STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

CR 2019-272593-FC
HON. JAMES ALEXANDER

NICHOLAS MAXIMILLIA REMINGTON,

Defendant.
_____/

JESSICA R. COOPER (P23242)
OAKLAND COUNTY PROSECUTING ATTORNEY
1200 NORTH TELEGRAPH ROAD
PONTIAC, MI 48341

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36400 WOODWARD AVE., SUITE 210
BLOOMFIELD HILLS, MI 48304-0913
ATTORNEY FOR DEFENDANT
_____/

NOTICE OF HEARING

PLEASE TAKE NOTICE that the following motion will be brought on for hearing on Wednesday, February 26, 2020, at 8:30 AM before the Honorable James Alexander in the 6th Judicial Circuit for the County of Oakland, 1200 N. Telegraph, Pontiac, Michigan, or as soon thereafter as counsel may be heard.

PEOPLE'S MOTION TO ADMIT SIMILAR ACTS EVIDENCE AT TRIAL PURSUANT TO MRE 404(b)

NOW COMES Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Beth M. Hand, Assistant Prosecuting Attorney, and states as follows:

1. That the Defendant is charged by way of General Information with: delivery of a controlled substance causing death.

2. That the offenses occurred on March 18, 2019, through March 19, 2019.

3. That a preliminary examination was held on September 27, 2019, and October 16, 2019, in the 52-1 Judicial District Court.

4. That the controlled substance Defendant delivered that resulted in the death of Denis Preka was 3, 4-methlyenedioxymethamphetamine (MDMA) commonly known as Molly or meth or Ecstasy.

5. That the Defendant captured the decedent's reaction to the drug up to including the decedent's point of being unresponsive and laying in the position where he was ultimately found deceased.

6. That the Defendant shared these videos on an application called Snapchat.

7. That a search warrant executed on Defendant's Snapchat account revealed numerous other videos the Defendant took of other individuals obviously reacting to drugs.

8. That the Defendant uses similar vernacular in those videos.

9. That a similar plan, scheme or system in doing an act can clearly be evidenced by these other videos in relation to the Defendant's actions in the instant case. The details are more thoroughly developed in the attached brief.

10. That in order for this Honorable Court to make its determination of the relevancy of these additional videos the People have attached them to these pleadings and respectfully request the Court view them.

11. That additionally, the People intend on introducing the facts and circumstances regarding Defendant's prior possession of MDMA on or about December 5, 2017, more thoroughly explained in the attached brief.

12. That further, the People intend on introducing Defendant's offer to sell methamphetamine on various occasions in 2017 to Joshua Anapoell and Defendant's statements to Anapoell that the robbers got his money but not his drugs and then showed Anapoell a bag of pills. The facts and circumstances more fully described in the accompanying brief.

13. That copies of the police reports, the results of a cell phone examination of Defendant's phone, the interview of Joshua Anapoell are being provided to Defendant with this motion.

14. That the purpose of the introduction of the evidence is to show the Defendant's identity of the possessor of the Snapchat account utilized, the identity of the person who delivered the drugs that killed Denis Preka, the identity of the person speaking in the videos depicting the reaction of Denis Preka to the drugs delivered to him, and the similar scheme, plan or system of acting utilized by the Defendant in the past.

15. That the case is not yet set for trial.

16. That the People place the Defendant on notice (pursuant to MRE 404(b)) that they intend to introduce, as part of their case-in-chief, the facts and circumstances surrounding the aforementioned offenses, which are more fully explained in the accompanying brief.

17. That by pleading not guilty, a defendant places in issue every element of the crime charged.

18. That MRE 404(b) states: "1) Evidence of other crimes, wrongs, or acts, is not admissible to prove the character of a person in order to show action and 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 crimes, wrongs, or acts, are contemporaneous with, or prior or subsequent to the conduct at issue in this case.

19. That the aforementioned evidence is also admissible pursuant to *People v VanderVliet*, 444 Mich 52 (1993).

20. That the aforementioned evidence is admissible pursuant to MRE 404(b) and *People v Vandervliet*, *supra*, because: a) the evidence is relevant to an issue under MRE 404(b) evidence other than propensity to commit a crime; b) the evidence is relevant under MRE 402; c) the probative value is not substantially outweighed by the danger of unfair prejudice under MRE 404(3), and d) the trial court may provide a limiting instruction under MRE 105. Further, due to the closeness in time of at least two of the offenses and the similarity between the activity, a nexus has been shown pursuant to *People v Crawford*, 458 Mich 376 (1998).

21. That reasonable notice in advance of trial of the intent to introduce such evidence as required by MRE 404(b)(2) has been given.

WHEREFORE, the People respectfully request this Honorable Court grant their motion to introduce MRE 404(b) evidence as part of their case-in-chief.

I declare that the foregoing statements are true to the best of my information, knowledge, and belief.

Respectfully submitted,

JESSICA R. COOPER
PROSECUTING ATTORNEY

By: Beth M Hand
Beth M. Hand
Assistant Prosecuting Attorney

DATED: FEBRUARY 19, 2020

STATE OF MICHIGAN

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BRIEF IN SUPPORT OF THE PEOPLE'S MOTION TO ADMIT SIMILAR ACTS EVIDENCE AT TRIAL PURSUANT TO MRE 404(b)

Defendant is charged with one count of delivery of a controlled substance causing death. The People intend on introducing other acts evidence in their case-in-chief. On the morning of March 19, 2019, members of the Novi Police Department were dispatched to 23132 Meadowbrook Road on a call of a subject who was having difficulty breathing. Officers responded to the location within minutes. Officer Hashim testified at the preliminary examination that upon arrival to the home he observed Denis Preka, the victim, lying on the floor in the foyer of the home. Denis Preka was pronounced dead. Other officers and the homeowner's son, Paul Wiedmaier were present when he arrived. Approximately 25-30 minutes after Officer Hashim arrived a male by the name

of Connor (later identified as Connor Gibaratz) came to the scene. [Preliminary Examination Transcript Volume 1 – hereinafter PETV1 – pages 10-14.]

Detective Balog testified that he arrived on the scene. The decedent, Denis Preka was lying "on his right side, there was obvious rigor and lividity to his body. He did have some vomit on the left side of his head – what appeared to be vomit, I should say. His head was facing east He was propped up. He had a – I believe it was a speaker and a gas can was propping up him." [PET V1 – page 21.] He further explained that it was absolutely apparent to him that the victim was deceased and appeared he had been so for some time. [PET V1 – pages 21-22.]

Through the course of the investigation into the death of Denis Preka, Detective Balog learned that Defendant had shared via the Snapchat application numerous videos of the events leading to the death of Denis Preka. Detective Balog received the videos from various sources and then again at a later date in response to a search warrant served upon Snap, Inc. Additionally, he received the Defendant's subscriber information and text messages that had been sent by utilizing the Snapchat application. The videos and the snapchat text messages were admitted into evidence at the preliminary examination. (Attached as Exhibit 1).

When asked if he could distinguish between the voices of the Defendant, Paul Wiedmaier, and Connor Gibaratz, Detective Balog indicated that he could. [PET V1 – page 26.] Defendant's attorney objected to the detective's ability to testify as to who's voices were being heard on the above referenced videos. The district judge overruled Defendant's objection. Detective Balog explained that some of the videos contained filters or overlays which are words or images that are placed on the video that are seen while the video is being viewed. The wording on the overlay's are as follows:

1) "He fucking know how ta srunit. Going straight cross-eyed up in this bitch. GAME OVER. TIME TO SLEEP." [PET V1 – pages 98-99.] Detective Balog testified the

voice in the video belongs to Defendant and he is saying "Keep your eyes straight dammit." The same voice states, "Eyes straight, eyes straight, yeah, this is the best moment of your life, run it baby."

2) "I just want him to stop being cross-eyed. I spoke to Jesus. He said he wanted my guardian angels. WAVE CHECK." Detective Balog testified the loudest voice in the video belonged to Defendant. [PET V1 – page 99.] That voice states: Hit it from the back Denis, run it. Pull it across. Run it.
3) "You can't handle the truth. The old whistle trick will get him boyz."
4) "You got an exam at 8 am? That's what the coffees for."
5) "He ripped himself a new vagina. Judgment day." (A circle is drawn around his crotch).
6) "This man wins the Oscar for best drama."
7) "Not an order in art individual. Wait for it, lower himself on face. CAN'T SLEEP"
8) "Who else is up RN?'
9) "It's Watering Time!"

The Snapchat text messages provided for Defendant's account as a result of the search warrant evidence numerous conversations regarding the sale and distribution of numerous drugs including Molly (MDMA). It was stipulated for exam purposes that the cause of death of the decedent was the ingestion of the controlled substances 3,4 methylenedioxymethamphetamine (MDMA) and a metabolite (MDA). [PET VI– pages 4-5.] One of the text messages on the Defendant's account on the morning of the decedent's death read as follows:

Incoming: "U give that dude meth"

Response: "Methylone and some moll." [PET VI– pages 132-133.]

Sergeant Jennings was qualified as an expert in the area of narcotics trafficking. Sergeant Jennings reviewed the numerous text messages and indicated that **many** of the messages were

consistent with the sale of drugs. Defendant referred to himself as "the plug" which is the term used to call yourself a supplier of drugs. [PET VI – page 134.] Additionally, Sergeant Jennings indicated that Molly is the powder form of Ecstasy and both are MDMA also known as 3,4 methylenedioxymethamphetamine. Defendant in many texts indicates he has Mol (Molly) for sale. Defendant trades valuables for drugs. The text messages occur on dates both prior to and after the death of Denis Preka. As noted by Judge Reeds, the day after the victim died, Defendant is back selling the same drug that killed him. [Preliminary Examination Transcript Volume II – page 32.]

That on December 4, 2017, members of the University of Michigan police department were summoned to 541 Thompson Street #4068 Williams House in Ann Arbor on reports of an armed robbery. Defendant and his friends claimed they had been robbed. The Defendant and his two friends were each interviewed separately. Defendant and his friends alleged that three black males entered his door room while he and his friends were working on a project. Defendant alleged one of the males introduced himself as Brian White. The details of the alleged armed robbery were fully explained in the police report. The People do not intend to introduce nor litigate the robbery. However, during the course of the investigation, the Defendant became uncooperative with the police. Officers obtained a search warrant for Defendant's room and forensically analyzed his cellular phone. The People intend on introducing messages discovered in the phone. The messages themselves are not subject to an MRE 404(b) analysis as they are statements, not acts. *People v Hartwick*, COA number 332391, dec'd August 17, 2017 (unpublished; copy attached).

It was shortly after this alleged armed robbery that Defendant ran into Josh Anapoell. Josh Anapoell will testify that he knew the Defendant from school and that they lived in the same dormitory. Defendant told Anapoell that "they stole my money and my phone but didn't get my drugs." Defendant then showed Anapoell a bag containing drugs and told Anapoell that the bag

contained Molly and tabs. Further, per Anapoell Defendant would offer to sell him drugs every time he saw him.

In addition to the testimony of Anapoell, the People intend on introducing Snapchat videos secured from the search warrant execution. These videos (attached as Exhibit 2 for the Court's review[1]) demonstrate a similar scheme or plan or system used by the Defendant in the past as well as his identity as the maker of the video and one of the speakers (his voice) in the videos in the instant case. Defendant challenged at preliminary examination the People's ability to prove the identity of the speakers in the video of the victim's reaction leading up to his death. In the additional videos it is clear the Defendant's voice is the same, his laugh is the same, his lingo/terminology/verbalization is the same, and importantly he is taping other people reacting terribly to the ingestion of what a reasonable person based on circumstantial evidence would conclude is a controlled substance. Of equal importance to the video portion of the clips is the audio portion of the clips which identifies Defendant's voice and his use of similar lingo/terminology/verbalization. In the videos (which were created in the early morning hours of March 18, 2019, less than 24 hours prior to the video in the instant case) the Defendant uses identical terms as used in the video of the instant case: his use of the terms "Go, go, go ,go"; "Runit"; " Faster, faster, faster"; "Yeah buddy"; "Fuckin runit"; and "Hit it". Defendant's word choice is nearly identical in narrating the clips. The clips also have the same Memoji or Bitmoji overlay as in some of the clips from the instant case. In two of the videos, males are either vomiting or have vomited just as Denis Preka. One of the males is taped drinking water after vomiting. The relevancy is clear when viewed in conjunction with the videos of Denis Preka. The Defendant pours water on Denis Preka while he is clearly unconscious making statements like "Clean as a

1 All attached exhibits have been provided now or previously to defense counsel.

whistle" and commenting on the need to hydrate. As indicated above, Detective Balog observed that the victim, Denis Preka, too had vomited.

ARGUMENT

The Michigan Supreme Court, in *People v VanderVliet*, 444 Mich 52 (1993), completely revamped the law as it applied to other acts evidence. The court ultimately overturned the four-pronged test as set forth in *People v Golochowicz*, 413 Mich 298 (1982), and stated, "The *Golochowicz* 'test' does not set the standard for the admissibility of other acts evidence." *VanderVliet*, *supra*, at 65. The court began its analysis of other acts evidence with the understanding that logical relevance of admissible evidence is determined by the Michigan Rules of Evidence 401 and 402. MRE 401 states as follows:

> 'Relevant evidence' means 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.

MRE 402 states:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

The court further determined that MRE 404(b) is a rule of legal relevance, as opposed to logical relevance, which limits the use of evidence that is logically relevant. *VanderVliet*, *supra*, at 62. MRE 404(b) states:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted 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.

The *VanderVliet* court held that MRE 404(b) excludes only one category of logically relevant evidence. The court stated:

> If the proponent's only theory of relevance is that the other act shows defendant's inclination to wrongdoing in general, to prove that the defendant committed the conduct in question, the evidence is not admissible.

Id., at 63 (1993).

Furthermore, the court stated: "Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *Id.*, at 65 (1993). The court quoted professor Imwinkelried's treatise on uncharged misconduct evidence extensively throughout the opinion and his analysis permeates the decision. At page 63, the court noted the reasoning for excluding other acts evidence when the proponent's only theory of relevance is that to prove a defendant's inclination to commit a crime, the court cited Imwinkelried, stating as follows:

> When the proponent uses the defendant's subjective character as proof of conduct on a particular occasion, there is a substantial danger that the jury will overestimate the probative value of the evidence. Imwinkelried, Uncharged Misconduct Evidence, §2:18, pp 48-49.

The court then proceeded to explain each of the prongs of the *Golochowicz* test, indicating why that test was no longer good law. First, the *VanderVliet* court rejected a requirement that the prosecution show a "distinctive similarity between other acts and the charge at issue." *VanderVliet*, *supra*, at 69. MRE 404(b) relevance does not require "a high level of similarity between the proffered other acts evidence and the act charged. *Id.*, at 69-70. However, a showing of similarity is required where "the evidence is proffered to rebut innocent intent. . . consciousness of wrongdoing." *Id.*, at 69. Nevertheless, the similarity requirement to address the element of intent "dictates only that the charged crime and the proffered acts 'are of the same general category.'" *Id.*, at 80 (quoting Imwinkelried, Uncharged Misconduct Evidence, §3:11, p. 23.)

Third, the *VanderVliet* court maintained the *Golochowicz* requirement that "the proffered evidence be relevant to some matter in issue." *VanderVliet*, *supra*, at 70. The court clarified,

however, that this requirement does not limit a determination of relevancy until the defendant actually raises the issue at trial. *Id.* Quite the contrary, "a plea of not guilty puts the prosecution to its proofs regarding all elements of the crime charged." *Id.*, at 78. The court explained:

> [A] tactical general denial by a defendant does not prevent the prosecutor from introducing other acts evidence at trial. The other acts evidence is relevant to, and probative of, the defendant's innocent intent. . .
>
> A general denial presumptively puts all elements of an offense at issue.

VanderVliet, *supra*, at 78. "In short, a defense need not be formally set up to create an issue clearly within the facts." *Id.*, at 79. Essentially, unless the defendant stipulates to an element, such as intent, the element is a material fact in issue. *Id.* Even if not specifically addressed by the defense, a jury will still require that the prosecution prove intent and, accordingly, lack of innocent intent. The court explained this type of proof:

> This theory of relevance is often referred to as the "doctrine of chances." This theory is widely accepted although its application varies with the issue of mens rea, it rests on the premise that "the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently."

VanderVliet, *supra*, at 79, fr 35. However, as mentioned previously, <u>similarity need not be shown</u> [emphasis added] when the other acts evidence is offered to show absence of mistake. *VanderVliet*, *supra*, at 80, fr 37. The court explained:

> The final exception listed in Rule 404(b) "absence of mistake or accident," is simply a special form of the exception that permits the use of other crimes to prove intent. In some applications, it overlaps the exception for knowledge in that proof that the defendant was aware of the nature of an act at an earlier point in time makes it unlikely that he would have forgotten that information at the time of the charged crime. Often the absence of mistake or accident is proved on a notion of probability, i.e., how likely is it that the defendant would have made the same mistake or have been involved in the same fortuitous act on more than one occasion. The relevance of other crimes for this purpose depends very much on the nature of the act involved; one might inadvertently pass more than one counterfeit bill but two accidental shootings of the same victim seem quite unlikely.
>
> The justification for admitting evidence of mistake or accident is the same as for the other exceptions involving proof of the defendant's statement of mind. When offered for this purpose, no inference to any conduct of the defendant is required and, in addition, in many

> cases the evidence does not require any inference as to the character of the accused. *VanderVliet*, *supra* at 80, fr 37 (quoting *Wright & Grahsm*, n 33, Federal Practice Procedure, §5247, pp. 517-518).

Finally, the *VanderVliet* court refuted the notion that *Golochowicz or Engelman* "superimposed a heightened prejudice versus probative weighing of the evidence under 404(b)." *VanderVliet*, *supra*, at 71. "No authority has been cited for the proposition that the balancing process is other than that required by Rule 403, and there is no evidence that this court intended a more restricted formulation of the balancing process . . . which does not include a superannuated weighing requirement." *Id.*, at 72. The heightened balancing process is inconsistent with the inclusive view of inadmissibility. *Id.* Essentially, exclusion derives only where the probative value is substantially outweighed by the danger of unfair prejudice. *Id.*

The court determined that the *Golochowicz* decision improperly characterized MRE 404(b) as a rule of exclusion as opposed to an inclusionary rule. At footnote 13, the court stated:

> Former Michigan Supreme Court Justice, now Federal Circuit Judge, James L. Ryan, observed in *United States v Vance*, 871 F2d 572 (CA 6, 1989):
>
> Rule 404(b), however, provides only that bad acts evidence is not admissible to prove character or criminal propensity; such evidence may be admissible for other purposes, 'such as,' but not limited to, those listed in the rule. This court has noted that Rule 404(b) 'is actually a rule of inclusion rather than exclusion, since only one use is forbidden and several permissible uses of such evidence are identified.' *VanderVliet*, *supra*, at 64.

After indicating that the *Golochowicz* four-prong test no longer applied to other acts evidence analysis, the court indicated its justification for adopting a broader perspective in regard to the admissibility of other acts evidence. It stated:

> At a psychological level, the *Golochowicz* formula addresses the fear, which most lawyers and many judges share, that jurors will give misconduct evidence more weight than deserved. This fear conflicts with the intuitive sense that some bad acts evidence is so powerfully probative that it would pervert the truth-seeking process to prevent a jury from using what looks like ordinary common sense.

VanderVliet, *supra*, at 73. [Emphasis supplied.] The court further held that Rule 404(b) is comprehensive and that the foundation of the rule is the familiar theory of multiple admissibility: "Evidence that is admissible for one purpose does not become inadmissible because its use for a different purpose would be precluded." *Id.*, at 73 (1993).

The court identified a new analytical approach to determining the admissibility of other acts evidence. Citing the United States Supreme Court's unanimous decision in *Huddleston v United States*, 485 US 681 (1988), the court set forth the following analytical approach:

> [First,] the evidence must be relevant to an issue other than propensity under Rule 404(b), to 'protect against the introduction of extrinsic act evidence when that evidence is offered solely to prove character.' Stated otherwise, the prosecutor must offer the other acts evidence under something other than a character to conduct theory.
>
> Second, as previously noted, the evidence must be relevant under Rule 402, as enforced through Rule 104(b), to an issue or fact of consequence at trial.
>
> Third, the trial court should employ the balancing process under Rule 403. Other acts evidence is not admissible simply because it does not violate Rule 404(b). Rather, 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 decisions of this kind under Rule 403. Finally, the trial court, upon request, may provide a limiting instruction under Rule 105.

VanderVliet, *supra*, at 74-75. [Emphasis in original.] [Citations omitted.]

Therefore, based upon the foregoing, the Michigan Supreme Court has identified the proper analysis for determining the admissibility of other acts evidence. The question before this Honorable Court turns to the application of this analysis to this case in particular. As will be demonstrated, applying the *VanderVliet* analysis to this case dictates that evidence of other narcotics sales is relevant and admissible in this case.

To sustain a charge of delivery of a controlled substance causing the death of another, the prosecution must prove each of the following elements beyond a reasonable doubt: (1) that the defendant delivered a schedule 1 or 2 controlled substance; (2) that the controlled substance was

then ingested by that person or another person; (3) that the substance was a cause of the death of a person.

Numerous courts have upheld the admission of evidence of a defendant's involvement in other acts of drug trafficking or possession of other large amounts of drugs to prove the defendant's intent to deliver. Imwinkelried, Uncharged Misconduct Evidence, §5:20.50, page 38. In *United States v Robison*, 904 F2d 365 (CA 6, 1990), the Sixth Circuit Court of Appeals determined that the testimonial evidence of the defendant's previous purchases of cocaine which occurred approximately five months before the charges alleged in the indictment, were properly admitted and the district court did not abuse its discretion in ruling as it did. The defendant, James Smoot, was convicted of possession with intent to distribute cocaine. The court held:

> We believe that the evidence was properly admitted by the district court because it concerns Smoot's intent. Smoot's defense was that he was only a user of drugs. However, evidence indicating previous deals suggests that this intent was not merely to use. In *United States v Rodriguez*, 882 F2d 1059, 1064-65 (6th Cir. 1989), cert. den., 493 US 1084 (1990), this court decided that evidence relating to a previous cocaine transaction was admissible under Rule 404(b) because it was probative as to defendant's intent to distribute the cocaine. Similarly, the testimony in the instant case is more probative than prejudicial, especially given the two limiting instructions given by the district court. *Robison*, *supra*, at 368 (1990).

