

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY MARK BRUCE,

Defendant-Appellant.

UNPUBLISHED

April 15, 2021

No. 354387

Otsego Circuit Court

LC No. 20-005851-FH

Before: SHAPIRO, P.J., and CAVANAGH and REDFORD, JJ.

PER CURIAM.

In this interlocutory appeal, defendant appeals by leave granted¹ the trial court’s order denying his motion to suppress evidence. We affirm.

I.

In July 2019, the complainant was shoe shopping at a T.J. Maxx store in Gaylord when she became suspicious that a male shopper was using his mobile phone to take photographs up her skirt. She confronted the man in the store, and he denied her accusation. The complainant then asked the man to show her what was on his phone, and he showed her about six pictures from the image gallery. When the complainant asked about his videos, the man replied that “my videos are my camera” and left. Through social media, the complainant identified defendant as the man she confronted in the store, and she then reported the incident to the state police.

State Trooper Nicholas Reszka went to defendant’s home about a week after the incident. After ascertaining that defendant was at the T.J. Maxx store on the day of the incident, Reszka asked defendant whether he had taken photographs up anyone’s skirt while at the store. Defendant stated that he had not taken any such photographs. He admitted that when he was at the store, he was confronted by a woman and that he let her look through the photographs on his phone. Reszka

¹ See *People v Bruce*, unpublished order of the Court of Appeals, entered November 19, 2020 (Docket No. 354387).

asked if defendant would also allow him to look through the photographs, to which defendant responded, “not without my attorney present.” Reszka then asked defendant to retrieve the phone from inside the house. Defendant complied, and when he returned with the phone, Reszka asked him to place the phone on the hood of the patrol car. Once defendant put the phone on the car, Reszka seized defendant’s cell phone pending a search warrant. A warrant to search defendant’s cell phone was authorized, and a subsequent search of defendant’s cell phone produced no photographs or videos of the complainant.

Defendant was charged with surveilling an unclothed person, MCL 750.539j(2)(a)(i), and using a computer to commit a crime, MCL 752.796; MCL 752.797(3)(c). After a preliminary examination, the district court bound defendant over to the circuit court as charged. Defendant subsequently filed a motion in the circuit court to suppress the evidence that was obtained from his cell phone as a result of the warrantless seizure. Defendant argued, in part, that the exigent circumstances exception to the warrant requirement did not apply because seizure of the phone was not necessary to prevent the loss or destruction of evidence.

At the motion hearing, the prosecution argued that the trooper had probable cause to believe that evidence of a crime would be found on defendant’s cell phone when it was seized. Moreover, the prosecution contended that there was an exigent circumstance “based on the inherent mobility and the ability to destroy evidence on defendant’s cell phone.” In response, defendant argued that, given there were no photographs or videos of the complainant on his cell phone, there was no probable cause, or an exigent circumstance, justifying the seizure of the phone.

The trial court denied defendant’s motion to suppress evidence, finding that the trooper had probable cause to seize defendant’s cell phone and exigent circumstances warranted the seizure.

II.

On appeal, defendant argues that the seizure of his cell phone was in violation of his rights under the United States and Michigan Constitutions because there was not a valid search warrant, and none of the exceptions to the warrant requirement apply.² We disagree.³

² Although defendant presents argument regarding numerous exceptions to the warrant requirement, the prosecution argues only that the exigent circumstances exception applies and so we decline to address the other exceptions discussed in defendant’s brief.

³ When reviewing a ruling on a motion to suppress, the trial court’s findings of fact are reviewed for clear error, and the court’s application of the underlying law is reviewed de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). “A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made.” *People v Roberts*, 292 Mich App 492, 502; 808 NW2d 290 (2011) (quotation marks and citation omitted).

The United States and Michigan Constitutions guarantee the right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11.⁴ “Generally, searches or seizures conducted without a warrant are presumptively unreasonable and, therefore, unconstitutional.” *People v Barbarich*, 291 Mich App 468, 472; 807 NW2d 56 (2011). “One of the exceptions to the Fourth Amendment warrant requirement is the so-called ‘exigent circumstances’ exception.” *People v Henry (After Remand)*, 305 Mich App 127, 138; 854 NW2d 114 (2014) (quotation marks and citation omitted). “When the police act pursuant to the exigent circumstances exception, they are searching for evidence or perpetrators of a crime. Accordingly, in addition to showing the existence of an emergency leaving no time for a warrant, they must also possess probable cause that the premises to be searched contains such evidence or suspects.” *People v Davis*, 442 Mich 1, 24; 497 NW2d 910 (1993). “The existence of an actual emergency is established if immediate action is necessary to . . . prevent the imminent destruction of evidence.” *People v Snider*, 239 Mich App 393, 408; 608 NW2d 502 (2000) (quotation marks and citation omitted). “Probable cause exists when the facts and circumstances known to the officers at the time of the search would lead a reasonably prudent person to believe that a crime has been or is being committed and that evidence will be found in a particular place.” *People v Beuschlein*, 245 Mich App 744, 750; 630 NW2d 921 (2001).

In this case, Trooper Reszka had probable cause to believe that defendant’s cell phone contained photographs or videos of the complainant. The complainant testified that defendant was standing “uncomfortably close” to her in the store while she was bending over to try on shoes. Defendant had his phone in his hand, and the complainant noticed that the camera application on defendant’s cell phone was open because she recognized the “shutter button” on the application. Although the complainant did not see any photographs of her on defendant’s cell phone when she confronted him, defendant may not have shown her all of the images on his phone. The complainant testified that when she asked defendant to show her his cell phone, he “went right to his gallery, opened up whatever folder it was, and then opened up a picture real quick” And when the complainant asked about videos on the phone, defendant gave an equivocal response. Further, defendant acknowledged to Reszka that he had been in T.J. Maxx and that the complainant had confronted him. Defendant’s acknowledgement of the incident, combined with the complainant’s report, was sufficient to establish probable cause that defendant illegally took photographs or videos of the complainant, and that the evidence remained in the electronic data on defendant’s phone. The fact that no photographs or videos of complainant were found on defendant’s cell phone does not eliminate the probable cause that Reszka had at the time of the seizure to believe that the cell phone contained evidence of a crime.

There was also an exigent circumstance justifying the warrantless seizure, namely, the risk of loss or destruction of suspected photographs or videos. Because defendant came to know that he was being investigated and that Reszka wanted to see photographs or videos on defendant’s cell

⁴ The Michigan constitutional protection against unreasonable search and seizure is construed as providing the same protection as the Fourth Amendment, absent a compelling reason to impose a different interpretation. *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011). In this case, defendant does not argue that the Michigan constitution provides greater protection against seizures of cell phones.

phone, Reszka had a legitimate concern that defendant would destroy any evidence that might have been contained on it. Defendant could have easily arranged for the disappearance of the cell phone or its contents. In fact, according to defendant, he had already purchased a new cell phone to use as his main phone. Consequently, it was reasonable for Reszka to conclude that the destruction or concealment of the suspected photographs or videos was imminent. Accordingly, Reszka was permitted to seize defendant's cell phone under the exigent circumstances exception to the warrant requirement, and defendant was not deprived of his rights under the United States and Michigan Constitutions.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Mark J. Cavanagh
/s/ James Robert Redford