STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2011
v	No. 299468 Wayne Circuit Court
STEVEN KEITH BOU, Defendant-Appellant.	LC No. 10-001388-FH

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with person less than 13 years of age). He was sentenced as a fourth habitual offender, MCL 769.12, to 10 to 25 years in prison. We affirm.

I

In June 2009, defendant attended a party at the home of Barbara Hall. Also attending the party was Hall's 12-year-old granddaughter (the victim). At some point, defendant and the victim were in the swimming pool together. Defendant offered to teach the victim how to float on her back. In the process of teaching the victim, defendant placed his hand on the victim's buttocks for approximately 20 seconds. Minutes later, defendant asked the victim to retrieve some hair gel for him from the bathroom. Defendant followed the victim into the house and told the victim that he wanted to take her picture. Defendant removed a camcorder from his bag and filmed the victim as she stood in the bathroom. Defendant then told the victim that she "ha[d] a nice body for a twelve year old." The victim was wearing only a bathing suit at the time.

The victim later told her grandmother what had happened. Hall reported the incident to the police. The victim gave oral and written statements to the police over the course of the following days. The police thereafter obtained a warrant to search defendant's home. A camcorder was recovered from defendant's residence. The police subsequently recovered a disk containing the video recording of the victim that defendant had apparently made with the camcorder in question.

Prior to trial, defense counsel moved to suppress evidence, including various videos and photographs of other young females found in defendant's possession, the video of the victim that

had been recovered by the police, and certain additional other-acts evidence. The trial court granted the motion in part, ruling that the prosecution could not introduce the videos and photographs of other young females or the additional other-acts evidence. However, the court ruled that the video of the victim taken by defendant was relevant, was not unduly prejudicial, and would be admissible at trial.

Defense counsel also moved to dismiss the CSC II charge on the ground that defendant had not been brought to trial within 180 days of the prosecution's receipt of notice that he was incarcerated and awaiting trial.[1] See MCL 780.131; MCL 780.133. The trial court denied the motion, finding that the prosecution had acted in good faith and had taken reasonable steps toward bringing defendant to trial within the 180-day period.

At trial, the jury heard the testimony of several prosecution and defense witnesses, including the victim, the victim's grandmother, a woman with whom defendant had attended the party, a private investigator, and the police officer who searched defendant's residence. The jury also watched the video recording that defendant had made of the victim. As noted previously, the jury convicted defendant of one count of CSC II.

II

Defendant first argues that the video he took of the victim should not have been admitted into evidence or played for the jury. He asserts that the video was irrelevant as a matter of law. He also asserts that the video's probative value was significantly outweighed by the danger of unfair prejudice, that the video was merely "propensity evidence designed to inflame the jury," and that the video constituted improper character evidence that was "disguised as something else." We disagree.

Defendant preserved this issue by moving to suppress the video recording. *People v Unger*, 278 Mich App 210, 243; 749 NW2d 272 (2008). We review for an abuse of discretion the trial court's decision to admit or exclude evidence. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). However, we review de novo any underlying questions of law concerning the admissibility of evidence. *Id.*

As an initial matter, we cannot agree with defendant's argument that the video recording was irrelevant as a matter of law. "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.'" *People v Fletcher*, 260 Mich App 531, 552-553; 679 NW2d 127 (2004), quoting MRE 401. All relevant evidence is admissible except as otherwise provided by law. MRE 402; *Fletcher*, 260 Mich App at 553.

[1] Defendant was on parole at the time of the instant alleged offense in June 2009. Once the prosecution charged defendant with CSC II, he was found to have violated his parole and was returned to prison as a parole violator.

Defendant was charged with, and convicted of, engaging in sexual contact with a person less than 13 years of age in violation of MCL 750.520c(1)(a). The uncontroverted evidence established that the victim was less than 13 years old at the time of the alleged offense. Accordingly, the question in this case was whether defendant had engaged in "sexual contact" with the victim within the meaning of the statute.

"Sexual contact" is defined in relevant part as "the intentional touching of the victim's . . . intimate parts or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for . . . [r]evenge[,] . . . [t]o inflict humiliation[, or] . . . [o]ut of anger." MCL 750.520a(q). "Intimate parts," in turn, are defined as "the primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(e). As these definitions make clear, in order to prove the elements of CSC II in this case, the prosecution was required to prove beyond a reasonable doubt (1) that defendant touched the victim's intimate parts, and (2) that he did so "for the purpose of sexual arousal or gratification," "for a sexual purpose," or "in a sexual manner for . . . [r]evenge[,] . . . [t]o inflict humiliation[, or] . . . [o]ut of anger." It was undisputed at trial that defendant touched the victim's buttocks while the two were in the pool together. MCL 750.520a(e). Therefore, the central issue was whether defendant had touched the victim's buttocks for a sexual or otherwise criminal purpose.

The video of the victim taken by defendant was relevant because it tended to establish that defendant had touched the victim "for the purpose of sexual arousal or gratification" or "for a sexual purpose" within the meaning of MCL 750.520a(q). The video tended to show that defendant's touching of the victim's buttocks in the pool was not innocent or merely inadvertent. The video led to the reasonable inference that defendant had pursued a course of conduct that would put him in proximity to the victim and that defendant had an age-inappropriate attraction to the victim. This evidence certainly would have made it more probable to a rational juror that defendant had touched the victim's buttocks for a sexual purpose. MRE 401. Because the video recording was probative of defendant's intent and purpose at the time he touched the victim's buttocks, we conclude that the video recording was logically relevant. See *People v VanderVliet*, 444 Mich 52, 80-81; 508 NW2d 114 (1993).

Nor was the video evidence inadmissible under MRE 403. While all evidence presented by the prosecution is presumably prejudicial to some extent, the pertinent inquiry under MRE 403 is whether the evidence is *unfairly* prejudicial. *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994). Video or photographic evidence is not inadmissible under MRE 403 if it is "substantially necessary or instructive to show material facts or conditions." *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994); see also *People v Falkner*, 389 Mich 682, 685; 209 NW2d 193 (1973). We concede that the jurors may have been shocked or repulsed by defendant's inappropriate sexual attraction to the 12-year-old victim in this case. However, video evidence is not rendered inadmissible merely because it depicts shocking details, *Hoffman*, 205 Mich App at 18, because it shows contents of a sexual nature, see *Lewis v LeGrow*, 258 Mich App 175, 203; 670 NW2d 675 (2003), or because its contents are "depraved" or "monstrous[ly] repugnan[t]," *People v Starr*, 457 Mich 490, 499; 577 NW2d 673 (1998). Here, as noted earlier, the video had a direct bearing on one of the elements of the charged offense and was used to establish that defendant's touching of the victim was done for an illegal, sexual

purpose. On the facts before us, we simply cannot conclude that the video's probative value was substantially outweighed by the danger of unfair prejudice or misleading the jury.

Lastly, we conclude that the video evidence was not inadmissible as improper character evidence under MRE 404(b). While evidence of other wrongs or acts "is not admissible to prove the character of a person in order to show action in conformity therewith," it may be admissible for a different purpose such as to establish a defendant's motive, intent, plan, scheme, or system. MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 511; 674 NW2d 366 (2004). Our Supreme Court has explained that, to be admissible under MRE 404(b), evidence (1) must be relevant under MRE 401 and MRE 402, (2) must not be unfairly prejudicial or otherwise inadmissible under MRE 403, and (3) must be pertinent to an issue other than propensity. *Starr*, 457 Mich at 496; *VanderVliet*, 444 Mich at 74-75. We have already determined that the video recording was relevant under MRE 401 and therefore admissible under MRE 402. We have also determined that the video recording was not unfairly prejudicial under MRE 403. All that remains is to determine whether the video recording was pertinent to an issue other than propensity.

As noted previously, defendant's intent and motive for touching the victim's buttocks were at issue as an element of the charged offense. "[O]ther acts evidence is especially pertinent where the trial court determines that the issue 'involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.'" *VanderVliet*, 444 Mich at 85, quoting *Huddleston v United States*, 485 US 681, 685; 108 S Ct 1496; 99 L Ed 2d 771 (1988). The video evidence was offered primarily to show defendant's motive and intent—namely, that he touched the victim for the purpose of gaining pleasure, arousal, or sexual gratification. We conclude that this was a proper, non-character reason for admitting the video recording. See *Starr*, 457 Mich at 500-501. Because the video recording was relevant to defendant's motive and intent—and not merely to defendant's propensity—admission of the video evidence did not violate MRE 404(b).[2] *VanderVliet*, 444 Mich at 84.

III

Defendant alleges that the trial court erred by permitting the prosecution to elicit evidence that he attempted to conceal the video from the police by giving it to a third party. Although this assertion is included in defendant's statement of the questions presented, it is not discussed or addressed in the body of defendant's brief on appeal. "The failure to brief the merits of an allegation of error constitutes an abandonment of the issue." *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004).

[2] We also agree with the prosecution that the video recording was admissible under the res gestae exception to MRE 404(b). See *People v Robinson*, 128 Mich App 338, 340-341; 340 NW2d 303 (1983). Playing the video recording at trial was necessary to present to the jury the full context in which the events took place. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). The video recording was made only minutes after defendant touched the victim in the pool and it served to illustrate and explain the circumstances of the touching. *People v Sheehy*, 31 Mich App 628, 630-631; 188 NW2d 231 (1971).

IV

Defendant next argues that the charge of CSC II should have been dismissed with prejudice because he was not tried in accordance with the 180-day rule of MCL 780.131 and the trial court therefore lost jurisdiction to try him under MCL 780.133. We cannot agree.

Defendant preserved this issue for appellate review by moving to dismiss the charge pursuant to the 180-day rule. See *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). We review de novo the trial court's interpretation and application of the 180-day rule. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

The 180-day rule of MCL 780.131 provides in relevant part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.

In turn, MCL 780.133 divests the court of jurisdiction to try the inmate and requires dismissal of the pending charges if "action is not commenced on the matter" within 180 days after the Department of Corrections delivers notice of the inmate's imprisonment. *People v Lown*, 488 Mich 242, 246; 794 NW2d 9 (2011).

Contrary to defendant's argument on appeal, MCL 780.131 "does not require that a *trial* be commenced or completed within 180 days of the date notice was delivered." *Id*. Instead, the rule requires only "that the prosecutor 'proceed promptly' and 'move[] the case to the point of readiness for trial' within the 180-day period." *Id*., quoting *People v Hendershot*, 357 Mich 300, 304; 98 NW2d 568 (1959). In this case, it is undisputed that more than 180 days elapsed between the prosecutor's receipt of notice from the Department of Corrections on October 14, 2009, and the beginning of defendant's trial on June 10, 2010. But the record establishes that the prosecutor commenced action well within 180 days after receiving the notice and proceeded promptly and with dispatch thereafter. We acknowledge that several delays were caused by the failure to secure defendant's physical presence at various critical stages of the proceedings. However, we perceive no evidence that the prosecutor did not legitimately intend to proceed to trial within 180 days or that the prosecution acted with anything other than good faith. See *Hendershot*, 357 Mich at 303-304. We cannot conclude that the trial court erred by denying defendant's motion to dismiss the CSC II charge pursuant to MCL 780.131 and MCL 780.133. *Lown*, 488 Mich at 272-273.

V

Defendant lastly argues that the evidence presented at trial was insufficient to support his conviction of CSC II. Again, we disagree.

No special steps are required to preserve a challenge to the sufficiency of the evidence. *Cain*, 238 Mich App at 117-118. We review a claim of insufficient evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have concluded that the essential elements of the offense were proved beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Id.* at 428.

As explained previously, to secure defendant's conviction of CSC II in this case, the prosecution was required to prove beyond a reasonable doubt (1) that defendant touched the victim's intimate parts, and (2) that he did so "for the purpose of sexual arousal or gratification," "for a sexual purpose," or "in a sexual manner for . . . [r]evenge[,] . . . [t]o inflict humiliation[, or] . . . [o]ut of anger." MCL 750.520c(1)(a); see also MCL 750.520a(e); MCL 750.520a(q). It is undisputed that defendant touched the victim's buttocks. See MCL 750.520a(e)

"Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime," *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998), and "[b]ecause of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient," *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). The evidence established that only minutes after touching the victim's buttocks, defendant asked the victim for some hair gel and followed the victim into her grandmother's house. Once inside, defendant asked the victim whether he could take her picture and told the victim that he would prefer to film her in the bathroom because the lighting was better. Defendant then told the victim that she "ha[d] a nice body for a twelve year old." As noted, the 12-year-old victim was wearing only a bathing suit at the time defendant filmed her.

Rational jurors could have reasonably inferred from the evidence presented at trial that defendant touched the victim's buttocks while in the pool for the purpose of sexual arousal or gratification, or for a closely related sexual purpose. See MCL 750.520a(q). The video recording and other evidence tended to establish that defendant had an improper sexual fascination with the young victim. This was further demonstrated by defendant's inappropriate comment concerning the victim's body. After reviewing the record in a light most favorable to the prosecution, we conclude that a rational jury could have found beyond a reasonable doubt that defendant touched the victim's buttocks for the purpose of sexual arousal or gratification. The prosecution presented sufficient evidence to support defendant's CSC II conviction.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell