STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2007
v	No. 271038 Kent Circuit Court
JULINA ROSE HOWELL, Defendant-Appellant.	LC No. 05-007626-FH

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial convictions of assaulting, resisting, or obstructing a police officer, MCL 750.81d(1), and assault and battery, MCL 750.81. The trial court sentenced defendant to two days in jail and 18 months' probation for both of her convictions. We affirm.

On July 14, 2005, Deputies Kelly Vitton and Mandy Trevino parked in front of an apartment complex in Grand Rapids, Michigan, after responding to a noise complaint involving defendant's daughter's apartment. At approximately 2:00 a.m., Patricia Dalman arrived at the complex with her friends, Kallyn Sheler and Lindy Lane. Sheler entered Dalman's apartment, while Dalman and Lane remained in the parking lot. When Sheler heard loud banging and shouting outside the apartment, she telephoned Dalman. Dalman then reported the situation to Deputies Vitton and Trevino, who agreed to follow Dalman back to the apartment. At that time, Dalman telephoned Sheler and asked her to come outside. According to Sheler, as soon as she exited the apartment, defendant approached her, grabbed her cellular telephone, and then grabbed her face and pushed it away. Both Dalman and Lane observed defendant grab Sheler's telephone and strike her in the face.

Deputies Vitton and Trevino testified that, when they arrived at the apartment, Sheler informed them that defendant assaulted her and took her telephone. The deputies subsequently attempted to arrest defendant. Testimony indicated that defendant responded by yelling, calling the deputies names, refusing to put her hands behind her back, and repeatedly kicking the deputies. Deputy Vitton warned defendant four or five times that, if she failed to cooperate, the deputies would use pepper spray on her. Because defendant continued to kick the deputies, and then spit in Deputy Vitton's face, Deputy Vitton sprayed defendant with pepper spray. After defendant continued to struggle, the deputy sprayed her a second time.

At trial, defendant testified that she did not touch Sheler and that Sheler gave her the cellular telephone. Defendant further claimed that, when the deputies arrested her, she cooperated with them fully. Additionally, four of defendant's friends and relatives testified that defendant acted appropriately during the arrest and that Deputy Vitton administered pepper spray for no reason.

Defendant argues on appeal that she was denied her constitutional right to a unanimous jury verdict because the trial court gave only a general unanimity instruction. Because defendant did not request a special unanimity instruction at trial or object to the general unanimity instruction given by the trial court, we review her claim of instructional error for plain error affecting her substantial rights. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003). To obtain relief, defendant must demonstrate the existence of a "clear or obvious" error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Moreover, "[t]o avoid forfeiture under the plain error rule, a defendant must show actual prejudice." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). The defendant bears the burden with respect to establishing prejudice and must show that the error affected the outcome of the lower court proceedings. *Carines*, *surpa* at 763. Additionally, reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 763-764.

Defendant was charged with one count of assault and battery upon Sheler and with one count of assaulting, resisting, or obstructing Deputy Vitton while she performed her duties as a police officer. Defendant claims that, because the prosecution presented more than one act as evidence for each of the charged offenses, the trial court was required to give a special unanimity instruction. We disagree. "A defendant has the right to a unanimous verdict and it is the duty of the trial court to properly instruct the jury on this unanimity requirement." *People v Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006). In most cases, a general unanimity instruction is sufficient to protect the defendant's right to a unanimous verdict. *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994). A specific unanimity instruction is only required when there is evidence of alternative acts allegedly committed by the defendant, each satisfying the actus reus element of the charged offense, and

> "1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." [*Martin*, *supra* at 338, quoting *Cooks*, *supra* at 524.]

In the instant case, the acts surrounding each of the charged offenses occurred so closely in time that they constituted single, continuous offenses against each of the victims. See *Cooks*, *supra* at 519-529 (discussing the "continuing offense" exception to the need for a specific unanimity instruction). Defendant committed a continuous series of assaultive acts against Sheler and then a continuous series of assaultive, non-cooperative acts against Deputy Vitton. Furthermore, defendant did not present materially distinct defense theories with regard to any of these individual acts but merely maintained that she acted lawfully throughout the period in question. The jurors simply had to decide whether to believe defendant and her supporting witnesses or whether to believe the prosecutor's witnesses. Additionally, there is no evidence that the jury was confused about the factual basis for defendant's guilt. Under the circumstances,

we conclude that defendant has not met her burden of demonstrating a "clear or obvious" error and resulting prejudice with regard to the court's instructions or with regard to the prosecutor's unobjected-to statements regarding unanimity during opening arguments. *Carines*, *supra* at 763.

Defendant further argues on appeal that the prosecutor committed misconduct by stating, during his closing argument, that an acquittal meant that Deputies Vitton and Trevino committed a crime against defendant. Specifically, defendant claims that, in making this statement, the prosecutor impermissibly shifted the burden of proof. We review defendant's unpreserved claim of prosecutorial misconduct under the plain error doctrine. *Carines*, *supra* at 763-764; *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Where a curative instruction could have alleviated any prejudicial effect, reversal is not warranted. *Ackerman*, *supra* at 449; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Watson*, *supra* at 586. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). A prosecutor must never shift his burden to prove that a defendant is guilty beyond a reasonable doubt, *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987), but he is free to comment on the improbability of a defendant's theory, see *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). A prosecutor may draw inferences from the testimony and argue that witnesses are not worthy of belief. *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985); *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Viewed in context, the prosecutor's statement did not impermissibly shift the burden of proof. Witnesses for the prosecution testified that defendant resisted arrest and that Deputy Vitton used her pepper spray only after repeatedly warning defendant. On the other hand, witnesses for the defense testified that defendant was fully cooperative during the arrest, implying that the deputies acted inappropriately. During his closing argument, the prosecutor highlighted this discrepancy. He argued that, because police officers generally do not administer pepper spray without cause, defendant's version of the arrest was highly unlikely. The prosecutor's closing remarks were not designed to shift the burden of proof to defendant. Rather, his remarks constituted a permissible attack on the probability of defendant's theory, *Fields*, *supra* at 115, and on the defense witnesses' credibility, *Buckey*, *supra* at 14-15; *Thomas*, *supra* at 455. Moreover, the trial court cured any potential for error by instructing the jury, more than once, that the lawyers' statements and arguments were not evidence and that the prosecution had the burden to prove each element of the charged offenses beyond a reasonable doubt. Therefore, defendant cannot establish that the prosecutor's statement affected the outcome of the trial, and reversal is not required. *Carines*, *supra* at 763.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter