

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON ROSHAWN HORNER,

Defendant-Appellant.

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UNPUBLISHED

July 26, 2011

No. 297658

Oakland Circuit Court

LC No. 2009-227905-FH

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of third-degree fleeing and eluding, MCL 257.602a(3), felon in possession of a firearm, MCL 750.224f, two counts of possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b, felonious assault, MCL 750.82, and assaulting, resisting, or obstructing a police officer, MCL 750.81d. Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 76 months to 20 years' imprisonment for the fleeing and eluding and felon in possession of a firearm convictions, 18 months to 15 years' imprisonment for the felonious assault and assaulting, resisting, or obstructing a police officer convictions, and five years' imprisonment for the felony-firearm convictions. We affirm.

Defendant first argues that the trial court's implementation of a jury-reform pilot project denied defendant his constitutional right to due process. Defendant claims that aspects of the project that permitted jurors to ask questions of witnesses and to discuss the case during trial recesses deprived him of his right to fair jury deliberations and improperly lessened the prosecution's burden of proof. We disagree.

Whether the implementation of the jury-reform pilot project violated defendant's right to due process under the Fourteenth Amendment is a constitutional question that this Court reviews *de novo*. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010). Because defendant did not preserve his challenge to the portion of the pilot program permitting the jurors to ask questions, this Court reviews that aspect of the issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Also, this Court reviews for an abuse of discretion a trial court's decision to permit juror questions. See *People v Heard*, 388 Mich 182, 188; 200 NW2d 73 (1972).

In Administrative Order No. 2008-2, the Michigan Supreme Court authorized several trial judges, including the trial judge in this case, to implement a pilot project to study the effects of a jury-reform proposal. Two aspects of AO 2008-2 are relevant here. Subsection (I) provides for juror questions:

The court may permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions. The court shall inform the jurors of the procedures to be followed for submitting questions to witnesses.

In addition, subsection (K) addresses juror discussion:

After informing the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of counsel, the court may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses. The jurors should be instructed that such discussions may only take place when all jurors are present and that such discussions must be clearly understood as tentative pending final presentation of all evidence, instructions, and argument.

Also, we note that MCR 6.414(E) expressly permits juror questions at the discretion of the trial court: “The court may, in its discretion, permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that inappropriate questions are not asked, and that the parties have the opportunity to object to the questions.”

In *Heard*, 388 Mich at 188, the Michigan Supreme Court held that “the questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court.” The Supreme Court noted that while less than half the states had spoken on the question at that time, all but one had recognized the right of jurors to ask questions. *Id.* at 186. “The basic reason underlying the decisions of these Courts is that the jurors are the finders of fact and any questions they may ask may help them in reaching their ultimate determination.” *Id.* at 187. The Supreme Court further explained that “in certain circumstances, a juror might have a question which could help unravel otherwise confusing testimony. In such a situation, it would aid the fact-finding process if a juror were permitted to ask such a question.” *Id.* at 187-188.

In *People v Stout*, 116 Mich App 726, 732-733; 323 NW2d 532 (1982), this Court rejected the defendant’s argument that *Heard* permitted juror questions only if the questions would unravel otherwise confusing testimony. The *Stout* Court stated, “Although the *Heard* opinion specifically referred to juror questions which ‘help unravel otherwise confusing testimony’ we do not believe that the Court meant to limit juror questions to only those situations, but, rather, was merely posing an example of where juror questions might aid in the fact-finding process.” *Id.* at 733.

In *State v Doleszny*, 176 Vt 203, 209; 844 A2d 773 (2004), the court stated that the vast majority of other states that have considered this issue allow juror questioning in some form. The *Doleszny* court indicated that ten federal circuit courts of appeal have approved the practice in some form, see *id.* at 210, and in *Medina v People*, 114 P3d 845, 851 (Colo, 2005), the court indicated that none of the federal circuit courts of appeal prohibit the practice. Many states have established jury-policy commissions that support allowing juror questioning in at least some cases, and scholarly and professional commentary is nearly unanimous in supporting the practice. See *Doleszny*, 176 Vt at 211-214, and authorities cited therein. The *Medina* court stated that those courts that prohibit juror questioning have done so primarily for policy reasons rather than on constitutional grounds. See *Medina*, 114 P3d at 854 (noting that in *State v Costello*, 646 NW2d 204, 214 n 4 (Minn, 2002), the Minnesota Supreme Court proscribed juror questioning under its supervisory power and did not reach the defendant's constitutional claims).

Here, the trial court complied with the requirements of AO 2008-2(I). The court directed the jurors to submit their questions in writing. The court explained to the jurors that it would ask a question only if it was allowed under the rules of evidence. Two juror questions were asked during the trial. In each instance, the trial court ensured that the questions were posed by the court itself, that no inappropriate questions were asked, and that the parties had an opportunity outside the hearing of the jury to object to the questions.

Defendant contends that a juror question to a police officer regarding whether the officer's training included starter pistols, as well as the prosecutor's follow-up question, did not clarify existing testimony but elicited further evidence. Defendant contends that the resultant testimony supported the prosecutor's theory that defendant had an actual pistol during the offenses and not a starter pistol. The officer had already testified on direct and redirect examination, however, that he believed defendant had shot a real firearm at him. We find, therefore, that the juror's question and the prosecutor's follow-up question did not elicit new evidence that prejudiced defendant. Similarly, a juror's question for defendant regarding why he bought caps for the starter gun, and the trial court's follow-up question about why defendant bought caps if the starter gun was supposed to protect him simply by looking like a real gun, merely permitted defendant to reinforce his earlier testimony by answering that he needed the starter pistol because he "deal[s] with some unscrupulous people" who will "run the other way" if "they hear a loud bang." Defendant's answer was consistent with his earlier testimony that three men had previously pulled pistols on him and that defendant figured the starter pistol looked like a real gun he could present if he ever faced a situation like that again. Because the juror questions aided the fact-finding process by clarifying existing testimony, the trial court did not abuse its discretion by permitting the juror questions. Defendant has not established a plain error that affected his substantial rights in connection with the juror questions.

Next, defendant contends that the aspect of the jury pilot program permitting jurors to discuss the case during trial recesses violated his right to fair jury deliberations and alleviated the prosecution of its burden to prove defendant's guilt beyond a reasonable doubt. This argument is refuted by the trial court's instructions in accordance with AO 2008-2(K). As required by the administrative order, the trial court told the jurors at the beginning of trial that they must not decide the case until they have heard all of the evidence, instructions of law, and arguments of counsel. Further, the court instructed the jury at the beginning of trial that any discussions before deliberations could occur only when all the jurors were present and that such discussions must be

clearly understood as tentative pending the final presentation of all evidence, instructions, and argument. In addition, the trial court instructed the jury at the beginning of trial that defendant was presumed to be innocent and that “[t]his presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that he is guilty.” The trial court repeated this instruction in its final instructions and also explained that “defendant is not required to prove his innocence or to do anything. If you find the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.” Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant cites *People v Hunter*, 370 Mich 262, 269; 121 NW2d 442 (1963), in which the Michigan Supreme Court stated that “jurors should not be encouraged to discuss evidence they have heard and seen during the course of trial until all of the evidence has been introduced, the arguments to the jury made, and the jury charged by the court . . . .”<sup>1</sup> See also *People v Blondia*, 69 Mich App 554, 557; 245 NW2d 130 (1976), in which this Court explained that “[w]hile it is clearly the law that the trial judge should instruct the jury not to discuss the case among themselves, the cases have held that the omission is not reversible error absent prejudice or at least a showing of such conversations.” Here, the trial court was expressly authorized by the Supreme Court in AO 2008-2 to instruct the jurors as it did, and the court’s instructions carefully ensured that no final decision or conclusion would be reached until the appropriate time. Moreover, there is no indication that the jurors actually discussed the case before deliberations or that defendant was prejudiced. Accordingly, we conclude that the trial court’s implementation of the jury-reform pilot project did not deny defendant his right to fair jury deliberations or alleviate the prosecution’s burden of proving defendant’s guilt beyond a reasonable doubt.<sup>2</sup>

Defendant’s next argument is that he was denied a fair trial due to the admission of evidence of defendant’s prior acts of fleeing from and shooting at a police officer. We disagree. “This Court reviews evidentiary decisions for an abuse of discretion.” *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002).

MRE 404(b)(1) 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,

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<sup>1</sup> This language from *Hunter* is arguably obiter dicta.

<sup>2</sup> We note that the Supreme Court has adopted new rules, to be effective on September 1, 2011, that partially incorporate certain elements from the pilot project and reject other elements. Although the new rules allow for juror questions in all cases, juror discussion before final deliberations will be allowed only in civil cases. Nevertheless, we emphasize that the procedure employed in the present case was authorized under law, did not deny defendant a fair trial, and does not require reversal.

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.

“To be admissible under MRE 404(b), bad-acts evidence must satisfy three requirements: (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice.” *People v Kahley*, 277 Mich App 182, 184-185; 744 NW2d 194 (2007). Also, the trial court, on request, may instruct the jury regarding the limited use of the evidence. *People v Watson*, 245 Mich App 572, 577; 629 NW2d 411 (2001). See also *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993).

The trial court properly concluded that the evidence of the prior bad acts was relevant to defendant’s intent because defendant was claiming that the shooting in this case was accidental. A defendant’s intent is a proper purpose for admitting other-acts evidence. MRE 404(b)(1). Moreover, the prior-act evidence was relevant to show that defendant intended to fire the weapon to effectuate his escape from the police officer in this case. Relevant evidence is “evidence having 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. Defendant claimed that he was carrying a starter pistol that went off by accident. Evidence that defendant had previously fired a gun at an officer during a similar attempt to flee and elude that officer made it somewhat more probable that the weapon here was discharged intentionally and that a starter pistol did not go off by accident as defendant claimed.

The prior-act evidence was also admissible for the proper purpose of showing a common plan, scheme, or system in doing an act. In *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000), the Michigan Supreme Court held 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.” “There must be *such a concurrence of common features* that the charged acts and the other acts are logically seen as part of a general plan, scheme, or design.” *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009) (emphasis in original). “Distinctive and unusual features are not required to establish the existence of a common plan or scheme.” *Kahley*, 277 Mich App at 185. In both the prior incident and in this case, defendant tried to flee from a police officer during an attempted traffic stop, crashed his vehicle, fled on foot, shot a firearm at the officer, and was later found hiding under an object, and in each case the firearm disappeared after the shooting. Given the concurrence of common features, a logical inference exists that the shooting in this case was part of a common plan or system of firing a weapon to effectuate an escape from a pursuing police officer.

Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The evidence was highly probative because it was relevant to the central issue at trial regarding whether defendant accidentally discharged a starter pistol or intentionally shot a firearm at the officer. The danger of unfair prejudice was minimized by the trial court’s limiting instruction, in which the court told the jury that the evidence could be considered only to decide whether defendant acted purposefully and not by accident or mistake

and whether defendant used a plan, system, or characteristic scheme that he had used before. The trial court emphasized that the jury could not convict defendant because it thought he was guilty of other bad conduct. The trial court thus did not abuse its discretion in admitting the prior-acts evidence.

Defendant's final argument on appeal is that his presentence investigation report (PSIR) contains an error that was addressed at sentencing but not corrected in the report. This Court reviews a trial court's response to a claim of inaccuracy in the PSIR for an abuse of discretion. *People v Lucey*, 287 Mich App 267, 275; 787 NW2d 133 (2010). A corrected copy of the PSIR filed with this Court reflects that the error discussed at sentencing has been corrected as defense counsel requested. Because the correction has been made, a remand to the trial court to make the correction is not required.

Affirmed.

/s/ Stephen L. Borrello

/s/ Patrick M. Meter

/s/ Douglas B. Shapiro