

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL STEPHEN IRISH,

Defendant-Appellant.

UNPUBLISHED

June 9, 2009

No. 282950

Barry Circuit Court

LC No. 07-100145-FH

Before: Beckering, P.J., and Wilder and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of disturbing the peace, MCL 750.170.¹ He was sentenced to 19 days in jail and a \$500 fine. The trial court also imposed two years' probation and court costs of \$1,000, a crime victim rights fund fee of \$50, state minimum costs of \$45 and a probation oversight cost of \$960. As a term of his probation, defendant is required to be tested for alcohol every weekday for two years. Defendant is responsible for paying the testing costs. He now appeals his conviction and sentence as of right. We affirm.

Defendant's conviction arises out of his conduct during a dispute with his neighbors Michael and Cathy Engle. Defendant admitted during his testimony that he yelled and screamed profanities at the Engles' window while he was outside near his house. Michael testified that defendant threatened to kill him. Cathy testified that defendant exposed himself to her after Michael walked away from the window. At trial, the prosecution introduced evidence of defendant's drunken behavior at a restaurant in 2004 to assist in establishing the elements of aggravated indecent exposure, MCL 750.335a(2)(b), a count on which defendant was ultimately acquitted. The evidence was introduced under MRE 404(b). According to witnesses at the restaurant, defendant was intoxicated and exposed himself to female patrons.

I

On appeal, defendant first contends that the trial court abused its discretion in admitting the other-acts evidence pursuant to MRE 404(b). This issue was properly preserved for review when defendant objected to the prosecution's notice of intent to introduce evidence under MRE

¹ Defendant was acquitted of aggravated indecent exposure, MCL 750.335a(2)(b).

404(b), and the trial court addressed and decided the issue. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). We review the matter for an abuse of discretion. *People v Crawford*, 458 Mich 376, 382-383; 582 NW2d 785 (1998). Further, a “preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.” *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (quotations omitted).

The trial court found that the evidence was admissible to show a common scheme or plan, motive, and to “support the credibility of the complaining witness in this case.” We agree with defendant that the evidence was inadmissible to support Cathy’s credibility. Other-acts evidence is not admissible to support the credibility of a witness as a matter of law. See *People v Sabin (After Remand)*, 463 Mich 43, 69-70; 614 NW2d 888 (2000). We also agree that the evidence was not logically relevant to show motive, and relevance is a necessary prerequisite to the admission of evidence under MRE 404(b). *Crawford*, *supra* at 387-388. However, the evidence was properly admitted as evidence of a common scheme or plan, was logically relevant to demonstrate defendant’s common behavior when intoxicated and confrontational, and was not unfairly prejudicial. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). To the extent that this case presents a close question, “a trial court’s decision on a close evidentiary question ordinarily cannot be an abuse of discretion.” *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003). Moreover, regardless whether the trial court abused its discretion in admitting the other-acts evidence in this case, defendant cannot show that he was prejudiced because he was acquitted of the charge for which the other-acts evidence was admitted, and he admitted during testimony to the conduct underlying his conviction. Defendant has failed to show that any error in the admission of the other-acts evidence was outcome determinative. *Lukity*, *supra*.

Additionally, we disagree with defendant that the trial court gave an inadequate limiting instruction with respect to the other-acts evidence because the court failed to indicate that the challenged evidence could only be used in determining defendant’s guilt or innocence as to the indecent exposure charge. Defendant waived this issue for review because his defense counsel affirmatively indicated that he had no objection to the instructions provided by the trial court. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001). Further, in reaching our conclusion, we reject defendant’s claim that the trial court should have delayed a determination on the admissibility of the other-acts evidence or controlled the order of proofs until the testimony “insured” that the other-acts evidence had significant probative value. While delaying the ruling may be appropriate in some circumstances, *People v Martzke*, 251 Mich App 282, 288; 651 NW2d 490 (2002), nothing in the record supports that a delay was necessary or would have changed the outcome in this case, *Lukity*, *supra*.

II

Defendant next contends that the prosecutor’s conduct denied him his right to a fair trial. Specifically, defendant claims the prosecutor withheld exculpatory evidence in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and the Michigan court rules, and lied to the tribunal. We disagree. Defendant’s argument concerns the prosecutor’s direct examination of Cathy at trial. The prosecutor had Cathy refer to the time she telephoned police as “time zero” and to reference that point in time to approximate the time of day that other events took place. Defendant contends that this trial tactic actually contradicted Cathy’s

preliminary examination testimony, and he claims the prosecution deliberately failed to inform the tribunal and the defense of the contrary testimony it planned to offer. Defendant did not preserve this issue for review because he did not make a timely and contemporaneous objection to the prosecutor's use of the "time zero" theory. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). An unpreserved nonconstitutional issue is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Defendants have a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment." *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady, supra*. In order to establish a *Brady* violation, a defendant must show the following:

(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).]

Defendant has failed to show that the prosecution had evidence favorable to his defense that he did not have or could not have obtained through reasonable diligence. Defendant was not denied access to police reports and records indicating the exact time police were called. The prosecutor's reference to "time zero" was not exculpatory evidence, but instead was a strategy of presenting evidence to the jury to obtain a chronological timeline. Moreover, defendant cannot show that pretrial notice of the "time zero" theory would have changed the outcome of the proceedings. *Cox, supra*. Even if the time of the telephone call to police made Cathy's preliminary examination testimony inaccurate with respect to estimated times, defendant was fully able and had the necessary information to cross-examine on the time discrepancies. Because defendant has failed to establish a *Brady* violation, he has failed to show that the prosecutor committed misconduct and therefore failed to show plain error on the record. *Carines, supra*. With regard to defendant's allegations that the prosecutor made false representation to the tribunal, defendant relies solely on attenuated speculation that the prosecutor's request to amend his witness list was an implicit reference to "time zero."

III

Defendant next contends that the combined effect of several errors denied him his right to a fair trial. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal." *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). "In making this determination, only actual errors are aggregated to determine their cumulative effect." *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). In order for this Court to reverse a defendant's conviction on the basis of cumulative error, "the errors at issue must be of consequence." *Knapp, supra*. There were no errors of consequence on the record that could be aggregated to reach a conclusion that defendant was denied a fair trial. *Id.*; *Lewis v LeGrow*, 258 Mich App 175, 202; 670 NW2d 675 (2003).

IV

Defendant lastly contends that the trial court abused its discretion in imposing a disproportionate sentence and claims his sentence was based on a presentence report that contained factual errors. This Court reviews a trial court's sentencing of a defendant for a crime not included in the sentencing guidelines exclusively for an abuse of discretion. *People v Compagnari*, 233 Mich App 233, 235-236; 590 NW2d 302 (1998). An abuse of discretion occurs when a trial court imposes a sentence that falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant's contention that his sentence is invalid because of inaccurate information in the presentence investigation report (PSIR) fails because a PSIR is not required where a sentence maximum does not exceed one year. *People v Shackelford*, 146 Mich App 330, 335; 379 NW2d 487 (1985); MCL 771.14(1). Moreover, the trial court properly handled the claims of inaccuracy raised before it.

Additionally, the trial court did not abuse its discretion in sentencing defendant to 19 days in jail and a \$500 fine. Defendant was previously convicted of numerous other misdemeanor offenses, and his conduct leading to conviction was outrageous. Under these circumstances, we find the trial court's sentence does not fall outside the range of principled outcomes. *Babcock*, *supra*.

With regard to defendant's probation, we note that a sentencing judge may impose up to a two-year probation period with supervision fees upon a defendant convicted of a misdemeanor offense. MCL 771.2(1). The court has "considerable discretion" in setting terms of probation. *People v Gonyo*, 173 Mich App 716, 718; 434 NW2d 223 (1988). However, "the exercise of that discretion must be guided by what is lawfully and logically related to defendant's rehabilitation." *Id.* "There is no ultimate catalogue of legal or illegal terms," *People v Johnson*, 92 Mich App 766, 768; 285 NW2d 453 (1979), and the Legislature did not define what constitutes a "lawful" term of probation. *People v Branson*, 138 Mich App 455, 458; 360 NW2d 614 (1984); MCL 771.3(4). Instead, "each judge must decide for himself whether there is a rational relationship between the restriction and rehabilitation." *Johnson*, *supra*.

In this case, the trial court did not abuse its discretion in imposing a two-year probationary period and supervisory fees. MCL 771.2(1). Nor did the court abuse its discretion in requiring defendant to undergo alcohol testing every weekday during the probationary period and pay the costs of testing. The court ordered defendant to appear at the drug court office every weekday between 8 a.m. and 9 a.m. On Monday of each week, defendant is required to take an ETG test, which according to the court indicates whether defendant has consumed alcohol within the last 80 hours. On Tuesday through Friday of each week, defendant is required to take a PBT or breathalyzer test. Pursuant to defendant's order of probation, he is required to pay the costs of

testing. We find that the terms of defendant's probation were rationally related to his rehabilitation. *Johnson, supra*.

Affirmed.

/s/ Jane M. Beckering

/s/ Kurtis T. Wilder

/s/ Alton T. Davis