STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2009
v	No. 286546 Calhoun Circuit Court
TROY YATES DEAL, Defendant-Appellant.	LC No. 2007-003158-FH

Before: Beckering, P.J., and Cavanagh and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of using a computer to communicate with another person to solicit the production of child sexually abusive material, MCL 750.145c(2), MCL 750.145d(1)(a), using a computer to communicate with another person to solicit the distribution of child sexually abusive material, MCL 750.145c(3), MCL 750.145d(1)(a), and nine counts of using a computer to accost, entice or solicit a child for immoral purposes, MCL 750.145a, MCL 750.145d(1)(a). The trial court sentenced defendant to serve 48 to 240 months in prison for using a computer to solicit the production of child sexually abusive material, 18 to 120 months in prison for using a computer to solicit the distribution of child sexually abusive material, and 18 to 120 months in prison for each of the nine counts of accosting, enticing or soliciting a child for immoral purposes. The trial court ordered the sentences to run concurrently. Because there were no errors warranting a new trial, we affirm defendant's convictions. However, because we conclude that the trial court erred in the scoring of defendant's sentencing guidelines, we vacate defendant's sentences and remand for resentencing.

Defendant first argues that the trial court erred when it refused to suppress the statements he made to Special Agent James May. We review a trial court's findings of fact during a suppression hearing for clear error, "giving deference to the trial court's resolution of factual issues." *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). We review "de novo the trial court's ultimate decision on a motion to suppress." *Id.*

"When a defendant invokes his right to counsel, the police must terminate their interrogation immediately and may not resume questioning until such counsel arrives. However, the defendant's invocation of his right to counsel must be unequivocal." *People v Tierney*, 266 Mich App 687, 710-711; 703 NW2d 204 (2005) (citations omitted). Thus, a police officer does not have to cease questioning a suspect where the suspect makes an ambiguous reference to his

or her right to have counsel; the suspect must articulate his or her desire in such a way that a reasonable police officer would understand the statement to be a request for an attorney. *Davis v United States*, 512 US 452, 459; 114 S Ct 2350; 129 L Ed 2d 362 (1994).

In this case, defendant did not make an unequivocal request for counsel. *Tierney*, 266 Mich App at 711. Rather, defendant merely inquired about whether he could call an attorney. After May told defendant that, if he called an attorney, they would have to cease speaking, defendant elected to continue speaking with May. May testified that he did not feel that defendant was actually requesting an attorney with his question. May and another agent also testified that they did not hear defendant tell his wife that he needed an attorney. Because defendant did not unequivocally invoke his right to counsel, it was not improper for the officers to continue speaking with defendant and the trial court correctly concluded that defendant's statements should not be suppressed. *Id*.

Defendant also argues the trial court erred when it permitted the admission of the transcripts of defendant's online chats with an officer for an improper purpose under MRE 404(b). 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).

Evidence of other crimes, wrongs, or acts is admissible if relevant for a proper purpose under MRE 404(b)(1) and if the probative value of the evidence is not substantially outweighed by unfair prejudice. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). Evidence of misconduct similar to that charged may be admissible to show that the charged act occurred if the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they were manifestations of a common plan, scheme, or system. *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). See also *People v Pesquera*, 244 Mich App 305, 318-320; 625 NW2d 407 (2001).

In this case, Czar401's online chats with Spyder_Gurl were sufficiently similar to the online chats with Qtpie, Gingergirl_Gingergirl, and N_Ur_Dreams_13, to infer the existence of a common scheme, plan, or system. *Pesquera*, 244 Mich App at 319. The common features include conversations about: (1) the desire to have anal sex, (2) the desire to have sex "doggie style," (3) the girl getting ejaculate on her face, neck, or body, (4) the girl bringing a friend to the encounter with defendant, and (5) the girl and her friend watching each other have sexual relations. Given these similarities, we conclude that the trial court did not abuse its discretion in admitting the other-acts evidence under the common scheme, plan, or system theory of logical relevance. *Id*. Also, because defendant generally denied his guilt by initially indicating that he did not conduct any of the online chats, all the elements of the charged offenses were at issue, which included his intent. *Sabin*, 463 Mich at 60. Defendant ultimately argued that he did not intend to commit the crimes and that he was just chatting with girls and not specifically targeting underage girls. Consequently, because the chats with Spyder_Gurl contained similar explicit sexual conversations with another fourteen-year-old girl, the chats with Spyder_Gurl were relevant to show that defendant intended to have explicit sexual conversations with underage girls.

Additionally, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence of intent or common scheme, plan, or system such that the evidence should have been excluded. The evidence was highly probative of intent and common scheme, plan, or

system. *Pesquera*, 244 Mich App at 320. And, the trial court gave the jury a limiting instruction that adequately protected defendant's rights. *Id*. Consequently, the trial court did not abuse its discretion in admitting the evidence to establish intent and common scheme, plan, or system. *Id*. at 319-320.

Defendant next argues that the prosecutor engaged in misconduct by resorting to an improper civic duty argument and that resort to that argument deprived him of a fair trial. Where issues of prosecutorial misconduct are preserved, we review them de novo to determine if the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). Issues of prosecutorial misconduct are reviewed "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *Id*. at 454.

A prosecutor may not make "civic duty arguments that appeal to the fears and prejudices of jury members." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Civic duty arguments are improper because they "inject issues into the trial that are broader than a defendant's guilt or innocence and because they encourage the jurors to suspend their own powers of judgment." *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). A prosecutor also may not make arguments that appeal to the sympathy of jurors. *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988). "Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial. They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Unger*, 278 Mich App 210, 235-236; 749 NW2d 272 (2008) (citations omitted).

At trial, defendant's trial counsel argued that defendant's chats were fantasy and he did not intend to actually meet with underage girls or to obtain pictures from them. In response, the prosecutor argued that the chat logs indicated that it was more than mere fantasy to defendant:

> Now suppose you have a 14-year-old child and suppose you walk into their bedroom, their computer's in their bedroom. You happen to turn on their computer and start taking a look through their computer as some parents do and in the course of looking through their computer, you happen to come across chats like this, you happen to see that your daughter or your niece or your granddaughter is talking to somebody named Czar401 and that he's saying to your daughter, your granddaughter, your aunt the same things that's in those chat logs that are admitted as exhibits here. I ask you, Ladies and Gentlemen, would you have any doubt as to the intentions of that person towards your daughter, your granddaughter, your niece?

Although it is a close question, after examining the comments in context, we conclude that the prosecutor did not make an improper civic duty argument or improperly invoke sympathy for a hypothetical victim.[1] The prosecutor did not argue that it was the jury's duty to

[1] We strongly caution the prosecutor from making arguments that invite the jury to place themselves in the position of the victim or the victim's family. Such arguments are rarely necessary to make points such as the one the prosecutor made in this case and invite appellate
(continued…)

convict defendant because he was a bad man who needed to be in prison where he could no longer harm children or that the jury must convict defendant to help stop the growing problem of Internet predators. See *Bahoda*, 448 Mich at 282. The prosecutor also did not argue that, even though the alleged victims were not actually fourteen-year-old girls, a young victim and her family would be entitled to justice based on the terrible things that defendant said to the victims. See *Swartz*, 171 Mich App at 372. Rather, although the prosecutor invoked imagery of actual victims, the prosecutor's comments were directed at the evidence adduced at trial and were a proper response to defendant's theory of the case. Therefore, they were not improper. *Bahoda*, 448 Mich at 282. And, the trial court sufficiently instructed the jurors so as to preclude any minimal prejudice that might have resulted by the form of the hypothetical posed by the prosecutor. Defendant was not denied a fair and impartial trial by this limited comment. *Thomas*, 260 Mich App at 453.

Defendant finally argues that the trial court improperly scored offense variable (OV) 10 at 15 points without evidence that he engaged in predatory conduct. See MCL 777.40. In *People v Russell*, 281 Mich App 610, 615; 760 NW2d 841 (2008), the Court determined that because the alleged victim was not an actual fourteen-year-old girl, but a special agent, no points could be assessed under OV 10. We are bound to follow *Russell*. MCR 7.215(C)(2). Therefore, we agree with defendant that the trial court erred when it scored OV 10 at 15 points because the record does not support such a scoring. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). When OV 10 is properly scored at zero points, it alters the minimum sentencing range for each of defendant's offenses. Accordingly, we must vacate defendant's sentences and remand for resentencing. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

We affirm defendant's convictions, but vacate his sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly

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