STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 5, 2001
v	No. 218912 Wayne Circuit Court
WILLIAM BURLEIGH, Defendant-Appellant.	LC No. 98-009961

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for carrying a concealed weapon, MCL 750.227; MSA 28.424, for which he was sentenced to eighteen months' probation. We reverse and remand for a new trial.

Defendant argues on appeal that the trial court abused its discretion by denying his motion for a mistrial after police officers testified that defendant was arrested during their investigation of an armed robbery, carjacking, and kidnapping, at the house where the victim was held hostage, and that defendant fit the description of one of the perpetrator's of the crimes. We agree.

At trial, Officer Karl McDowell testified he was flagged down by a citizen who reported that he had been robbed, his vehicle taken, and he was held hostage at 17541 Gable (the address where defendant was later arrested). On cross-examination, McDowell stated the complainant described the three suspects as black males and defendant could fit the description of one of them who was also described as possessing a nickel-plated automatic (pistol). McDowell acknowledged that defendant had not been charged with carjacking, and as far as he knew, only was charged with carrying a concealed weapon. When asked if anyone had been arrested on the citizen's complaint, McDowell responded, "Yes. The crew did make an arrest. I don't know what the arrests were for, who was arrested." McDowell testified he had no knowledge of the

robbery complainant being involved in the present case.[1]

Officer Lonnie Wade testified that he went to 17541 Gable after meeting McDowell about an armed robbery and carjacking. Wade testified the house was boarded up and the front door was open. Wade testified that he saw defendant standing in what he thought was a dining room with a cup in his hand. Wade further testified that defendant looked at him and then walked quickly toward the rear of the home. Wade went to the front of the house while his partner, Officer Clive Stewart, went to the rear of the house. Wade testified he ran after defendant, who "was near the right bedroom door, and with his right hand he discarded a weapon on the floor of that bedroom, threw it on the floor of the bedroom there." Because of darkness in the house, Wade was unable to say what type of weapon he saw, other than a small handgun. Wade also testified that defendant was asked if he had a permit or license and defendant answered "no."

Officer Stewart testified his partner told him where to find a weapon and he retrieved a ".380 caliber blue steel automatic" from the west rear bedroom. The weapon was not examined for fingerprints. Three other people (two males and a female) were in the house when the police arrived. All occupants of the house were arrested, defendant for carrying a concealed weapon and the other three for entering a vacant building without permission. Stewart also testified the house was vacant but people were "squatting" or living there.

After Officer Wade's direct testimony, defendant moved for a mistrial because of the admission of evidence regarding the alleged carjacking and armed robbery. Defense counsel argued the evidence had "tainted the proceedings irreparably," especially because of the surprising answers McDowell gave about the suspects' descriptions and that one of the suspects fit the description of defendant. The prosecutor argued the evidence was an exception to the hearsay rule: "just asked for the purpose of why he was there." The trial court denied the motion for mistrial because it had twice instructed the jurors on the limited purpose they could consider the evidence. The trial court also noted that cross-examination disclosed that defendant "had not been involved in any kind of carjacking."

One of the other male occupants of the house, a friend of defendant, testified that defendant did not run when the police arrived. Defendant also testified he did not run from the police and he did not have a gun. Defendant testified he had not been to the house before, and was only there that day looking for someone he knew as "Pops."

While deliberating, the jury submitted a question to the trial court: "if a person discarded a weapon, would that be considered concealment?" The trial court answered the jury's question, in part, as follows: "[t]he short answer to that, ladies and gentlemen, is well sometimes, yes, sometimes no, which obviously is not particularly helpful to you." The trial court went on to give a modified version of CJI2d 11.1, with paragraph three, on concealment, modified to read,

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[1] After the defense motion for mistrial was denied, Detroit police officer Lonnie Wade acknowledged on cross-examination that defendant and the others in the house had nothing to do with the robbery complainant.

"[s]econd, you must be satisfied from the evidence *that at some point* the pistol was concealed on or about the person of the defendant. A pistol is concealed if it cannot readily or easily be seen by those who come in ordinary contact with the defendant." [Emphasis added.] The jury returned its guilty verdict within an hour of this answer and instruction by the trial court.

Defendant contends that he is entitled to a new trial because he was prejudiced by the admission of police officer testimony regarding an armed robbery, carjacking, and kidnapping for which defendant was not charged. We agree. The trial court abused its discretion by allowing evidence of uncharged offenses that were not relevant or material to any fact at issue in this carrying a concealed weapon case. MRE 401; MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Furthermore, even if marginally relevant to explain why the police went to the house where defendant was arrested, the slight probative value of the evidence was substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Wilkins*, 408 Mich 69, 74; 288 NW2d 583 (1980).

In *Wilkins*, *supra*, the defendant was also convicted of carrying a concealed weapon. The trial court permitted a police officer to testify about what an informant had told him (to watch for a described black male, driving a described car, who would be carrying a gun) for the purpose of establishing "a basis for the subsequent action of the officers." *Id*. at 71. Our Supreme Court went beyond the question of whether the evidence was hearsay and concluded that the evidence was simply not relevant or material to any fact in dispute. *Id*. at 72-73.

Similarly, in the present case, the testimony about other crimes and the reason the police were investigating the vacant house was not relevant or material to the issue of whether defendant was carrying a concealed weapon. To be relevant, evidence must be material and probative of a fact of consequence to the action. *People v Mills*, 450 Mich 61, 67; 537 NW2d 909, modified, remanded 450 Mich 1212; 539 NW2d 504 (1995). To be material, the fact must be one "in issue" or within the "range of litigated matters in controversy." *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000), quoting *Mills*, *supra* at 68. In the present case, *why* the police went to 17541 Gable was not consequential to the case because that fact was not in issue nor in dispute and thus, under these circumstances, was not admissible. MRE 401; MRE 402; *Wilkins*, *supra*.

Moreover, even assuming the evidence of other crimes was marginally relevant to show why the police went to the home on Gable Street, the danger of unfair prejudice substantially outweighed its probative value. MRE 403; *Wilkins*, *supra* at 74. In the present case, the evidence indicated one or more violent crimes had recently occurred at the house where defendant was found with two other (black) males and a female. Furthermore, the suspects were described as three black males, one of whom could fit the description of defendant. Finally, the robbery suspects were thought to be armed with an "automatic," which was the same type of weapon that defendant was charged with carrying concealed on or about his person.

The danger of unfair prejudice was present in this case because the jury could have inferred (despite the limiting instruction), based on the similarities between the described robbery

and what the officers actually found at 17541 Gable, that defendant and his male companions had committed the other crimes or were generally bad men of criminal character. It is well settled that evidence of other crimes, wrongs, or acts may not be used to prove a defendant's guilt, except in limited circumstances, not present in this case. MRE 404(b); *Sabin, supra* at 56. As applied to the case at bar, "the prejudicial impact of this evidence, offered for a limited purpose, is self-evident." *Wilkins, supra*.

Had the proof of defendant's guilt been greater, and had the disavowal of defendant's involvement been more forthright, the prejudicial impact would have been less. For example, in *People v Piggee*, 27 Mich App 367, 368-369; 183 NW2d 638 (1970) the defendant was found by the police with a sawed-off shotgun under his clothing. During the trial, one of the officers mistakenly testified that the defendant had been arrested for armed robbery. *Id*. at 370. Not only did the officers retract the statement through testimony, but the trial court instructed the jury to disregard the officer's statement completely. This Court found the trial court did not abuse its discretion by denying a motion for mistrial. *Id*. at 370-371.

In contrast, in the present case, whether defendant even possessed a gun was contested. Officer Wade first saw a cup in defendant's hand (which later is not accounted for). The inside of the house was dark, even though it was sunny outside, which prevented Officer Wade from offering a description of what he saw defendant toss into the bedroom other than that it was a small handgun. The house itself was not defendant's home, but an abandoned house to which many people clearly had access. Furthermore, the recovered handgun itself was never physically connected to defendant through fingerprints or other means.[2]

The nil evidentiary value of the evidence of other crimes, coupled with the danger of unfair prejudice and the closely contested issues of fact (whether defendant carried a pistol and whether, if he did, it was concealed) combined to impair defendant's right to a fair trial. The trial court abused its discretion, first by admitting the evidence and then by not granting a mistrial. There simply was no justification to force defendant to defend against both the charge of carrying a concealed weapon and the uncharged crimes that were alleged to have been committed at the Gable Street address.

Because we remand for new trial, we do not address defendant's remaining issue, but we do address an issue that was not briefed by the parties to prevent the repetition of the error on remand. The trial court's answer to the jury's question on concealment, as applied to the evidence and theory of the prosecutor, was inaccurate. Normally, failure to brief an issue on appeal constitutes a waiver of the issue. *People v Kean*, 204 Mich App 533, 536; 516 NW2d 128 (1994). But, even absent objection, instructional error may be grounds for reversal where the alleged error results in manifest injustice. MCL 769.26; MSA 28.1096; MCR 2.613(A); *People v Kelly*, 423 Mich 261, 271-272; 378 NW2d 365 (1985).

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[2] Defendant's admission that he did not have a concealed weapons permit or license was not an admission of ownership or possession.

In reviewing claims of instructional error, an appellate court must review instructions as a whole. *Kelly*, *supra* at 270-271. Even if instructions are not perfect, there is no error if they fairly present the issues to be tried and they sufficiently protect a defendant's rights. *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996). However, instructions must address each element of the offense charged, as well as defenses and theories of the parties that are supported by the evidence. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). When an instruction has no evidentiary support, it should not be given. *Id*.

The offense of carrying a concealed weapon, contrary to MCL 750.227; MSA 28.424, as applied to this case, has two elements: (1) that defendant carried a pistol, and (2) the pistol was concealed on or about his person. CJI2d 11.1; *People v Davenport*, 89 Mich App 678, 682; 282 NW2d 179 (1979). Merely carrying a pistol in one's hands, without concealment, would not violate the statute. *People v Kincade*, 61 Mich App 498, 502-503; 233 NW2d 54 (1975). In *Kincade* concealment was not found when the police raiding a blind pig observed an object in the defendant's hand which was not determined to be a revolver until recovered from the floor. *Id*. at 501, 504-505.

Likewise, concealment without contemporaneous "carrying" on or about the person does not violate the statute. In *People v Adams*, 173 Mich App 60, 61; 433 NW2d 333 (1988), this Court addressed the issue of whether a pistol found in an unattended suitcase at Detroit Metropolitan Airport could support a charge of carrying a concealed weapon against a defendant who claimed the suitcase after the gun had been found. The Court looked to *Brown v United States*, 58 US App DC 311; 30 F2d 474, 475 (1929), which interpreted a federal statute, similar to Michigan's, and held that "on the person" included weapons near or in "close proximity" to the defendant. *Adams*, *supra* at 62-63. Accordingly, this Court held the defendant could not be convicted because "[t]he gun was in a suitcase not within her control and was not in close proximity to her." *Id*. at 63.

Thus, Michigan's statute requires that "carrying" and "concealment" of the weapon be contemporaneous. Furthermore, the requirement that the weapon be "on or about the person" requires that the weapon be within the control of and in proximity to the defendant, consistent with the legislative purpose of the concealed weapons statute, "to discourage quarreling persons from suddenly drawing and using concealed weapons." *Id*. The answer and modified instruction given by the trial court permitted the jury to find that the element of concealment was satisfied at a point when the weapon was no longer being carried, after it was thrown away by defendant. There was no proof at trial, in the light most favorable to the prosecutor, that the recovered pistol was close enough to defendant, after it had been discarded, to satisfy the "carry" element as discussed in *Adams*, *supra*.

Furthermore, it was not the prosecutor's theory that by throwing the handgun away, defendant had concealed it. Likewise, it was not the prosecutor's theory that defendant was carrying the pistol *after* it had been thrown into the bedroom. Rather, the prosecutor's theory, supported by the evidence, was that defendant was carrying the pistol concealed in his waistband. The evidence may have supported an inference that defendant was attempting to conceal or hide the handgun from the police, but the evidence did not support the conclusion that defendant was carrying the handgun *after* he had thrown the gun into the bedroom. We conclude, therefore, that

the answer and modified jury instruction given by the trial court denied defendant a fair trial by providing a misleading statement of the law to the jury on the element of concealment. The instruction was not supported by the evidence and was inconsistent with the theory of the prosecutor and should not have been given. *Wess, supra*.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder