# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK S. SEITZ,

Defendant-Appellant.

UNPUBLISHED
May 29, 2001

No. 211347
Wayne Circuit Court
Criminal Division
LC No. 97-001898

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK SEITZ,

Defendant-Appellant.

No. 211349
Wayne Circuit Court
Criminal Division
LC No. 94-007931

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Before: Neff, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

In Docket No. 211347, defendant was convicted by a jury of ethnic intimidation, MCL 750.147b; MSA 28.344(2), felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of one to two years' imprisonment for the ethnic intimidation conviction and thirty-two to forty-eight months' imprisonment for the felonious assault conviction, and a consecutive two-year term for the felony-firearm conviction. In Docket No. 211349, defendant was found guilty of violating the terms of his probation in a prior case based on his conduct and resulting convictions in the ethnic intimidation case. His probation was revoked, and he was sentenced on his underlying conviction of felonious assault, MCL 750.82; MSA 28.277, to thirty-two to forty-eight months' imprisonment, and to time served for a conviction of intentionally aiming a firearm without malice, MCL 750.233; MSA 28.430. He appeals by right. We affirm, but remand for correction of defendant's judgments of sentences.

First, defendant argues that the trial court erred by denying his motion to suppress evidence seized from his home. We disagree. A trial court's ruling on a motion to suppress evidence as illegally seized will not be reversed on appeal unless it is clearly erroneous. *People v Hampton*, 237 Mich App 143, 148; 603 NW2d 270 (1999). A ruling is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*.

Here, resolution of this issues turns on the credibility of the witnesses at the suppression hearing. The police officer who testified at the hearing claimed that defendant invited him into his home, and that he observed the evidence at issue in plain view. Defendant denied inviting the officer into his home. The trial court found the officer's testimony more believable. We defer to this determination, given the trial court's superior position to assess the witnesses. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999). Accepting the trial court's credibility determination, we conclude that the officer was lawfully in a position from which he could view the incriminating evidence and, therefore, could properly seize it under the consent and plain view exceptions. *People v Cooke*, 194 Mich App 534, 539; 487 NW2d 497 (1992). Accordingly, we find no clear error in the trial court's decision to deny defendant's motion to suppress.

Next, defendant argues that reversal is required because of the admission of evidence of his prior bad acts. We disagree. The admissibility of bad acts evidence is within the trial court's discretion and will not be reversed on appeal absent 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 there was no justification or excuse for the ruling made." *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

MRE 404(b) governs admission of evidence of bad acts. It provides:

> (1) 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) it must be offered for a proper purpose; (2) it must be relevant; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994).

Because defendant did not object to much of the challenged testimony, appellate relief is precluded with respect to such evidence absent plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Here, the evidence

concerning defendant's prior conduct with the Berrys was relevant to the issue of defendant's intent (i.e., whether defendant intended to harass the Berrys because of race), a proper purpose under MRE 404(b). Moreover, because defendant's intent in this regard was central to the ethnic intimidation charges, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. Thus, the admission of this evidence was not error.

While we agree that similar evidence involving defendant's prior actions with others was not as probative, and may perhaps be viewed as improper character evidence prohibited by MRE 404(b), we are not persuaded that the admission of such evidence affected defendant's substantial rights, or that it is more probable than not that the any error was outcome determinative. Accordingly, appellate relief is not warranted. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

Next, defendant argues that there was insufficient evidence to support his conviction for ethnic intimidation. We disagree. "In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

The ethnic intimidation statute, MCL 750.147b; MSA 28.344(2), provides:

> (1) A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:
>
> (a) Causes physical contact with another person.
>
> (b) Damages, destroys, or defaces any real or personal property of another person.
>
> (c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur.

The statute is satisfied when there is evidence of an underlying predicate criminal act committed because of racial animosity. *People v Stevens*, 230 Mich App 502, 505; 584 NW2d 369 (1998), quoting *People v Richards*, 202 Mich App 377, 379; 509 NW2d 528 (1993).

The fact that defendant was rude to others did not preclude the jury from finding that he was motivated to harass the victims because of their race. The evidence showed that defendant used many racial epithets and made several racist remarks towards the Berrys immediately preceding the charged felonious assault. Viewed most favorably to the prosecution, the evidence was sufficient to enable the jury to find, as it did, that defendant had the specific intent to harass the victims because of their race.

Next, defendant argues that the trial court abused its discretion when it allowed the prosecutor to question him regarding whether he possessed literature about how to avoid prosecutions during a police stop in 1994. The decision whether to admit evidence is within the discretion of the trial court. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). We will find an "abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Id.*

Here, the prosecutor's inquiry was relevant to the credibility of defendant's claim that he acted in self-defense. Accordingly, we conclude that the court did not abuse its discretion. Furthermore, even if the trial court erred in allowing the line of questioning, because defendant denied possessing any such literature, no contrary evidence was presented, and the trial court instructed the jury that the lawyer's questions were not evidence, it is not more probable than not that the error was outcome-determinative and, therefore, this issue would not warrant reversal. *Knapp*, *supra*.

Next, defendant contends that he was deprived of a fair trial because of prosecutorial misconduct. We disagree. Questions of misconduct by the prosecutor are decided case by case. On review, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Here, defendant did not object to the conduct challenged on appeal, and we are satisfied from our review of the record that defendant has failed to show any plain error affecting his substantial rights with respect to the challenged conduct. Accordingly, this issue does not merit reversal. *Carines*, *supra*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

In Docket No. 211349, defendant argues that the trial court erroneously revoked his probation on the basis of his subsequent convictions in the ethnic intimidation case because he did not have notice that the charges in that case would be used as a basis for the court's determination that he violated his probation. We find no merit to this claim, which defendant raises for the first time on appeal. The probation violation petition and bench warrant clearly reference the charged case involving the Berrys. Furthermore, on the basis of the evidence in that case, and defendant's subsequent convictions, the trial court properly determined that defendant violated the terms of his probation, which prohibited defendant from violating any criminal law.

We also reject defendant's claims that relief is warranted because the trial court never explicitly found that his probation violation merited revocation of probation, or that he did not receive the requisite contested hearing.

Probation violation hearings are summary and informal and are not subject to the rules of evidence or pleading applicable in a criminal trial. The scope of these proceedings is limited and the full panoply of constitutional rights applicable in a criminal trial do not attach. However, probationers are afforded certain due process at violation hearings because of the potential for loss of liberty. Specifically, a probationer has the right to a procedure consisting of (1) a factual determination that the probationer is in fact guilty of violating probation, and (2) a discretionary determination of whether the violation warrants revocation. *People v Pillar*, 233 Mich App 267, 269; 590 NW2d 622 (1998).

Here, although not explicitly stating so, it is apparent that the trial court determined that defendant's probation violation merited revocation of his probation. See *People v Laurent*, 171 Mich App 503, 506; 431 NW2d 202 (1988). Although defendant complains that the court found that he violated his probation based on the testimony at the ethnic intimidation trial, the charges in that case served as the basis for the alleged probation violation, the court had discretion in determining the method of the probation violation hearing, MCL 771.4; MSA 28.1134, and defendant did not object when the prosecutor requested that defendant's ethnic intimidation trial be used to determine a factual basis for the probation violation. Under the circumstances, we find no error requiring reversal.

We agree, however, that the trial court lacked the authority to order the sentences in the ethnic intimidation case to be served consecutively to the sentence imposed in the probation violation case. *People v Leal*, 71 Mich App 319; 248 NW2d 252 (1976). Accordingly, we remand for correction of the judgments of sentence to indicate that the sentences in the two cases are to be served concurrently with each other. Also, a copy of the corrected judgments of sentence shall be transmitted to the Department of Corrections.

We affirm, but remand for correction of the judgments of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey