

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY LEE NOBLE,

Defendant-Appellant.

UNPUBLISHED

October 1, 1996

No. 181633

LC No. 94-6486-FH

Before: McDonald, P.J., and White and P. J. Conlin*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of attempted escape from prison, MCL 750.193; MSA 28.390. Defendant also pleaded guilty to habitual offender, third offense, MCL 769.11; MSA 28.1083. He was sentenced to eighteen months to ten years to be served consecutively to the sentence he was serving at the time of his attempted escape. Defendant now appeals as of right. We affirm.

On March 18, 1994, Floyd Walker, an officer employed by the Michigan Department of Corrections at Camp Tuscola, observed defendant attempting to scale a security fence and negotiate his body under the barbed wire at the top of the fence. Defendant was apprehended and searched for contraband and weapons, but all that was recovered was a blue laundry bag. He claimed that he was leaving to purchase and bring back liquor to sell to fellow inmates.

Defendant was later charged with escaping or attempting to escape from prison. At trial, defendant again claimed that he intended to return to Camp Tuscola after he obtained the liquor. Several of defendant's former co-inmates also testified that defendant operated a liquor selling enterprise that required him to sneak liquor into the prison.

On appeal, defendant raises three issues. First, defendant contends that the trial court failed to arraign him on the original or amended information as required by MCR 6.113. However, defendant,

* Circuit judge, sitting on the Court of Appeals by assignment.

failed to raise this objection at trial and therefore, the issue is waived on appeal. *People v Dowdy*, 211 Mich App 562; 563 NW2d 794 (1995).

Defendant also contends that there was insufficient evidence to convict him of attempted prison escape because the prosecution failed to prove that he had the requisite specific intent. We disagree.

When addressing a claim of insufficient evidence, we view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Lee*, 212 Mich App 228; 537 NW2d 233 (1995).

MCL 750.193; MSA 28.390 provides in relevant part:

A person imprisoned in a prison of this state who breaks prison and escapes, breaks prison though an escape is not actually made, escapes, leaves the prison without being discharged by due process of law, attempts to break prison, or attempts to escape from prison, is guilty of a felony, punishable by further imprisonment for not more than 5 years.

Under the statute, the crime of prison escape is not a specific intent offense. *People v Noble*, 18 Mich App 300; 170 NW2d 916 (1969). However, to convict a person of *attempted* prison escape under the statute, the prosecutor must prove that the defendant had the specific intent to commit the crime and did an overt act far enough toward the removal of “himself from the imposed restraint over his person . . . to amount to commencement of the consummation.” *People v Marsh*, 156 Mich App 831; 402 NW2d 100 (1986).

In the instant case, the fact that defendant was lawfully confined to prison was not disputed. Additionally, defendant conceded that he intended to leave the prison grounds. Further, the evidence established that despite the absence of any permission to do so, by scaling the fence and trying to make it past the barbed wire, defendant made an overt act in furtherance of his removal from lawful custody. Therefore, by his own admission, as well as the evidence of his being discovered scaling the security fence, sufficient evidence was presented whereby the jury could have found beyond a reasonable doubt that defendant had the specific intent to escape from prison.

Finally, defendant contends that the trial court committed reversible error when it excluded evidence of prior liquor transactions that occurred within the prison. Again, we disagree.

We review a trial court’s decision to admit or exclude evidence for abuse of discretion. *People v Hurt*, 211 Mich App 345; 536 NW2d 227 (1995). We will not find an abuse of discretion unless an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v McAllister*, 203 Mich App 495; 445 Mich 914 (1994).

Relevant evidence is defined as that which has 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. Relevant evidence may be excluded if it creates a substantial danger of unfair prejudice, confusion of the issues or misleading of the jury. MRE 403. Even when the ground cited by the trial court in support of its exclusion of evidence was not correct, provided the evidence was inadmissible for *any* reason under the rules of evidence, the fact that the trial court misidentified the ground for the exclusion does not require reversal. *People v Vandelinder*, 192 Mich App 447; 481 NW2d 787 (1992).

In the instant case, during cross-examination of John Kaijala, a supervisor for the Department of Corrections, defense counsel attempted to question Kaijala as to whether liquor had ever been discovered in the prison. The prosecutor objected to the line of questioning on ground of relevancy and the trial court sustained the objection. Then, instead of confining the inquiry to whether liquor had ever been discovered on defendant's person, defendant asked whether "any inmate" had been found intoxicated before defendant's attempted escape. Defendant claimed to be offering the evidence to prove that defendant had an ongoing liquor selling enterprise. The trial court then sustained an objection by the prosecutor, citing MRE 401 and 403.

A reasonable person could have found that the trial court's grounds for excluding evidence of intoxicated inmates were justified. Had defendant sought to offer evidence of his own acts of uncharged intoxication or possession of liquor, the evidence may have arguably been relevant under MRE 404(b). That rule is an inclusionary rule that permits a trial court to admit evidence of other crimes, wrongs or acts engaged in by a person for nonconformity purposes such as proving motive, intent, scheme or plan. *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). However, as defendant conceded, he sought to elicit evidence of other prison inmates' intoxication to prove his own motivation for leaving the prison.

Additionally, the trial court could have reasonably concluded that evidence of other inmates' acts would have misled the jury or confused the issue that was indeed relevant to the action -- whether defendant possessed the specific intent to escape from prison. MRE 403. Furthermore, even if the trial court erred when it refused defendant's attempt to admit the evidence through the testimony of Kaijala, it was harmless because evidence that defendant allegedly operated a liquor selling enterprise came in through the testimony of defendant and other defense witnesses. *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994).

Affirmed.

/s/ Gary R. McDonald

/s/ Patrick J. Conlin