

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ALAN KENWABIKISE,

Defendant-Appellant.

UNPUBLISHED

October 30, 2007

No. 269406

Allegan Circuit Court

LC No. 05-014316-FH

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

PER CURIAM.

Defendant was convicted by a jury of two counts of assaulting and resisting a police officer, MCL 750.81(d)(1). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 40 to 180 months' imprisonment, to be served consecutively to the sentence for which he was on parole. He appeals as of right his convictions and sentences. We affirm.

Defendant argues that he was denied his right to a unanimous verdict by the trial court's failure to give the jury a specific unanimity instruction or, in the alternative, his right to effective assistance of counsel was violated by counsel's failure to object to the omission of the specific unanimity instruction. Defendant claims that the jury could have found that he committed the crime by refusing to give officers his name, by telling one of the other suspects to pick up the cigarette, by knocking the officer's hand off his shoulder, by actively resisting arrest, or by threatening both officers with physical interference or force, and that because any one of those acts might have supported his conviction, the jury should have been required to reach a unanimous verdict on which act proved the crime. We disagree.

Defendant did not object below, expressed satisfaction with the instructions and declined the opportunity to request additional instructions. Defendant did not expressly waive any claim of error in the instructions, however, so the issue is merely unpreserved, not waived. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Unpreserved jury instruction challenges are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999).

The Michigan Constitution provides that a criminal defendant has a right to a unanimous verdict for conviction. Const 1963, art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). To protect that right, the trial court must properly instruct the jury regarding the requirement that a verdict be unanimous. *Cooks, supra* at 511. In most cases, the general

unanimity instruction is adequate to protect that right, but when a pattern of conduct is offered to prove a single charged offense, the general instruction may be inadequate. *Id.* A specific instruction that the jury must unanimously agree on which act the defendant committed that constituted the crime may be required when the various acts forming the basis of the crime are materially distinct from each other, *id.* at 512, or where “there is reason to believe the jurors might be confused or disagree about the factual basis of defendant’s guilt.” *Id.* at 524. Absent jury confusion, where the government offers a series of similar acts as proof of the actus reus, a specific unanimity instruction is not required if (1) the acts are so similar in nature and time, so they are one continuous transaction; (2) it offers substantially the same evidence to prove the multiple acts; and (3) the defense offers substantially the same defense to the acts. *Id.* at 524.

We find no plain error. Defendant’s various acts of resistance and obstruction were not materially distinct from each other; rather, his behavior was one continuous transaction of escalating resistance. Substantially the same evidence proved the various acts: police officer testimony that defendant resisted the officers and his resistance escalated during the encounter. Defendant also presented the same defense to the acts. He claimed that he did not resist the officers and that the officers over-reacted, used inappropriate force, and had to justify their use of force to cover-up their misbehavior. Finally, there is no reason to believe that the jurors were confused or disagreed about the factual basis of the charge—they did not ask questions of the court during deliberations and reached a unanimous verdict on both counts. The trial court did not clearly err when it failed to give a specific unanimity instruction, *id.* at 530, and counsel was not ineffective for failing to request such an instruction.

Defendant also argues that prosecutorial misconduct denied him a fair trial. He challenges several statements the prosecutor made during rebuttal. Absent objection, our review of alleged prosecutorial misconduct is generally precluded, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Because defendant did not object to the prosecutor’s closing remarks at trial, this Court’s review is for plain error affecting defendant’s substantial rights. *Id.*

“A prosecutor has the responsibility of a minister of justice, not simply that of an advocate.” *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003). A prosecutor may vigorously argue the people’s case, and although he must avoid “inflaming the prejudices of a jury, there is no requirement that he phrase his argument in the blindest of all possible terms.” *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973). In addition, prosecutors may “argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case,” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). When a defendant challenges a statement made in closing argument, this Court examines the pertinent part of the record and evaluates the remarks in context to determine if the defendant was denied a fair trial. *Bahoda*, *supra* at 266-267. The remarks are read as a whole and “evaluated in light of defense arguments and their relationship to the evidence and testimony at trial” *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

Defendant challenges the prosecutor’s repeated referral to defendant’s parole status to show that he was a bad person and to show that he was not a credible witness. Defendant argued to the jury that because he was on parole, the officers believed that they could do whatever they

wanted with him and used excessive force. To justify their use of force, they fabricated the claim that defendant resisted. The prosecutor argues that once defendant raised the issue of his parole status he was free to argue all of the implications of that status. Indeed, once evidence is introduced, the defendant opens “the door to a full and not just a selective development of that subject.” *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993), quoting *United States v Fairchild*, 505 F2d 1378, 1383 (CA 5, 1975). Here, defendant raised his parole status, thus the prosecutor was free to respond to defendant’s theory of fabrication and argue that defendant was unworthy of belief, and that the police officers were worthy belief. See *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004); *People v Humphreys*, 24 Mich App 411, 414; 180 NW2d 328 (1970).

We conclude, however, that portions of the prosecutor’s argument were improper. In addition to arguing the credibility issue, the prosecutor also urged the improper propensity inference. That the prosecutor called defendant a “jerk” and a “punk” and a poor role model for the teenagers he accompanied that night lends additional support for the conclusion that the prosecutor intended to characterize defendant as a bad person. The sole purpose of those comments was to attack defendant’s character and invite a forbidden bad character inference. Denigrating a defendant with prejudicial remarks and focusing on the personalities involved instead of the evidence is impermissible. *Bahoda, supra*, 448 Mich at 282-283.

Defendant’s final challenge to the prosecutor’s closing argument is that he made an improper civic duty argument when he argued to the jury that it should convict defendant because otherwise it would send a message to teenagers that they may disobey the police. We agree. A prosecutor may not urge the jurors to convict the defendant as part of their civic duty. *Bahoda, supra* at 282; *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). Such arguments are condemned because they inject issues into the trial that are broader than a defendant’s guilt or innocence of the charges, and because they encourage the jurors to suspend their own powers of judgment. *Abraham, supra* at 273. In this case, the jury was clearly encouraged to base its verdict on considerations other than defendant’s guilt or innocence by the prosecutor’s arguments. The prosecutor did not urge the jury to base its verdict on the evidence presented at trial. Rather, the focus of the argument was that area teenagers will learn a bad lesson if defendant is acquitted. These comments improperly placed the focus, not on defendant’s guilt or innocence, but on the broader good of the community, and they improperly injected issues beyond guilt or innocence. *Id.*

Having found prosecutor misconduct, we nevertheless conclude that reversal is not warranted. Defense counsel dealt quite effectively with the prosecution’s efforts to use defendant’s parole status to support its case, and effectively focused the jury’s attention on the evidence, including the testimony of persons who observed the incident. We are satisfied that the jury’s verdict would not have been different had the prosecutor avoided improper argument.

We also reject defendant’s argument that he was entitled to credit for time spent in jail before he began to serve his current sentence. Defendant was on parole when the instant offense was committed. Any credit must therefore be applied to the sentence from which parole was granted, and not the new sentence. *People v Stead*, 270 Mich App 550, 552; 716 NW2d 324 (2006).

Affirmed.

/s/ Donald S. Owens

/s/ Helene N. White