

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 15, 2014

v

WILLIAM CARLYLE POMEROY, JR.,

Defendant-Appellant.

No. 314219
Tuscola Circuit Court
LC No. 12-102323-FH

Before: GLEICHER, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of child sexually abusive activity, MCL 750.145c(2), capturing the image of an unclothed person, MCL 750.539j(1)(b), possession of child sexually abusive material, MCL 750.145c(4), and surveilling an unclothed person, MCL 750.539j(1)(a). Defendant was sentenced to concurrent prison terms of 22 to 33 years' for child sexually abusive activity, 6 years' and 4 months to 33 years' for capturing the image of an unclothed person, 4 to 15 years' for possession of child sexually abusive material, and 2 years' and 10 months to 15 years' for surveilling an unclothed person. For the reasons set forth in this opinion, we affirm.

FACTS

Defendant's convictions arise from the videotape recording of JT, the 15-year-old daughter of SW, a woman defendant had been romantically involved with. SW testified that on June 15, 2011 she had been in a romantic relationship with defendant for two years and that she and defendant lived together. SW testified that "for the longest time" defendant was in the habit of waking each morning at 6:30 a.m. However, defendant changed his morning habits about three weeks prior to June 15 and began waking 40 to 45 minutes earlier.

On June 15, 2011, defendant woke SW sometime between 6:10 and 6:30 a.m. He asked her if she had seen his SD card that he was unable to find. SW testified that defendant stated that the chip was in his shorts. SW told defendant that the card may have gone into the washing machine, so the two went downstairs to the laundry room to look for it. At that point defendant informed SW that the card contained music and that he had wrapped it in a blue napkin. They did not find the card and defendant left for work.

Later that morning, while SW was doing laundry, she opened the dryer and found an SD card wrapped in a blue napkin. SW put the card into her home computer and a video of her 15-year-old daughter JT appeared on the screen naked and in her bathroom shower. The video was “done” or modified on June 3 at 6:30 a.m.

SW was asked where it appeared the video was shot from and she stated, “[I]f you’re standing taking a shower it would be down in your left-hand corner.” SW testified that there were tiles missing from the shower stall in that area. She stated, “I had noticed one—one morning that one of the tiles looked like it had been kind of pushed in, and I thought, well, that’s strange because I don’t remember it being like that the day before.” SW described the hole as “a good size” and stated that she could see through the hole down into the downstairs bathroom.

SW stated that the downstairs bathroom was “spooky” and “dingy” and seldom used by her and her daughters. SW testified that several months prior to discovering the video, defendant was doing repair work in the downstairs bathroom. SW explained that defendant took apart the ceiling and put insulation on the left-hand side of the lower bathroom but did not finish the right hand side, “which would have been the shell of the tub above.” The prosecution introduced photographs of the ceiling and the upstairs shower. SW explained, “[t]his part of the ceiling that is out, you can see our bathtub upstairs.” SW stated that there was a six-foot- step ladder set up directly under the hole in the ceiling.

SW’s other daughter, ST, testified that one morning when she was about to get into the shower, she saw “something in there and it looked like a video camera.” ST described what she saw as “like blue duct tape, like something—the camera or something was like taped to a stick or something to get it up there.” When asked if she had ever seen blue duct tape in the house before she said she had and that it belonged to defendant.

After SW found the card, she sent a text message to defendant to let him know she had found what he was looking for. She did not tell him she had viewed the video. Defendant called SW and asked her to put the SD card in a bag of rice. At noon that day, defendant unexpectedly came home to retrieve his cell phone charger. SW explained that defendant had a worried look on his face, but he did not ask about finding the SD card. Defendant testified that he did not ask about the SD card because he “had found my chip. That was in the truck. It had fallen out. It was in my truck. So I had my music chip, so I never thought no more of it.”

SW testified that she called the police around 6:00 p.m. Shortly thereafter, SW sent defendant a text message telling him that she had viewed the contents of the SD card and that he was not allowed to return to the house. Officer Ruth Osborne responded to the call and arrived at SW’s home later that evening. Osborne viewed the video and took the SD card into evidence. She also took photographs of both bathrooms. The SD card was admitted at trial and the video was played for the jury.

Defendant was arrested and charged. Before trial, the prosecution sought to introduce other-acts evidence pursuant to MRE 404(b). Specifically, the prosecution sought to introduce evidence concerning defendant’s conduct with his former stepdaughters. In addition, the prosecution sought to introduce evidence that defendant did renovations in the bathroom of his former wife, AD’s home, wherein he left holes near the shower and toilet. Finally, the

prosecution sought to introduce evidence that AD observed defendant watching pornography featuring a girl that appeared to be 12 or 13. The prosecution argued that the other-acts evidence was relevant to prove motive, common plan or scheme, and identity.

Defendant moved to suppress the evidence, arguing that it was not relevant and was unduly prejudicial. The trial court denied defendant's motion to suppress.

At trial, Osborne testified that she executed a search warrant at the home of defendant's parents, where defendant maintained an address. Osborne found a room on the second floor of the residence that she described as "the defendant's bedroom." Osborne found a large compact disc (CD) case that contained approximately 500 pornographic DVDs, "most of which was—is of young girls." Osborne also found several adult magazines with titles such as "barely legal," all depicting either young-looking women or models dressed as young girls. Osborne agreed that none of the material appeared to be illegal.

Defendant's former wife AD testified that she and defendant were married from 2005 to 2010. Defendant did renovations to her home. One of the areas of renovation was in the bathroom, which defendant never finished. AD testified that defendant's renovations left several holes in the floor and walls around the toilet and bathtub.

AD had two daughters, SC and SS, ages 9 and 12, at the time she was married to defendant. AD testified that defendant wanted to install security cameras in teddy bears to monitor the girls' activity. AD refused. AD testified that she once walked in on defendant watching pornography that involved a female who appeared to be "approximately 12 or 13 years old." AD became concerned when her oldest daughter always wanted to sit on defendant's lap. The prosecution asked about the content of this discussion, but the court sustained defendant's objection and the prosecutor did not continue the line of questioning.

SC testified regarding an incident when defendant walked into the bathroom to use the toilet when she was in the shower. SS testified that defendant occasionally walked into the bathroom when she was showering. On another occasion, SS explained that "I was taking a bath and I thought I saw somebody looking in where the stopper is." According to AD, the stopper cap was one of the areas of the tub defendant had been working on. At the time, SS went downstairs to investigate and "didn't see anything that jumped out at" her. She stated that defendant was in the basement.

Officer Geoff Boyer took photographs of AD's home as part of the investigation and those photographs were admitted at trial over the defendant's objection. Boyer testified that he discovered a low-voltage transformer that he felt was in an "odd place" behind the wall in the bathroom at AD's house. The prosecution asked if the transformer could have been used to power a video camera and he answered, "I believe so, yes."

Defendant was convicted and sentenced as set forth above. This appeal ensued.

ANALYSIS

I. OTHER-ACTS EVIDENCE

Defendant argues that the trial court erred in admitting other-acts evidence that (1) AD saw him watching pornography featuring a girl who appeared “approximately 12 or 13 years old,” (2) defendant made renovations to AD’s bathroom that left holes near the tub, (3) evidence that SS saw an eye “looking at her” while she was in the shower, and (4) evidence that defendant wanted to place cameras in his stepdaughters’ teddy bears.

We review a trial court’s decision to admit or exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Preliminary issues regarding whether evidence is admissible under the rules of evidence involve questions of law that we review de novo. *Id.*

MRE 404(b)(1) governs the admissibility of other-acts evidence and 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, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), evidence must be offered for a proper purpose, it must be relevant, and the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403, and, finally, a trial court may provide a limiting instruction if requested. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994).

In this case, evidence of the pornography was admissible for the proper purpose of proving identity and motive. Other-acts evidence is admissible to prove identity when there exists “some special quality or circumstance of the bad act tending to prove the defendant’s identity. . . .” *People v Golochowicz*, 413 Mich 298, 312; 319 NW2d 518 (1982). Here, evidence that AD saw defendant viewing pornography featuring a young female tended to show that defendant had a sexual interest in young girls. Defendant’s conduct incorporated a unique quality or circumstance in that it involved viewing pornography featuring young females. This evidence was relevant to prove the identity of the person who filmed JT. The jury could have inferred that defendant had a sexual interest in young females, and that, in order to satisfy the interest, he refurbished SW’s bathroom so that he could view and film JT while she was naked in the shower. For the same reasons, the evidence also tended to show that defendant had motive to commit the crime—i.e. he had motive to view and film JT when she was naked in order to satisfy the sexual interest he had in young girls.

Evidence that defendant renovated AD’s bathroom and left holes in the bathroom near the tub and evidence that SS observed an eye looking at her while she showered was admissible to prove that defendant acted according to a common plan or scheme in this case. “[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.” *People v Hine*, 467 Mich

242, 251; 650 NW2d 659 (2002). “For other acts evidence to be admissible there must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan.” *Id.*

In this case, evidence of defendant’s previous conduct at AD’s house shared common features with the charged conduct in this case such that the prior conduct and the charged conduct evinced a common plan or scheme. In particular, defendant would renovate in and around the bathrooms of his female companions in a manner that would allow him to view young girls as they showered or bathed. At AD’s home, defendant altered the bathroom and left holes near the shower. Similarly, in this case, defendant altered the bathrooms in SW’s home in a manner that left a small viewing hole near the shower that JT used. Evidence supported that defendant took advantage of his handiwork in both homes in a similar manner when he used them to view a young girl showering or bathing. Evidence that defendant employed his common plan or scheme was relevant in this case in that it supported the inference that defendant was the person that recorded JT in the shower. In this respect, the evidence showed that defendant’s modus operandi was to view girls from bathrooms that he renovated, which in turn shed light on the identity of the perpetrator.

AD’s testimony that defendant wanted to place security cameras in the teddy bears of his stepdaughters was also admitted for a proper purpose. The evidence showed that defendant was familiar with video recording devices, which in turn was relevant to prove identity in this case. A jury could have inferred that defendant was the person who recorded JT because he was familiar with video recording devices. Furthermore, evidence that police found a transformer installed on the wall of AD’s bathroom supported the inference that defendant used video recording devices. A police officer testified that the transformer could have been used for a video recorder and there were holes in the bathroom at AD’s house; this would have allowed a trier of fact to infer that defendant intended to record his stepdaughters in the shower. This evidence, when considered in conjunction with evidence that defendant possessed SD cards supported the inference that part of defendant’s common plan or scheme was to use recording devices to record young girls. This, in turn, supported the inference that defendant was the individual who recorded JT.

Finally, the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403.¹ Evidence is unfairly prejudicial under MRE 403 when the evidence tends to inject “considerations extraneous to the merits of the lawsuit, e.g., the jury’s bias, sympathy, anger, or shock.” *People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011) (citations and quotation omitted). “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

In this case, while the other-acts evidence was damaging to the defense, it was not unfairly prejudicial. See *People v Eliason*, 300 Mich App 293, 302; 833 NW2d 357 (2013)

¹ Defendant does not contend that the trial court failed to provide a requested instruction. Thus, the fourth prong of the *VanderVliet* analysis is not implicated.

[“The mere fact that evidence is damaging to a defendant does not make the evidence *unfairly* prejudicial” (emphasis in original)]. Here, the other-acts evidence was relevant to prove identity and motive and to show that defendant acted according to a common plan or scheme in committing the charged offenses. In these respects, the evidence was highly probative. In addition, there was no danger that the jury gave the evidence undue or preemptive weight. *Crawford*, 458 Mich at 398. There was substantial other evidence in this case that supported the inference that defendant committed the charged offenses. In particular, SW found an SD card that matched the card defendant stated that he lost. Defendant performed renovation work on SW’s bathroom that left holes near the shower, creating the opportunity to record the video. Furthermore, the evidence was not unnecessarily cumulative, it did not confuse the issues or mislead the jury and the trial court properly instructed the jury regarding the burden of proof and the presumption of innocence.

In sum, the trial court did not abuse its discretion in admitting the other-acts evidence under MRE 404(b).

II. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor engaged in misconduct during closing argument.

“This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial.” *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Where, as in this case, a defendant fails to object in the lower court, the issue is reviewed for plain error affecting substantial rights. *Id.*

In her closing statement, the prosecutor stated:

The other allegation and what we fully believe and what we actually hope that you see from the evidence is that this video was made for a sexual purpose. What other reason could there be? Why else would you tape someone naked in the shower? The Jerry Sandusky defense, I’m trying to make sure the hygiene is proper? What other reason is there? We challenge you to think of another reason. There isn’t.

“Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial.” *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). “A prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief and is not required to state inferences and conclusions in the blandest possible terms.” *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Here, the context in which the comments were made does not indicate that the prosecutor was attempting to link defendant and Jerry Sandusky or suggest that the cases were similar. Instead, the remark was made in response to defendant’s theory that the video recording was not erotic. The prosecutor attempted to show that the defense was devoid of merit. Moreover, to the extent the comment was improper, it was limited and the prosecutor did not focus on Sandusky in her closing argument. In addition, the trial court instructed the jury that “[t]he lawyers’

statements and arguments are not evidence” and that the jury should not let prejudice influence their decision. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) (“It is well established that jurors are presumed to follow their instructions.”). In short, the prosecutor did not commit misconduct that denied defendant a fair trial.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that trial counsel rendered ineffective assistance.

“A claim of ineffective assistance of counsel presents a mixed question of law and fact. This Court reviews a trial court’s findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim.” *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011) (citations omitted). Because no evidentiary hearing was held, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

To establish a claim of ineffective assistance of counsel, a defendant must show that trial counsel’s performance was (1) deficient on an objective standard of reasonableness and (2) “the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant argues that counsel was ineffective when he argued that the video of JT was not “sexually abusive material” under the statute as follows:

Sexual excitement or erotic nudity. I don’t see any of those when I look at that film at all. With due respect to the young lady, we see a large female. When I picture erotic nudity, sexual intercourse, erotic fondling, I’m looking for a blond, blue-eyed lady with voluptuous breasts showing off various parts of her body, rubbing, caressing, to get excited so you don’t need Viagra. That doesn’t happen in this particular case.

* * *

When you look at these types of definitions, you’re looking for something to get you excited, to get a male excited. When you look at that, to me it’s gross, offensive.

Then they go on to say what erotic nudity is. It’s “The lascivious exhibition of the . . .” genitalia. That means you’re demonstrating the female genitalia here. You’re playing with it. You’re doing something with it. You’re manipulating it.

Defendant argues that the comments about the complaining witness’s weight and appearance “color[ed] the jury’s perception” of defendant in a negative way. Defendant argues that there was “no justifiable reason for such comments to be made by counsel.”

Counsel made a strategic decision regarding how to best proceed with a defense. He attempted to argue that defendant could not have possessed child sexually abusive material because the video did not meet the statutory definition. Counsel spoke frankly about the definition of “erotic nudity,” which is required under the statute, and he argued that the nudity depicted in the video was not “erotic,” in part by commenting on the witness’s physical appearance. Counsel made a strategic decision to argue that the video was not lewd or lustful and did not tend to produce lewd emotions. To do so, counsel necessarily had to address and characterize the contents of the video. Merely because the strategy was unsuccessful does not render it objectively unreasonable. See *People v Rice*, 235 Mich App 429, 445; 597 NW2d 843 (1999) (“[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel’s competence with the benefit of hindsight.”)

Defendant also asserts that defense counsel’s failure to file a motion in limine before trial constituted ineffective assistance. Specifically, defendant argues that defense counsel should have moved in limine to exclude evidence that his ex-wife’s daughter liked to sit on his lap, and evidence that defendant watched a National Lampoon movie that contained nudity in the presence of his stepdaughters. Defendant argues that although defense counsel successfully objected to the introduction of this evidence at trial, the damage had already been done because the prosecutor asked the question and the jury heard the answer. Defendant argues that counsel’s failure was particularly egregious because the trial court invited defendant to file the motion in limine when granting the motion to admit the other-acts evidence.

Counsel objected when the prosecutor attempted to introduce prejudicial evidence. Counsel was prepared for the objection and could have concluded that it was better to object at trial on a question-by-question basis as opposed to filing a motion. Moreover, even if counsel should have filed a motion in limine, defendant cannot show that, but for counsel’s failure, the result of the proceeding would have been different. *Carbin*, 463 Mich at 600. There was substantial other evidence establishing defendant’s guilt and the trial court sustained counsel’s objections to the evidence and instructed the jury not to consider evidence that it had stricken from the record. See *Graves*, 458 Mich at 486 (jurors are presumed to follow their instructions).

IV. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the evidence presented by the prosecutor failed to prove every element of the crimes of child sexually abusive material/activity, MCL 750.145c(2), and possession of child sexually abusive material, MCL 750.145c(4), beyond a reasonable doubt.

We review a defendant’s challenge to the sufficiency of the evidence de novo to determine whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact that every element of the charged offenses were proven beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991).

Defendant argues that the video in question does not meet the statutory definition of child sexually abusive material.

In relevant part, MCL 750.145c(2) proscribes making or producing “child sexually abusive material,” and MCL 750.145c(4) proscribes “knowingly possessing” “child sexually abusive material.”² “Child sexually abusive material” is statutorily defined in relevant part as “any depiction . . . of a child . . . engaging in a listed sexual act.” MCL 750.145c(1)(m).³ “Listed sexual act” includes “sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or *erotic nudity*.” MCL 750.145c(1)(h) (emphasis added). For purposes of this case, “erotic nudity” means “the lascivious exhibition of the genital, pubic, or rectal area of any person,” and “lascivious” means “wanton, lewd, and lustful and tending to produce voluptuous or lewd emotions.” MCL 750.145c(1)(g).

Defendant argues that the video of JT showering was not “erotic nudity,” as argued by the prosecution, because it was not a “lascivious exhibition of the genital, pubic, or rectal area of any person.” Instead, defendant argues, the video merely depicted nudity, which is not proscribed by statute and is a protected form of speech under the First Amendment.

Contrary to defendant’s argument, the video recording did not constitute a constitutionally-protected form of speech. While “innocent” or “innocuous” child nudity may not amount to “erotic nudity,” *People v Riggs*, 237 Mich App 584, 590-592; 604 NW2d 68 (1999), in this case, there was sufficient evidence to prove that the video of JT amounted to a depiction of erotic nudity in that it constituted a wanton, lewd, and lustful depiction of JT’s genital, pubic or rectal area that tended to produce voluptuous or lewd emotions. Specifically, SW testified that JT’s breasts and genital area was visible on the recording. She was in the shower and unclothed. A reasonable jury could have concluded that the recording was wanton, lewd, and lustful and produced lewd emotions in defendant. Evidence showed that defendant had a sexual interest in young girls, which shed light on his motive for making the recording. The recording was not innocent. It was made surreptitiously in a manner intended to produce sexual gratification. Defendant placed the camera in an area of the home that assured he would capture JT in a state of undress. The jury was properly instructed on the statutory definition of “erotic nudity,” and the word “lascivious.” It was reasonable for the jury to conclude that the reason defendant, an adult man, would surreptitiously videotape a teenage girl naked and in the shower was for wanton, lewd and lustful purposes and that it produced lewd emotions in defendant. In short, there was sufficient evidence to allow a rational jury to convict defendant of the charged offenses beyond a reasonable doubt.

² It is undisputed that JT was a “child” for purposes of these statutes. See MCL 750.145c(1)(b) (a “child” is a person who is less than 18 years old).

³ This definition is codified as MCL 750.145c(1)(o) in the current version of the statute as amended by 2012 PA 53. The current version of the statute applies to events taking place on or after March 1, 2013. The statute in effect at the time of the events in this case was adopted as 2004 PA 478. References in this opinion are to the statute in effect at the time the events in this case occurred.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Deborah A. Servitto