STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 17, 2002
v	No. 229366 Kent Circuit Court
ROBERTO LUIS PENHA, Defendant-Appellant.	LC No. 99-007258-FH

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of resisting and obstructing a police officer, MCL 750.479. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 13 months' to 4 years' imprisonment.[1] We affirm.

Defendant first challenges the trial court's admission of evidence concerning the domestic violence charge that led to the instant arrest. Defendant claims that the charge was not relevant to any issue at trial, its prejudicial effect substantially outweighed its probative value, and it was offered for the improper purpose of demonstrating defendant's propensity for violence. We review the trial court's decisions on the admission of evidence for abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000).

Under MRE 404(b), other acts evidence is admissible if it is offered for a proper purpose, it is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). A proper purpose is one other than to establish the defendant's character in order to show his propensity to commit the charged offense. *Id.* Upon request, the trial court may provide a limiting instruction. *Id.* at 75. "[A] defendant's general denial places all the elements of the charge at issue." *Sabin, supra*.

In the present case, the prosecutor offered testimony of the domestic assault for proper purposes.[2] This Court has explained that "evidence of prior 'bad acts' is admissible where those

[1] At that same time, the trial court sentenced defendant on his conviction by plea of aggravated domestic violence, MCL 750.81a.

[2] The prosecutor stated, "we intend to meet our burden of proof in terms of properly (continued…)

acts are 'so blended or connected with the (charged offense) that proof of one incidentally involves the other or explains the circumstances of the crime.'" *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). Additionally, "'res gestae' has been defined as 'the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect.'" *Robinson, supra*, quoting *People v Castillo*, 82 Mich App 476, 479-480; 266 NW2d 460 (1978). More recently, in *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), our Supreme Court relied on its reasoning in *Delgado*. The *Sholl* Court noted that "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place," *id.* at 741, and that the more jurors know about the full transaction, the better equipped they are to perform their sworn duty, *id.* at 742.

The charged offense in the present case, resisting and obstructing arrest, requires proof that the officer is carrying out his lawful duty. MCL 750.749; *People v Wess*, 235 Mich App 241, 243-244; 597 NW2d 215 (1999). To make this showing, the prosecutor attempted to demonstrate that the police officer responded to a call reporting domestic violence and, based on the facts with which he was presented, including the physical condition of the victim and her statements, was justified in trying to confront defendant and eventually apprehend defendant. Under *Scholl, supra*, and *Robinson, supra*, the trial court did not abuse its discretion in admitting evidence of the domestic violence leading to defendant's arrest. Moreover, the evidence was relevant because it provided context concerning the arrest of defendant and it tended to show that the police officer was authorized to make the arrest.[3] Under these circumstances, the prejudicial effect did not substantially outweigh its probative value. The evidence was properly admitted.

Next, defendant challenges the trial court's denial of defendant's motion for directed verdict and the sufficiency of the evidence. Defendant asserts that the trial court erred in denying his motion for a directed verdict at the close of plaintiff's case and that the evidence is insufficient to sustain defendant's conviction because no evidence demonstrated that defendant physically interfered with the police.

When determining whether sufficient evidence has been presented to avoid a directed verdict and to sustain a conviction, this Court must 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 proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508,

---

(…continued)

characterizing the out-of-control, combative, violent, unresponsive, confrontational behavior of the defendant on the night in question." Moreover, the prosecutor argued that the evidence was relevant because "it gives us that picture of what the officer's coming into, in light of, you know, this whole demeanor and behavior and attitude that this defendant brings to the officer when he resists." The trial court referred to the appropriateness of the testimony to demonstrate defendant's "state of mind," although "res gestae" is also a proper characterization of the prosecutor's and the trial court's reasoning.

[3] The testimony at issue, which depicts a violent fight during which defendant, among other things, hit, choked, and kicked the victim of the domestic assault because she refused to engage in sex, is relevant to show that the police officer was authorized to arrest defendant.

515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Mayhew*, 236 Mich App 112, 124-126; 600 NW2d 370 (1999).

Recently, in *People v Vasquez*, 465 Mich 83; 631 NW2d 711 (2001), our Supreme Court held that the "resisting and obstructing" statute, MCL 750.479, "proscribes threatened, either expressly or impliedly, physical interference and actual physical interference with a police officer." *Id.* at 85-86, 90 (Markman, J.), 115 (Kelly, J.). The Court explained that "both physical interference that poses a threat to the safety of the police officers ('assault, beat, or wound') *and* physical interference that does not necessarily, but nevertheless may, pose a threat to the safety of police officers ('obstruct, resist, [or] oppose') are proscribed." *Id.* at 94 (Markman, J.). Further, the Court explained that it was not necessary for a defendant to physically interfere with law enforcement officers at all. *Id.* at 97. In doing so, the Court approved of an earlier case, *People v Philabaun*, 461 Mich 255, 263; 602 NW2d 371 (1999), in which the Court stated:

> Although the classic example of resisting or obstructing involves a defendant who physically interferes with the officer, actual physical interference is not necessary because case law instructs that an expressed threat of physical interference, absent actual physical interference, is sufficient to support a charge under the statute. And while an expressed threat of physical interference with an officer is sufficient to support a charge under the statute, such a threat is not necessary because this Court has held that a constant barrage of obscene and abusive remarks to an officer, taken together with the refusal to comply with the officer's orders, is sufficient to warrant a charge under the statute.

In commenting on the situation presented in *Philabaun, supra*, the *Vasquez* Court noted that the defendant's refusal to comply with a search warrant was sufficient to support a charge under the statute, because in refusing to cooperate, the defendant interfered with the officers and left the officers with no other choice but to use physical force. *Vasquez, supra* at 97-98 (Markman, J.). Under our Supreme Court's reasoning, we conclude that defendant's assertion in the present case that physical violence is necessary to sustain a resisting arrest conviction is without merit.

Further, evidence presented at trial indicated that the uniformed police officer responding to the domestic violence call encountered the victim, who appeared severely beaten—she had cuts on her face and was covered in blood. Witnesses to the assault and the arrest testified that the officer came to the door and repeatedly asked defendant to step outside the house. The police officer testified that when he told defendant that he was under arrest, defendant responded with profanities and hand gestures as if "he wanted me to fight him." From this testimony, a reasonable juror could have found that defendant's conduct threatened the police officer. Moreover, defendant's refusal to cooperate and his retreat from the front porch area toward the kitchen placed the police officer in danger. Finally, as in *Philabaun, supra*, defendant's barrage of vulgarities and his unwillingness to cooperate required that the police officer use force, in this case the chemical spray, to subdue him. Thus, the evidence was sufficient to avoid a directed verdict and to support defendant's conviction.

Finally, defendant challenges the trial court's instruction to the jury that physical violence is not necessary to prove the charge. As explained above, physical violence is not a necessary

element of a charge of resisting and obstructing, *Vasquez*, *supra*, and thus defendant's argument is without merit.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra