STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2004
v	No. 245011 St. Clair Circuit Court
GERALD WAYNE DEFRANCE, Defendant-Appellant.	LC No. 02-000388-FH

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felon in possession of a firearm, MCL 750.224f, resisting or obstructing an officer, MCL 750.479, recreational trespass, MCL 324.73102(1), wildlife conservation violation (hunting deer out of season), MCL 324.40118(1), and failure to wear hunter orange, MCL 324.40116.[1] He was sentenced to three years' probation with the first year to be served in the county jail[2] for the felon in possession and resisting or obstructing convictions, and ninety days in jail for each of the remaining convictions. He appeals as of right. We affirm.

I. FACTS

Officer John Borkovich testified that he was employed as an officer of the Department of Natural Resources (DNR) on the day of the incident and had "full police powers in the State of Michigan." He indicated that the real property at issue in the present case was owned by Detroit Edison, and consisted of a large tract of land that was "heavily wooded" and "maybe a good area to go hunting." He said that he had found people trespassing and hunting there in the past during

[1] Defendant was acquitted of an additional charge of felonious assault and an attendant charge of possessing a firearm during the commission of a felony.

[2] The judgment of sentence and order of probation provide for sixty days of this jail term to be suspended on the fulfillment of certain conditions and also authorize the placement of defendant in a work release program. The record also includes a post-judgment order providing for a twenty-five percent reduction in defendant's jail sentence.

routine patrols. It is undisputed that the date of the incident was outside the legal season for hunting deer with firearms.

At about 9:30 a.m. on the day of the incident, Officer Borkovich was walking on the Detroit Edison property while in uniform and wearing a coat that had a "Michigan Conservation Officer emblem on the sleeves." Officer Borkovich saw a person whom he identified as defendant dressed in full camouflage clothing with a "pack basket" on his back and carrying a rifle. The person had "no orange on." At a point when defendant was about seventy yards away, Officer Borkovich said, "Stop. Police. Police. Stop," and gave a similar command again after the person did not stop. According to Officer Borkovich, defendant then removed his pack basket and let it fall to the ground and ran with his weapon in hand. He indicated that he made multiple commands for defendant to stop, identified himself as the police and a conservation officer, told defendant that he was under arrest, and ran after defendant.

Officer Borkovich testified that defendant eventually ran behind a white pole barn and that he momentarily lost sight of defendant's back. As Officer Borkovich was running toward the pole barn, defendant emerged looking directly at him. He said that he told defendant to drop his gun and again identified himself as a police officer and conservation officer, but there was no reaction and that defendant was "staring at me holding onto the scope gun [sic]." Officer Borkovich said that he drew his gun, aimed it at defendant's chest, and began to pull the trigger while giving loud commands to him to drop his gun. Officer Borkovich explained that he did not pull the trigger far enough to actually shoot because defendant's gun was not aimed at him. Officer Borkovich indicated that after about one to three minutes of yelling at defendant to drop his gun, he finally dropped it.

Officer Borkovich then ordered defendant on the ground. Defendant walked about ten or twelve steps and then got down on his knees on the ground. Officer Borkovich said he walked behind defendant to handcuff him and place him in custody, but defendant got up and began pushing him. He also said that defendant got up on his feet after he repeatedly told him to get on the ground and stay there. He described defendant as pushing, shoving, and bumping him with his chest and said that defendant "kept coming at me, not saying a word." He said that he told defendant to cooperate or he would mace him and that he placed defendant in handcuffs behind his back, but that the pushing still did not stop. Officer Borkovich testified that a third person was at a residence directly in front of the pole barn and had been repeatedly screaming to the effect of asking what was going on in his yard. He also said that he had called for backup at some point and estimated that the backup arrived about eight to ten minutes after he had defendant in handcuffs.

Officer Borkovich testified that he made remarks to defendant to the effect that he did not understand defendant's behavior and that defendant said, "I'm not hunting." However, Officer Borkovich said that the way defendant was dressed was consistent with what he had seen deer hunters wear in the past. He also indicated that defendant described where his pickup truck was located and that he found items indicative of a person hunting deer, specifically apples, a bag of corn, a crossbow, and different camouflage clothing items, but he did not recall seeing any orange clothing. Officer Borkovich said that he found a "Magnum Grunter" on defendant's person, which is a "deer call" or item marketed to attract "bigger bucks," and he believed there was an image of "a big deer with a big rack on it" on the side of this item. He also found a hunting knife, flashlight, and firearm slugs on defendant's person. Officer Borkovich indicated

that defendant had a bag that contained a "grunt tube," which imitates a deer noise and attracts deer, and a bottle that contained something that smelled like deer urine. Officer Borkovich maintained that defendant's hunting paraphernalia was not for coyote hunting based on his experience with coyote hunters, but rather was consistent with deer hunting.

Walter Hooper testified that he lived on Fisher Road on the day of the incident and that his residence was surrounded by the Detroit Edison property. As Hooper walked outside on the deck of his house, he saw a person in "full dress camo" come around the front of a pole barn with a shotgun in his hand. After this, Hooper saw another person with a gun out. He said that he eventually asked "who are you" and that Officer Borkovich opened up his jacket, said he was a police officer, and showed his badge. Hooper testified that he heard Officer Borkovich yelling that he was a police officer and "drop the gun." Hooper described the man in camouflage as not being cooperative when an effort was made to handcuff him, specifically that he was "still pushing and shoving." Hooper identified defendant as the man in camouflage.

Garth Jones, a probation officer, testified that defendant had a prior felony conviction in 1970 for larceny from a person. Deborah Furay, a deputy clerk with the St. Clair County Clerk's Office, stated that a review of her office's records disclosed that defendant had never applied for reinstatement of the right to possess a gun.

Defendant testified that his purpose in going into the woods of the property at issue was to retrieve a friend's tree stand. He asserted that he was not deer hunting that day. However, defendant said that he was hunting coyotes earlier that day at nearby property that belonged to a friend. Defendant described the "call" item that he had as a device that was useful in making a distressed baby deer sound, which would help bring in coyotes. Defendant explained at one point that he had a shotgun with him at the time he encountered Officer Borkovich because he "[j]ust took it with me," but later said that he had it with him just in case he saw a coyote. He testified that the shotgun was not loaded. Defendant denied seeing any "no hunting" or "no trespassing" signs on Fisher Road when he crossed it to go into the woods or at any prior time. Defendant said that while he was on the property he eventually saw the "silhouette" of a man. Defendant said he thought the man was Ray Boswell, with whom he had a "run-in" in the past because the man was coming from the direction of Boswell's property. Defendant claimed that he ran because he was afraid of Boswell. Defendant eventually stopped and saw an officer with a pistol pointed directly at him who was telling him to drop the gun. He indicated that he immediately dropped the gun. He described the officer as being "so mad," "a crazy person," and "look[ing] like Charles Manson." Defendant maintained that Officer Borkovich knew that defendant "didn't point my gun at him" and that the officer "fabricated this story about me sneaking around." He testified that Officer Borkovich said to him, "I'm going to fix your a--. Who do you think you are running on me?" Defendant said that he put his hands up until Officer Borkovich told him to put one of his arms behind his back and that he did not want to do that because of the "look" that the officer had on him and because he did not want to turn his back on the officer. He indicated that he wanted to do what Officer Borkovich told him, but that he "just wouldn't turn around" and "just couldn't do it." Defendant said that he did not hear Officer Borkovich identify himself as a police officer at any time before he saw him in the clearing pointing a gun at defendant. Defendant denied ever shoving, pushing, or struggling with Officer Borkovich.

II. PRIOR FELONY CONVICTION EVIDENCE AND INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he was denied a fair trial by the introduction of evidence that he had been previously convicted of larceny from a person and by repeated references to that conviction during trial. This evidence was relevant to the felon in possession of a firearm charge. Defendant appears to contend that the prosecutor should have presented the evidence of his prior felony conviction in a manner that merely informed the jury that he had a prior felony conviction, without revealing the specific felony of which he was convicted. We disagree.

A. Standard of Review

Defendant did not preserve this issue with an appropriate objection below, thus we may grant relief only for plain error that resulted in the conviction of an actually innocent defendant or that seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant did not raise his claim of ineffective assistance of counsel below, therefore our review is limited to errors apparent on the existing record. *People v Wilson*, 257 Mich App 337, 363; 668 NW2d 371 (2003).

B. Analysis

Defendant did not offer to stipulate to a prior predicate felony for purposes of the felon in possession of a firearm charge. He cannot now successfully claim that admission of this evidence, which established a necessary element of the felon in possession of a firearm charge, was erroneous. *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997). Accordingly, we conclude that defendant has not established any plain error with regard to the references to his prior larceny from a person conviction.

Defendant alternatively argues that his trial counsel was ineffective by not objecting to references to the specific nature of his prior larceny from a person conviction. We disagree because defense counsel's failure to object may be considered reasonable trial strategy. To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient with counsel having made errors so serious that counsel did not perform as the counsel guaranteed by the Sixth Amendment, and (2) a reasonable probability of a different outcome but for counsel's error. *Id.* at 362. There is a strong presumption that counsel's performance constituted sound trial strategy. *Id.*

In this case, trial counsel may not have objected to references to the prior larceny from a person conviction as a matter of strategy in order to allow the age and nature of this conviction to be emphasized for purposes of contesting the felon in possession charge. Importantly, trial counsel reasonably could have determined that the alternative course of action suggested by defendant on appeal, i.e., stipulating to the existence of a predicate felony, would not have served defendant's interests. Rather, as discussed further below, it made strategic sense for defense counsel to allow the age and nature of the prior felony into evidence as part of a strategy of effectively appealing for jury nullification with regard to the felon in possession charge. While the defense may have had little chance of defeating this charge in any event, counsel reasonably

could have concluded that it was worth pursuing this strategy in order to contest that charge compared to an alternative course of effectively conceding guilt to the charge in order to reduce potential prejudice with regard to the less serious charges of which defendant was convicted.[3]

A substantial part of trial counsel's strategy with regard to the felon in possession charge amounted to an open appeal for jury nullification on the ground that it would be unfair or unwarranted to convict defendant of that offense under the circumstances of this case. The following remarks in defense counsel's closing argument manifest that he was effectively asking the jury to acquit defendant of the felon in possession charge despite the seemingly insurmountable evidence of defendant's prior felony conviction based on a claim that defendant was sincerely ignorant of being subject to the felon in possession of a firearm statute and defendant having indicated his possession and use of firearms to government entities:

> With regard to the charge of felon in possession of a firearm, you may recall the testimony of [defendant] that he even registered his guns with the local Clay Township Police Department when his insurance company asked him to. To get the rider on his insurance policy. He didn't have to. He didn't have anything to hide. Walked in, gave the information, not a problem.
>
> If he was a felon in possession of a firearm, the Clay Township Police Department could have stopped him right there, arrested him right there at that time.
>
> *Yes, we've all heard that ignorance is no excuse, ignorance of a law is no excuse, but it is also reasonable to believe that there's also a thing called cruel and unusual and unfair charges and prosecution as well.* If all [defendant] had to do was fill out an application card, do you think he would have done that? If anybody at any time had ever told him that he needed to do such a thing, do you think he would have done that? He liked to hunt every year. The State of Michigan granted him hunting licenses with guns, with firearm licenses every

[3] The only felony convictions in this case were for felon in possession of a firearm and resisting or obstructing an officer. The information filed in this case reflects the undisputed fact that the five-year potential sentence for felon in possession of a firearm was the longest potential sentence of any crime with which defendant was charged. However, while defendant was acquitted of felonious assault and felony-firearm, if he had been convicted of those charges the total potential maximum imprisonment would have been six years, i.e., four years for assault and a consecutive two-year sentence for felony-firearm. Obviously, defendant was not prejudiced with regard to the assault and felony-firearm charges by defense counsel's decision to contest the felon in possession charge because he was acquitted of those charges. However, even if we were to factor the assault and felony-firearm charges into our analysis, trial counsel could reasonably have concluded that it would have been of such little benefit to effectively concede guilt of the felon in possession charge, punishable by up to five years' imprisonment, as part of any strategy to defeat the potential of one more year of imprisonment upon conviction of the assault and felony-firearm charges that defendant's best interests would not have been served by failing to contest the felon in possession charge.

> year. From the State of Michigan. The same state who [sic] has records of all convictions (emphasis added).

The emphasized remarks reflect that trial counsel was asking the jury to acquit defendant of the felon in possession charge based on jury nullification, i.e., that it would be "cruel and unusual" or "unfair" to convict defendant of that charge under the circumstances of this case, even if he was legally guilty of that crime.

While an appeal for jury nullification might generally be outside the bounds of reasonable trial strategy, in light of the significance of contesting the felon in possession charge in this case, and the evident lack of any plausible grounds to contest the existence of defendant's prior conviction, it was not unreasonable strategy for counsel to urge the jury to decline to convict defendant of this charge based on extra-legal considerations. In this regard, the existence of substantial indications that defendant was sincerely unaware of a legal prohibition on his possession of a firearm provided a plausible basis for trial counsel to believe that this appeal for jury nullification might have a realistic chance of succeeding. Notably, while cross-examining Jones, trial counsel highlighted that defendant was only about seventeen or eighteen years old when he was convicted of the prior larceny from a person offense. Trial counsel also elicited from defendant that he did not hide his shotgun from "the law" at anytime since purchasing it, but rather had registered his firearms with the Clay Township police about ten or twelve years previously. Defendant's testimony also reflected that he had purchased a rider to an insurance policy to specifically cover his firearms. He further said that he had a gun hunting license for small game. These indications that defendant effectively reported his possession of firearms to governmental agencies and to his insurance company served to suggest that he was simply unaware of any legal bar to his possession of a firearm based on his prior felony conviction, which in turn provided trial counsel with a plausible basis for appealing for jury nullification as to the felon in possession charge on the ground that it would be unfair to convict defendant of that charge. In connection with this strategy, allowing the jury to know the nature and age of defendant's thirty-two-year old conviction for larceny from a person was reasonable because (1) it could support a conclusion that it was understandable for defendant to not realize that such an old conviction would trigger a legal prohibition on firearm possession, and (2) it apprised the jury that the predicate felony was not for a recent or more serious crime, such as an offense involving actual or attempted infliction of physical harm on a person. Thus, we conclude that defendant has not established that trial counsel provided ineffective assistance with regard to this matter.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence to support his recreational trespass conviction. We disagree.

A. Standard of Review

In considering this sufficiency of the evidence issue, we view the evidence in a light most favorable to the prosecution to determine whether it would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Gonzalez*, 468 Mich 636, 640; 664 NW2d 159 (2003). In doing so, we must draw all reasonable inferences and make credibility choices in support of the jury's verdict. *Id.* at 640-641.

B. Analysis

The recreational trespass statute, MCL 324.73102(1), provides, in pertinent part:

> Except as provided in subsection (4),[4] a person shall not enter or remain upon the property of another person, other than farm property or a wooded area connected to farm property, to engage in any recreational activity or trapping on that property without the consent of the owner or his or her lessee or agent, if either of the following circumstances exists:
>
> (a) The property is fenced or enclosed and is maintained in such a manner as to exclude intruders.
>
> (b) The property is posted in a conspicuous manner against entry. The minimum letter height on the posting signs shall be 1 inch. Each posting sign shall be not less than 50 square inches, and the signs shall be spaced to enable a person to observe not less than 1 sign at any point of entry upon the property.

