

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMARIO ROBEHIER WADE-BEY,

Defendant-Appellant.

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UNPUBLISHED

April 14, 2009

No. 284157

Muskegon Circuit Court

LC No. 07-055739-FH

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assaulting, resisting, and obstructing a police officer, MCL 750.81d(1). He was sentenced as a fourth habitual offender, MCL 769.12, to three to 15 years in prison. Defendant appeals as of right. We affirm.

As defendant was getting out of a stolen car, a marked police cruiser pulled up in front of the vehicle and a uniformed officer, from another marked cruiser, pointed his gun at defendant and ordered him to put his hands up. Defendant complied. Defendant was ordered to get on the ground, but fled on foot. He did not heed commands to stop, but was ultimately apprehended. Defendant maintained that he did not notice the police uniforms, saw only the gun, and fled out of fear that he was going to be robbed and killed. He claimed he had been the victim of a recent armed robbery.

Defendant first argues that the trial court erred in waiving the notice requirements for the admission of evidence under MRE 404(b). We disagree. To refute defendant's claim that he was unaware of the officers' status as officers, the prosecutor sought to introduce evidence regarding a prior instance of resisting arrest in which defendant resisted uniformed officers after being blocked by a police vehicle. As the trial court pointed out, both attorneys were new to the file and no one was aware that defendant would testify in his own defense or that he would claim he had no knowledge of the officers' status. Defendant posits that his plea of not guilty put all issues into dispute, that knowledge is an element of resisting and obstructing a police officer, MCL 750.81d(1), and that the prosecution therefore should have known that knowledge would be at issue. However, nothing in the record suggests that the prosecutor should have anticipated the defense asserted. Thus, the prosecutor would not have known that he needed evidence to rebut it. Since the prosecutor cannot be faulted for failing to predict the defense and provide notice, excusing the lack of notice before trial was not error.

Defendant also argues that this evidence was inadmissible for impeachment and inadmissible as substantive evidence under MRE 404(b). We find no abuse of discretion in the admission of this evidence under MRE 404(b), see *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999), and accordingly, do not address the impeachment issue.

Defendant indicates in his appellate brief that the trial court improperly highlighted MRE 404(b) as a basis for admission of this evidence. While the prosecutor initially cited alternative grounds for the evidence's admission: impeachment and MCL 768.27<sup>1</sup>; it was defense counsel who first raised MRE 404(b) as being applicable. Furthermore, the statute cited by the prosecutor is similar to MRE 404(b), but does not require notice. In context, while the prosecutor did not immediately specify MRE 404(b) as a basis for admission, his reference to MCL 768.27 in effect put MRE 404(b) at issue. Moreover, the prosecutor subsequently indicated he was seeking admission under this evidentiary rule. We see no basis for assigning significance to the order of the arguments. The important issue is whether the MRE 404(b) justification for admission was adequate.

Knowledge and motive are proper purposes for admission of evidence under MRE 404(b). The evidence was not being offered to show that defendant previously resisted arrest. The evidence was offered to establish a similar situation where defendant resisted arrest knowing the officers' status. This evidence assisted the jury in determining whether defendant was aware of the officers' status in the instant case. Thus, the trial court did not abuse its discretion in admitting the evidence for the purpose of establishing knowledge as permitted by MRE 404(b).

Defendant next argues that the trial court erred in allowing impeachment with a prior conviction for unlawfully driving away a motor vehicle ("UDAA"). He asserts that the trial court failed to articulate sufficient reasons as required by MRE 609(b). In addition, defendant contends that the evidence was more prejudicial than probative and did not qualify for admission under MRE 609(a)(2)(B). Subsection (b) of that rule provides:

For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

The trial court noted that *People v Dixon*, 175 Mich App 472; 438 NW2d 303 (1989), identifies UDAA as an impeaching offense under MRE 609 as it is indicative of veracity. The trial court did not comment on the age of the conviction, but it is undisputed that the sentencing date was June 19, 2006. In *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005), this Court

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<sup>1</sup> MCL 768.27 was superceded by MRE 404(b). See *People v Smith*, 120 Mich App 429,436, 327 NW2d 499 (1982).

held that a “trial court’s failure to articulate on the record its analysis of these factors does not require reversal if the trial court was aware of the pertinent factors and of its discretion.” Thus, the trial court’s probative value determination should be upheld. With regard to the prejudicial effect determination, the trial court failed to expressly address similarity to the instant offense and the ramifications if defendant did not testify. However, defense counsel made argument on the similarity of the offenses shortly before the court ruled. Moreover, the record discussion of this issue established that the purpose of defendant’s testimony was to convey to the jury that he thought he was the victim of a “stick up.” The trial court was aware of the similarity of the offenses and the cost that would be incurred if defendant did not testify. Accordingly, the failure to articulate the reasons for the prejudicial effect determination was not fatal. *Meshell, supra*. We find no abuse of discretion.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Patrick M. Meter  
/s/ Deborah A. Servitto