

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY LEE WAKELEY, a/k/a TIMOTHY  
LEE WAKEKEY,

Defendant-Appellant.

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UNPUBLISHED  
December 21, 2006

No. 262977  
Crawford Circuit Court  
LC No. 04-2251-FH

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle while visibly impaired (OWVI), MCL 257.625(3),<sup>1</sup> a lesser included offense to the offense of operating a motor vehicle while under the influence of intoxicating liquor (OUIL), MCL 257.625(1). He was sentenced as a fourth habitual offender, MCL 769.12, to 45 to 180 months' imprisonment, to run consecutively to his sentence for a parole violation. Defendant appeals as of right. We affirm.

After receiving a dispatch indicating that witnesses had observed a vehicle matching the description of defendant's truck driving erratically in the area of North Down River Road in Grayling, Michigan, Crawford County Deputy Sheriff Dean Goss effectuated a traffic stop of the truck. Goss asked defendant, the driver of the truck, to exit and removed the keys from the ignition. Goss smelled alcohol on defendant's breath and suspected that he was intoxicated. Goss had been acquainted with defendant for several years. He knew that defendant had recently

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<sup>1</sup> MCL 257.625(3) states:

A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of intoxicating liquor, a controlled substance, or a combination of intoxicating liquor and a controlled substance, the person's ability to operate the vehicle is visibly impaired. . . .

been released from prison and was on parole. He immediately contacted defendant's parole officer, who confirmed that defendant could not consume alcohol as a condition of his parole. Goss arrested defendant on a parole violation. He did not administer field sobriety tests to defendant. The prosecutor charged defendant with OUIL based on Goss's report of the arrest.

### I. Other-Acts Evidence

Defendant argues that the trial court erroneously admitted as evidence other-acts testimony by Goss and by his mother, Donna Wakeley. We disagree. Defendant did not raise specific and timely objections to the testimony he challenges on appeal, as required to preserve these evidentiary issues for our review. MRE 103(a)(1). Accordingly, we review the trial court's actions for plain error affecting defendant's substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Error affects substantial rights if it is outcome-determinative, therefore, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

MRE 404(b)(1), which governs admission of other-acts evidence, provides:

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.

MRE 404(b) is a rule of inclusion. *People v Pesquera*, 244 Mich App 305, 317; 625 NW2d 407 (2001). Relevant other-acts evidence does not violate MRE 404(b) unless offered only to show the criminal propensity of an individual and to establish that he acted in conformity therewith. *People v Katt*, 248 Mich App 282, 304-305; 639 NW2d 815 (2001), *aff'd* 468 Mich 272 (2003). Our Supreme Court developed a four-part test to determine if other-acts evidence is admissible pursuant to MRE 404(b):

First, the prosecutor must offer the other-acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a "determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under Rule 403.'" Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), citing *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994).]

Defendant argues that the trial court erroneously permitted Goss to testify regarding defendant's parole status and propensity to abuse alcohol. In particular, defendant contests the admission of Goss's statements that defendant had recently been released from prison, that he was on parole, and that he could not consume alcohol as a condition of his parole. He also contests the admission of Goss's explanation for arresting defendant for a parole violation and not for OUIL.<sup>2</sup>

However, the prosecutor offered the contested testimony by Goss to explain the circumstances surrounding defendant's arrest, not to establish defendant's bad character or his propensity to drive while intoxicated. Further, evidence that defendant was on parole and was prohibited from consuming alcohol as a condition of his parole is relevant under MRE 402 to explain why Goss arrested defendant for a parole violation and not for OUIL. Defendant's criminal status and Goss's decision to arrest him for a parole violation are also relevant to explain Goss's failure to give defendant field sobriety tests.

Defendant further asserts that these statements establishing "[defendant's] bad character as a prior convict and his propensity for alcoholism . . ." are unfairly prejudicial. Although we acknowledge that evidence that defendant was on parole and that he had an alcohol problem would be prejudicial to a defendant charged with OUIL, "all evidence is somewhat prejudicial to a defendant—it must be so to be relevant." *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). However, MRE 403 only states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Again, the evidence of defendant's parole status and Goss's awareness that defendant had an alcohol problem is probative to explain why Goss chose to "give [defendant] a break" and arrest him on a parole violation for consuming alcohol instead of conducting field sobriety tests and arresting him for OUIL. Accordingly, we conclude that the unfair prejudice that might result from the admission of this testimony does not substantially outweigh the probative value of this testimony to explain the circumstances surrounding defendant's arrest.

Moreover, the trial court properly instructed the jury both during opening statements and when instructing the jury after the close of evidence that it could only consider evidence of defendant's parole status or other bad acts to "understand[] why the officer handled the matter as he did." Further, the court noted that the jury could not consider this evidence as indicative of defendant's criminal propensity. Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994). We presume that the jury properly followed these instructions and only considered this evidence for the specified purpose. Accordingly, the trial court did not err when it permitted Goss to make the contested statements.<sup>3</sup>

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<sup>2</sup> When the prosecutor asked Goss to explain why he arrested defendant for a parole violation, Goss explained, "I knew he just got out of prison and I knew that [defendant] needed help and I really thought that just violating him may solve the problem as far as putting him back in treatment."

<sup>3</sup> Alternately, these contested statements were admissible under the doctrine of completeness.

(continued...)

Next, defendant argues that the trial court erred when it permitted the prosecutor to question Wakeley regarding defendant's history of driving while intoxicated. Specifically, defendant contests the statements elicited by the prosecutor in the following exchange:

Q. All right. Was he—have you ever ridden with him when he had been drinking?

A. Sure.

Q. Does he stay on his side of the road or does he use both sides of the road?

A. He stays on his side pretty good.

Q. What's pretty good?

A. I mean he's not zig zagging all over.

Q. He's not?

A. And I don't ride with him if he's—

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(...continued)

It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the “complete story” ordinarily supports the admission of such evidence.

Stated differently:

“Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.” [*People v Delgado*, 404 Mich 76, 83; NW2d (1978) (citations omitted).]

By driving under the influence of alcohol on the evening in question, defendant simultaneously violated the provisions of MCL 257.625 and the conditions of his parole. Further, the prosecutor charged defendant with OUIL based on evidence of defendant's intoxicated state while driving immediately before his arrest for the parole violation. By noting that defendant was arrested for a parole violation, Goss explained the circumstances of defendant's arrest, including why he did not give defendant field sobriety tests and, hence, why the prosecution did not have evidence of these tests to present to the jury. Because information concerning the conditions of defendant's parole and his arrest for a parole violation were necessary to give the jury the “complete story” surrounding defendant's arrest, this evidence was properly admissible under the doctrine of completeness.

Q. If he's been drinking?

A. Right.

Q. Okay. Have you ever seen him driving drunk where he zig zags all over the road?

A. Not really.

Q. No.

A. I don't go out drinking and carousing on the roads.

Q. All right.

A. And I don't go with Timothy when he does it.

Q. All right.

A. Or if he does it either one.

Q. All right. But he's—you've seen him leave the house when he shouldn't have, haven't you?

A. Not really.

However, we conclude that Wakeley's testimony on cross-examination, including the passage excerpted above, supported defendant's theory that reasonable doubt existed regarding whether he was intoxicated at the time of his arrest. Therefore, the admission of this testimony was not outcome-determinative and did not violate defendant's substantial rights. The prosecutor elicited the contested testimony immediately after Wakeley stated, in response to the prosecutor's inquiry, that she thought that defendant was a "careless driver" and "always is screwing with something." In the contested exchange, Wakeley testified that when she drove with defendant after he had been drinking, he did not "zig zag[] all over" the road.<sup>4</sup> Her testimony does not support a finding that defendant was intoxicated at the time witnesses observed him driving on the evening of his arrest, but supports an inference that defendant was merely a careless driver. Further, Wakeley did not testify that she had ever observed defendant driving while intoxicated. Again, her testimony merely established that, if defendant went "drinking and carousing on the roads," she was not with him, and that she never saw defendant leave her house (and presumably drive) when he was intoxicated. Because Wakeley's cross-examination testimony was consistent with defendant's theory of the case, it was not outcome-

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<sup>4</sup> Wakeley's statements were made in response to questions regarding defendant's driving ability after he had been drinking, not regarding defendant's driving ability when he was drunk.

determinative and, therefore, the trial court did not plainly err when it admitted this testimony in evidence.<sup>5</sup> *Carines, supra* at 763.

Defendant also argues that statements made by the prosecutor in his opening remarks concerning defendant's parole status were improperly admitted. However, statements by the prosecutor are not evidence. MCR 6.414(C). Therefore, defendant fails to establish that these statements constitute improperly admitted other-acts evidence.

Further, the prosecutor's remarks do not constitute an act of prosecutorial misconduct. Although "[a] prosecutor may not make a statement of fact to the jury that is unsupported by the evidence in the case," *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992), the prosecutor's statement that defendant was on parole at the time of his arrest was supported by evidence later presented at trial.

## II. Prosecutorial Misconduct

Defendant claims that the prosecutor engaged in misconduct when he improperly opined regarding defendant's guilt in his opening and closing statements. We disagree. Defendant failed to object to the contested remarks at trial. Accordingly, he fails to preserve these issues for our review. We review unpreserved allegations of prosecutorial misconduct for plain error affecting defendant's substantial rights. *Carines, supra* at 763, 774.

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). "Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *Id.* at 272-273.

Defendant contests the following remark by the prosecutor in his opening statement:

At this point, I looked at [the police report] and based upon what I knew and based upon the evidence that was set forth in that report, much of which unfortunately at the time in which Mr. Goss stopped the vehicle and took him into custody, he didn't know based upon that evidence I issued a warrant for driving under the influence of intoxicating liquor. Basically that's why we're here.

Defendant also disputes the propriety of the following statement made by the prosecutor in his closing argument:

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<sup>5</sup> Further, defense counsel "opened the door" to questions concerning defendant's demeanor when intoxicated when he asked Wakeley if she had ever seen defendant after he had been drinking and if he was intoxicated when he was at her home shortly before his arrest. See MRE 611.

Now the reason that the Prosecutor is available in these cases or in all cases is that's [sic] I supposedly I'm suppose to—I supposedly—we act as a buffer between the police, the defendants, between everybody in the Court. It has to tunnel through our office in order to go for the charges. When I saw the report it's obvious what happened. There was a warrant issued for OUIL, for driving under the influence of intoxicating liquor.

Finally, defendant disputes the propriety of the prosecutor's statement during his rebuttal argument that "[i]n this case I didn't agree at all with Mr. Goss's discretion."

However, the prosecutor's remarks explain his reasons for charging defendant with OUIL after he was arrested for violating his parole. Further, immediately after making the contested statement during his closing examination, the prosecutor reminded the jury that he had merely explained his rationale in charging defendant with OUIL, and that the jury had the duty to independently consider the facts and determine defendant's guilt or innocence. Further, the trial court instructed the jury that it must decide the case based on the evidence presented and that "[t]he lawyer's [sic] statements and arguments are not evidence," and jurors are presumed to follow their instructions. *Hana, supra* at 351. The jury was properly informed of the context in which it could consider the contested statements, and the prosecutor's statements did not deny defendant a fair and impartial trial. Accordingly, the trial court did not plainly err when it failed to recognize the prosecutor's statements as indicative of prosecutorial misconduct.

### III. Ineffective Assistance of Counsel

Defendant also argues that his counsel was ineffective because he failed to object to the challenged evidence adduced from Goss and Wakeley and to the prosecutor's challenged remarks. Because defendant failed to move for a new trial or an evidentiary hearing, our review of defendant's claims of ineffective assistance of counsel is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). As discussed *supra*, we have concluded that defendant's allegations that the trial court erroneously admitted other-acts evidence and that the prosecutor committed misconduct are without merit. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003). Therefore, defense counsel was not ineffective for failing to object to the challenged statements.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Donald S. Owens