Defendant contends that there was insufficient evidence that the property at issue was fenced or posted against trespassing or hunting. We disagree. Following lengthy questioning by defense counsel related to the posting provisions of MCL 324.73102(1)(b), Officer Borkovich testified that the property at issue had "been posted for 17 years." When asked if he knew for a fact that "the north side of Fisher Road, the parcel we're talking about" was properly posted at any time, Officer Borkovich replied, "[a]t any time it's been for 17 years." He also said that the signs were "much bigger than the minimum square inch" and that "the letters are much bigger than the minimum square [sic] inch." Viewing this testimony in a light most favorable to the prosecution, the jury could reasonably have found that the property at issue was consistently and properly posted against trespassing, in accordance with the requirements of MCL 324.73102(1)(b), throughout the seventeen years preceding the incident and was so posted against trespassing on the day of the incident.[5] While defendant relies on additional testimony from Officer Borkovich acknowledging that he did not look for or see signs against trespassing on the property on the day of the incident, this did not preclude the jury from reasonably concluding that the property was so posted on the day of the incident based on the officer's testimony about the consistent state of the property in this regard. Indeed, it is a settled principle that the prosecution is not required to negate every reasonable theory consistent with the defendant's innocence in order to present sufficient evidence of a charged crime. *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002). Similarly, the jury was free to discount testimony from other witnesses upon which defendant relies to cast doubt on whether

[4] MCL 324.73102(4), which generally allows a person to enter the property of another to retrieve a hunting dog, is not implicated in this case.

[5] While the record does not indicate that there was evidence of the property being fenced against intruders, this is immaterial because MCL 324.73102(1) plainly allows the prosecution to show, in pertinent part, *either* that the property was fenced or enclosed to exclude intruders *or* that it was posted against trespassing as provided in the statute.

the property was appropriately posted against trespassing on the day of the incident. *People v Lundy*, 467 Mich 254, 258; 650 NW2d 332 (2002).

IV. MOTION TO SEQUESTER WITNESS

Defendant claims that the trial court abused its discretion, *In re Jackson*, 199 Mich App 22, 29; 501 NW2d 182 (1993); *People v Jehnsen*, 183 Mich App 305, 309; 454 NW2d 250 (1990), by denying his motion to sequester the witnesses. We disagree.

A. Standard of Review

Assuming for purposes of discussion that the trial court abused its discretion by denying this motion, defendant is not entitled to relief because, at most, he has established nonconstitutional error[6] and it is not more probable than not that the outcome was affected. *People v Phillips*, 469 Mich 390, 396; 666 NW2d 657 (2003).

B. Analysis

It is evident that the testimony of Officer Borkovich, who was called as the prosecutor's first witness in her case-in-chief, presented the most critical evidence against defendant with regard to his conduct at the time of the incident. This testimony preceded any other trial testimony and, as a result, it could not have been improperly influenced by the testimony of other witnesses. Further, defendant has not demonstrated, nor is there any specific indication in the record, that Officer Borkovich's testimony colored the testimony of other witnesses in a manner that prejudiced defendant. While defendant refers to testimony from Sergeant David Rock as suggesting that he became more enlightened regarding the incident by hearing Officer Borkovich's testimony, Sergeant Rock was called as a witness by the defense, not the prosecution. Indeed, the prosecution did not even cross-examine Sergeant Rock. Thus, contrary to the implication of defendant's argument, the prosecution did not use Sergeant Rock's presence during Officer Borkovich's testimony to defendant's detriment. Accordingly, we conclude that defendant is not entitled to relief because it is not more probable than not that the trial court's failure to sequester the witnesses was outcome determinative.

V. TESTIMONY REGARDING DEFENDANT'S PRIOR JAIL TIME

Next, defendant asserts that he is entitled to a new trial based on Deputy Ronald Matthews' testimony that referenced another deputy indicating that he knew defendant from a prior time when defendant was in jail. We disagree. In *People v Griffin*, 235 Mich App 27, 35-37; 597 NW2d 176 (1999), this Court held that a witness' "brief incidental mention" that a

[6] Defendant advances a conclusory argument that the failure to sequester witnesses violated his constitutional due process right to a fair trial. However, he presents no argument to reasonably support a conclusion that there is a constitutional right to the sequestration of witnesses, nor have we found any authority articulating such a constitutional right. In any event, in light of our analysis, it is apparent that the trial court's failure to sequester the witnesses did not deny defendant a fair trial.

defendant was earlier incarcerated did not warrant a mistrial. The pertinent circumstances in *Griffin* were substantially more egregious than those in the present case. In *Griffin,* the witness testified to a statement by the defendant in a telephone call that he was in jail, despite having been instructed not to say anything in the jury's presence about the defendant's prior incarceration. *Id.* at 35-36. In contrast, there is no indication that Deputy Matthews violated any express instruction not to mention defendant's earlier time in jail. Further, while the trial court eventually sustained a hearsay objection to the testimony at issue, it was not simply a gratuitous statement, but rather was reasonably related to the subject matter of the pertinent portion of Deputy Matthews' testimony. Specifically, the prosecutor was questioning Deputy Matthews about the circumstances in which defendant changed clothing after being arrested. Deputy Matthews indicated that "Deputy Stanley" said he was familiar with defendant from defendant "being in jail some other time" and that it would be "no problem" to allow defendant to remove some of his clothing. It is apparent that the prosecutor elicited the testimony regarding the circumstances in which defendant changed clothing in order to rebut a suggestion from earlier questioning by defense counsel, while cross-examining Officer Borkovich, that law enforcement officers required defendant to strip naked while he was outside. Accordingly, there is no basis for concluding that either the prosecutor or Deputy Matthews deliberately injected the reference to defendant's earlier time in jail as part of a calculated strategy to inappropriately prejudice defendant. In light of *Griffin,* we conclude that defendant is not entitled to relief based on this issue.

VI. PRIOR TRESPASSING INCIDENT

Defendant argues that he is entitled to a new trial because the prosecutor improperly elicited testimony from him during cross-examination about a prior occurrence, approximately two months before the incident at issue, in which he apparently trespassed on property and was placed "on notice" to some extent regarding legal restrictions on hunting on another person's property and the legal requirement of wearing hunter orange while hunting. We disagree.

A. Standard of Review

The only objection to this testimony by defense counsel below was that there was "no question relative to the charges at hand," i.e., that the testimony was irrelevant. We review this preserved evidentiary question for an abuse of discretion. *People v Coy,* 258 Mich App 1, 3; 669 NW2d 831 (2003).

B. Analysis

Relevant evidence is evidence having "any tendency" to make the existence of a fact of consequence to the determination of the action more or less probable than it would be without that evidence. MRE 401. It is apparent from a review of the applicable portion of the recreational trespass statute, MCL 324.73102(1), and the statute generally requiring a person to wear hunter orange while hunting, MCL 324.40116, that defendant is correct that the prosecution was not required to prove his knowledge of the existence of those legal requirements in order to prove violations of those statutes. However, the evidence at issue was relevant to the resisting or obstructing an officer charge in this case. The resisting or obstructing statute, MCL 750.479(1)(a), prohibits a person from "knowingly and willfully" obstructing an officer "acting in the performance of his or her duties." Testimony that defendant was placed on notice from a

prior incident that it was unlawful to hunt on another person's property without permission and was at least generally illegal to hunt without wearing hunter orange made it more probable that defendant knew that Officer Borkovich was acting in the performance of his duties when he attempted to stop or arrest defendant for hunting on the Detroit Edison property in circumstances in which defendant was not wearing hunter orange. Thus, the trial court did not abuse its discretion by concluding that this evidence was relevant.[7]

Defendant also argues that this evidence should have been excluded as unfairly prejudicial under MRE 403, and was inadmissible propensity evidence proscribed by MRE 404(b). These claims are unpreserved because defendant did not object on these grounds below. *People v Bulmer*, 256 Mich App 33, 34-35; 662 NW2d 117 (2003) (objection to evidence on one ground is insufficient to preserve an appellate attack based on a different ground). Thus, relief is available only for a plain error that affected substantial rights. *Id.* at 35. With regard to MRE 403, we conclude that there was no plain error because the trial court was not called upon to exercise its discretion to determine whether the evidence should be excluded and it is not clear or obvious that the probative value of this evidence was substantially outweighed by the potential for unfair prejudice. With regard to MRE 404(b), the evidence was not excluded by that provision because the plain language of MRE 404(b)(1) provides that it does not exclude other acts evidence that is admissible to show a defendant's knowledge which, as discussed above, was the relevant ground for admission of this evidence. As to defendant's argument that the prosecution failed to provide proper notice of this evidence under MRE 404(b)(2), we conclude that any impropriety in this regard does not entitle defendant to relief because it did not affect his substantial rights, given that the evidence was admissible and there is no indication that earlier notice would have allowed the defense to respond to this evidence in a different manner. See *People v Hawkins*, 245 Mich App 439, 453-456; 628 NW2d 105 (2001) (unpreserved issue of failure to provide notice required by MRE 404(b)(2) did not warrant relief where evidence was admissible and the defendant "never suggested how he would have reacted differently to this evidence had the prosecutor given notice").

VII. JUDICIAL BIAS

Defendant claims that he was denied a fair trial because the trial judge was biased and displayed prejudice against the defense. Essentially, defendant argues that the trial judge erred by denying his motion to recuse himself from this case. We disagree.

A. Standard of Review

We review the trial court's findings of fact with regard to this motion for an abuse of discretion while the application of the facts to the law is reviewed de novo. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

B. Analysis

[7] In light of this analysis, we need not reach the prosecution's argument that this evidence was relevant and admissible as impeachment evidence.

We conclude that defendant is not entitled to relief based on this issue because he has not presented a reasonable basis for finding that the trial judge was personally biased or prejudiced against him. There is a heavy presumption of judicial impartiality. *Id*. at 391. A judge will not be disqualified based on a claim of bias or prejudice absent actual personal bias or prejudice against a party or the party's attorney. *Id.* For the most part, defendant's claim is based on various rulings by the trial court denying his motions and overruling defense objections. However, judicial rulings themselves almost never constitute a valid basis for alleging bias unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003). Defendant has presented no reasonable basis for concluding that the trial judge's rulings on various matters displayed such deep-seated favoritism or antagonism. Rather, as the trial judge aptly observed in denying defendant's motion to recuse himself, "That's exactly what a judge is supposed to do is make the rulings." The trial judge also correctly observed that defense counsel's unhappiness "with the fact that I ruled not always in his favor, isn't a basis for a judge to recuse himself."

Defendant argues that the judge's bias is evident from the judge's remark, "All right. Whatever that means," after defense counsel replied, "Ready as instructed, yes," when the trial court asked if the defense was ready to proceed near the beginning of the second day of trial. But comments critical or hostile to counsel are ordinarily not supportive of a finding of bias or partiality. *Wells, supra* at 391. In any event, this brief remark does not reasonably demonstrate actual bias or partiality against the defense, but rather is more naturally understood as simply an expression of bewilderment at a rather odd remark by defense counsel to a straightforward question. Defendant also refers to remarks by the trial judge in connection with a ruling on a matter outside the presence of the jury in which the judge questioned whether defense counsel questioned potential witnesses and expressed that he was "consistently astounded at the absolute, total disregard of following the rules" by defense counsel. In context, the judge's remarks reflect that this was an opinion formed on the basis of defense counsel's conduct in handling the case. Such opinions during the course of the trial process do not constitute bias or partiality where, as here, they do not show deep-seated favoritism or antagonism that would render the exercise of fair judgment impossible. *Id.* This is particularly so here as the remarks were directed at defense counsel, not defendant. *Id.* at 391-392 (motion for disqualification properly denied with regard to punishment and ire directed at defense counsel but not indicating bias or prejudice against the defendant).

VIII. CUMULATIVE ERROR

Finally, defendant argues that the cumulative effect of all the previous allegations of error raised in this appeal denied him a fair trial. While the cumulative effect of individual errors may warrant reversal in some circumstances, even if none of the individual errors standing alone would do so, the effect of cumulative error must be seriously prejudicial in order to warrant a finding that the defendant was denied a fair trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). In light of our analysis of the various claims raised on appeal, we find no basis for concluding that defendant was denied a fair trial with regard to the previously raised issues, whether considered singly or in combination. Thus, defendant is not entitled to relief based on his claim of cumulative error.

Affirmed.

/s/ Donald S. Owens
/s/ Bill Schuette
/s/ Stephen L. Borrello