpersuasive. The jury found that defendant possessed the keys with the intent to steal, which is an element of the offense charged, MCL 752.811(b). At least one key recovered by Gillis opened parking meters unique to Traverse City. The other-acts evidence of defendant's common scheme or plan in making homemade parking meter keys and using them to empty parking meters was highly probative of defendant's intent.

Defendant also suggests that the trial court misapplied the balancing test of MRE 403 and that its curative instruction was ineffective. We disagree. Although all relevant evidence may be prejudicial, *People v Murphy* (*On Remand*), 282 Mich App 571, 582-583; 766 NW2d 303 (2009), the record does not establish that the other-acts evidence in this case injected considerations extraneous to the merits of the lawsuit, such as shock or bias, *Pickens*, 446 Mich at 337. The trial court instructed the jury, "For example, you must not decide it shows the defendant is a bad person, or that he is likely to commit crimes. You must not convict the defendant here because you think he's guilty of other bad conduct." This instruction reduced any potential for unfair prejudice and " '[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors.' " *People v Pinkney*, 316 Mich App 450, 476; 891 NW2d 891 (2016). Defendant cannot establish that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *Smith*, 282 Mich App at 194.

Defendant also argues that the prosecution failed to provide proper pretrial notice of its intent to offer the other-acts evidence. MRE 404(B)(2) provides:

> The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

Defendant acknowledges that he actually received a week's pretrial notice of the other-acts evidence. But he nevertheless argues that this was unreasonable under MRE 404(b)(2). The prosecution explained at the motion hearing that the reason for the late notice was that, at a recent pretrial conference, defendant had informed his counsel of a witness who would testify that he had put the keys in the truck, and defense counsel had indicated that he would call this

witness in order to disprove defendant's knowledge of the keys and intent to steal.[6] The trial court did not rule on whether this reason amounted to good cause, but instead concluded that the notice was not unreasonable because defendant knew about the other-acts evidence from discovery—well in advance of trial—even if he did not know that the prosecution would offer them as evidence. Although defendant claims that this ruling shifted the burden of MRE 404(b) notice to him, MRE 404(b)(2) contemplates that a determination of admissibility under the rule may be influenced by a defendant's theory of defense. It was not unreasonable for the prosecution to seek admission of the other-acts evidence only after learning that defendant intended to call a defense witness whose testimony was being offered to negate the elements of knowledge and intent, which were purposes for which the other-acts evidence was relevant. Moreover, even if the prosecution's notice was unreasonable, defendant makes no argument that any additional notice would have affected his strategy or the outcome of the trial. Therefore, any error related to notice was harmless. *People v Lukity*, 460 Mich 484, 493-495; 596 NW2d 607 (1999).

IV. EXTRANEOUS INFLUENCE ON THE JURY

Defendant also argues that he is entitled to a new trial because of the risk that the jury was exposed to extraneous information during trial, namely a newspaper article reporting that defendant had requested to enter a guilty plea midtrial. We disagree.

In *People v Garay*, 320 Mich App 29, 39-41; ___ NW2d ___ (2017), lv pending, this Court explained:

> A defendant has a right to be tried by a fair and impartial jury. *Duncan v Louisiana*, 391 US 145, 153; 88 S Ct 1444; 20 L Ed 2d 491 (1968). Consistent with this right, a jury may only consider the evidence that is presented in court. *People v Stokes*, 312 Mich App 181, 187; 877 NW2d 752 (2015). A jury's consideration of extraneous facts not introduced into evidence deprives a defendant of his constitutional rights of confrontation, cross-examination, and effective assistance of counsel. *Id*. To establish that an extraneous influence was error requiring reversal, a defendant must prove two points: (1) the jury was exposed to an extraneous influence and (2) the extraneous influence created a real and substantial possibility that it could have affected the jury's verdict. *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997). To prove this second point, the defendant must "demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extraneous influence and the adverse verdict." *Id*. at 89. If the defendant proves these two points, then the burden shifts to the prosecution to demonstrate that the error was harmless beyond a reasonable doubt. *Id*. The prosecution may do so by proving that "the extraneous influence was duplicative

[6] Ultimately, defendant did not present any witnesses at trial. At the end of the first day of trial, defense counsel stated, without elaboration, that he was no longer going to call the witness he had referred to at the pretrial conference.

> of evidence produced at trial or the evidence of [the defendant's] guilt was overwhelming." *Id*. at 89-90.

" 'External' matters include publicity and information related specifically to the case the jurors are meant to decide . . . ." *Id*. at 90.

The court did not question the jurors about whether they had read the newspaper article or knew about defendant's willingness to enter a plea. And there is nothing in the record indicating that jurors were actually exposed to an extraneous influence. Nonetheless, even if some jurors saw the article, the trial court instructed the jury at the beginning of trial that the only information that it should "receive about this case is admissible testimony here from the witness stand and nothing else" and that independent research was forbidden. The jury took an oath that it would only base its verdict on the evidence admitted. The trial court reminded the jury of its oath during the closing instructions. The jury is presumed to have followed the court's repeated instructions and not to have considered the newspaper article about the case in rendering its verdict. *Pinkney*, 316 Mich App at 476.

Defendant also has not established a real and substantial possibility that the newspaper article, even if seen, affected the jury's verdict. Evidence of defendant's guilt was overwhelming and any conceivable extraneous influence would have been harmless. *Budzyn*, 456 Mich at 89.

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra