# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 29, 2008 |
| v | No. 273272<br>Mason Circuit Court |
| ELRICO JAMES BROOKS,<br><br>Defendant-Appellant. | LC No. 06-001592-FH |

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of resisting, obstructing, or opposing a police officer, MCL 750.81d(1). Defendant was sentenced as a habitual offender, third conviction, MCL 769.11, to a prison term of one year, four months to four years. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first asserts that he was deprived of a fair trial when the trial court declined to instruct the jury on the offense of attempted resisting and/or obstructing of a police officer. Upon indictment of an offense that consists of different degrees, the jury or judge in a non-jury trial may find the defendant guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense. MCL 768.32(1). "A requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002) However, "it is not error to omit an instruction on such lesser offenses, where the evidence only tends to prove the greater." *Id.* at 355-356, citing *People v Patskan*, 387 Mich 701, 711; 199 NW2d 458 (1972). We review issues of law concerning jury instructions de novo and the trial court's determination whether a particular instruction is applicable to the facts for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2007).

In the instant case, the evidence tended to prove only the greater of the offenses, or no offense at all. The police officers testified that defendant pulled away when they attempted to handcuff him and that defendant dropped to his knees and became dead weight when they ordered him to get in the police car. Officer Haveman testified that he then applied pressure to the mandibular angle (below the earlobe) to gain compliance, but the maneuver was ineffective. The defense presented in defendant's testimony and in closing argument was that defendant did not resist or oppose the officers. He testified that he did not get in the police car because he was

unable to do so, that he dropped to his knees as a result of the application of the mandibular angle, and that he did not pull away when an officer attempted to handcuff him. The crime of attempt requires a specific intent to commit the greater crime and an action in furtherance of that intent. *People v Burton*, 252 Mich App 130, 141; 651 NW2d 143 (2002). If the jury accepted defendant's view of the evidence, that both intent and action were lacking, it could not convict defendant of resisting a police officer or of attempting to resist a police officer. If, on the other hand, the jury accepted the officers' description of defendant twisting and stepping away when they attempted to handcuff him and of dropping to his knees and becoming dead weight when he was directed to get in the car, then the completed offense would be proven. Defendant also asserts that he could have been found guilty of attempt by virtue of giving a false name, an act that does not constitute resisting or obstructing, *People v Vasquez*, 465 Mich 83, 94, 114; 631 NW2d 711 (2001), but which could be construed as an act in furtherance of an intent to resist or obstruct. This theory is at complete variance with any presented by defendant in the trial court. Defendant denied giving a false name and consistently indicated that he had identified himself to the officers by responding to "Mr. Brooks." Because the requested instruction was not consistent with a rational view of the evidence, *Cornell, supra* at 337, the trial court did not abuse its discretion by declining to give it.

Defendant next asserts that testimony concerning his conduct of resisting an arrest in 1998 was improper "bad acts" evidence proscribed by MRE 404(b)(1). Because this issue was not preserved for appeal, defendant must demonstrate plain error affecting his substantial rights, in that he was actually innocent, or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings regardless of the defendant's innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

In order to be admissible under MRE 404(b), generally bad acts evidence (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *Id.* at 509; *People v Dobek*, 274 Mich App 58, 85; 732 NW2d 546 (2007). Evidence that is only relevant to show the defendant's character or his propensity to commit the crime must be excluded. *Knox, supra* at 510. Upon request, the trial court may provide a limiting instruction. *Id.* at 509.

In the instant case, plaintiff indicated that the bad acts evidence would be offered to show motive, intent, and scheme, plan, or system. In *People v Sabin*, 463 Mich 43, 63; 614 NW2d 888 (2000), the Supreme Court explained that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." The similar acts need not be part of a "single or continuing conception or plot." *Id.* at 64. However, general similarity between the charged and uncharged offenses does not by itself establish a plan, scheme, or system. *Id.* In this case, we can discern no more than general similarity between defendant's conduct some eight years earlier, in stiffening his body and refusing to walk, refusing to get in a police car when instructed, and kicking a police officer when the officers were attempting to place him in the car against his will, to that charged in this case, involving twisting away while the officer attempted to handcuff him, kicking his shoes off, dropping to his knees, and refusing to get in the car when instructed, requiring that he be lifted into the car by the officers. Therefore, the evidence was not relevant to show a plan or scheme. However, the trial court instructed the jury as well that the prior incident could be used to show

that defendant "acted purposefully, that is, not by accident, or mistake, or because he misjudged the situation. . . ." The prior incident indeed could have relevance to show that defendant actually resisted arrest, rather than not being aware that the officer was trying to handcuff him, or because he was unable to comply with the officers' directions, as defendant asserted in his testimony. Therefore it was relevant for a proper purpose, *Knox, supra* at 509. Further, the evidence did not pose such a risk of unfair prejudice as to outweigh its probative value, *Id.*; MRE 403, especially in light of the fact that a limiting instruction was given.

In any event, the evidence presented in the case does not suggest that defendant was innocent of the crime of which he was convicted. *Knox, supra* at 508. He admitted that he was argumentative and failed to get in the police car after being directed to do so, and the testimony of the officers was adequate to establish that he passively resisted their instructions and physically resisted the attempt to handcuff him. Under these circumstances, there is no plain error requiring reversal. *Id.*

Affirmed.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood