

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff- Appellee,

v

DENNIS GEORGE CLIFFORD,

Defendant-Appellant.

UNPUBLISHED
November 3, 2000

No. 220750
St. Joseph Circuit Court
LC No. 98-009483-FC

Before: Doctoroff, P.J., and Holbrook, Jr. and Smolenski, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, larceny in a building, MCL 750.360; MSA 28.592, larceny of a firearm, MCL 750.357b; MSA 28.589(2), carrying a concealed weapon, MCL 750.227; MSA 28.424, committing a felony while in possession of a firearm, MCL 750.227b; MSA 28.424(2), and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). Defendant was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to a term of 4 to 6 years' imprisonment for the felonious assault conviction, 5 to 7½years' imprisonment for the larceny of a firearm conviction, 5 to 7½years' imprisonment for the carrying a concealed weapon conviction, 2 years' imprisonment for the felony-firearm conviction, and to time already served for the larceny in a building and possession of marijuana convictions. We affirm.

This case arises from an incident in which defendant fired several shots in the direction of Scott Reynolds and Jack Wetzel when defendant realized that Reynolds and Wetzel were watching him burglarize Gerald Timar's house. At trial, defendant claimed that he was not shooting at Reynolds and Wetzel, but instead was firing at a dirt mound in order to disarm the guns. Defendant further claimed that he was not burglarizing Timar's house because he had Timar's consent to enter his house.

I.

Defendant first argues that the trial court erred in refusing to read certain requested instructions to the jury. We disagree.

At trial, defense counsel requested that the trial court read the following standard criminal jury instructions: CJI2d 11.23, intentionally pointing a firearm without malice; CJI2d 11.24, discharge of a firearm while intentionally aimed without malice; CJI2d 17.4, mitigating circumstances; and CJI2d 25.2b, second-degree home invasion—breaking and entering. Intentionally pointing a firearm without malice, MCL 750.233; MSA 28.430, and discharge of a firearm while intentionally aimed without malice, MCL 750.234; MSA 28.431, are misdemeanors, whereas second-degree home invasion, MCL 750.110a; MSA 28.305(a), is a felony.

We analyze a trial court's refusal to read lesser included *felony* offense instructions under the test set forth in *People v Ora Jones*, 395 Mich 379, 390; 236 NW2d 461 (1975), which requires that a trial court instruct the jury regarding a cognate lesser included felony if the evidence could support a conviction of that felony. However, we analyze a trial court's refusal to read lesser *misdemeanor* offense instructions under the framework first enunciated in *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982), in which our Supreme Court adopted a rational basis test for lesser misdemeanor offense instructions. *People v Steele*, 429 Mich 13, 20; 412 NW2d 206 (1987).

A.

We first address defendant's claim that the trial court improperly refused to give the requested lesser *misdemeanor* offense instructions. The decision to grant or deny a requested lesser included misdemeanor instruction will be reversed on appeal only upon a finding of an abuse of discretion. *Stephens*, *supra*, 265. A trial court should grant a request to read a lesser misdemeanor offense instruction if the following conditions are met: (1) the party must inform the court of exactly what lesser offenses are being requested; (2) an "appropriate relationship" must exist between the charged offense and the requested misdemeanor; (3) the requested misdemeanor must be supported by a rational view of the evidence at trial; (4) if the prosecutor requests the instruction, the defendant must have adequate notice of it as one of the charges against which he may have to defend; and (5) the requested instruction must not result in undue confusion or injustice. *Steele*, *supra*, 208-210.

Here, the third condition was not satisfied. The trial court correctly refused to read the two requested misdemeanor instructions – intentionally pointing a firearm without malice and discharge of a firearm while intentionally aimed without malice – because the requested misdemeanors were not supported by a rational view of the evidence adduced at trial. *Stephens*, *supra*, 262-263. The testimony of Wetzel and Reynolds indicated that defendant pointed the gun at them after yelling at them in an angry manner because they were watching his activities at Timar's house. Defendant testified that he never pointed his guns at the victims. If the jury believed Wetzel's and Reynolds' testimony, it could only conclude that defendant pointed the gun with malice. If the jury believed defendant's testimony, it could only conclude that defendant did not point the gun at the victims at all. There was no evidence from which the jury could conclude that defendant pointed the gun at the victims without malice. Thus,

the trial court properly determined that a rational view of the evidence adduced at trial would not support a conviction of either misdemeanor.¹

B.

Next, defendant argues that the trial court erred by refusing to give the lesser included felony offense instruction for second-degree home invasion. A trial court must give a requested instruction on a lesser included felony if the evidence could support a conviction of the lesser felony. See *Steele*, *supra*, 20; *Ora Jones*, *supra*, 390. Here, the trial court explained that it refused to give either second-degree home invasion instruction² because the instruction for first-degree home invasion was more appropriate. Unlike second-degree home invasion, under the facts of this case, a conviction of first-degree home invasion required that the prosecutor prove that defendant was armed with a dangerous weapon. There was no dispute that defendant possessed a firearm when he was leaving Timar's house. Where the only difference between first-degree home invasion and second-degree home invasion is that first-degree home invasion requires proof that the defendant was armed with a dangerous weapon, while second-degree home invasion does not, and where there was no dispute that defendant was armed with a dangerous weapon when he entered Timar's home, the trial court did not err in refusing defendant's request for an instruction regarding second-degree home invasion.³

C.

Defendant next argues that the trial court erred by refusing to instruct the jury on mitigating circumstances for the assault with intent to murder count. Michigan Criminal Jury Instruction 17.4 instructs the jury that a defendant can be convicted of assault with intent to commit murder only if he would have been guilty of murder had the person he assaulted actually died. If the circumstances of the assault would have reduced the charge to manslaughter had the assault victim died, the defendant is not guilty of assault with intent to commit murder. See CJI2d 17.4. Here, the trial court refused to instruct the jury regarding mitigating circumstances, concluding that being detected while committing a burglary is not a legally recognized state of provocation that would have reduced the charge from murder to manslaughter had one of the assault victims died. Moreover, where defendant never introduced evidence or made any arguments to indicate that he committed assault with intent to murder under justifiable or mitigating circumstances but, rather, emphatically denied committing the crime altogether, the requested instruction was not warranted by the evidence. We therefore conclude that the trial court did not err in refusing to instruct the jury regarding mitigating circumstances.

II.

¹ We note that upon defendant's request, the trial court instructed the jury that it could consider the lesser offenses of felonious assault and reckless use of a firearm.

² CJI2d 25.2b addresses "breaking and entering." CJI2d 25.2d addresses "entering without permission."

³ The trial court did, however, read defendant's requested instruction for the lesser offense of larceny in a building.

Next, defendant argues that the trial court's questioning of Reynolds deprived him of a fair trial. We disagree. We review the entire record to determine if the trial court abused its wide discretion and power in matters of trial conduct. *People v Cole*, 349 Mich 175, 199-200; 84 NW2d 711 (1957). A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

"A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct." *Id.* "The principal limitation on a trial court's discretion over matters of trial conduct is that its actions not pierce the veil of judicial impartiality." *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). The trial court's questions must be limited in scope, material to the issues in the case, and posed in a neutral manner. *Id.* at 51; *People v Piscunere*, 26 Mich App 52, 56; 181 NW2d 782 (1970). The fact that testimony elicited by a trial court's questions damaged a defendant's case does not demonstrate that the trial court improperly assumed the role of surrogate prosecutor. *Davis, supra* at 51. "As long as the questions would be appropriate if asked by either party and, further, do not give the appearance of partiality, we believe that a trial court is free to ask questions of witnesses that assist in the search for truth." *Id.* at 52.

Defendant argues that the trial court assumed the role of the prosecutor by eliciting testimony from Reynolds that had not previously been raised by the parties at trial, and that the testimony formed the basis for the trial court's decision to deny the motion for a directed verdict with respect the assault with intent to commit murder charge. Specifically, defendant argues that the trial court should not have asked Reynolds why he believed that defendant was shooting at him. Reynolds gave the following response: "The tone of his voice, and then the shots fired. And we found some saplings out there with holes in them." We find no error in the trial court's conduct. A trial court may question witnesses in order to clarify testimony or elicit additional relevant information. MRE 614(b); *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992). The trial court in the instant case was attempting to clarify Reynolds' direct-examination testimony that he was afraid because defendant was shooting at him.

