STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2015
v	No. 323406 Baraga Circuit Court
RAFAEL VERNIER BEAN, Defendant-Appellant.	LC No. 2012-001247-FC

Before: SAAD, P.J., and STEPHENS and O'BRIEN, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial on the charge of being a prisoner in possession of a weapon, MCL 800.283(4). The court sentenced defendant to 30 months to 15 years as a habitual fourth offender, MCL 769.12. We affirm.

I. FACTS

On July 13, 2011, correctional officer Brian Hoover discovered an object in defendant's prison cell near the inner frame of the cell door while defendant was showering. Hoover described the item as a "stabbing-like device" made of rolled up newspaper, a sock, and some pens. Correctional officer James Rasanen, who was with Hoover, described the object as "newspaper rolled up, wrapped with a sock with two pens on the end" that was "approximately 11 inches long." Hoover explained that the pens were not sharpened, but they were damaged and it looked like they had been "stabbed in the wall . . . to make sure they were solid." Hoover opined that the item could be used to injure a person. Hoover testified that when he seized the item, defendant, who had a view of the cell from the shower, called out, "that was just a decoy. The real one will be coming out soon." The prosecution presented evidence that defendant was the sole occupant of the prison cell from April 5, 2011 to August 11, 2011.

II. MCL 800.283(4)

Defendant argues that MCL 800.283(4) is unconstitutionally vague. He asserts that because virtually any item can be used as a weapon, the statute fails to provide adequate notice of the prohibited conduct. He also asserts that because the statute vests too much power and discretion in law enforcement officers to decide what is or is not be a prohibited item, it is subject to arbitrary enforcement. This challenge was not preserved below, so appellate review is

limited to whether there was plain error that affected defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). To avoid forfeiture under the plain error rule, three requirements must be met: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citations omitted). The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id*.

The void-for-vagueness doctrine is derived from the Due Process Clauses of the Fourteenth Amendment and Const 1963, art 1, § 17, which guarantee that the state may not deprive a person of life, liberty, or property without due process of law. *People v Roberts*, 292 Mich App 492, 497; 808 NW2d 290 (2011). "A statute challenged on constitutional grounds is presumed to be constitutional and will be construed as such unless its unconstitutionality is clearly apparent." *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998). A statute may be challenged as unconstitutionally vague when (1) "it is overbroad and impinges on First Amendment freedoms," (2)" it does not provide fair notice of the conduct proscribed," or (3) "it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated." *People v Noble*, 238 Mich App 647, 651; 608 NW2d 123 (1999). A statute provides fair notice when it "give[s] a person of ordinary intelligence a reasonable opportunity to know what is prohibited . . . ." *Id*. at 652. "A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Id*.

Defendant challenges the constitutionality of MCL 800.283(4), which provides as follows:

> Unless authorized by the chief administrator of the correctional facility, a prisoner shall not have in his or her possession or under his or her control a weapon or other implement which may be used to injure a prisoner or other person, or to assist a prisoner to escape from imprisonment.

This Court previously reviewed vagueness challenges to this statute and found that it was constitutional in *People v Osuna*, 174 Mich App 530; 436 NW2d 405 (1988) and *People v Herron*, 68 Mich App 381; 242 NW2d 584 (1976).

A person of ordinary intelligence would understand that pens protruding from a rolled up newspaper bound together by a sock is a "weapon or other implement which may be used to injure a prisoner or other person" as contemplated by MCL 800.283(4). Such an object plainly has "weapon-like qualities that could be used to harm others." *Herron*, 68 Mich App at 383. Notably, defendant understood that the object was a weapon because the officer that found the object testified that defendant told him, " 'That was just a decoy. The real one will be coming out soon.' "

Defendant's argument that that statute is vague because any ordinary item, such as a pen, could be a weapon is equally unavailing. "We must use some common sense in our construction, and requiring the Legislature to specify every type of implement proscribed would make little

sense." *Id*. Further, a prisoner would have implicit permission, unless expressly forbidden, to possess an ordinary object like a pen for writing. *Id*.

Defendant's argument that the statute is vague because it invites arbitrary enforcement also fails. To determine whether an act allows for arbitrary enforcement, we must examine it to determine if it "provide[s] standards for enforcing and administering the laws in order to ensure that enforcement is not arbitrary or discriminatory. . . ." *In re Forfeiture of 719 N Main*, 175 Mich App 107, 112–113; 437 NW2d 332 (1989). The act does not invite arbitrary enforcement because enforcement is limited to a weapon or "other implement which may be used to injure" that is not "authorized by the chief administrator of the correctional facility." MCL 800.283(4). This creates a clear standard for enforcing and administering the law.

Defendant also argues that the phrase "implement which may be used to injure" is broad. Again, we do not expect the Legislature to contemplate every implement that may be used to injure another nor to anticipate the creativity of prisoners to morph ordinary objects into weapons. There is no alternative innocent explanation for the implement created by defendant here. Also, the fact that the implement was hidden from plain view supports that defendant knew the item was prohibited. "Generally, a criminal defendant may not defend on the basis that the charging statute is unconstitutionally vague or overbroad where the defendant's conduct is fairly within the constitutional scope of the statute." *People v Rogers*, 249 Mich App 77, 95; 641 NW2d 595 (2001).

In this case, Hoover acknowledged that the materials defendant used to make the object were common in the prison environment. However, it is also clear that the chief administrator of the correctional facility did not authorize defendant to fashion or combine the materials in such a way that they took on weapon-like qualities. Thus, it is clear that the statute was not arbitrarily applied to defendant in this case.

Defendant also raises some hypothetical scenarios where, he claims, the statute could be arbitrarily enforced. "When a defendant's vagueness challenge does not implicate First Amendment freedoms, the constitutionality of the statute in question must be examined in light of the particular facts at hand without concern for the hypothetical rights of others." *Vronko*, 228 Mich App at 652. Thus, defendant cannot obtain the relief requested by posing hypothetical scenarios when the statute was not vague or arbitrarily enforced as it applied to the facts of this case.

III. INADMISSIBLE EVIDENCE

Defendant also contends that the trial court impermissibly admitted improper character evidence about his prior assaultive behavior. Defendant contends this was plain error that prejudiced his defense.

The trial court has a duty to limit the introduction of evidence to relevant and material matters. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). "Pursuant to MRE 404(b), 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." *Id*. However, such evidence may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or

absence of mistake or accident" when material. MRE 404(b). The trial court must determine whether evidence offered for a permissible purpose is relevant under MRE 402 and whether the danger of unfair prejudice substantially outweighs the probative value of the evidence under MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). MRE 404(b) requires the prosecution to provide "reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial."

In this case, Hoover testified on direct examination that he had to place defendant in leg restraints when taking him to the shower because of defendant's "previous assaultive behavior." Hoover also testified on cross-examination that he was "aware of the assaultive behavior" because defendant "still is on a permanent leg restraint." Hoover explained that any time defendant "comes out of a cell, his arms have to be behind his back, and then he needs to be restrained by the legs, as well."

Hoover's testimony improperly introduced evidence of defendant's prior bad acts in violation of MRE 404(b). The challenged evidence was not relevant, i.e., it did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. And the danger of unfair prejudice was high. It portrayed defendant as a violent man who must be restrained by force.

Nevertheless, defendant cannot show that that error in admitting the bad acts evidence affected the outcome of the lower court proceedings. Evidence was introduced that showed that defendant was the only occupant of his cell on the day in question. In fact, prison records indicated that defendant was the sole occupant of the cell from April 5, 2011 to August 11, 2011. Correctional officers found the weapon in defendant's cell by the inner frame of the door. Significantly, it is reasonable to assume that defendant had prior knowledge of the weapon because the officer that discovered the weapon testified that defendant commented that the item " 'was just a decoy' " and that the " 'real one will be coming out soon.' " Given the substantial evidence of guilt, defendant has not established that evidence relating to his prior assaultive behavior affected the outcome of the trial.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also contends that counsel was ineffective for failing to object when Hoover testified about defendant's previous assaultive conduct. Because defendant failed to motion for a new trial or request an evidentiary hearing of this claim, review is limited to the existing record. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

"[I]t is the defendant's burden to prove that counsel did not provide effective assistance." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). "To prove that defense counsel was not effective, the defendant must show that (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *Id.* at 80-81, citing *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "The defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different." *Id*. at 81.

For the same reasons cited with respect to admission of the evidence, defendant cannot demonstrate that counsel's actions prejudiced him. Again, the prosecution elicited evidence that defendant was the sole occupant of his cell, officers found the weapon-like object in his cell, and defendant's comments indicated that knew about the object. Thus, defendant has not demonstrated that counsel's actions prejudiced his defense.

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Colleen A. O'Brien