

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYAN JAMES VINSON,

Defendant-Appellant.

UNPUBLISHED

August 24, 2006

No. 259079

Calhoun Circuit Court

LC No. 04-002006-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYAN JAMES VINSON,

Defendant-Appellant.

No. 259204

Calhoun Circuit Court

LC No. 2004-002098-FH

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right from his jury trial convictions of assault with a dangerous weapon, MCL 750.82, and third-degree retail fraud, MCL 750.356d(4), in docket number 259079 and his convictions after a second jury trial for assault with a dangerous weapon and third-degree retail fraud arising out of a different incident in docket number 259204. Defendant was sentenced on the same day for his convictions at both trials. The trial court sentenced defendant as a habitual fourth offender, see MCL 769.12, to 4 to 15 years of imprisonment for each assault with a dangerous weapon conviction and to 93 days for each third-degree retail fraud conviction. The trial court credited defendant 383 days on each of his assault with a dangerous weapon convictions and 93 days on each third-degree retail fraud conviction. We affirm.

We shall first address defendant's argument that he was wrongfully deprived of his right to counsel at both his preliminary examination and his circuit court arraignment. Specifically, defendant contends that he never unequivocally waived his Sixth Amendment right to counsel

and, because the preliminary examination and arraignment are critical stages, the deprivation of counsel during those stages constitutes structural error mandating reversal. We do not agree.

This Court reviews for clear error the trial court's factual findings surrounding a defendant's waiver of Sixth Amendment rights. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). However, to the extent that the waiver ruling "involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *People v Russel*, 471 Mich 182, 187; 684 NW2d 745 (2004).

Defendant had a consolidated preliminary examination for both cases. On the first day of the preliminary examination, March 18, 2004, defendant indicated some dissatisfaction with his current attorney and asked the trial court to replace him with new counsel. However, the trial court denied the request.¹ Defendant then objected to the commencement of the preliminary examination because he felt that he should have expert witnesses. Despite defendant's protestations, the trial court determined that the prosecution could present its case. Thereafter, defendant's trial counsel, John D. Brundage, indicated that defendant wanted to represent himself. Defendant then stated that he felt he had to under the circumstances, but did not explicitly state that he desired to represent himself.

Mr. Brundage: Are you asking the Court to represent yourself?

The Defendant: I think that would probably be, ah –

The Court: Well, it's not probably. Mr. Brundage, I'd require you to sit there anyway so let's go ahead. All right. And I'll listen –

Mr. Brundage: Your Honor, for clarification, ah – and I understand that it's difficult for the Court, ah, to have stand-by counsel. I think probably we would need a ruling on whether Mr. Vinson will be representing himself. In terms of, you know, will I be cross examining witnesses or will I be here for advice, ah –

The Court: All right. What's it going to be, Mr. Vincent [sic], with this?

The Defendant: I think I need to contact an – contact my – another attorney to question this to find out what I should do at this point. As you said, I can hire my own counsel.

The Court: Correct, you can hire your own counsel.

¹ Defendant had already had two different attorneys appointed to defend him. The first attorney was replaced after a breakdown in the attorney-client relationship and the second was apparently replaced due to a scheduling conflict.

The Defendant: I feel at this time we should – we should hold – hold this off until I can contact an attorney that I have been in contact with, that Mr. Brundage is aware of that, and see what they believe I should do at this point.

The Court: Well, I'm going to let the State proceed. You'll have the opportunity then to get a transcript and confer with your – if you hire another attorney on it. And if [the witness] needs to be – he's been here several times. If he needs to be brought back, we'll deal with that at that time. So go ahead, Mr. Kabot.

From this it does not appear that the trial court seriously considered, let alone granted, defendant's equivocal request to represent himself. Instead, it appears that it was summarily denied as was his request for an adjournment.²

After the prosecution presented its witnesses, Brundage indicated that he and his client had a difference of opinion on how to proceed.

Mr. Brundage: I've discussed this prior to coming to preliminary examination with my client with regard to, without going into your conversations, whether defense would be calling potential witnesses who have been named in various parts of the police reports and my strategic decision not to. My defendant – my client disagrees with that. And so I don't know if, again – if he wants to represent himself at this point so that he can call what witnesses he thinks need to be called or whether he wants to proceed based on my advice not to call any witnesses.

The Court: Mr. Vinson, on that?

The Defendant: Yes, sir, I'll, ah – from this point on, I guess I'll have to represent myself. I'll have to have counsel appointed to do subpoenas for me because I want the doctors from the ER room here to testify concerning the wound on the victim.

The Court: All right. I'll adjourn it so that you can subpoena witnesses.

The Defendant: And as I say, I would need counsel appointed.

The Court: And you're free to either use Mr. Brundage or hire your own attorney.

² The trial court indicated that, at least for that day, Brundage was to perform the cross-examination of the witnesses. In addition, when defendant later asked the trial court to permit him to ask questions, the court responded, “—that's for your attorney to do.” Hence, it is clear that the trial court considered Brundage to still be defendant's appointed counsel.

The Defendant: I've already asked Mr. Brundage to do this in a letter which I have copies of with me.

The Court: Well, that's – he's your attorney until another one replaces him. So that's where we're at.

After this discussion, defendant's trial counsel stated that he could not continue to represent defendant under the circumstances. The trial court then indicated that it would not be appointing new counsel for defendant and asked defendant how he wanted to proceed. Defendant again responded in an equivocal manner. Finally, the trial court stated, "Well, leave it at this. You can assist with the subpoenas and once they're done then we'll broach the issue of representation. Okay."

Before the preliminary examination resumed, defendant's trial counsel moved for permission to withdraw as defendant's counsel. At a hearing held on April 14, 2004, the trial court granted the motion, but indicated that defendant's trial counsel should remain as an advisor. The trial court entered an order to that effect on April 21, 2004. On April 29, 2004, the preliminary examination resumed. Because of the previously entered order, defendant was not represented by counsel, although Brundage was present as an advisor. At the continued preliminary examination, defendant admitted several documents into evidence, but did not present any witnesses. Based on this preliminary examination, the district court bound defendant over for trial.

On June 28, 2004, defendant appeared for his arraignment with Brundage as his advisor. During the arraignment, defendant stated that he was not voluntarily representing himself. After a brief discussion, the trial court said it would appoint a new attorney for defendant and entered a plea of not guilty for all charges on defendant's behalf.

The Sixth Amendment to the United States Constitution guarantees the right to counsel at all critical stages of the criminal process for an accused who faces incarceration. *Williams, supra* at 641, citing *Maine v Moulton*, 474 US 159, 170; 106 S Ct 477; 88 L Ed 2d 481 (1985).³ "The phrase 'critical stage' refers to 'a step of a criminal proceeding, such as arraignment, that [holds] significant consequences for the accused.'" *People v Willing*, 267 Mich App 208, 228; 704 NW2d 472 (2005), quoting *Bell v Cone*, 535 US 685, 695-696; 122 S Ct 1843; 152 L Ed 2d 914 (2002). Although entitled to counsel, a criminal defendant may, subject to the trial court's discretion, choose to waive representation and represent himself or herself. *Willing, supra* at 219. However, before granting such a request, the trial court must determine that "(1) the defendant's request is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily after being informed of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business." *Id.*

³ "The Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *Williams, supra* at 641, citing *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

The preliminary examination is a critical stage during which a defendant is entitled to have representation. *Coleman v Alabama*, 399 US 1, 9-10; 90 S Ct 1999; 26 L Ed 2d 387 (1970). In the present case, it is clear that defendant was represented by counsel on the first day of the preliminary examination. However, it is also clear that the trial court permitted defendant's trial counsel to withdraw without appointing new counsel or obtaining an unequivocal waiver of defendant's right to representation. See *Willing*, *supra* at 219. Consequently, it was error for the trial court to resume the preliminary examination without first appointing new counsel for defendant.

Constitutional errors must be classified as either structural or nonstructural. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). If the error is structural, reversal is automatic. However, if the error is nonstructural, it is subject to the harmless beyond a reasonable doubt test. *Id.* Although the wrongful deprivation of representation during a critical stage of the criminal process has been held to be structural error requiring automatic reversal, see *United States v Cronin*, 466 US 648, 659 n 25; 104 S Ct 2039; 80 L Ed 2d 657 (1984), the United States Supreme Court has held that, where a defendant is completely deprived of representation at a preliminary examination, reversal is not warranted unless the defendant suffered prejudice as a result of the deprivation.⁴ *Coleman*, *supra* at 10-11, citing *Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967) (establishing the harmless beyond a reasonable doubt standard); see also *People v Carter*, 412 Mich 214, 217-218; 313 NW2d 896 (1981) (following the holding in *Coleman* and adopting the harmless beyond a reasonable doubt standard for cases where a defendant is wrongfully deprived of representation at the preliminary examination).⁵ Therefore, we must now determine whether the error was harmless beyond a reasonable doubt.

Applying the relevant harmless error standard to this case, we conclude that the lack of counsel at the preliminary examination was harmless beyond a reasonable doubt. Defendant was represented by counsel during the first day of the preliminary hearing, during which time defense counsel effectively cross-examined the prosecution's main witness for each of the cases. Specifically, on the first day of the preliminary examination, a witness to the incident at the Wal-Mart testified that he observed defendant steal items from the store, and, when he attempted to stop defendant, defendant cut him with a knife. Similarly, a witness to the incident at Meijer testified that she saw defendant conceal at least one MP3 player in his shirt, and that defendant

⁴ This is consistent with the United States Supreme Court's determination that the deprivation of counsel at a critical stage must have contaminated the entire criminal proceeding in order to warrant the presumption of prejudice. See *Satterwhite v Texas*, 486 US 249, 257; 108 S Ct 1792; 100 L Ed 2d 284 (1988). Thus, where the resultant evil caused by the Sixth Amendment violation is limited to the erroneous admission of particular evidence, a harmless error analysis is still appropriate. *Id.*

⁵ For this reason, the holding in *People v Murphy*, ___ Mich App ___, ___ NW2d ___ (2006) is inapplicable to the facts of this case. In *Murphy*, the Court determined that the failure of the defendant's trial counsel to file a brief in opposition to the prosecution's interlocutory appeal effectively deprived counsel of representation during an appeal. This, the Court held, constituted structural error mandating reversal. This case does not involve an interlocutory appeal, but rather an arraignment and a preliminary examination.

waived a knife at her when she attempted to prevent him from leaving the store. On the day where defendant was denied the assistance of counsel, defendant requested that the court order the prosecutor to produce the store policies for Wal-Mart and Meijer, and the court granted defendant's request, but no witnesses were examined and no substantive evidence was produced that was later used against defendant at trial. Rather, the evidence that was used to bind defendant over for trial was the evidence produced during the first day when defendant was represented by counsel. It seems beyond reasonable dispute that the testimony of the witnesses was sufficient to support defendant's bind over on the charged crimes. Finally, there is no evidence that any testimony or evidence derived from the second day of the preliminary examination was used to defendant's detriment during his actual trials. Cf. *White v Maryland*, 373 US 59; 83 S Ct 1050; 10 L Ed 2d 193 (1963). Accordingly, we conclude that this error was harmless beyond a reasonable doubt.

Defendant was also deprived of representation at his arraignment before the circuit court. See MCR 6.113. An arraignment is considered a critical stage where the defendant must assert a particular defense or lose the opportunity to present that defense. See *Hamilton v Alabama*, 368 US 52; 82 S Ct 157; 7 L Ed 2d 114 (1961). Likewise, regardless of the normal function of the arraignment, where a defendant's earlier plea of guilty at the arraignment while not represented by counsel was used against the defendant at trial, the lack of representation will warrant reversal without a showing of prejudice. *White, supra* at 60. However, in the present case, defendant was not required to take any special steps at his arraignment to preserve his rights or defenses. Further, there is no record evidence that the entry of a not guilty plea on defendant's behalf was used against him at trial or disadvantaged him in any way. See *People v Trudeau*, 51 Mich App 766, 771; 216 NW2d 450 (1974) and *People v Stewart*, 22 Mich App 51, 52-53; 176 NW2d 700 (1970). Consequently, this claim of error does not warrant reversal.

Defendant next contends that, in both cases, he was denied the effective assistance of counsel because his trial counsel did not raise the defense of insanity or temporary insanity. Specifically, defendant argues that his history of substance abuse amounted to involuntary intoxication that affected his ability to distinguish between right and wrong. We disagree.

"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). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* The effective assistance of counsel is presumed, and any defendant seeking to prove otherwise bears a heavy burden. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

The defense of involuntary intoxication is part of the defense of insanity if the involuntary intoxication "puts the defendant in a state of mind equivalent to insanity." *People v Wilkins*, 184 Mich App 443, 449; 459 NW2d 57 (1990). Voluntary intoxication is not an absolute defense unless the "voluntary continued use of mind-altering substances results in a settled condition of insanity before, during, and after the alleged offense." *People v Caulley*, 197 Mich App 177, 187 n 3; 494 NW2d 853 (1992). Voluntary intoxication is a defense only to a specific intent crime, *People v Langworthy*, 416 Mich 630, 638; 331 NW2d 171 (1982), such as felonious assault, *People v Robinson*, 145 Mich App 562, 564; 378 NW2d 551 (1985).

Defendant never testified that he was under the influence of any alcohol or controlled substance during the incidents in question. Likewise, employees from both Wal-Mart and Meijer testified to defendant's behavior before, during and after the respective incidents. None of the employees indicated that defendant acted in a manner consistent with someone who was under the influence of a controlled substance. Similarly, none of the police officers testified that defendant appeared to be under the influence of a controlled substance. Likewise, there is no evidence that defendant suffered from a settled condition of insanity as a result of continued drug abuse. Although "[a] defendant is entitled to have his counsel investigate, prepare and assert all substantial defenses," *People v Hubbard*, 156 Mich App 712, 714; 402 NW2d 79 (1986), the failure to bring a defense will not support an ineffective assistance of counsel claim where there is no evidence to support the alleged defense, *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Moreover, a defendant's trial counsel is not required to raise a meritless defense. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Because there was no evidence to support the conclusion that defendant was under the influence of drugs or alcohol at the time of the offenses, whether voluntarily or involuntarily consumed, and there was no evidence to suggest that defendant's drug use had resulted in a settled condition of insanity, "before, during, and after" the incidents in question, see *Caulley, supra* at 187 n 3, defendant's trial counsel cannot be faulted for not having defendant evaluated or otherwise raising this defense. See also *Emerson, supra* at 349 (holding that the defendant's trial counsel was not deficient for failing to raise a similar defense where there was no evidence to support a "defense of insanity based on the continual voluntary ingestion of mind-altering drugs.").

Defendant next contends that, in docket number 259079, the trial court erred when it failed to dismiss a juror who was related to one of the prosecution's witnesses. We disagree. This Court reviews a trial court's decision concerning whether to remove a juror for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

During jury selection for the trial in docket number 259079, the trial court listed a number of potential witnesses. None of the jurors indicated that they recognized any of the witnesses. However, following one witness' testimony, the witness informed the court that he was related to one of the jurors by marriage. Out of the presence of the other jurors, the court questioned the juror about his relationship to the witness:

Q. [T]he reason I had you come in is because I don't know if you recognized the last witness, but the last witness . . . recognized you as a – I would classify it as a shirt-tale relative, or a –

A. Yeah. It's my – actually, it would be a sister-in-law's nephew, I think it is. I've seen him every once in a while in church.

Q. That's what he said. Maybe a couple times a year or whatever.

A. Right.

Q. Is that now – obviously – maybe you did nor you didn't make the connection beforehand, the name, and the person, and what have you?

A. No, I did not.

Q. And now that you have, my question to you is is that going to impact, affect your ability to be a fair and impartial juror in this case?

A. No, it's not.

Q. Are you going to give his testimony greater weight, or lesser weight, –

A. No, it's not (sic).

Q. – you know, because of that distance [sic] relationship or whatever?

A. Like I said, I don't have anything, really, maybe Christmas time or something like that we might see each other for an hour or something like that, but.

Q. Well, come the next Christmas, or whatever, and you saw him and just say you sat through this trial and you decided to come back not guilty, are you going to feel awkward or uncomfortable on that score, or?

A. No.

* * *

The court: Any challenges for cause?

Prosecutor: No, your Honor.

Defense counsel: Yes, Judge. I think that if I had known or had this information when we were picking the jury, I probably would have used a preemptory to excuse [the juror]. . . .

The court noted that there was nothing unique in this situation that would require the jurors removal. The court further determined that the relationship will not affect the juror's ability to be a fair and impartial. Therefore, the trial court concluded, there was no reason to excuse the juror. On this record, we cannot conclude that the trial court abused its discretion.

First, defendant contends the court did not adequately question the juror about factors that might improperly influence his decision. However, as noted above, the court asked the juror if the relationship would affect his ability to be a fair and impartial juror, and the juror indicated that it would not. The court also asked the juror if he was going to give the witnesses testimony more or less credibility as a result of their relationship, to which the juror responded he would not. Therefore, contrary to defendant's contention on appeal, it appears the court adequately questioned the juror. See *People v Lee*, 212 Mich App 228, 250; 537 NW2d 233 (1995).

Next, defendant contends he was denied his right to a fair trial because he would have likely removed the juror with a preemptory challenge. Defendant notes that, in *People v Graham*, 84 Mich App 663, 668; 270 NW2d 673 (1978), this Court reasoned that a defendant is entitled to relief on appeal if it can be established that: (1) the defendant suffered actual prejudice as a result of the juror's presence, or (2) that defendant could have successfully

challenged the juror for cause, or (3) that the defendant would have “otherwise dismissed” the juror had the information been revealed during voir dire. However, in *People v Daoust*, 228 Mich App 1, 8-9; 577 NW2d 179 (1998), this Court stated:

[W]e decline to follow the “otherwise dismissed” language contained in the earlier cases, because (1) it is not based on the defendant’s right to an impartial jury and (2) its application requires the trial court to undertake what is essentially a futile task.

* * *

For these reasons, we hold that when information potentially affecting a juror’s ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause.

Accordingly, defendant is not entitled to a new trial simply because he alleges he would have used a peremptory challenge to dismiss the juror. Rather, defendant must demonstrate that he was actually prejudiced by the presence of the juror or that the juror was properly excusable for cause. *Id.* at 9. Defendant has failed to present any evidence that he was actually prejudiced by the presence of the juror or that the juror could have been dismissed for cause. Therefore, there was no error warranting reversal.

Defendant next contends that the trial court erred in sentencing him to 4 to 15 years of imprisonment for both assault with a deadly weapon convictions. Specifically, defendant argues that the trial court should have taken into consideration defendant’s strong family support, his addiction to cocaine, and should have assessed defendant’s rehabilitative potential through intensive alcohol, drug, and psychiatric treatment. Additionally, defendant argues that the sentence was disproportionate to the crime and that the trial court erred when it relied on factual findings not made by the jury in sentencing him.

In order to preserve challenges to the trial court’s sentencing decisions, a defendant must object at the sentencing hearing. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). In this case, defendant did not object to the PSIR, the sentencing recommendation, or the court’s sentencing decision. Therefore, the issue was not preserved for appeal.

First, with regard to defendant’s contention that the court failed to take into consideration his personal history, a court must articulate its reasons for imposing a sentence on the record at the time of sentencing. *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006). However, this requirement is “satisfied if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines.” *Id.* at 313.

In these cases, defendant acknowledged during sentencing that the guidelines were accurate and that the recommendation was within the guidelines. The prosecutor asked the court to follow the recommendation in both cases, noting that the recommendation was at the top of the guidelines for defendant because defendant’s criminal record indicated that defendant needed

to be separated from society as long as possible. Immediately after the parties' statements, the court "agree[d] with the agent's assessment . . . [that defendant] need[ed] to be separated from society". The court followed the recommendation and sentenced defendant at the top of the guidelines. Therefore, the court need not have made any comments on defendant's personal history because the articulation requirement was satisfied with the court's acknowledgment that it was sentencing defendant within the statutory guidelines. *Id.*

Next, defendant contends the punishment was disproportionate to the crimes charged. "The principle of proportionality requires that a sentence be proportionate to the seriousness of the circumstances surrounding the offense and the offender. A sentence that violates the principle of proportionality constitutes an abuse of discretion." *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000) (internal citations omitted). However, as noted above, defendant's sentence fell within the statutory guidelines, and "[s]entences falling within the recommended guidelines' range are presumptively not excessively severe or unfairly disparate." *People v Beneson*, 192 Mich App 469, 470; 481 NW2d 799 (1992). Moreover, the court properly considered a number of factors, including the harm done to the victim, the violent nature of the offense, and defendant's criminal history and concluded that there was a need to separate defendant from society for as long a period of time as permissible within the sentencing guidelines. See *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997) (where a habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the laws of society, a sentence within the statutory limits is proportionate). Accordingly, the trial court did not abuse its discretion.

Finally, defendant contends the court's ability to impose an enhanced sentence violates the federal Constitution pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006) our Supreme Court held that *Blakely* does not apply to Michigan's indeterminate sentencing structure. Therefore, this argument must fail.

Defendant next argues that, in docket number 259204, the trial court abused its discretion in admitting prior bad act evidence because the evidence was offered to prove defendant's propensity to commit the crimes with which he was charged. Even if the evidence was relevant, it was more prejudicial than probative. Further, the court erred in holding that that the prosecutor did not have to give proper notice of his intent to use the bad act evidence.

This Court reviews the admission of evidence for an abuse of discretion. *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998).

During the trial in docket number 259204, the following testimony was elicited from a prosecution witness:

Q. Okay. Where did you first see [defendant]?

A. He was walking in front of our CD, our Media area; our CD's and DVD's.

Q. Okay. And why did you follow him?

A. Because the week prior to that, he had concealed two personal portable MP3 players.

Q. Or at least that's what you thought?

Defense counsel: Judge, I'm going to object.

Q. Is that correct?

A. Yes.

Court: Well, I'll take the answer. I mean, he's not on trial for what may have transpired or may not have transpired the week before. I'm going to let this evidence come in simply to provide you with an explanation of why she did what she did, or why she was focusing on one particular person. So don't read into this, you know, that because he was suspected of taking something previously that he must have done it this day. You certainly cannot do that, and I don't want you to do that, so just be careful with that. Go ahead.

In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), our Supreme Court adopted the approach to other acts evidence enunciated by the United States Supreme Court in *Huddleston v United States*, 485 US 681, 691-692; 108 S Ct 1496; 99 L Ed 2d 771 (1988). *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000).

First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a “determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403.” *VanderVliet, supra* at 75, quoting advisory committee notes to FRE 404(b). Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*Id.* at 55-56.]

In this case, the court found that MRE 404(b) did not apply because Evans's testimony was not being offered to prove that defendant was acting in conformity with his prior acts of shoplifting; rather, Evans's testimony was being offered to explain why she began to follow defendant. We agree with the trial court's determination that this testimony was both relevant and offered for a purpose other than establishing defendant's propensity to commit crimes. Further, although there may have been some minimal prejudice associated with this testimony, the court instructed the jury that it should only consider the evidence for the limited purpose of explaining why the witness began to follow defendant. Juries are presumed to follow their

instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, this claim of error is without merit.

There were no errors warranting reversal or resentencing.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Michael J. Talbot