Moreover, a review of the transcript reveals no indication that the trial court's questioning of Reynolds caused the jury to be prejudiced against defendant. The court's questions were confined to clearing up ambiguities in the testimony elicited on direct-examination. Specifically, the court asked Reynolds to explain his basis for testifying that he believed that defendant had shot at him, thereby eliciting testimony that Reynolds was at the location of the shooting several days later and noticed that certain saplings had bullet holes in them. Accordingly, the questions regarding Reynolds' belief that defendant was shooting at him were relevant to issues in dispute and were intended to clarify those issues. Furthermore, the transcript indicates that the testimony that formed the basis of the court's decision to deny the motion for a directed verdict was elicited by the prosecutor before the court questioned Reynolds. Accordingly, we conclude that the trial court did not pierce the veil of judicial impartiality by questioning Reynolds.

III.

Next, defendant argues that the trial court abused its discretion by admitting evidence regarding a prior altercation between defendant and Timar. We disagree. The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Evidence of prior crimes, wrongs, or acts is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). MRE 404(b)(1) provides that

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) the proponent of the evidence must offer the evidence for a proper purpose (i.e., a purpose other than establishing the defendant's character to show his propensity to commit the offense); (2) the prosecutor must establish relevance; and (3) the probative value of the bad acts evidence must not be substantially outweighed by its potential for unfair prejudice. *Crawford, supra*, 385; *Starr, supra*, 496; *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). Upon request, the trial court must provide a limiting instruction as to the use of the bad acts evidence regardless of whether the evidence was introduced by the prosecutor or the defendant. *Id.* at 74-75.

Defendant argues that the trial court abused its discretion by allowing Timar and Bowers to testify that defendant assaulted Timar with a firearm during an argument on the day before defendant burglarized Timar's house and assaulted Wetzel and Reynolds with a firearm. The prosecutor argued, and the trial court agreed, that the testimony of Timar and Bowers was admissible to show whether defendant legitimately believed that he had Timar's consent to enter Timar's premises or whether defendant had the intent to commit a felony when he entered the premises. We conclude that the prosecutor articulated a proper purpose for the evidence.

Defendant further argues that the testimony of Timar and Bowers "lacked relevance to proving the elements of the charged offenses." To prove first-degree home invasion, the prosecution was required to prove that defendant entered Timar's home with the intent to commit a felony, larceny, or an assault, or that defendant entered Timar's home without permission. MCL 750.110a(2); MSA 28.305(a)(2). As already noted, the evidence at issue was relevant to whether defendant legitimately believed that he had permission to enter Timar's property and to whether he had the intent to commit a

felony when he entered the property. Therefore, we conclude that the evidence was relevant to proving the first-degree home invasion charge.

Finally, we must determine whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. “Prejudice inures when marginally probative evidence would be given undue or preemptive weight by the jury.” *Rice, supra* at 441. Here, the trial court noted that with respect to the first-degree home invasion count, it was unlikely that the jury would confuse defendant’s intent to steal and his character trait for viciousness. The trial court further stated the following:

I acknowledge that there is the possibility of unfair prejudice but it is not such that it outweighs the probative value of the evidence which I consider to be quite strong. In other words, no reasonable man, if they did what the defendant has claimed to have done, could honestly believe that he had the right to enter.

We agree and conclude that the probative value of the challenged evidence was not substantially outweighed by its potential for unfair prejudice. Therefore, the trial court did not abuse its discretion in admitting the testimony of Timar and Bowers to attack defendant’s theory that he had Timar’s consent to enter Timar’s premises.

IV.

Defendant next argues that there was insufficient evidence for the jury to convict him of possession of marijuana. We disagree. To determine whether defendant’s conviction for possession of marijuana was supported by sufficient evidence we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992).

The crime of possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d), requires the prosecutor to prove beyond a reasonable doubt that defendant knowingly or intentionally possessed marijuana. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). Defendant argues that there was insufficient evidence to justify his conviction for possession of marijuana because the prosecutor failed to scientifically substantiate that the green, leafy substance that Chief Michael L. Ochampaugh retrieved from defendant’s pocket was actually marijuana. However, in addition to the testimony of Trooper Thayer and Chief Ochampaugh that defendant told them the substance was marijuana, Trooper Thayer testified that, although he did not field test the substance that Chief Ochampaugh retrieved from defendant while placing defendant in custody, he suspected that the substance was marijuana based upon the appearance of the substance and his training and experience as a police officer. Chief Ochampaugh also testified that during his twenty-seven years as a police officer, he had seen “quite a lot” of marijuana, and that he had identified the previously admitted substance as marijuana.

Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could find beyond a reasonable doubt that the prosecution proved the essential elements of

possession of marijuana. Therefore, we conclude that there was sufficient evidence to convict defendant of possession of marijuana.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski