

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
December 21, 2010

v

MATTHEW B. MILLER,  
  
Defendant-Appellant.

No. 293099  
Kent Circuit Court  
LC No. 08-009906-FH

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Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of interfering with an electronic communication, MCL 750.540(4), and possessing a firearm during the commission of a felony, MCL 750.227b.<sup>1</sup> He was sentenced to consecutive prison terms of 6 to 24 months for the interfering with an electronic communication conviction and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. VOIR DIRE

Defendant argues that the jury was tainted during voir dire when the prosecutor led a juror to believe that constructive possession of a firearm was the same as ownership of the firearm. We disagree.

Defendant did not object to the prosecutor's comments or questions about constructive possession during voir dire. We review this unpreserved claim of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

For purposes of the felony-firearm statute, MCL 750.227b, "possession of a weapon is not the same thing as ownership of a weapon." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). "To be guilty of felony-firearm, one must *carry* or *possess* the firearm, and must do so *when* committing or attempting to commit a felony." *Id.* (emphasis in original). To

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<sup>1</sup> Defendant was acquitted of unlawful imprisonment, MCL 750.349b.

the extent that the prosecutor's comments and examples implied that ownership of a firearm equals constructive possession, the comments inaccurately stated the law.

However, defendant cannot show prejudice. The trial court instructed the jury that it must take the law as the trial court gives it, and that if the lawyers say something different, the jury must follow what the trial court said. The trial court also instructed the jury that a person has constructive possession of an item "if there is proximity to the article, together with an indicia of control," or stated otherwise, "a defendant has constructive possession of an item if the location of the item is known and it is reasonably accessible to the defendant." These instructions correctly defined constructive possession. See *Burgenmeyer*, 461 Mich at 437-438. A jury is presumed to follow its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, the trial court's correct instruction on constructive possession dispelled any prejudice that defendant may have suffered due to the prosecutor's inaccurate statement of constructive possession in voir dire. There was no plain error affecting defendant's substantial rights.

## II. LIMITING INSTRUCTION

Defendant asserts that the trial court erred when it instructed the jury that it could consider the bad-acts evidence admitted pursuant to MRE 404(b) in determining whether he was guilty of interfering with an electronic communication. Specifically, defendant maintains that the trial court should have crafted a limiting instruction that specified how the jury could consider each piece of bad-act evidence. We disagree.

Defendant failed to preserve this claim of error by not objecting to the limiting instruction that was given by the trial court. MCR 2.516(C). We review an unpreserved claim of instructional error for plain error affecting defendant's substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).<sup>2</sup>

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<sup>2</sup> The issue raised by defendant in the question presented is a claim of instructional error. Thus, to the extent that defendant argues in the body of his brief on appeal that the trial court erred in admitting the bad-acts evidence, that argument is not properly presented for our review. MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009).

Nevertheless, we conclude that the trial court did not abuse its discretion in admitting the evidence. The trial court admitted the bad-acts evidence pursuant to MRE 404(b) to show defendant's motive for committing the charged crimes, explaining that defendant told the victim what he intended to do to his ex-wife and then restricted the victim's movement to prevent her from telling anyone, and to show defendant's pattern of jealousy and physical violence in dealing with women when they express a desire to end a relationship with him. In his brief on appeal, defendant claims that the trial court ignored the "flexible approach" the Supreme Court in *People v VanderVliet*, 444 Mich 52, 89-91; 508 NW2d 114 (1993), encouraged trial courts to use in determining the admissibility of bad-acts evidence. Defendant contends that the trial court should not have ruled on the prosecutor's motion to admit bad-acts evidence until after he either

When bad-acts evidence is admitted, a “defendant is entitled to a carefully crafted limiting instruction advising the jurors that they are to consider the other acts evidence only as indicative of the reasons for which the evidence is proffered to cushion any prejudicial effect flowing from the evidence.” *People v Martzke*, 251 Mich App 282, 295; 651 NW2d 490 (2002). A limiting instruction generally “suffice[s] to enable the jury to compartmentalize evidence and consider it only for its proper purpose . . . .” *People v Crawford*, 458 Mich 376, 399 n 16; 582 NW2d 785 (1998). Based on the record, defendant was afforded an opportunity to request a limiting instruction, and the trial court delivered an instruction based on CJI2d 4.11. Ultimately, the trial court utilized the standard limiting jury instruction for bad-acts evidence and correctly instructed the jury to consider the bad-acts evidence only for noncharacter purposes. Where the bad-acts evidence was properly admitted, and was relevant to the charges of false imprisonment and interfering with an electronic communication, we find no error in the trial court’s instruction. Moreover, under the circumstances here, where defendant made no specific request for an instruction tailored to the specific circumstances of the instant case, the trial court did not plainly err in giving the standard instruction.

### III. DIRECTED VERDICT

Defendant claims that the trial court erred in denying his motion for a directed verdict on the offense of interfering with an electronic communication. We disagree.

We review “the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt.” *Aldrich*, 246 Mich App at 122.

MCL 750.540(4) provides that “[a] person shall not willfully and maliciously prevent, obstruct, or delay by any means the sending, conveyance, or delivery of any authorized communication, by or through any . . . telephone line . . . .” Defendant claims that the trial court

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testified or indicated his decision not to testify. However, defendant makes no argument that the record, at the time the trial court ruled on the motion, was insufficient to allow the trial court to reliably determine the admissibility of the bad-acts evidence. We conclude that the trial court did not abuse its discretion in deciding the prosecutor’s motion before trial.

Defendant also claims that the trial court admitted the bad-acts evidence without addressing the relevance between his act of holding a knife to the throat of his ex-wife in 1993 and his act of interrupting the text message that the victim was trying to send. We find no merit to defendant’s argument, as it fails to account for all of defendant’s actions toward the victim on September 6, 2008. Defendant’s act of grabbing the cellular telephone from the victim was only one of numerous threatening and violent acts defendant took toward the victim. When the res gestae of the charged crimes is considered, the trial court did not abuse its discretion in admitting the bad-acts evidence. Defendant’s acts toward the victim and those toward his ex-wife in 1993 demonstrate a common pattern by defendant of engaging in threatening and physically violent acts toward women who desire to end a relationship with him. See *People v Hine*, 467 Mich 242, 250-253; 650 NW2d 659 (2002).

should have granted his motion for a directed verdict because the evidence presented by the prosecution failed to establish that he acted maliciously or that he knew the victim was attempting to send a communication. He also claims that because he owned the cellular telephone, the victim was not authorized to send a communication over the telephone.

Relevant to this issue, the victim testified that after she told defendant that she was going to call the police, defendant threw a cordless landline telephone at her. However, the victim was unable to get a dial tone. Defendant told her that he had disconnected the telephone line. Then, while defendant was pacing around the house, the victim tried to use her cellular telephone to send a text message to a friend for help. When defendant saw her using the cellular telephone, he grabbed the telephone from her. Defendant eventually returned the cellular telephone to the victim, but only after he had removed the battery. The victim admitted that defendant had purchased the cellular telephone, but stated that because defendant had been unemployed for over a year, she was paying the telephone bill. “Malicious” is defined as “[w]ithout just cause or excuse.” Black’s Law Dictionary (7th ed). “A factfinder can infer a defendant’s intent from his words or from the act, means, or the manner employed to commit the offense.” *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that defendant acted maliciously in taking the cellular telephone from the victim and that he took the telephone knowing that the victim was attempting to send a communication. *Aldrich*, 246 Mich App at 122.

Further, we reject defendant’s claim that because he purchased the cellular telephone, the victim was not “authorized” to use it to send a communication. In essence, defendant maintains that only the owner of an electronic communication device can “authorize” its use for communication. This issue requires us to interpret the meaning of the term “authorized” in the statute. In interpreting a statute, we are bound by the language of the statute. “[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.” *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003) (quotation omitted). As nothing in the plain language of MCL 750.540(4) equates authorized use of an electronic communication device with ownership of it, we conclude that ownership is not a necessary component to the authorized use of the device. Accordingly, we find no merit to defendant’s argument.

#### IV. INTERFERING WITH AN ELECTRONIC COMMUNICATION INSTRUCTION

Defendant asserts that the trial court’s instruction on the offense of interfering with an electronic communication was erroneous. We disagree.

Defendant did not object to the trial court’s instruction, thereby failing to preserve this issue for appellate review. MCR 2.516(C). We review unpreserved claims of instructional error for plain error affecting the defendant’s substantial rights. *Aldrich*, 246 Mich App at 124-125.

The trial court gave the following instruction for the offense of interfering with an electronic communication:

The defendant is charged in Count 2 with the crime of interfering with an electronic communication. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant willfully and maliciously acted;

Second, to prevent, obstruct, or delay by any means;

Third, the sending, conveyance, or delivery of an electronic communication;

And, fourth, through a cell phone.

In a rambling discourse without meaningful citation to relevant authority, defendant complains that the instruction was erroneous because it did not define the terms “willfully” and “maliciously.” In particular, defendant attempts to persuade us that it was plain error for the trial court not to tailor the instruction to the particular facts of the case so that the jury would not misapprehend what constituted acts sufficient to convict of the offense. However, a trial court does not err when it fails to define a term that “is generally familiar to lay persons and is susceptible of ordinary comprehension.” *People v Knapp*, 244 Mich App 361, 377; 624 NW2d 227 (2001) (quotation omitted). “Maliciously” and “willfully” are terms generally familiar to lay persons and have commonly understood meanings. As such, the trial court did not plainly err when it did not sua sponte define these terms for the jury.

Defendant also claims that the instruction was inadequate because it failed to inform the jury that the communication must be “authorized.” Because a jury instruction must include all elements of the offense, *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000), we agree with defendant that the instruction was deficient in this regard. The trial court should have instructed the jury that the prosecutor needed to prove beyond a reasonable doubt that defendant prevented or obstructed the sending of an “authorized electronic communication.” However, defendant fails to establish that he was prejudiced by the error. Defendant contends that had the jury been instructed that the communication must have been authorized, it would have questioned the victim’s authority to use the cellular telephone. The argument relates to defendant’s belief that only an owner of an electronic communication device can authorize a communication over the device. But, as already stated, based on the plain language of the statute, ownership of the electronic communication device is not a necessary component to sending an authorized communication over the device. Accordingly, defendant fails to establish that the trial court’s failure to instruct the jury that defendant must have prevented or obstructed an “authorized electronic communication” affected the outcome of the trial. *Carines*, 460 Mich at 763.

Affirmed.

/s/ Christopher M. Murray  
/s/ Joel P. Hoekstra  
/s/ Deborah A. Servitto