Similarly, in a case where the defendant was charged with delivery of 13.7 grams of cocaine, the Seventh Circuit Court of Appeals approved of the admission of evidence that the defendant had purchased cocaine on numerous occasions prior to his delivery charged in the indictment. *United States v Shukitis*, 877 F2d 1322 (1989). The testimony was presented by way of a witness cooperating with the government, Phillip Arocho, a self-proclaimed large-scale drug dealer in the Lake County, Indiana, area. The court reasoned:

> The evidence of Shukitis' prior cocaine purchases from Arocho, a well-known drug dealer in the Lake County area, was highly relevant and probative of Shukitis' intent and opportunity to obtain cocaine from Arocho, whether or not Shukitis obtained the cocaine for his own use or for resale. . . . Arocho's testimony was directly related to the count in the indictment charging the defendant with knowingly and intentionally distributing

> cocaine. Finally, the district court properly instructed the jury that this evidence could be considered only for the limited purposes of determining the defendant's knowledge and intent. Because the defendant has presented no evidence to convince us otherwise, 'we make the crucial and valid assumption the jurors carefully follow instructions given them by the court.' *United States v Stern*, 858 F2d 1241, 1250 (7th Cir. 1988). Accordingly, we hold that the district court did not abuse its discretion in admitting evidence of Shukitis' previous cocaine purchases from Arocho. *Id.*, at 1329 (7th Cir. 1989).

See also, *United States v Prati*, 861 F2d 82 (5th Cir. 1988); *United States v Nichols*, 750 F2d 1260 (5th Cir. 1985). Therefore, numerous federal courts, applying the same standard as identified in *VanderVliet* which relied on *Huddleston v United States*, have admitted other acts evidence in narcotics cases, dealing with charges of possession with intent to distribute narcotics as well as the actual delivery of narcotics.

In Michigan, the Court of Appeals addressed this exact issue in *People v Mouat*, 194 Mich App 482 (1992). There, as in the federal cases identified above, the trial court admitted testimony from a cooperating witness about prior sales of cocaine that the defendant had made before his arrest and charge with the crime of delivery of 225-649 grams of cocaine. The court held:

> The testimony regarding the prior drug activity showed defendant's intent to distribute cocaine, which was necessary for defendant's convictions. Defendant admitted possession of the drugs, and the only major issue in the case was whether he intended to deliver the drugs to others. Therefore, intent was in issue. Although the evidence was clearly prejudicial to the defendant, it was highly probative with regard to the issue of intent. We believe that the probative value of the evidence substantially outweighed the danger of unfair prejudice. *Id.*, at 484-485 (1992).

It should be noted that the Court of Appeals in *Mouat*, *supra*, was applying the old *Golochowicz* standard which was significantly more stringent than that which is currently applied pursuant to *VanderVliet*. See also: *People v Cadle*, 204 Mich App 646 (1994) (evidence of cocaine found in the defendant's home, which was subject to a separate prosecution, admissible in the defendant's trial on the charge of possession with intent to deliver over 650 grams of cocaine found outside the home.) Therefore, it is clear that the state of Michigan has followed the rationale of the

federal courts and admitted evidence of other narcotics possessions or transactions to prove the defendant's knowledge or intent in separate narcotics cases.

In the end, *VanderVliet* establishes a test for the inclusion and admission of other acts evidence. The *VanderVliet* court cautions courts against fear and apprehension when confronted with other acts evidence. In fact, the court cautioned against the concern that juries will give misconduct evidence more weight than deserved. *VanderVliet*, *supra*, at 72. The court specifically dismantled the prior test, which fit "the profession's visceral anxiety regarding misconduct evidence." *Id.*, at 73. Reading *VanderVliet* leaves one with the unmistakable impression that other acts evidence should be admitted.

In *People v Crawford*, 458 Mich 376 (1998), a case where similar acts were excluded, the court indicated the reason for the exclusion was the factual relationship between the 1988 crime and the charged offense was simply too remote for the jury to draw a permissible intermediate inference of the defendant's *mens rea* in the present case. Unlike *Crawford*, the factual relationship between the case charged is not too remote for a jury to draw a permissible and intermediate inference of the defendant's *mens rea*. *Crawford*, *supra*, at 396. The Defendant's possession of MDMA and his frequent offer to sell drugs to Anapoell occurred in 2017. The videos were shared within 24 hours of the instant case.

In *People v Williams*, 240 Mich App 316, 323 (2000), the defendant claimed the admission of MRE 404(b) evidence was impermissible under *Crawford*, *supra*. The Court of Appeals disagreed. The defendant was charged and convicted of possession with intent to deliver 650 or more grams of controlled substance. The court ruled that the introduction into evidence of a series of drug transactions by the defendant prior to the raid on the defendant's house was directly relevant to the defendant's intent, knowledge, and scheme—all of which were at issue in the case.

In the case at bar, the proffered other acts evidence is likewise admissible in the prosecution's case-in-chief to establish the necessary elements of the Defendant's identity as the person in the video when victim is reacting to the ingestion of drugs and similar scheme or plan the Defendant has used in the past. Defendant clearly demonstrates a pattern of recording people reacting terribly to drugs. Defendant laughs while it occurs. Defendant encourages the behavior. Defendant's prior numerous offers to sell Anapoell drugs and his possession and admission of possessing Molly demonstrate a scheme, plan or system Defendant has used in the past. Defendant's prior behavior also demonstrates a lack of mistake. By entering a not-guilty plea, the Defendant places into question each element of the offense charged. Defendant in his motions states he adamantly denies the within charges. Therefore, the question of who delivered the controlled substance and whether the Defendant knew he was delivering a controlled substance, becomes a question of fact for the jury to determine. The evidence itself is, in fact, logically and legally relevant.

However, the evidence must also not be inordinately prejudicial pursuant to MRE 403. Only when the prejudice is *UNFAIR* and *SUBSTANTIALLY* outweighs the probative value of the evidence does it become inadmissible. MRE 403. Any relevant evidence will be damaging to some extent (*People v Mills-Camilli*, 450 Mich 75; 537 NW 2d 909 (1995)). The Supreme Court has specifically indicated that a heightened standard of logical relevance is not required before the prior acts are admissible. *People v Starr*, 457 Mich 490, 499; 577 NW 2d 673 (1998). Because the evidence in this case is not marginally probative but pertinent on essential issues which will arise in trial, the jury would give this evidence appropriate weight. *People v Mills/Camilli*, *supra*, at 75.

Furthermore, because the evidence is so critical for the prosecution and there is no less prejudicial means by which the substance of the evidence regarding the Defendant's identity as the holder and user of the Snapchat account in question is critical to the People's case. The videos,

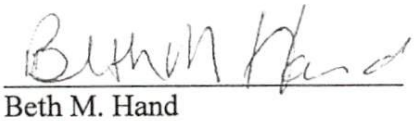
other than those relating to the death of Denis Preka demonstrate this. Defendant's Snapchat account clearly establishes he was in the business of selling drugs, among them MDMA or molly or meth or mol, (3, 4-methylenedioxymethamphetamine), the drug that caused the death of Denis Preka. Identity, lack of mistake and similar scheme are proper purposes for admission of the MRE 404(b) evidence. The admission of the evidence would not be unfair. *Id.*, at 76. At trial, the court can give a limiting instruction to the jury regarding the nature of the MRE 404(b) evidence and the prosecution would be limited in the manner in which it could argue the evidence. The probative force of the evidence would not stir the jurors "to such passion … as to [be swept] beyond rational consideration of [the defendant's] guilt or innocence of the crime on trial." *People v Starr*, *supra*, at 503. Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by a jury. *People v Mills/Camilli*, *supra*.

The gap between the incident in the case at bar and the prior acts as it relates to Josh Anapoell is approximately two years. As it relates to videos it is less than 24 hours. Clearly, the timing of the prior does not dispel the probative value.

WHEREFORE, for the foregoing reasons, the People respectfully request that this Honorable Court grant their motion to admit MRE 404(b) evidence at trial.

Respectfully submitted,

JESSICA R. COOPER
PROSECUTING ATTORNEY

By: 
Beth M. Hand
Assistant Prosecuting Attorney

DATED: FEBRUARY 19, 2020
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ATTACHMENT

People v. Hartwick

Court of Appeals of Michigan

August 17, 2017, Decided

No. 332391

Reporter
2017 Mich. App. LEXIS 1342 *; 2017 WL 3567548

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v RICHARD LEE HARTWICK, Defendant-Appellant.

Prior History: **[*1]** Oakland Circuit Court. LC No. 2012-240981-FH.

People v. Hartwick, 303 Mich. App. 247, 842 N.W.2d 545, 2013 Mich. App. LEXIS 1894 (Nov. 19, 2013)

Core Terms

marijuana, trial court, plants, marijuana plant, immunity, patient, text message, possessed, credibility, registry, ineffective, controlled substance, identification card, grow, chain of custody, expert witness, suppress, deliver, inside, assistance of counsel, defense counsel, narcotics, phone, preponderance of evidence, search and seizure, medical marijuana, qualification, evidentiary, qualifying, kilograms

Judges: Before: SAAD, P.J., and SERVITTO and GADOLA, JJ.

Opinion

PER CURIAM.

Defendant appeals as of right his jury trial conviction of the delivery or manufacture of 5 to 45 kilograms of marijuana, MCL 333.7401(2)(d)(ii), and the possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). The trial court sentenced him, as a fourth habitual offender, MCL 769.12, to 2 to 40 years in prison for the delivery or manufacture of 5 to 45 kilograms of marijuana conviction, and 2 to 15 years in prison for the possession with intent to deliver marijuana conviction. We affirm.

This case arises out of an incident on September 27, 2011, in which two police officers went to defendant's house in Pontiac to investigate a tip that someone was distributing marijuana from that location. The officers met defendant outside of the house, and one of the officers, Detective Ferguson, asked him if there was marijuana inside. Defendant replied that there was and that he was growing marijuana in compliance with the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 et seq. Detective Ferguson asked if could see the marijuana, and defendant let him enter the house. The detectives and defendant went into a back bedroom that was a grow room **[*2]** for the marijuana. They found many marijuana plants in that room and additional marijuana and drug paraphernalia in other parts of the house. The detectives counted the marijuana plants, determined that defendant was over the amount allowed under the MMMA, and seized the evidence. Defendant was later arrested and charged with the crimes of which he is now convicted.

This case has a lengthy procedural history. Before trial,

defendant moved for dismissal of the charges under § 4 of the MMMA, MCL 333.26424, as well as § 8 of the MMMA, MCL 333.26428, and, alternatively, sought to assert the § 8 affirmative defense. The trial court held that defendant was not entitled to § 4 immunity. It also denied defendant's request for dismissal under § 8 and ruled that he could not present the § 8 defense at trial because he had failed to prove the elements for the affirmative defense.

On October 11, 2012, we denied defendant's delayed application for leave to appeal. *People v Hartwick*, unpublished order of the Court of Appeals, entered October 11, 2012 (Docket No. 312308). On April 1, 2013, the Michigan Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. **[*3]** *People v Hartwick, 493 Mich 950; 828 NW2d 48 (2013)* (*Hartwick I*). On November 19, 2013, we affirmed the trial court's ruling in a published opinion, holding that defendant was precluded from asserting immunity from prosecution under § 4 because he "failed to introduce evidence of (1) some of his patients' medical conditions, (2) the amount of marijuana they reasonably required for treatment and how long the treatment should continue, and (3) the identity of their physicians." *People v Hartwick, 303 Mich App 247, 250, 260; 842 NW2d 545 (2013)* (*Hartwick II*). We further held that defendant was not entitled to assert the § 8 defense because he did not present evidence that his patients had bona fide physician-patient relationships with their certifying physicians and that he knew the amount of marijuana needed to treat the conditions of his patients. *Id. at 266-268*. We rejected defendant's theory that the possession of a registry identification card alone was sufficient to meet the standards in the statute for a complete defense. *Id. at 262, 269-270*.

On July 27, 2015, after granting leave to appeal, the Michigan Supreme Court affirmed in part and reversed in part the judgment of this Court and remanded the case to the trial court for an evidentiary hearing regarding defendant's entitlement to immunity pursuant to *MMMA § 4*. *People v Hartwick, 498 Mich 192, 239, 244-245; 870 NW2d 37 (2015)* (*Hartwick* **[*4]** *III*). The Supreme Court held that the trial court erred in failing to make factual findings regarding the number of marijuana plants in defendant's possession and findings regarding the other elements of defendant's § 4 immunity claim. *Id. at 239*. Further, the Court found error in the trial court's analysis of the fourth element relating to the medical use of marijuana. *Id. at 238*. It noted that a § 4 analysis should focus on the defendant's conduct. *Id.* Finally, the Supreme Court agreed with our Court that defendant failed to present prima facie evidence of the elements of § 8(a) to assert a defense under the MMMA. *Id. at 239*.

On remand, the trial court conducted a § 4 hearing and concluded that defendant failed to prove by a preponderance of the evidence at least two of the four elements necessary to assert an immunity claim. It found that defendant did not show he was in possession of a patient registry identification card at the time the police searched his house. It also found that defendant had more than the statutorily allowable amount of marijuana plants in his possession at that time.

The trial court also conducted a hearing on defendant's motion to suppress the evidence seized from his house as **[*5]** the fruit of an illegal search. He claimed that he believed the officers had a warrant to search and that he never consented to the search of his residence. The trial court found otherwise and denied the motion to suppress. It concluded that the prosecution proved by a preponderance of the evidence that the search was conducted with defendant's consent.

At trial, there was again conflicting evidence regarding several issues concerned with the search. There was evidence that the officers discovered 78 marijuana plants in an unlocked room of the house. However, defense witnesses testified that defendant possessed either 70 or 72 plants and that the room in which they were stored was kept shut and locked. Among the items seized was defendant's cell phone. Detective Robert Ludd was qualified as an expert in street level narcotics trafficking and opined that the text messages from the phone indicated that defendant possessed the marijuana with the intent to deliver it rather than use it for personal consumption. At the conclusion of the trial, the jury found defendant guilty of the delivery or manufacture of 5 to 45 kilograms of marijuana and possession with intent to deliver marijuana. **[*6]** Following his sentencing, defendant filed the instant appeal.

I. IMMUNITY UNDER THE MMMA

Defendant argues that the trial court erred in dismissing his claim of immunity under § 4 of the MMMA. We disagree.

We review a trial court's decision on a motion to dismiss criminal charges for an abuse of discretion, which exists when a decision "falls outside the range of principled outcomes." *People v Nicholson, 297 Mich App 191, 196;*

822 NW2d 284 (2012). A trial court's factual findings regarding § 4 immunity under the MMMA are reviewed under the clearly erroneous standard, and questions of law surrounding the § 4 immunity determination are reviewed de novo. Hartwick III, 498 Mich at 201. "A ruling is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." People v Bylsma, 493 Mich 17, 26; 825 NW2d 543 (2012) (citation and quotation marks omitted).

While marijuana remains illegal in Michigan, the MMMA allows the medical use of marijuana by a limited class of individuals. Section 4 of the MMMA grants broad immunity from criminal prosecution and other penalties to qualified patients and caregivers. MCL 333.26424. Our Supreme Court recently addressed this case and set forth the appropriate test for establishing immunity under the MMMA, stating that defendant must prove by a preponderance **[*7]** of the evidence that he:

> (1) possessed a valid registry identification card for himself as a qualifying patient and for each of the five other connected registered qualifying patients,
>
> (2) possessed no more than 72 marijuana plants and 15 ounces of usable marijuana,
>
> (3) kept the marijuana plants in an enclosed, locked facility, and
>
> (4) was engaged in the medical use of marijuana. [Hartwick III, 498 Mich at 237-238.]

Further, the Court held that defendant was entitled to a presumption of the medical use of marijuana if he demonstrated by a preponderance of the evidence that he possessed:

> (1) a valid registry identification card for himself as a patient and for each of the five other registered qualifying patients to whom he is connected under the MMMA, and
>
> (2) no more than 72 marijuana plants and 15 ounces of usable marijuana. [Id. at 238.]

The prosecution could then rebut this presumption in accordance with § 4(d)(2). Id. The fact-finding required to determine whether § 4 is applicable to the facts of a certain case is a question for the trial court's consideration and ultimate determination. People v Jones, 301 Mich App 566, 577; 837 NW2d 7 (2013).

Following a three-day hearing, the trial court issued an opinion holding that defendant was not entitled to immunity under § 4 of the MMMA. **[*8]** In its opinion, the trial court found that defendant established by a preponderance of the evidence that he possessed five registry identification cards as a caregiver for his five patients at the time of the search. However, the trial court found that defendant failed to show that he was a qualified patient. The trial court found that defendant's application for the patient registry card was insufficient to establish that he possessed a valid card. It stated that defendant failed to show that his application was actually submitted or had been submitted by a particular date and that he had never made an effort to obtain verification from the state of his valid registry status.

According to the record, defendant possessed a valid registry identification card for himself as a qualifying patient and for each of the five registered qualifying patients at the time of the search. At the hearing on July 18, 2012, the prosecution stipulated that defendant held a valid registry identification card as a patient for medical marijuana purposes. However, the prosecution subsequently argued that its stipulation was for purposes of the § 8 defense alone. The record indicates that the prosecution's **[*9]** stipulation to the validity of defendant's registry card extended to the § 4 immunity issue. Both defense counsel and the prosecution presented arguments relating to that issue at the hearing, and the trial court made a determination on defendant's request for immunity along with its ruling regarding the affirmative defense. Accordingly, there was a clear stipulation that defendant possessed a valid card as a medical marijuana patient. With such a stipulation, there was no requirement for defendant to secure a certified copy of the registration documents or some other more official document as the trial court indicated. Given these facts, the trial court erred in its finding that defendant did not meet the first element of a § 4 immunity claim.

Next, the trial court found that defendant failed to meet the second element of a § 4 immunity claim. Under the MMMA, defendant, as the caregiver, was allowed to have 12 plants for each patient under his care and another 12 for himself as a patient. The trial court held that the credible evidence showed "that there were at least seventy-six plants in the home." The trial court found that both Detective Doty and Detective Ferguson each counted **[*10]** a total of 78 plants. It also found that Detective Doty's testimony was credible and that defendant's testimony was inconsistent. It noted that the forensic lab report indicated that a total of 76 plants were submitted for testing. Thus, the trial court concluded that at most defendant was allowed to possess 72 marijuana plants, and defendant failed to establish that he was within the limit imposed under the

statute.

Here, there was conflicting evidence regarding the number of marijuana plants found at the house. Detective Doty testified that he and Detective Ferguson each counted the marijuana plants, and there were 78 plants at the house. The plants were placed in a bag, and the detective wrote the number of plants on the bag. He stated that each of the plants had a root system. Defendant testified that he was growing about 60 or 61 marijuana plants in the sunroom. Another room had two marijuana plants. He also said there were no more than 64 plants in total. Defendant was asked, however, about his previous testimony that there were 71 plants in Styrofoam cups.

The trial court is afforded deference in matters of credibility. *People v Farrow, 461 Mich 202, 209; 600 NW2d 634 (1999)*. After hearing from the witnesses, the court found that **[*11]** Detective Doty was a more credible witness. In addition, there was corroborating evidence that the forensic lab report showed that more than 72 plants arrived for testing. In light of the evidence and giving deference to the trial court's determinations of credibility, it cannot be said that the trial court erred in finding that defendant possessed more than the statutorily allotted number of marijuana plants when the search was conducted. Because defendant failed to establish this element of a *§ 4* immunity claim, it was not an abuse of discretion for the trial court to deny defendant's motion to dismiss the case on the basis of immunity under the MMMA. Generally, the first three elements of immunity under the MMMA are all-or-nothing propositions. *Hartwick III, 498 Mich at 218*. Therefore, further analysis of the other elements is unnecessary.

II. SEARCH AND SEIZURE

Defendant argues that his *Fourth Amendment* rights were violated when the police searched his house without a warrant or voluntary consent. We disagree.

We review de novo a trial court's ultimate decision on a motion to suppress. *People v Gingrich, 307 Mich App 656, 661; 862 NW2d 432 (2014)*. We review for clear error a trial court's findings of fact made during the suppression hearing. *Id.* "A finding of fact is clearly erroneous **[*12]** 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." *Id.* (citation and quotation marks omitted).

The United States and Michigan Constitutions both guarantee every person the right to be free from unreasonable searches and seizures. *US Const, Am IV*; *Const 1963, art 1, § 11*. A warrantless search is unreasonable per se. *People v Dagwan, 269 Mich App 338, 342; 711 NW2d 386 (2005)*. However, voluntary consent is an exception to the warrant requirement. *Id.* The consent exception permits a search and seizure if the consent is unequivocal, specific, and freely and intelligently given. *Lavigne v Forshee, 307 Mich App 530, 538; 861 NW2d 635 (2014)*. "Whether consent to search is freely and voluntarily given presents a question of fact that must be determined on the basis of the totality of the circumstances; the presence of coercion or duress will militate against a finding of voluntariness." *Id.*

On the basis of the totality of the circumstances, the trial court did not clearly err in finding that defendant voluntarily consented to the search of his house. Detective Doty testified that he and Detective Ferguson responded to a complaint about marijuana at a house in Pontiac on September 27, 2011. The officers had not obtained a warrant, believing it was more **[*13]** appropriate to approach the homeowner since it was a possible medical marijuana situation. Instead, they conducted a "knock and talk" at the house. Detective Doty heard Detective Ferguson explain to defendant the reason for the police visit and ask defendant if he was a medical marijuana cardholder. Defendant responded that he was a medical marijuana caregiver and had marijuana plants inside the house. The officers asked defendant if they could inspect the marijuana grow inside the house and he "welcomed [them] in." Detective Doty testified that Detective Ferguson did not tell defendant that they had a warrant or hand defendant a piece of paper. The detectives and defendant entered the side door of the house. Detective Doty stated that defendant was very cooperative with their investigation. Detective Doty recounted that he could see the grow lights when he was standing by the front door. Defendant took the officers to the grow room. Detective Doty saw marijuana plants in that room and branches of marijuana drying in another room. Detective Doty testified that they counted the plants, realized defendant was over the legal limit allowed under the MMMA, and seized the plants and other **[*14]** evidence.

On cross-examination Detective Doty testified that there were no pictures taken at the house and he had no notes on this case. However, he reviewed the police report that Detective Ferguson wrote and had personal recollection of things concerning this case. He testified that Detective Ferguson was no longer with the sheriff's

department and that he did not know the reason for his absence. Detective Doty noted that he had originally stated they entered the front door of the house but later recalled it was the side door. Detective Doty was questioned regarding a case approximately two years ago where he was the affiant on the search warrant, a mistake was found regarding the search, and the case was dismissed. Detective Doty testified that this was the first time in his almost 20 years of police work that such a mistake had occurred. There was a letter admitted as a defense exhibit from the prosecutor's office indicating concern over Detective Ferguson's truthfulness and explaining that some of the cases on which he worked or charges in those cases had been dismissed.

Defendant testified that it was afternoon and he was standing in his yard when two officers pulled up in a vehicle. **[*15]** Detective Ferguson approached him and started a discussion with him. At some point, Detective Doty joined the conversation. Detective Ferguson asked defendant if he was growing marijuana, and defendant said he was. Detective Ferguson then asked for his identification cards. Defendant took out his wallet and showed the detective his cards. Detective Ferguson told defendant that they were going in to search his house. The officer handed defendant what defendant believed was a search warrant and went inside. Defendant did not look at or read the paper the detective gave him because he immediately followed the detective into the house. Defendant testified that Detective Ferguson did not ask if he could go inside the house and that defendant never gave him consent to search the house. However, in his motion to suppress defendant averred that the officer asked him if he could do a search of the house, and defendant answered, "[N]o." Defendant claimed that, once inside, Detective Ferguson took the paper back and the items from defendant's pockets and had defendant sit down. Detective Ferguson returned to get defendant because the grow room was locked. Defendant contended that the grow lights **[*16]** were not visible from outside of the room.

On cross-examination, defendant admitted he had never denied that he was growing marijuana. Rather, he thought that he was in compliance with the MMMA. It was noted that in his motion to suppress, defendant claimed that Detective Ferguson said "he was going in the fucking house" and that the officer would "break the fucking door down" if defendant did not let him in the house. At the hearing, defendant testified that the officer did not use curse words during their interactions. Defendant explained that he might have been under an adrenaline rush when he was recounting the incident to his counsel. Defendant denied that there were text messages from his phone about drugs.

At the conclusion of the hearing, the trial court ruled that defendant had consented to the search and denied his motion to suppress the evidence. The trial court noted that it had been nearly five years since the search and seizure occurred. It found that both Detective Doty and defendant had some lapses in their memories of the events. However, the trial court found that Detective Doty was a more credible witness than defendant, whose testimony was inconsistent. It also found **[*17]** that defendant's belief that he was in compliance with the law supported Detective Doty's account that defendant allowed the detectives to search his home. The trial court stated that the timing of defendant's motion just before trial "lends to its lack of credibility." The trial court noted that there was a basis for concern that the other detective who was part of the knock and talk operation might have been untruthful in other cases. However, it found that Detective Doty was present during the search and was "very credible." Again, we give deference to the trial court "where a factual issue involves the credibility of the witnesses whose testimony is in conflict." *Farrow, 461 Mich at 209*. There was no error in the trial court's finding that Detective Doty's account of the interaction was more believable and that consent was obtained. Additionally, defendant's consistent assertion that he had marijuana and believed he was in compliance with the law is a circumstance that also supports a finding of consent. Given the evidence before it, there is no clear error in the trial court's finding that defendant gave consent to the search. Therefore, there was no violation of his *Fourth Amendment* right against an unreasonable search **[*18]** and seizure.

III. CHAIN OF CUSTODY

Defendant contends that it was error for the trial court to admit Detective Doty's testimony regarding the number of marijuana plants found at defendant's house when there was no chain of custody established regarding the plants. We disagree.

To preserve an evidentiary issue for review, the party must object to the admission of the evidence at trial and specify the same ground for objection that it claims on appeal. *People v Douglas, 496 Mich 557, 574; 852 NW2d 587 (2014)*. Defense counsel objected to the chain of custody of the marijuana in the mason jars, not the marijuana plants in the grow room. Therefore, this issue is not preserved for appeal. We review unpreserved evidentiary issues for plain error affecting

the defendant's substantial rights, which requires a showing of prejudice, in other words that the error affected the outcome of the proceedings. *People v Carines, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999)*.

The authenticity of evidence must be established when admitting real evidence and does not require a perfect chain of custody. *People v White, 208 Mich App 126, 130; 527 NW2d 34 (1994)*. Rather, "any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims." *Id. at 130-131*.

The **[*19]** real marijuana plants were not introduced into evidence and, therefore, did not require proof of a chain of custody. Nevertheless, a chain of custody was established regarding the marijuana seized. Detective Doty testified that defendant told the police he was growing marijuana in the house and showed them the grow room. Detective Doty counted and re-counted 78 plants during the search. He also explained that the plants were placed into large yard bags, and he labeled the bags with the number of plants inside. The plants were submitted to the crime lab for testing. Rachel Norgart, an expert in forensic chemistry, testified that she tested 20 of the plants that she received, and they all tested positive as marijuana. There was testimony that the plants were later destroyed for health and safety reasons. This testimony established that the plants found at defendant's house and tested at the lab were the same plants and that they were marijuana plants.

Any issue regarding the number of plants went to the credibility of witnesses, which is a matter for the jury to determine. *People v Lemmon, 456 Mich 625, 637; 576 NW2d 129 (1998)*. Detective Doty testified that there were 78 marijuana plants found. Defense witnesses testified that there were **[*20]** 70 or 72 plants at the house on the day of the search. Defendant improperly argues that the dispute over the number of plants indicated that he did not possess more than the amount permitted under *§ 4 of the MMMA*. The trial court previously determined that defendant was not entitled to immunity under that statute. Thus, the only relevant inquiry relating to the charges was whether defendant was manufacturing 5 to 45 kilograms of marijuana or between 20 and 200 marijuana plants. See *MCL 333.7401(2)(d)(ii)*. Either the low number of 70 plants or the high number of 78 plants was sufficient to establish that defendant was in possession of an illegal amount of marijuana. It was the jury's task to weigh the evidence and determine whether defendant possessed the requisite amount of marijuana to meet the charged crimes. Accordingly, there was no error in admitting Detective Doty's testimony about the number of marijuana plants recovered from defendant's house. Defendant was not denied his constitutional right to due process of law.

IV. QUALIFICATION OF AN EXPERT WITNESS

Defendant challenges the admissibility of Detective Ludd's testimony on the basis that the expert witness was not qualified to testify regarding **[*21]** narcotics dealings pursuant to *MRE 702*. Defendant has waived review of this issue. At trial, the prosecution moved to have Detective Robert Ludd qualified as an expert in the field of street level narcotics trafficking. Defense counsel stated he had "[n]o objection" to Detective Ludd's qualification as an expert witness. A party waives an issue if the party intentionally relinquishes or abandons a known right. *People v Carter, 462 Mich 206, 215; 612 NW2d 144 (2000)*. Therefore, defense counsel's approval of the qualification extinguished any error and precludes appellate review of this issue. *Id.*

Even if this issue had not been waived, there is no error requiring reversal. The testimony involved how the evidence found in defendant's house and on his cell phone was generally indicative of weighing and selling marijuana. Detective Ludd was qualified to testify because of his specific training and experience in the area of narcotics and his prior qualification as an expert in street level narcotics trafficking.

V. OTHER ACTS EVIDENCE

Defendant asserts that the prosecution improperly introduced text messages from defendant's cell phone indicating that he was dealing in controlled substances other than marijuana. He claims that this evidence constituted inadmissible **[*22]** other acts evidence under *MRE 404(b)* and was unduly prejudicial. We disagree.

Defense counsel did not preserve this issue by objecting to the admission of the evidence regarding other controlled substances. *Douglas, 496 Mich at 574*. We review unpreserved evidentiary issues for plain error affecting the defendant's substantial rights, which requires a showing of prejudice, in other words that the error affected the outcome of the proceedings. *Carines, 460 Mich at 763-764, 774*. We also review de novo the question of whether a defendant was deprived of a right without due process of law. *People v Schumacher, 276*

Mich App 165, 176; 740 NW2d 534 (2007).

Defendant argues that the trial court improperly allowed Detective Ludd to testify about statements made by defendant in the three months prior to his arrest regarding his dealings in controlled substances other than marijuana. The prosecution introduced as an exhibit the entire record containing over 3,000 text messages from defendant's cell phone from June 24, 2011, to September 28, 2011. It then questioned the expert witness on certain incoming and outgoing calls referring to drug transactions and payments. Some of those text messages referred to other controlled substances such as Vicodin, Fentanyl, and Norco.

According to defendant, this evidence was improperly admitted **[*23]** because it constituted other acts evidence under MRE 404(b). Defendant's argument lacks merit. MRE 404(b) provides that, unless a delineated exception applies, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b) applies only to prior acts, not to prior statements. People v Rushlow, 179 Mich App 172, 176; 445 NW2d 222 (1989). A text message is considered a statement.[1]

Here, the statements were admitted at trial as admissions by a party opponent under MRE 801(d)(2)(A). Such a statement is excluded from the definition of hearsay if it is "offered against a party and is . . . his own statement . . . ." People v Goddard, 429 Mich 505, 523; 418 NW2d 881 (1988) (RILEY, J., concurring). The appropriate inquiry then is whether the admitted statement is relevant. Rushlow, 179 Mich App at 176. Evidence is relevant if it has "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." MRE 401.

Defendant's statements regarding controlled substances other than marijuana were relevant. Specifically, they showed defendant's intent to deliver drugs. Further, the statements were not unfairly prejudicial. Evidence offered against a party is "by its very nature . . . prejudicial, **[*24]** otherwise there would be no point in presenting it." People v Fisher, 449 Mich 441, 451; 537 NW2d 577 (1995). "The pivotal consideration is whether the probative value of the testimony is substantially outweighed by unfair prejudice." Id. The text messages were highly probative of an element of the crime charged. The prosecution was required to prove that (1) defendant knowingly possessed a controlled substance, (2) defendant intended to deliver the controlled substance, (3) the substance in possession was marijuana and defendant knew that it was, and (4) the marijuana was in a mixture that weighed less than five kilograms. MCL 333.7401(2)(d)(iii); see also People v Crawford, 458 Mich 376, 389; 582 NW2d 785 (1998). The text messages at issue established defendant's intent to deliver the controlled substances and not to use them for personal consumption. They did not insert extraneous considerations such as bias, anger, sympathy, or shock into the merits of the case. See Fisher, 449 Mich at 452-453, citing People v Goree, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). For these reasons, there was no error requiring reversal in the admission of the challenged statements and defendant was not deprived of his right to due process.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims that his trial counsel was ineffective for failing to object to the trial court's qualification of an expert witness and **[*25]** to the prosecution's introduction of other acts evidence. We disagree.

Generally, "[a] claim of ineffective assistance of counsel presents a mixed question of law and fact." People v Brown, 294 Mich App 377, 387; 811 NW2d 531 (2011). "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." Id. However, because defendant failed to move for a new trial or an evidentiary hearing below, we review this unpreserved claim of ineffective assistance of counsel for errors apparent on the record. People v Petri, 279 Mich App 407, 410; 760 NW2d 882 (2008).

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate "(1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

[1] See *People v Shigwadja*, unpublished opinion per curiam of the Court of Appeals, issued January 19, 2017 (Docket No. 329471) (holding that the defendant's threat "was a statement in a text message, not an other act"). Although unpublished decisions are not precedentially binding authority, MCR 7.215(C)(1), they may be persuasive. See People v Christopher Green, 260 Mich App 710, 720 n 5; 680 NW2d 477 (2004).

have been different." *Douglas, 496 Mich at 592* (quotation marks and citation omitted). "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)*. Decisions regarding what evidence to present, how to question witnesses, and whether to raise objections to procedures, evidence, or argument are presumed **[*26]** to be matters of trial strategy, and this Court will not second-guess counsel's strategic decisions nor will it analyze counsel's competence with the benefit of hindsight. *People v Horn, 279 Mich App 31, 39; 755 NW2d 212 (2008)*; *People v Unger, 278 Mich App 210, 242-243, 253; 749 NW2d 272 (2008)*.

First, defense counsel's failure to object to and actual affirmation of Detective Ludd as an expert witness in street level narcotics trafficking does not constitute the ineffective assistance of counsel. The record establishes that Detective Ludd's training and experience were sufficient to satisfy the requirements for an expert witness pursuant to *MRE 702*. In addition, his opinion testimony was offered to assist the jury in understanding the evidence and determining a fact in issue. Defense counsel is not required to make a meritless or futile objection. *People v. Putman, 309 Mich. App. 240, 245; 870 N.W.2d 593 (2015)*. Therefore, defense counsel was not ineffective by failing to challenge this decision.

Second, defense counsel's failure to object to the introduction of defendant's text messages does not constitute the ineffective assistance of counsel. As previously determined, the text messages were introduced as statements under *MRE 801(d)(2)(A)*, not as other acts evidence pursuant to *MRE 404(b)*, and their introduction did not deprive defendant of a fair trial. An objection to the admission of the statements **[*27]** as impermissible other acts evidence would have been futile. Thus, defense counsel's failure to raise a meritless objection to the introduction of the text messages did not deny defendant the effective assistance of counsel. See *id.*

Affirmed.

/s/ Henry William Saad

/s/ Deborah A. Servitto

/s/ Michael F. Gadola

End of Document

Office of the Prosecuting Attorney
County of Oakland

JESSICA R. COOPER
Prosecutor

Paul T. Walton
Chief Assistant Prosecutor

February 19, 2020

PROOF OF SERVICE

I, Dave Szlezyngier, being duly sworn, depose and say that on February 19, 2020, the referenced document(s) were provided to:

Neil S. Rockind, Esq.;

□ by placing same in a sealed envelope addressed as stated and depositing same for mail pick-up service at the Oakland County Prosecutor's Office;
□ by facsimile at _____ from the Oakland County Prosecutor's Office;
☑ by personal service.

#2526

Dave Szlezyngier /Investigator

Neil S. Rockind, Esq.
36400 Woodward Ave., Suite 210
Bloomfield Hills, MI 48304-0913

Re: People v Nicholas Maximillia Remington
CR 2019-272593-FC

Dear Mr. Rockind:

Enclosed are copies of the following items in regard to the above-captioned matter.

- People's Motion (with Notice of Hearing) to Admit Similar Acts Evidence at Trial Pursuant to MRE 404(b), brief in support, and praecipe.
- University of Michigan Police reports relative to MRE 404(b) evidence.
- Novi Police Department follow-up report for CR No. 190015581-011.
- One (1) DVD containing Snapchat videos for the purpose of using as MRE 404(b) evidence.
- One (1) 8GB flash drive containing Defendant's cell phone analysis relative to the University of Michigan police reports.

Sincerely,

JESSICA R. COOPER
PROSECUTING ATTORNEY

Beth M. Hand
Assistant Prosecuting Attorney

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Office of the Prosecuting Attorney
County of Oakland

JESSICA R. COOPER
Prosecutor

Paul T. Walton
Chief Assistant Prosecutor

February 19, 2020

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TO BE FILED WITH ASSIGNMENT CLERK BY 4:30 P.M. ON OR BEFORE WEDNESDAY PRECEDING MOTION DAY

PRAECIPE FOR MOTION AND MISCELLANEOUS DOCKET

STATE OF MICHIGAN
The Circuit Court for the County of Oakland
1200 N. Telegraph Rd., Dept. 404, Pontiac, MI 48341-0404

People of the State of Michigan
Plaintiff

v.

Nicholas Maximillia Remington /CR 2019-272593-FC
Defendant

(ATTACH BAR CODE LABEL HERE)

Motion Date: Wednesday, February 26, 2020

Motion Title: People's Motion to Admit Similar Acts Evidence at Trial Pursuant to MRE 404(b)

YOUR MOTION WILL NOT BE SCHEDULED IF YOU DO NOT COMPLETE EITHER #1 OR #2 BELOW:

1. I hereby certify that I have made personal contact with N/A on N/A, 202___, requesting concurrence in the relief sought with this Motion and that concurrence has been denied.

OR

2. I have made reasonable and diligent attempts to contact counsel requesting concurrence in the relief sought with this motion on N/A, 202___.

Attorney: Beth M. Hand (P47057) Phone: 248-858-0670

Moving Party: Plaintiff

Date: February 19, 2020

(Motion briefs must be delivered to the judge's chambers.)

C-10 (8-00) 46569

Local Rule 2.119

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