

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KRISTOPHER L. PATTERSON,

Defendant-Appellant.

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UNPUBLISHED

April 12, 2005

No. 251564

Kalamazoo Circuit Court

LC No. D 01-1488 FH

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant, Kristopher Patterson, was convicted by a jury of unlawful assembly, MCL 752.543. He was sentenced to three years of probation and ordered to pay \$3,482.50 in restitution. He appeals as of right. We affirm.

**I. FACTS**

On the night of September 8, 2001, a large number of people began to congregate in a neighborhood near the campus of Western Michigan University. The crowd, although growing in size, was relatively calm until police made the first arrest of the night at approximately 11:00 p.m. Officer Jeff Crouse testified that he estimated 2,500 people were present and that the majority of the people were drinking alcohol. After the initial arrest, the crowd erupted and began throwing bricks, bottles, rocks, branches and other debris at the police. The crowd then started a large fire in the middle of Lafayette Street. As the night progressed, people continued to throw more objects into the fire, and as the fire grew, it became the gathering point for the unruliest members of the crowd. One participant went as far as to climb the pole of a low hanging power line and proceed to do pull-ups from the power line. At this point, the crowd was far beyond the control of the police.

Once additional officers arrived on the scene, police then formed a “V” formation line, in order to penetrate the crowd and restore order. After making three passes through the crowd, and firing about forty canisters of teargas, the crowd began to disperse and the police moved in to arrest those who were running from the teargas. Officer Crouse testified that he had monitored defendant on two occasions, one of which was over thirty minutes. Officer Crouse identified defendant, because of defendant’s floral print shirt, as one of the many people who was antagonizing the crowd. Officer Crouse stated that he personally monitored defendant dancing,

acting exuberant, and carrying on with the rest of the crowd. After the final bombardment of teargas, Officer Crouse and Officer Fred Milton, along with other officers, moved into the area. Officer Crouse spotted defendant running from the area to escape the effects of the teargas that saturated the area. After a brief struggle and assistance from other officers, defendant was arrested and taken into custody.

## II. JURY INSTRUCTIONS

Defendant's first issue on appeal is that the trial court erred by refusing to instruct the jury on specific intent for the crime of unlawful assembly, MCL 752.543. We disagree.

### A. Standard of Review

This Court reviews a claim of instructional error and questions of statutory interpretation *de novo*. *People v Marion*, 250 Mich App 446, 448; 647 NW 2d 21 (2002), citing *People v Bartlett*, 231 Mich App 139, 143; 585 NW 2d 341 (1998).

### B. Analysis

Defendant asserts on appeal that the unlawful assembly statute, MCL 752.543, contains language that requires a specific intent to engage in or advance conduct constituting the crime of riot, and that the jury should have been given a specific intent instruction.

At trial, defendant requested the standard jury instruction for specific intent, CJI 2d 3.9, be given to the jury. Although defendant requested a specific intent instruction, defendant failed to articulate just how the instruction should be read to the jury. As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances. *Napier v Jacobs*, 429 Mich 222, 235; 414 NW2d 862 (1987) Since defendant has failed to properly preserve this issue for appeal, defendant has forfeited this issue, and this Court reviews only for plain error. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123, (1994).

Similar to this case, the *Grant* Court addressed the issue of a statutory provision requiring a trial court to give a preliminary instruction to the jury. The Court stated that the main question was whether the unpreserved, nonconstitutional plain error may nonetheless be considered as an exception to the preservation rule, and if so, whether reversal is required. *Id* at 546. In *Grant*, citing *United States v Olano*, 507 US 725; 113 S. Ct. 1770; 123 L Ed 2d 508, (1993), our Michigan Supreme Court applied the three step test developed in *Olano*, regarding whether a unpreserved, nonconstitutional plain error could be addressed by an appellate court in the event of possible forfeiture.

The first limitation on appellate authority under Rule 52(b) [plain, unpreserved error] is that there indeed be an "error." Deviation from a legal rule is "error" unless the rule has been waived.

The second limitation on appellate authority under Rule 52(b) is that the error be "plain." "Plain" is synonymous with "clear" or, equivalently, "obvious."

The third and final limitation on appellate authority is that the plain error "affect substantial rights." This is the same language employed in Rule 52(a), and in most cases it means that the error must have been prejudicial: It must have affected the outcome of the proceedings. *Grant* at 548-549. (emphasis added; citations omitted)

First and foremost, defendant fails to meet the first and second prongs of the above mentioned test. There was no error, whether clear or obvious, in the instruction given by the trial court. There was no standard jury instruction available, and the trial court properly instructed the jury on the elements of unlawful assembly. Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000).

The trial court read the unlawful assembly statute several times to the jury. The trial court instructed the jury that mere presence at the assembly is not enough. The court correctly focused the jury on the crime of unlawful assembly by reading the elements of the crime and specifically stating that defendant did not have to engage in violent conduct to be guilty of unlawful assembly.

Furthermore, defendant fails the third and final prong, requiring the error to affect a substantial right, or stated differently, the error must have affected the outcome of the proceedings. During trial, the jury heard testimony from numerous police officers that conflicted with the testimony of defendant's friends, regarding what role the defendant played the night in question. Contrary to defendant's appellate counsel's assertions that defendant was appalled by the crowd's behavior, several police officers testified that defendant was an active participant in the events of the night in question. Under the instruction given by the trial court, the jury was able to properly weigh the evidence and determine whether or not defendant was guilty. Defendant has offered no persuasive evidence that a different instruction would have changed the outcome of the trial, nor that the conviction rests on grounds other than the evidence that was properly offered at trial.

### III. PROSECUTORIAL DISCLOSURE

Defendant's second issue on appeal is that defendant's due process rights were violated when the prosecution failed to provide defense counsel with information concerning a prosecutorial witness' testimony that contradicted statements the witness had previously given to defense counsel before trial. Furthermore, defendant argues that had the information been disclosed, defendant would have excused a juror that was "acquainted" with the witness, and by not doing so, the fundamental fairness component of the Due Process Clause was violated.

#### A. Standard of Review

This Court reviews factual findings under the clearly erroneous standard. MCR 2.613(c). This Court reviews questions of law *de novo*. *Bennet v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996).

### B. Disclosure

Defendant argues that the prosecution was required to disclose information that contradicted statements that Officer Milton had previously made to the defense prior to trial. Prior to trial, Officer Milton told the defense in an interview that he could not remember seeing defendant on Lafayette Street on the night in question. Subsequently, the prosecution showed Officer Milton a video of the events and his memory was refreshed, stating that he did remember defendant being present on Lafayette Street. Defendant argues that had the information regarding the officer's different statements been disclosed, defendant's entire trial strategy would have changed.

MCR 6.201(A)(2) requires that a party, upon request, must provide all other parties any written or recorded statement by a lay witness whom the party intends to call at trial. Counsel's notes of an interview with a witness to be called at trial do not constitute a *statement* for purposes of mandatory disclosure under MCR 6.201(A)(2). *People v Holtzman*, 234 Mich App 166, 168; 593 NW2d 617 (1999) (*emphasis in original*). In *Holtzman*, this court refused to extend the scope of MCR 6.201(A)(2), specifically the term *statement*, to the prosecutor's notes of an interview with a witness to be called at trial.

Applied to the instant case, defendant was not required to disclose to the prosecution any notes from the interview with Officer Milton (where Officer Milton stated he could not remember defendant being present). Likewise, the prosecution was under no duty to disclose its notes from the subsequent interview with Officer Milton. The prosecution had no way of knowing about Officer Milton's previous statements, just as the defense had no way of knowing about the subsequent statement to the prosecution. The defense had full opportunity to attack the credibility of Officer Milton's contradictory statements on cross-examination, and did so. Furthermore, there is nothing in the record that would indicate that Officer Milton gave his original statement to the defense out of malice or deceit. The record shows that when the defense called Officer Milton for the interview, he had been sleeping, and had no records or data with him. The fact that Officer Milton gave a statement to the defense during an interview, under less than ideal circumstances, and that the officer's memory was later refreshed, is not enough to show bad intentions or misconduct on the part of the officer, or error by the court.

### C. Due Process

Defendant also argues that his Due Process rights were violated as a result of the undisclosed information because had the defense known what Officer Milton would testify to, the defense would have excused a juror that was acquainted with Officer Milton, due to the potential deference the juror might have shown to Officer Milton's testimony.

By failing to move the court to excuse the juror after trial, either during the trial or at defendant's motion for a new trial, defendant failed to properly preserve this issue for appellate

review. The standard this Court applies in reviewing an unpreserved constitutional error is set out in *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999), citing, *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). The court in *Carines* held that:

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. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence."

Defendant has failed to avoid forfeiture under the plain error rule as described in *Carines*. Even assuming that defendant passes muster under the first and second prongs of *Carines*, defendant, who carries the burden of proof, has ultimately failed to show any plain error that affects his substantial rights. As the above cited text points out, the third prong can be simplified into the question, "Did the error affect the outcome of the lower court proceeding?"

Defendant argues that his entire defense theory would change due to the fact that two officers, and not just one, stated they had seen the defendant's conduct on the night in question. Defendant has offered no evidence as to what this alternative defense theory would have been, or how such a theory would have changed the outcome of the trial. The fact that one juror was acquainted with a witness, Officer Milton, does not equate to juror bias, much less a presumption that the entire trial would have resulted differently but for this particular juror. Defense counsel was able to question the juror during voir dire and felt comfortable allowing the juror to stay, even though an extra juror was available and could have been empaneled.

Finally, as *Carines* indicates, this Court has discretion in granting a reversal, and such reversal is warranted "only when the plain, forfeited error resulted in the conviction of an actually innocent defendant" or when an error "seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." There is no evidence that the jury improperly convicted the defendant. The jury viewed video of the event, and heard testimony from numerous police officers and friends of the defendant that were present the night in question. The jury properly weighed the evidence and came to a conclusion, and defendant has not contradicted this.

#### IV. RESTITUTION

Defendant's final argument in appeal is that the trial court improperly awarded restitution against the defendant for damage caused to police vehicles and other property, because there was no direct evidence that the damage was actually caused by defendant.

##### A. Standard of Review

This Court reviews the amount of a restitution order for an abuse of discretion. *People v Tyler*, 188 Mich App 83, 87; 468 NW2d 537 (1991).

#### B. Analysis

MCL 769.1(g)(b) specifically empowers the court to order restitution damages against a criminal defendant for certain crimes. The statute provides in pertinent part that:

The court may order the individual to reimburse the public community college, public college, or public university, or this state, or a local unit of government of this state for expenses incurred as a result of the riot, incitement to riot, unlawful assembly, or civil disorder. The amount shall be reasonable and shall not exceed the individual's pro rata share of the costs. Reimbursement under this section shall otherwise be made in the same manner as reimbursement is made under section 1f of this chapter.

It clear from the plain language of the above quoted statute that defendant's third issue on appeal is without merit. MCL 769.1(g)(b) specifically includes damages that arise from the crime of unlawful assembly as adequate grounds for restitution. Contrary to defendant's arguments, MCL 769.1(g)(b) does not require proof that a defendant actually caused the damage sustained the during the unlawful assembly. The conviction of unlawful assembly, coupled with the damage sustained during the assembly, is enough to warrant restitution. Defendant has offered no evidence that the estimated damages were unreasonable or inflated. Furthermore, defendant was ordered to pay restitution on a pro rata basis, which is totally consistent with the statute.

Affirmed.

/s/ Bill Schuette  
/s/ E. Thomas Fitzgerald  
/s/ Richard A. Bandstra