STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 27, 2012
v	No. 305377 Ionia Circuit Court
IGNACIO JAMES VANHORN, Defendant-Appellant.	LC No. 2011-015043-FH

Before: M. J. KELLY, P.J., AND HOEKSTRA AND STEPHENS, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of assault of a prison employee, MCL 750.197c, and prisoner in possession of a weapon, MCL 800.283(4). Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to 24 to 90 months for each conviction. Defendant's sentences were to run consecutive to the sentences defendant was serving when he committed the instant offenses. Defendant appeals as of right. We affirm.

Defendant was a prisoner at the Bellamy Creek Facility and was housed in "5 Block," a level-four housing facility. On December 27, 2010, defendant returned from lunch and was let back in his cell. Officers heard glass break in the cell and when they looked in, defendant had broken a TV on the floor of the cell. When defendant's cell was opened to allow his cellmate in, defendant exited the cell. Officers ordered defendant to return to his cell, but defendant ignored them and threatened the officers with a weapon. Officers testified that the weapon in defendant's hand was a sharp, glass, triangular object.

Defendant exited 5 Block and proceeded through a gate where another officer tried to subdue defendant from behind. However, defendant turned around and struck the officer in the chest with the weapon in his hand. The officer was not hurt and there were no marks left on the officer from where defendant hit him. Eventually defendant was subdued and an officer recovered the weapon and placed it in an evidence locker.

Defendant argues that testimony in violation of the prohibition against character evidence was admitted through the testimony of a prison officer. Defendant failed to object to this testimony at trial and this issue is unpreserved. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To obtain relief under the plain error doctrine, the defendant must prove the following: (1) there was an error, (2) the error was clear

or obvious, and (3) the plain error affected substantial rights. *Id*. If the error seriously affected the integrity of the judicial system or resulted in the conviction of an actually innocent person, then reversal is warranted. *Id.* at 763-764.

Generally, relevant evidence is admissible at trial. MRE 402. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable. MRE 401. But relevant evidence will be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Ortiz*, 249 Mich App 297, 305-306; 642 NW2d 417 (2001). All evidence tends to be prejudicial, but it is only where there exists the danger that the probative value of a piece of evidence will be outweighed by unfair prejudice that the evidence should be excluded. *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010). Unfair prejudice means "there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

MRE 404(b)(1) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, other acts evidence may be used for other purposes, such as demonstrating intent, scheme, or plan, *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), or when it explains the circumstances of the crime, *People v Malone*, 287 Mich App 648, 662; 792 NW2d 7 (2010). The jury is better equipped to perform its sworn duty when it knows the whole story; therefore, other acts evidence, including evidence about other crimes, is ordinarily admissible when it explains the circumstances of the charged crime. *Id.* Other acts evidence carries the risk of being misused or confusing; therefore, there is a heightened need for a careful balancing of the probative value and prejudicial effect. *Ortiz*, 249 Mich App at 306.

Defendant asserts that the officer's testimony regarding level-four prisoners in general, and specifically that level-four prisoners are "more violent prisoners," was offered solely to prove defendant was violent and was acting in conformity with his violent character. Defendant also maintains that the evidence is unfairly prejudicial and should have been excluded through MRE 403. The testimony was as follows:

> *Q.* Okay. And 5 Block is a facility that holds prisoners, is that correct?
>
> *A.* Correct.
>
> *Q.* Okay. What level is that?
>
> *A.* Level 4.
>
> *Q.* Can you tell the jury what that means, Level 4?
>
> *A.* Level 4 is considered closed, which is they're more violent prisoners and they have less movement.

The challenged testimony did not refer to another crime, wrong, or act committed by defendant. It did not reference how he had come to be imprisoned or how he had acted while in prison. Rather, the testimony was a generalization about level-four prisoners and how their daily routine was strictly controlled by prison officials. In addition to testifying that level-four

prisoners spend 18 hours a day in their cells, the officer testified that the times when level-four prisoners are allowed out of their cells is scheduled. He explained that the officers get a "master sheet," and each level-four prisoner gets a "daily itinerary." The officer agreed that level-four prisoners are not able to move around as they please. Thus, the reference to level-four prisoners being more violent came within the context of explaining the circumstances of the crime, specifically, explaining that defendant was not able to exit his cell if it was not a scheduled time to do so. As such, this evidence is not precluded from admission by MRE 404(b).

Moreover, the relevance of the evidence was not substantially outweighed by the danger of unfair prejudice. Defendant asserts that the evidence was too prejudicial to be admitted because it did nothing but demonstrate to the jury that defendant was a violent man resisting the prison officers. As discussed, the testimony was probative because it explained to the jury that the movement of level-four prisoners was strictly controlled. It is true that explaining that defendant was housed in a unit reserved for "more violent prisoners" carries the danger that the evidence could be used to infer that defendant committed the violent crimes charged (because he is a "more violent prisoner[]"). However, this danger was mitigated by the court, which instructed the jury as follows: "Defendant's status as a prisoner or his housing in a particular unit is not evidence or proof, in and of itself, that he's a bad person or likely to commit crimes." Juries are presumed to follow their instructions. *People v Mardlin*, 487 Mich 609, 629; 790 NW2d 607 (2010).

Next, defendant argues that the trial court erred in admitting the piece of glass into evidence. Defendant argues that there was no evidence presented linking him to the piece of glass that the trial court admitted into evidence. We review a trial court's admission of evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An abuse of discretion occurs when the decision falls beyond the range of principled results. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). A trial court's decision on a close evidentiary question generally does not evidence an abuse of discretion. *People v Cameron*, 291 Mich App 599, 608; 806 NW2d 371 (2011).

Defendant maintains that no proper foundation was laid that the piece of glass entered into evidence was the weapon he supposedly had in his possession during the incident in issue. Real or original evidence is usually evidence that had a direct role in the incident and needs an adequate foundation before it is admissible. *People v White*, 208 Mich App 126, 129-130; 527 NW2d 34 (1994), citing 2 McCormick, Evidence (4th ed), § 212, pp 7-8. A proper foundation is established through testimony that the evidence is what it purports to be and that the evidence is in substantially the same condition. *Id.*

Officer Higbee testified that he heard the sound of breaking glass from inside defendant's cell and Officer Barrett observed a TV on the floor of the cell. He also testified that defendant exited his cell with a sharp, pointed object and slashed at him with the object. Officer Smith said he saw defendant with a "sharp, glass, triangle, object." He also testified that he never lost visual contact with the object in defendant's hand and he observed it on the ground after defendant was subdued. A third officer testified that when he arrived at the scene, other officers were saying to look for the weapon. He heard someone say, "It's right there." This officer testified that he looked down and saw the glass, which he picked it up and put in a container and placed it into the State Police evidence locker.

At trial, two officers testified that the piece of glass the prosecutor was offering as the weapon was the same piece of glass they saw during the incident and that it remained in substantially the same condition. Defendant asserts that multiple people had access to the evidence locker and the glass was left in there for 11 days. However, it is well settled that after a proper foundation has be laid for real evidence, any deficiency "in the chain of custody goes to the weight of the evidence rather than its admissibility." *White*, 208 Mich App at 130-131. The trial court did not err in determining there was a sufficient foundation for the admission of the glass.

Defendant also asserts that the glass was inadmissible because there was no physical evidence, such as fingerprints or DNA, linking him to it. While such evidence would have strengthened the link between the glass and defendant, the absence of such evidence does not render the foundation laid for its admission inadequate. The glass was properly admitted.

Next, defendant argues that there was insufficient evidence to support the jury's verdicts of guilty on both charges. We review sufficiency of the evidence issues de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). We examine the evidence in a light most favorable to the prosecution, and determines whether a rational trier of fact could have found that every essential element was proven beyond a reasonable doubt. *Id.* at 196.

MCL 750.197c(1) provides as follows:

> A person lawfully imprisoned in a jail, other place of confinement established by law for any term, or lawfully imprisoned for any purpose at any other place, including, but not limited to, hospitals and other health care facilities or awaiting examination, trial, arraignment, sentence, or after sentence awaiting or during transfer to or from a prison, for a crime or offense, or charged with a crime or offense who, without being discharged from the place of confinement, or other lawful imprisonment by due process of law, through the use of violence, threats of violence or dangerous weapons, assaults an employee of the place of confinement or other custodian knowing the person to be an employee or custodian or breaks the place of confinement and escapes, or breaks the place of confinement although an escape is not actually made, is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $2,500.00, or both.

An assault is "an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *Cameron*, 291 Mich App at 614 (quotation marks and citation omitted).

Defendant maintains that there was no evidence presented that the officer who was the victim of the assault was placed in fear by defendant. The prosecution had to prove either an attempted battery or an unlawful act that placed another in reasonable apprehension (not fear) of an imminent battery. The evidence of record clearly established an attempted and completed a battery. A battery is "an intentional, unconsented and harmful or offensive touching of the person of another." *Cameron, 291 Mich App at 614* (quotation marks and citation omitted). The victim testified that defendant hit him in the chest with the weapon defendant had in his hand.

Two other officers also testified that defendant hit the victim in the chest. Every battery "necessarily includes an assault because a battery is the very consummation of the assault." *Id.* (quotation marks and citation omitted). Defendant notes that there were no marks or tears on the victim's coat. But it is not required that the evidence show that the victim of the assault sustained an actual injury. All that is required is a harmful or offensive touching. *Id.* The fact that the victim's coat was not cut when hit by defendant does not establish that defendant was not armed with a broken piece of glass. Although there is a possibility that a coat struck by glass would be cut, it is not necessarily so, particularly given the numerous potential variables that could impact the outcome. Therefore, there was sufficient evidence presented to establish that defendant assaulted a prison employee.

Defendant asserts that there was also insufficient evidence to support the jury's verdict of guilty of prisoner in possession of a weapon. MCL 800.283(4) provides:

> Unless authorized by the chief administrator of the correctional facility, a prisoner shall not have in his or her possession or under his or her control a weapon or other implement which may be used to injure a prisoner or other person, or to assist a prisoner to escape from imprisonment.

There was ample evidence that defendant was in possession of a piece of glass that he was using as a weapon. There was sufficient circumstantial evidence presented to support the reasonable inference that defendant broke the TV in his cell and used a piece of the glass (later found on the prison floor near defendant after he was restrained) to threaten the officers and to assault the victim. *Carines*, 460 Mich at 757. The jury's verdicts were supported by sufficient evidence.

Finally, defendant argues that defense counsel was ineffective for failing to object to the prosecutor's posting of the elements of the crimes for the jury to see. We find defendant has abandoned this issue. Defendant does not cite any authority to support his argument that the prosecution was committing an error by allowing the jury to see the elements of the crimes during opening statement. The court is specifically charged to present these elements to the jury by MCR 2.513 (A). Additionally, defendant does not articulate how this alleged error amounts to prejudice, nor does he assert that the elements shown to the jury were incorrect or incomplete. A defendant cannot announce a position and leave "it to this Court to discover and rationalize the basis for the claim." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) (quotation marks and citation omitted). In any event, the court instructed the jury on the elements of the crimes charged, as well as stating that the jury was to take the law as stated by the court. Defendant does not challenge the accuracy of the court's instructions. Again, juries are presumed to follow the instructions of the court. *Mardlin*, 487 Mich at 629.

Affirmed.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens