

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN DAVID HARMS,

Defendant-Appellant.

UNPUBLISHED

August 8, 2006

No. 260358

Lapeer Circuit Court

LC No. 03-007927-FH

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one felony count of malicious destruction of police property, MCL 750.377b; two felony counts of resisting and obstructing a police officer causing injury, MCL 750.81d(2); and one misdemeanor count of operating a vehicle with a suspended license, MCL 257.904. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to four to fifteen years in prison on each of the three felony convictions, and 48 days in jail on the misdemeanor conviction, with the sentences to run concurrently. Defendant appeals as of right. We affirm in part and reverse in part.

I.

Defendant first argues that the trial court erred by admitting his complete driving record from the Secretary of State rather than redacting it to show only that defendant was driving with a suspended license at the time of the incident. However, assuming that the trial court erred by admitting this document, we conclude that defendant is not entitled to relief based on this issue under the applicable standard for preserved, nonconstitutional error.

Preserved, nonconstitutional error in a criminal case does not warrant relief unless “after and examination of the entire cause,” it “is more probable than not that the error was outcome determinative.” *People v Phillips*, 469 Mich 390, 396-397; 666 NW2d 657 (2003), quoting *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). With regard to defendant’s convictions for malicious destruction of police property and resisting and obstructing a police officer causing injury, the police officers involved in the incident testified that defendant was uncooperative with the police. Their undisputed testimony establishes that defendant kicked out a window of a police car, shattering the glass, which struck and injured two officers. Although defendant’s driving record included a number of intoxicated driving offenses and may have been generally prejudicial in reflecting negatively on defendant’s character, it does little to show that

he has a propensity for the type of violent conduct involved in this case. Accordingly, in light of the overwhelming independent evidence of defendant's guilt with respect to the malicious destruction and resisting and obstructing charges, defendant is not entitled to relief based on any error in the admission of his full driving record because this evidence was not outcome determinative.¹

We also note that defendant's statement of the question presented for this issue suggests that it involves a constitutional issue by referring to defendant's due process right to a fair trial. Defendant's arguments on this issue, however, are based entirely on nonconstitutional, Michigan evidentiary law with no reference to constitutional law. Thus, defendant has abandoned any constitutional argument regarding this issue by completely failing to argue its merits. See, e.g., *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.").

II.

Defendant next argues that there was insufficient evidence of the required notice to him of the suspension of his license to support his conviction of operating a vehicle with a suspended license. We agree. In reviewing the sufficiency of the evidence to support a conviction, this Court must decide whether, viewing the evidence in the light most favorable to the prosecution, a rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Patterson*, 428 Mich 502, 524-525; 410 NW2d 733 (1987).

Defendant was convicted of operating a vehicle with a suspended license in violation of MCL 257.904. In this regard, MCL 257.904(1) provides:

A person whose operator's or chauffeur's license or registration certificate has been suspended or revoked *and who has been notified as provided in [MCL 257.212] of that suspension or revocation*, whose application for license has been denied, or who has never applied for a license, shall not operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state. [Emphasis added.]

Notification as provided in MCL 257.212 is, therefore and element of this offense.

MCL 257.212 provides:

¹ In light of our conclusion below that there was insufficient evidence to support defendant's operating a vehicle with a suspended license conviction, we need not consider that conviction with regard to this issue.

If the secretary of state is authorized or required to give notice under this act or other law regulating the operation of a vehicle, unless a different method of giving notice is otherwise expressly prescribed, *notice shall be given either by personal delivery to the person to be notified or by first-class United States mail addressed to the person at the address shown by the record of the secretary of state.* The giving of notice by mail is complete upon the expiration of 5 days after mailing the notice. Proof of the giving of notice in either manner may be made by the certificate of a person 18 years of age or older, naming the person to whom notice was given and specifying the time, place, and manner of the giving of notice. [Emphasis added.]

Thus, according to the plain language of MCL 257.904(1) and MCL 257.212, the required notice of a suspended license to a defendant must have been provided by personal delivery or first-class United States mail addressed to the defendant's address shown by the record of the Secretary of State.

From our review of the record, there was no evidence presented that defendant was sent notice at his address of record with the Secretary of State by either personal delivery or United States mail. The only testimony at trial was provided by the four police officers that were involved in the incident giving rise to this case, and none of them testified regarding any such notice. The prosecution refers to the driving record that was introduced in this case as including a reference to a warning letter being sent to defendant. However, the trial court instructed the jury that the driving record was "only admitted for the purpose of determining whether [defendant] was driving on a suspended license. If there's [sic] other things on there you're to ignore those because they're not evidence in this case." Because the driving record was admitted at trial only as evidence of defendant driving on a suspended license, it did not constitute evidence that defendant was given notice of the suspension. The prosecution further references testimony from a police officer that "just weeks prior" she assisted in an incident "involving this subject and he was suspended," evidently meaning that defendant was stopped for driving on a suspended license some weeks before the present incident. As a practical matter, this may well have put defendant on notice that his license was suspended. But, as indicated above, the plain language of MCL 257.904(1) requires a person to have been notified as provided in MCL 257.212 of the relevant license suspension in order to be guilty of the crime of operating a vehicle with a suspended license. In other words, although it may seem anomalous, even if defendant was effectively placed on actual notice of the license suspension by the earlier police stop (if he was not already on notice at that point), such notice would not fulfill the notice element of MCL 257.904(1) under the plain language of the statute. See *People v Gillis*, 474 Mich 105, 115; 712 NW2d 419 (2006), quoting *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) ("If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written.").

Thus, there was insufficient evidence to support defendant's operating a vehicle with a suspended license conviction because a rational fact-finder could not have found the notice element of that crime to have been proven beyond a reasonable doubt. *Patterson, supra* at 524-525. Moreover, the federal Double Jeopardy Clause bars retrial for a crime following a judicial determination that there was insufficient evidence presented at trial to support a conviction of that crime. *People v Watson*, 245 Mich App 572, 596; 629 NW2d 411 (2001). Thus, we

conclude that defendant's operating a vehicle with a suspended license conviction must be reversed and this case remanded for entry of an acquittal as to that charge.

III.

Finally, defendant argues that the trial court erred by requiring him to reimburse the county for costs of his appointed counsel without properly considering his ability to pay. Because defendant did not preserve this issue below, our review is only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Further, reversal is warranted only if the error resulted in conviction despite the defendant's actual innocence, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764. We conclude that the trial court plainly erred in failing to properly consider defendant's ability to pay with regard to this repayment obligation and that defendant is entitled to relief for this plain error.

A trial court is required to make findings on whether a defendant is indigent based on the factors listed in MCR 6.005. These factors include (1) whether the defendant is presently employed, his present earning capacity, and living expenses; (2) whether the defendant has outstanding debts and liabilities; (3) whether the defendant has qualified for and receives any form of public assistance; (4) whether the defendant, without undue financial hardship, may convert any personal or real property which s/he owns; and (5) any other circumstances that would impair the ability to pay a lawyer's fee as would normally be required to retain competent counsel. MCR 6.005(B). In addition, a trial court must consider the hardships that requiring repayment would cause to the defendant or the defendant's family. *People v Dunbar*, 264 Mich App 240, 253; 690 NW2d 476 (2004), quoting with approval *Alexander v Johnson*, 742 F2d 117, 124 (CA 4, 1984). "The purpose of this inquiry is to assure repayment is not required as long as he remains indigent." *Id.* As the court did not make findings on any of these issues, perhaps with the exception of relying on defendant's statement at his arraignment that he was presently self-employed without an income-producing position, the trial court plainly erred by imposing an obligation on defendant to repay attorney costs without considering factors that were required by controlling law to be considered. We consider it apparent that this plain error affected defendant's substantial rights and undermined the fairness of this portion of defendant's sentence. *Carines, supra* at 763, 774. Thus, we conclude that, with regard to this issue, this case must be remanded to the trial court to reconsider whether, on the basis of the appropriate factors, to impose an obligation on defendant to repay attorney costs. We remand the decision of the sentencing court for findings on the defendant's financial circumstances in light of this opinion and the factors set out in MCR 6.005.

We affirm defendant's malicious destruction of police property and resisting and obstructing a police officer convictions. However, we reverse defendant's operating a vehicle with a suspended license conviction. We remand this case for entry of an acquittal as to the operating a vehicle with a suspended license conviction and for appropriate reconsideration of whether defendant should be required to repay some or all of his attorney costs. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Michael J. Talbot