

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY BRIAN NEWSON,

Defendant-Appellant.

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UNPUBLISHED

September 15, 2009

No. 284226

Oakland Circuit Court

LC No. 2007-214240-FC

Before: Stephens, P.J., and Jansen and Wilder, JJ.

STEPHENS, J. (*concurring*)

While I concur with the majority on the result I write separately to address the admission of evidence by several witnesses that testified regarding defendant's "extensive criminal history." Other than his absconder status at the time of the assault, none of the other acts were sufficiently probative of issues before the trier of fact and, therefore, evidence of those acts was inadmissible.

MRE 403 proscribes the admission of relevant evidence "if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (Emphasis added.) All relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). The fact that evidence is prejudicial does not make its admission unfair. *Id.* Unfair prejudice exists only "where either 'a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect,' or 'it would be inequitable to allow the proponent of the evidence to use it.'" *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002), quoting *Mills*, supra at 75-76. In this case, the minimal probative value of the evidence in question outweighed the probative value of that evidence. The breadth of defendant's criminal history bears little logical relevance to motive, intent or common scheme or design. The fact that police had previously stopped defendant might have some minimal relevance to whether he could recognize police vehicles. However, the record does not reflect that all of the departments used the same procedures, that there is presumed protocol for handling situations like the one where this arrest was made, or any other particulars that raise the probative value of the evidence beyond the tangential.

The error in this case, however, does not require a reversal of the conviction. Even if the evidence had been stricken, the admissible evidence against the defendant was more than sufficient to support a conviction. Therefore, because defendant cannot show that the error affected his substantial rights, he cannot establish that he is entitled to relief on the basis of this unpreserved issue. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). Additionally, the jury is presumed to have heard and heeded the trial court's instructions on the effect of this evidence. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Finally, while a more vigorous defense could have been given, the conduct of trial counsel does not fall below the standard of conduct imposed on counsel in criminal cases in Michigan.

/s/ Cynthia Diane Stephens