

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 20, 2012

v

JACOB LEE PUISIS,

No. 302483
Muskegon Circuit Court
LC No. 10-059128-FH

Defendant-Appellant.

Before: RONAYNE KRAUSE, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of obstructing a parole officer, MCL 750.479(1)(a). He was sentenced as an habitual offender, second offense, MCL 769.10, to 15 months to 3 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in admitting Officer Steven Stout and Officer Emilio Trejo's testimony as other acts evidence under MRE 404(b). The decision whether to admit evidence is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). Because the issues concerning evidentiary error in this case are nonconstitutional and properly preserved, the standard for reversal is whether, in the context of the remaining untainted evidence, "it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

The test for the admissibility of other acts evidence under MRE 404(b) has four factors:

First, the prosecutor must offer the "prior bad acts" evidence under something other than a character or propensity theory. Second, "the evidence must be relevant under MRE 402, as enforced through MRE 104(b)[.]" Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004) (citations omitted).]

Here, defendant's theory of the case placed at issue defendant's intent to obstruct the parole officers' efforts to arrest him. Evidence that defendant resisted arrest in the past was highly probative of defendant's intent or absence of mistake or accident in this case. The evidence was offered for a proper purpose under MRE 404(b)(1) and relevant under MRE 402. The evidence was also admissible under MRE 403 because it is directly related to an essential element of this case, and there was no evidence on the record that the jury gave the evidence undue or preemptive weight. *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The trial court also appropriately instructed the jury concerning the proper use of the other acts evidence. The trial court did not abuse its discretion in admitting Stout and Trejo's testimony because their testimony satisfied all four factors for the admission of other acts evidence under MRE 404(b). *Knox*, 469 Mich at 509.

Moreover, we note that even without the challenged testimony, there was other substantial evidence to enable the jury to convict defendant beyond a reasonable doubt for obstructing a parole officer. MCL 750.479 defines obstructing a parole officer as "[a] person shall not knowingly and willfully . . . obstruct . . . [a] parole officer." "'Obstruct' includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." MCL 750.479(8)(a). The evidence presented by the prosecution showed that defendant knew that Agent Paul Martin was his parole officer, that defendant knew he was under arrest, that defendant refused to comply with Martin's orders, that defendant ran away from Martin, that defendant struggled against Officer Chad Hoop's attempt to handcuff him, that defendant continued to threaten parole officers after his arrest, and that defendant continued to attempt to stand up and lean towards parole officers after his arrest. Defendant has failed to show that it was more probable than not that a different outcome would have resulted without the admission of Stout and Trejo's testimony. *Lukity*, 460 Mich at 495.

We also note that within defendant's argument concerning other acts evidence, defendant claims that the trial court erred in admitting a statement made by Martin that he had an "assaultive past" and that the prosecutor committed misconduct by unfairly characterizing defendant as a defiant criminal during closing arguments. These claims were not properly presented because they were not raised in defendant's statement of the questions presented, and we need not consider these claims any further. MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Nevertheless, we have reviewed defendant's arguments and find them to be without merit.

Defendant also argues the trial court's participation in the pilot program under Administrative Order No. 2008-2, allowing juror discussion before formal deliberations, infringed upon defendant's right to a fair and impartial trial and his right to due process. Because defendant did not object to the jury instruction, this claim of constitutional error is not preserved. *People v McRunels*, 237 Mich App 168, 171; 603 NW2d 95 (1999). Unpreserved claims of constitutional error are reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, error, which is clear or obvious, must have occurred and affected defendant's substantial rights. *Carines*, 460 Mich at 763. This latter requirement requires a showing of prejudice, that the error affected the outcome of the lower court proceedings. *Id.* The defendant bears the burden of persuasion with respect to prejudice. *Id.* Reversal is not warranted unless the error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity or public reputation of judicial

proceedings' independent of the defendant's innocence." *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

The trial court's instruction that permitted the jury to discuss the evidence among themselves in the jury room during trial recesses is generally contrary to Michigan legal precedent. See *People v Hunter*, 370 Mich 262, 269; 121 NW2d 442 (1963); *People v Monroe*, 85 Mich App 110, 112; 270 NW2d 655 (1978); *People v Blondia*, 69 Mich App 554, 557; 245 NW2d 130 (1976).¹ However, the trial court was given authority to instruct the jury as it did by Supreme Court Administrative Order No. 2008-2, and we find no plain error.

Defendant cites *Commonwealth v Kerpan*, 508 Pa 418, 422-423; 498 A2d 829 (1985) to support his argument that there are five substantial concerns with allowing pre-deliberation discussions to occur.

First, since the prosecution's evidence is presented first, any initial opinions formed by the jurors are likely to be unfavorable to the defendant, and there is a tendency for a juror to pay greater attention to evidence that confirms his initial opinion. Second, once a juror declares himself before his fellow jurors he is likely to stand by his opinion even if contradicted by subsequent evidence. Third, the defendant is entitled to have his case considered by the jury as a whole, not by separate groups or cliques that might be formed within the jury prior to the conclusion of the case. Fourth, jurors might form premature conclusions without having had the benefit of the court's instructions concerning what law they are to apply to the facts of the case. Fifth, jurors might form premature conclusions without having heard the final arguments of both sides. [Citations omitted.]

Defendant also argues that a sixth concern is raised where a particularly forceful or well-regarded juror may form his or her opinion based on early evidence and convince the collective jury to follow his reasoning before both sides have an equal attempt to state their case.

In this case, however, there is no indication on the record that the jury actually discussed the merits of the case before the end of the trial. Also, despite the fact that one of the jurors taught criminal justice, the trial court addressed the concern in voir dire by asking the juror if he had special knowledge that affected his ability to be a juror in this case. The juror told the court that he did not have special knowledge. The trial court also asked the juror if could avoid the temptation to tell the other jurors to listen to him based on his knowledge of the criminal justice system. The juror told the court that he could. Moreover, regardless of whether the jury discussed the case before the end of the trial, the trial court's instruction guarded against the jury making premature conclusions by requiring the jury to keep an open mind and not "make a decision about anything in the case until you have heard all of the evidence, my instructions of the law, and the arguments of the attorneys." Defendant claims that it is fallacious to believe that the jury would follow court instructions to keep all pre-deliberation discussions of the case

¹ The *Blondia* Court also noted that if there was a change to the rules regarding instructions, it was the province of our Supreme Court. *Blondia*, 69 Mich App at 558.

tentative. However, jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235. The trial court did not commit plain error because the trial court's instructions protected defendant's right to have his case decided by a fair and impartial jury and defendant's right to due process. *Carines*, 460 Mich at 764.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood