STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2002
v	No. 227059 Muskegon Circuit Court
JOSHUA PAUL HUSTED, Defendant-Appellant.	LC Nos. 99-043967-FH 99-043968-FH

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of malicious destruction of police property, MCL 750.377b, and of resisting and obstructing a police officer, MCL 750.479. Defendant appeals by right. We affirm.

This case arose from the Michigan State Police fugitive team's arrest of defendant on outstanding warrants.

Defendant argues that there was insufficient evidence to prove beyond a reasonable doubt that defendant was guilty of resisting and obstructing police officers. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994).

The elements of resisting arrest are that the defendant resisted an arrest, the arrest must have been lawful, the person making the arrest must have been an officer of the law, the defendant must have intended to resist such officer, the defendant must have known that he was resisting an officer, and the defendant must have known that the officer was making an arrest. CJI2d 13.1; *People v Julkowski*, 124 Mich App 379, 383; 335 NW2d 47 (1983).

In essence, defendant's argument is that the testimony of several witnesses indicated that defendant might not have known that he was being detained by police officers. Specifically, defendant contends that the testimony "from several witnesses" indicated that the officers did not identify themselves to defendant. Defendant contends further that even if he were aware that he was being arrested by police officers, the evidence did not establish that he intended to resist

arrest; rather, it established that his struggle resulted from "his defensive reaction to punches and kicks he received prior to and during arrest."

This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra* at 514-515; *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Although defendant is correct that some of the witnesses' testimony arguably posed a question regarding whether the police officers identified themselves, other witnesses testified that the officers did. Each of the police officers testified that they identified themselves. Furthermore, there was evidence that at least some of the officers exhibited police insignia, and that defendant recognized the officers, Trooper Anderson in particular, independently of any police identification shown at that time, before he ran. Defense witness Angela Scott testified that Anderson is a "cop that hangs around" and that he was "most frequently involved" in the neighborhood. Also, defense witness Barnes testified that he heard defendant say "something about them not catching him before." The jury apparently found the prosecution witnesses more credible than those of the defense, and thus there was sufficient evidence presented to support its conclusion that defendant knew he was being detained by police officers.

Defendant's contention that the evidence "suggested" that he struggled with police only to defend himself from punches and kicks is only one interpretation of the evidence. A different, equally reasonable interpretation of the evidence is consistent with the jury's finding that defendant intended to resist arrest. Anderson testified that he made multiple pleas to defendant to cooperate but that defendant did not comply. The police had to use pressure point tactics in order to gain defendant's compliance, but did not punch him. Various other police officers described in detail defendant's lack of cooperation, foul language, and the tactics used to handcuff and subdue him. They also denied kicking, punching, or otherwise beating defendant. Anderson's testimony regarding defendant's statement that Anderson "couldn't catch [defendant] the first two times," which, for reasons discussed *infra* was properly admitted, also supported the jury's conclusion that defendant knew that police officers were after him and that he was resisting arrest. Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt. *Wolfe*, *supra* at 515.

Defendant next argues that the court abused its discretion by admitting two pieces of evidence that he characterizes as other "bad acts" evidence under MRE 404(b). We disagree.

First, defendant takes issue with Anderson's testimony that defendant said Anderson "couldn't catch me the first two times you chased me." The decision whether to admit evidence is within the sound discretion of the trial court. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion occurs "when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *Id.*

MRE 404(b) governs admission of evidence of bad acts. It provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity,

> intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 74; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994).

As previously stated *supra*, the elements of resisting arrest are that the defendant resisted an arrest, the arrest must have been lawful, the person making the arrest must have been an officer of the law, the defendant must have intended to resist such officer, the defendant must have known that he was resisting an officer, and the defendant must have known that the officer was making an arrest. CJI2d 13.1; *Julkowski, supra*. The statute proscribes threatened physical interference and actual physical interference with an officer. *People v Vasquez*, 465 Mich 83, 91-92; 631 NW2d 711 (2001).

At trial, defendant's theory of defense was that defendant did not know that Anderson and the other officers were police officers, and that, accordingly, the prosecution had not established that he knew that he was being arrested or pursued by officers and had not established defendant's intent to evade arrest. However, Anderson's testimony indicated that defendant recognized Anderson as a police officer and had both the knowledge and intent to resist arrest. Thus, not only was the statement offered for a proper purpose, it was also highly relevant.

Furthermore, the probative value of the other acts evidence in this case was not substantially outweighed by the danger of undue prejudice. The probative value of the evidence relating to the previous chases was great: it went directly to the knowledge and intent elements of the crime. Moreover, numerous witnesses testified to defendant's verbally abusive behavior as well as his physical resistance, and, defense counsel stipulated to the existence of valid arrest warrants in order to minimize their impact at trial. We believe that such damaging admissible evidence operated to diminish the impact of defendant's statement as testified to by Anderson. In this context, the likelihood that the jury would use the evidence for an improper purpose - and, hence, subject defendant to unfair prejudice – is minimal.

Significantly, "unfair prejudice" does not mean "damaging." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), modified 450 Mich 1212; 539 NW2d 504 (1995). Any relevant evidence will be damaging to some extent. *Id.* Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or that it would be inequitable to admit the evidence. *Id*. at 75-76. As this Court in the recent case of *People v Smith*, 243 Mich App 657, 674; 625 NW2d 46 (2000), remanded on other grounds 465 Mich 928 (2001), explained, "virtually all evidence introduced at trial by an opponent is specifically intended to prejudice the other party." Anderson's testimony was offered for a proper purpose. It was relevant, and its probative value was not substantially outweighed by its potential for

unfair prejudice. *Starr, supra*. In light of the foregoing, the evidence was admissible under MRE 404(b)(1).

Second, defendant takes issue with Sergeant DeClercq's testimony describing the fugitive team's role in law enforcement. We fail to see how this testimony could be characterized as other "bad acts" evidence on the part of defendant. This is especially true in light of the court's own questions to DeClercq following defense counsel's motion for mistrial that highlighted the team's participation in cases not involving dangerous felons and in light of the court's cautionary instruction to the jury. Even treating DeClercq's statement as one involving MRE 404(b) evidence, we cannot say that the probative value of the evidence was outweighed by the danger of unfair prejudice.

Next, defendant argues that the court erred by failing to give defendant's requested jury instruction, CJI2d13.5. Our review of the record indicates that the court indeed gave the relevant portion of the instruction and did so in accordance with the Use Note accompanying the instruction: the court selected the one appropriate paragraph of the instruction and gave it. Therefore, this issue is meritless. We further note that our review of the record indicates that despite defendant's assertions to the contrary, CJI2d 13.2, the instruction on "Interference with an Officer Maintaining the Peace," was not given.

We affirm.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Christopher M. Murray