

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY BRIAN NEWSON,

Defendant-Appellant.

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UNPUBLISHED

September 15, 2009

No. 284226

Oakland Circuit Court

LC No. 2007-214240-FC

Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Following a trial, a jury found defendant guilty of assault with intent to do great bodily harm less than murder, MCL 750.84, resisting or obstructing a police officer, causing injury, MCL 750.81d(2), and receiving or concealing a stolen motor vehicle, MCL 750.535(7). Defendant appeals by right the convictions. We affirm.

I. Facts

Defendant was convicted of assaulting a police officer with a stolen van, while attempting to escape capture. Defendant picked up 17-year-old JT in the van, drove to a motel in the city of Ferndale, and rented a room for three hours. In the interim, the Ferndale police discovered the van in the parking lot, learned from motel personnel that defendant was the driver, and set up surveillance. Police witnesses explained that when defendant began to back out of his parking space, Officer Jason Collett and Sergeant Baron Brown simultaneously drove their police patrol cars into the lot, and Collett, who had activated his car's emergency lights, blocked defendant's exit. Officer Joseph Brugnoli approached the van on foot, shined a gun-flashlight at the van, and yelled two or three times to defendant "Stop the car, it's the police!" Collett got out of his patrol car, leaving the door open, and walked toward the van. Brown shined a high beam spotlight inside the van, briefly locked eyes with defendant, and because he thought defendant was going to comply, disengaged the light and exited his patrol car.

Officers testified that defendant then shifted from reverse to drive and bypassed Brugnoli, who then chased the van on foot. Defendant drove around Brown's patrol car as Brown repeatedly yelled, "[S]top, police, stop, police!" But defendant accelerated, and drove directly toward Collett and his patrol car, which still had the overhead lights on. Collett testified that defendant was driving directly at him at 20 to 25 miles an hour, so he stepped on the panel inside the door, partially closed the door, and attempted to use it as a shield. Officers testified that

defendant crashed into the driver's side door of Collett's patrol car, pinning Collett between the door and the doorframe. Collett then fired several shots at the van's driver's side. Defendant continued to drive, and the van stopped, because it became lodged between Collett's patrol car and a parked SUV. An officer removed defendant and JT from the van, and medical personnel took defendant from the scene.

Officer Janessa Schalk testified that JT told her that during the episode, she realized that the police were trying to stop the van. Detective Kenneth Denmark also testified that JT told him that she knew that Collett's car was a police car, because the overhead lights were on. At trial, JT denied that she told the officers that she knew that the police were trying to stop defendant, denied seeing any officers in the parking lot, and claimed that the patrol cars were unrecognizable, because no lights were activated. She claimed that she recognized the police only after Collett started shooting, and further claimed that defendant crashed into Collett's patrol car after Collett shot him.

At trial, defendant admitted that he knew that the van was stolen, and that one of the "bad things" he does is drive around in stolen vehicles. But he denied any intent to hit a police officer. Defendant testified that he was intoxicated, high on marijuana, listening to loud music, and talking with JT, and did not see any officers approach him on foot, hear anyone direct him to stop, or recognize any vehicle as a patrol car. Although he saw one vehicle with an overhead light, he assumed it was a taxicab. He claimed that he could not see as he drove toward the exit, because a bright light was shining in his face, so he put his arm up to block the light from his eyes and drove. He explained that he was shot in the arm when he raised it, which caused him to collide with Collett's car. Defendant was shot four times, with one shot underneath his armpit.

## II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to sustain his conviction for assault with intent to do great bodily harm less than murder, because there was no evidence that he intended to harm Collett. We disagree.

When determining whether sufficient evidence was presented at trial to support a conviction, this Court must 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). This Court will not interfere with the role of the trier of fact of determining the weight of evidence, or the credibility of witnesses. *Id.* at 514. Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

"Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). An intent to cause great bodily harm less than murder may be inferred from facts in evidence; because an actor's state of mind is difficult to prove, only minimal circumstantial evidence is required. *Id.*

Evidence was presented that, before the assault, defendant had continuously ignored the officers' pleas to stop, and was attempting to escape capture in a stolen vehicle. Before defendant returned to the stolen vehicle, Collett and Brown had positioned their fully marked police cars in the parking lot, and Collett's car, with emergency lights activated, was partially blocking the exit. As defendant backed out of a parking space, officers approached him on foot, identified themselves, and yelled for him to stop. Brugnoli was about six to eight feet in front of the van when he last directed defendant to stop, and Brown had shined a spotlight into the van and momentarily locked eyes with defendant. But instead of complying with the officers' commands, defendant shifted the van into drive, bypassed Brugnoli, and drove around Brown's patrol car, continuing to ignore orders to stop. Although defendant claimed that he did not know that the police were attempting to stop him, there was evidence that defendant's passenger told officers that she recognized that the police were trying to stop the van. Evidence also showed that defendant continued to drive directly toward Collett and his patrol car, and crashed into the driver's side door, pinning Collett between the door and the doorframe. Also, the evidence showed that Collett had backed into his patrol car as defendant drove toward him, and that defendant would have run over Collett had he not moved out of the way in time.

Viewed in a light most favorable to the prosecution, the testimony was sufficient to establish that defendant assaulted Collett, with the intent to do great bodily harm less than murder. Although defendant argues that he did not intend to harm the officer, the question of his intent was a matter for the trier of fact to resolve. *Wolfe, supra*. In addition, defendant's claim that his goal was only to escape through the exit does not negate a finding that he intended to do great bodily harm in order to effectuate that escape. The evidence was sufficient to sustain defendant's conviction of assault with intent to do great bodily harm less than murder.

### III. Other Acts Evidence

Defendant argues that his convictions must be reversed because evidence of other acts was improperly admitted under MRE 404(b), and because the prosecution's notice of intent to introduce his criminal history and probationary status was inadequate under MRE 404(b)(2). We disagree.

Before trial, the prosecution filed a notice of intent and a motion to admit evidence of defendant's criminal history and probationary status under MRE 404(b). The prosecution sought to admit the evidence as proof of motive, intent, absence of mistake, and system in doing an act. Defendant filed an objection, but the record does not indicate that a ruling was made, and defendant did not object to the evidence at trial. Therefore, this issue is not properly preserved for appeal. *People v Herrick*, 277 Mich App 255, 259; 744 NW2d 370 (2007). Also, defendant failed to object to the references that he was in the motel room with a "very young girl," and that he had a previous gunshot wound. We therefore review this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

#### A. Adequacy of Pretrial Notice under MRE 404(b)(2)

Defendant argues that the prosecution's notice of intent was not "specific enough to meet the strict requirements" of the court rule. MRE 404(b)(2) provides:

The prosecution in a criminal case shall provide reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

The prosecution's notice indicated that it intended to offer evidence of the following other acts, under MRE 404(b):

1. That on January 27, 2006 Defendant Gregory Newson was involved in the theft of a parked minivan from a home in Royal Oak, Michigan. That Defendant Gregory Newson fled from the police when they attempted to apprehend him for his involvement with the stolen minivan. Defendant was subsequently convicted of receiving and concealing stolen property in case number 2006-207079-FH.

2. That on February 16, 2007 Defendant Gregory Newson was observed in a suspicious situation regarding an attempting to gain access to a parked motor vehicle in Grosse Pointe Farms, Michigan. Defendant Gregory Newson fled from the police and was subsequently apprehended.

3. That Defendant was on probation at the time he committed the present offenses to the Oakland County Circuit Court in case number 2006-207079-FH.

Defendant is notified that the prosecuting attorney intends to produce other acts evidence at trial for the purpose of proving motive, intent, lack of mistake or accident, and system in doing an act.

This notice of intent provided reasonable notice of the general nature of the proposed evidence, and the rationale for its admission. Thus, there was no plain error. Further, defendant has failed to indicate what he would have done differently, had additional information been provided. Thus, he has not established that he was prejudiced by the notice provided. See *People v Hawkins*, 245 Mich App 439, 455-456; 628 NW2d 105 (2001).

#### B. The "Other Acts" Evidence

MRE 404(b)(1) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. See also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). But other acts evidence is admissible under MRE 404(b)(1) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, under MRE 403.<sup>1</sup>

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<sup>1</sup> Evidence is relevant if it has "any tendency to make the existence of any fact that is of  
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*People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998). In application, the admissibility of evidence under MRE 404(b)(1) necessarily hinges on the relationships among the elements of the charges, the theories of admissibility, and the defenses asserted. *Id.* at 75.

### 1. Criminal History and Probationary Status

Defendant argues that evidence regarding his criminal history involving stolen vehicles and his probationary status was inadmissible under MRE 404(b), because it was irrelevant and prejudicial. At trial, several witnesses, including defendant, referenced his criminal history. Brugnoli testified that after learning defendant's identity from motel personnel, he did a computer check and learned that defendant had "a very extensive criminal history and . . . stolen vehicles was in his criminal history before." Brown and Collett both answered yes when asked if they took precautions after learning information regarding defendant's criminal background. Denmark testified that at the time of this incident, defendant was on probation for receiving or concealing stolen property in Oakland County, and was a probation absconder out of Wayne County. The prosecutor elicited from defendant that he had been stopped by the police while in a stolen vehicle six or seven times previously, and defendant confirmed that he was on probation for receiving or concealing a stolen van.

The evidence was not offered to show that defendant had a bad character. Rather, it assisted the jury in weighing defendant's motive and intent, and to rebut any claim of mistake or accident, particularly where defendant denied any knowledge that police officers were ordering him to stop the stolen van. Evidence that defendant had been stopped by the police on six or seven prior occasions, while in a stolen vehicle, was relevant to the defense claim that defendant did not recognize the police cars, or know that the officers were trying to stop the van. As noted by plaintiff, the evidence was probative of defendant's familiarity with the police, their practices, and their vehicles. The evidence was also relevant to show an absence of mistake, i.e., to rebut defendant's claim that he mistook the officers or their patrol cars for civilians. Also, the evidence of defendant's probationary status was relevant to defendant's motive to escape and to harm an officer to avoid capture. We therefore conclude that the evidence was relevant to the factual issues in this case.

Further, defendant has not demonstrated that the evidence was unfairly prejudicial under MRE 403. While the acts described were serious and incriminating, such characteristics are inherent in the underlying crimes for which defendant was accused. The danger that MRE 403 seeks to avoid is that of *unfair* prejudice, because, presumably, all evidence presented by the prosecution is prejudicial to the defendant. *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994). Moreover, in its final instructions, the trial court gave a cautionary instruction to the jury, concerning the proper use of the other acts evidence, thereby limiting the potential for unfair prejudice. The probative value of the evidence was not substantially outweighed by a danger of unfair prejudice.

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consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The relevancy "threshold is minimal: 'any' tendency is sufficient probative force." *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998).

## 2. Defendant in a Motel Room with “a very young girl”

During trial, the prosecutor asked Brown if he was aware that defendant was in the motel room with “a very young girl,” and Brown answered “yes.” Defendant now argues that this evidence was inadmissible under MRE 404(b), and admitted only to “portray that [he] was a vile child sexual predator.” To the extent that MRE 404(b) is applicable to this evidence, defendant cannot demonstrate prejudice. Both defendant and JT testified that JT was 17 years old, thereby clarifying any improper inference regarding JT’s youth.<sup>2</sup> Therefore, this unpreserved claim does not warrant reversal.

## 3. Previous Gunshot Wound

Defendant argues that the prosecutor’s reference to him having a prior gunshot wound, unrelated to this incident, “contaminated his character.” During direct examination, defendant testified about the location of his gunshot wounds, and defense counsel asked him to remove his shirt to show the jury their location. When objecting to defendant removing his shirt, the prosecutor stated: “I think the witness would be able to accurately point, first of all. Second of all, there’s a *prior gunshot wound*, I understand, *unrelated to this incident*, so there may be some question with accuracy as to that.”

First, evidence that defendant has a prior gunshot wound, standing alone, is not evidence of “other crimes, wrongs, or acts” under MRE 404(b). Also, the prosecutor’s statement was not evidence, see *People v Lee*, 212 Mich App 228, 256-257; 537 NW2d 233 (1995), as the trial court, in its final instructions, so instructed the jury. In addition defendant cannot establish prejudice, because he clarified in his testimony, which was evidence, that he had not been shot previously:

*Q.* Let’s start with this: Do you have a prior gun - - gunshot wound?

*A.* Never been shot before. Never.

Therefore, this unpreserved claim does not warrant reversal.

## C. Effective Assistance of Counsel

We reject defendant’s alternative argument that defense counsel was ineffective for failing to object to the other acts evidence, and for failing to request a cautionary instruction. Because defendant has failed to establish that the evidence of his criminal history and probationary status was not admissible under MRE 404(b), his claim of ineffective assistance of counsel cannot succeed. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Further, given the admissible evidence against defendant, and the trial court’s instructions, there is no basis for concluding that there is a reasonable probability that, but for counsel’s failure to object, the jury’s verdict would have been different. *Id.* Finally, because the trial court gave a cautionary instruction to the jury, concerning the proper use of the other acts evidence, defendant

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<sup>2</sup> JT also testified that defendant was 22 or 23 years old.

cannot establish a claim of ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Defendant is not entitled to a new trial.

#### IV. Right to Present a Defense

Defendant also argues that the trial court's denial of his request to remove his shirt, to show the jury his actual wounds from when Collett shot him, deprived him of his constitutional right to present a defense. We disagree.

We review this constitutional question de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). Although a defendant has a constitutional right to present a defense, US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), he must still comply with procedural and evidentiary rules, which are established to assure fairness and reliability in the verdict. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984).

The trial court's decision to deny defendant's request did not deprive him of his right to present a defense. The defense sought to show that defendant's arm was raised to block a spotlight when Collett shot him under his armpit, which caused the van to collide with Collett's vehicle. The fact that defendant was shot under his armpit tended to support the defense position that defendant could not see, was shot first, and did not deliberately collide with Collett's vehicle. But the trial court did not exclude all evidence depicting the location of the gunshot wounds. During defendant's earlier testimony, he testified about the location of the bullet wound under his armpit: "After . . . I got past the light that was in my face, 'cause I put my arm up like this (indicating) to block the . . . light. That's how I end[ed] up gettin' shot right here (indicating)."

Immediately before requesting to remove his shirt, defendant testified as follows:

Q. How many times were you shot?

\* \* \*

Q. Four times? And where'd the first bullet go?

A. The first bullet entered under my armpit.

Q. All right.

A. Like I said, I had my hand up, so it had to hit. That's when I felt the most. That's why I probably was combative, 'cause I had a butte right next to my heart, so I feel like that was the fir[st] one.

Immediately after the trial court's denial of defendant's request, the following exchange occurred:

*Defense counsel:* Well, explain to us again, the gunshot wound that you said that you got underneath your armpit, show us again where it was.

*Defendant:* It's right here, under my armpit (indicating).

*Defense counsel:* May I approach the witness?

*Defense counsel:* (CONTINUING): I'm going to show you my pen here. Show us -- show us where you -- where you say --

*Defendant:* Right here (indicating). I can feel it right now as we speak.

*Defense counsel:* All right. All right. Do you believe that's where it entered?

*Defendant:* First -- that's the first shot.

*Defense counsel:* Okay. The second shot?

*Defendant:* The second shot, I believe, hit the back of my arm right here (indicating).

*Defense counsel:* All right. Is there marks [sic] there?

*Defendant:* Yes, there's a mark.

*Defense counsel:* If you were to take off your shirt, the jury could see a mark there also?

*Defendant:* Yes.

*Defense counsel:* Shot number three?

*Defendant:* Shot number three into my side (indicating).

*Defense counsel:* Okay, and do you know if that bullet exited?

*Defendant:* No, not to this day.

*Defense counsel:* Okay. Is there a fourth shot?

*Defendant:* Yes, sir. I got shot in my leg.

Subsequently, during closing argument, defense counsel presented the defense based on defendant's testimony of the location of the gunshot wound under his armpit.

In sum, the record shows that the trial court did not preclude defendant from presenting a defense. Moreover, contrary to defendant's implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct

2142; 90 L Ed 2d 636 (1986); *People v Blackmon*, 280 Mich App 253, 259; 761 NW2d 172 (2008). Consequently, reversal is not warranted on this basis.

Affirmed.

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder