

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY JAMAR FUTRELL JR.,

Defendant-Appellant.

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UNPUBLISHED

March 11, 2021

No. 352103

Berrien Circuit Court

LC No. 2019-002370-FH

Before: TUKEL, P.J., and JANSEN and CAMERON, JJ.

PER CURIAM.

Defendant, Henry Jamar Futrell, Jr., appeals as of right his jury trial conviction of delivery of less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(iv). Defendant was sentenced to 16 months to 40 years' imprisonment. We affirm.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

This case arises from defendant's sale of cocaine to an undercover police sergeant. Police received a tip that they could purchase drugs if they contacted a certain phone number. Sergeant Shawn Yech, a narcotics officer, sent a text message to the phone number, and at the time, he did not know who the phone belonged to. On April 29, 2019, Sergeant Yech sent the phone number a text message that received no response. On May 15, 2019, Sergeant Yech sent another text message that said, "What good. You around." On May 26, 2019, Sergeant Yech received a response that said, "I just got out." On the same day, Sergeant Yech responded to the text message, and asked, "[Y]ou get locked up??" The phone number responded, "Yup." Sergeant Yech then received a text message that said, "Light bet hard right." Sergeant Yech testified that, based on his experience as a narcotics officer, the meaning of this message that "what he said was all right. Bet, meaning, all right, I understand. And hard right. Hard would be a street term for crack cocaine."

Through text messages, Sergeant Yech set up a deal to buy \$80 dollars of crack cocaine. The defendant drove a silver car to the drug transaction, and Sergeant Yech was able to see defendant's face. By inputting defendant's license plate number into the police computer, police

were able to determine where defendant lived and were able to determine that defendant was on felony probation. Police learned that defendant was released from jail on May 19, 2019.

The prosecution sought to admit the evidence as other-acts evidence under MRE 404(b) to show that defendant could not respond to the earlier text messages because he was incarcerated, and defendant objected. The trial court allowed the evidence of defendant's prior incarceration, but limited it to the date that defendant was released. The trial court did not allow the prosecution to ask why defendant was incarcerated or the circumstances involving the incarceration. The trial court also provided a limiting instruction to the jury. Defendant was ultimately convicted by a jury, and this appeal followed.

## II. STANDARD OF REVIEW

On appeal, defendant argues that any probative value in the evidence of his prior incarcerations was substantially outweighed by undue prejudice, and therefore should have been excluded under MRE 403 because the admission of this evidence was outcome-determinative.

The admissibility of other-acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, whether a rule or statute precludes admission of evidence is a preliminary question of law that this Court reviews de novo. *People v Denson*, 500 Mich 385, 396; 902 NW2d 306, 314 (2017). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). Reversal is only required when it is more probable than not that the error was outcome-determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

## III. ANALYSIS

MRE 404(b)(1) governs admission of evidence of other bad acts, and it states:

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.

Our Supreme Court has set the following standard to determine when other-acts evidence is admissible: (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the trial court must consider, under MRE 403, whether the probative value of the other-acts evidence is substantially outweighed by its potential for unfair prejudice; and (4) upon request, the trial court must instruct the jury that the other-acts evidence is to be considered only for the proper purpose for which it was admitted. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Defendant only challenges prong three of the *VanderVliet* test and argues that any probative value was substantially outweighed by the danger of unfair prejudice. MRE 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Unfair prejudice occurs when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v Waclawski*, 286 Mich App 634, 672; 780 NW2d 321 (2009).

“In reviewing the trial court's decision for an abuse of discretion, the appellate court must view the evidence in the light most favorable to its proponent, giving ‘the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.’ ” *United States v Moore*, 917 F 2d 215, 233 (CA 6, 1990) (citation omitted). “[T]he draftsmen intended that the trial judge be given very substantial discretion in ‘balancing’ probative value on the one hand and ‘unfair prejudice’ on the other, and that the trial judge should not be reversed simply because an appellate court believes it would have decided the matter otherwise.” *Id.* (citation, brackets, and some quotation marks omitted). [*People v Head*, 323 Mich App 526, 540-541; 917 NW2d 725 (2018).]

Here, defendant argues that the probative value of corroborating the text messages with defendant was “weak,” when compared to the undue prejudice of showing that defendant has a propensity to commit crime. The text messages between defendant and Sergeant Yech read as follows:

[*Sergeant Yech*]: Hey what’s up. Got a new number. Hit me back

[*Sergeant Yech*]: What good. You around

[*Defendant*]: I just got out

[*Sergeant Yech*]: You get locked up??

[*Defendant*]: Yup[.]

Moreover, at trial testimony was offered to show: (1) defendant first reported to his probation officer on May 20, 2019, and he was in jail before that; (2) the sergeant was able to see that defendant was on felony probation, and he contacted defendant’s probation officer; and (3) defendant was released from jail on May 19, 2019, and the sergeant associated that release date to the times that he received text messages back from the phone number.

The evidence that defendant was in jail did have probative value. The prosecution used this evidence to establish that whomever was operating this phone that was exchanging text messages with Sergeant Yech had recently been released from jail, and likely did not text back earlier because the person was in jail. Thus, the timeline of when defendant was incarcerated

supported the identification of defendant in this case. Indeed, defendant asserted a mistaken identity defense, making this information essential to the case. The trial court understood the probative value, and it stated why it was allowing the evidence in on the record. See *Crawford*, 458 Mich at 383.

We agree with defendant that the testimony regarding defendant's prior incarceration was prejudicial: the jury would hear evidence that defendant had previously been incarcerated and this information could lead to an inference that defendant had a propensity to commit crimes. However, under the standard of review, which maximizes the probative value and minimizes the prejudicial effect, see *Head*, 323 Mich App at 540, we find no error in the admission of the evidence.

The evidence that defendant was previously incarcerated was very limited, and was only admitted to corroborate dates of the text messages. The prosecution did not ask how long defendant was in jail, and it made no mention of the crime defendant had committed. Further, the trial court gave a limiting instruction to the jury on how defendant's jail time should be considered, and explicitly stated that it could not be used for character purposes. It is well established that jurors are presumed to follow their instructions. *Waclawski*, 286 Mich App at 674. Therefore, the prejudicial affect was mitigated by the steps that the trial court took to keep the subject matter of defendant's incarceration from the jury. Where the probative value of the evidence in question was not substantially outweighed by undue prejudice, we conclude that the trial court did not abuse its discretion by admitting the evidence.

Moreover, even if the admission of the evidence was error, any resulting prejudice was not sufficient to constitute reversible error. Sergeant Yech presented eyewitness testimony of the identity of defendant, and testified that he saw defendant's face during the hand to hand drug transaction. Sergeant Yech also testified regarding the text messages he sent to and received from defendant when setting up the drug transaction, and further testified that he had confirmed defendant's phone number with defendant's probation officer. Finally, defendant drove the same vehicle to the drug transaction and to his probation officer's office. We also note that when presenting evidence of defendant's past incarceration, the prosecution did not give any specific information, and a limiting instruction was provided to the jury. Thus, we conclude that the admission of other-acts evidence, here defendant's past incarceration, was not outcome-determinative. *Knapp*, 244 Mich App at 378.

Affirmed.

/s/ Jonathan Tukel  
/s/ Kathleen Jansen  
/s/ Thomas C. Cameron