

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN EDWARD HICKS,

Defendant-Appellant.

UNPUBLISHED

August 12, 2004

No. 248149

Calhoun Circuit Court

LC No. 02-003503-FH

Before: Murray, P.J., and Markey and O’Connell, JJ.

PER CURIAM.

The jury convicted defendant of resisting, obstructing, or opposing one of the two police officers that arrested him incident to disorderly conduct committed in the presence of the officers. Defendant had been charged for resisting both of the officers. Defendant was sentenced to eighteen months’ probation. Defendant appeals as of right his conviction for resisting, obstructing, or opposing a person he knew was performing his duties. MCL 750.81d(1). We affirm.

I. Facts

Two police officers arrived at defendant’s home to investigate a complaint that noise was coming from the home. It was quiet when the officers arrived, although while the officers were outside discussing the complaint with defendant, defendant became irate and began yelling at the officers. The officers decided to arrest defendant for this behavior, but before they could do so, defendant went inside his house, continuing to yell at the officers while he slammed shut the doors and windows.

Defendant later came outside through the side door of his home. After speaking briefly with defendant, one of the officers announced that he was placing defendant under arrest, and defendant turned and ran back up his driveway, toward both the door to his home and toward his pet Rottweiler that was chained near the garage. The officers grabbed defendant, dragged him out of reach of the dog’s chain, and, because defendant was struggling against them, took defendant to the ground and put handcuffs on defendant as he flailed and kicked. At this point, a friend of defendant’s pulled his vehicle into the driveway, and defendant proceeded to struggle against the officer holding him as his friend was arrested by the other officer.

II. Analysis

Defendant first argues that the trial court erred when it denied defendant's motion to admit evidence under MRE 404(b) that one of the two arresting officers had pleaded guilty to disorderly jostling in relation to an off-duty fight at a bar. Defendant contends that the evidence was admissible to demonstrate the identity of the police as the aggressors in the scuffle as he was being arrested, and that the prior conviction demonstrated the existence of a prior plan or scheme on the part of the officer to engage in acts of assaultive behavior. The trial court denied defendant's motion, reasoning that there was no question that the police had grabbed defendant when they were arresting defendant. The trial court further reasoned that the evidence was inadmissible because there was an insufficient factual connection between the circumstances surrounding the officer's conviction, resulting from a bar fight while the officer was off-duty, and the methods used by the police when arresting defendant.

We review a trial court's order relating to the admissibility of evidence for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). To be admissible under MRE 404(b), the evidence must be offered for a proper purpose, the proper purpose must be relevant to the case under MRE 402 as it is enforced through MRE 104(b), and the probative value of the evidence cannot be substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994).

The trial court did not abuse its discretion when it determined that one off-duty bar fight was not proper evidence of a common plan or scheme to commit violent acts. Defendant argues that the evidence would have been admissible to demonstrate that the officer acted in conformity with the earlier violent act. Introduction of evidence for the purpose of proving that a person acted in conformity with character is exactly the purpose prohibited by MRE 404(b). *Id.* at 55-56.

Defendant next argues that his conviction was against the great weight of the evidence, and that the trial court improperly denied his motions for new trial and directed verdict of acquittal. Initially, we note that defendant argues that the trial court failed to apply the "thirteenth juror" standard when evaluating the evidence. This argument is inherently flawed, because the "thirteenth juror" standard was invalidated by *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998).

In *Lemmon*, our Supreme Court recognized that jurors were the ultimate triers of fact, and that the trial court could not dismiss the jury's findings simply because it disagreed with the result reached by the jury. *Id.* at 636-640, 646-647. As a result, the trial court may only grant a motion for new trial if "the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result" were the result to stand. *Id.* at 642. Here, both officers testified that they were in uniform, that they were driving marked police vehicles, and that defendant struggled against them after being told he was under arrest. The jury was free to believe this version of events, and the trial court did not abuse its discretion when it denied defendant's motions.

Defendant also argues that his conviction was against the great weight of the evidence because it was the result of an inconsistent compromise verdict because the jury convicted

defendant of resisting one of the arresting officers, but not the other. Although inconsistent verdicts may not be rendered by a trial court sitting without a jury, it is permissible for juries to render inconsistent verdicts. *People v Vaughn*, 409 Mich 463, 465-466; 295 NW2d 354 (1980). Defendant's claim is legally without merit.

Finally, defendant argues that offenses under local ordinances regulating disorderly conduct and loud, vociferous, and boisterous persons are lesser included offenses of resisting, obstructing or opposing a police officer in the exercise of his duties as the crime is set forth in MCL 750.81d. Because these were lesser included offenses, defendant argues, the trial court erred when it refused defendant's request that the jury be instructed on the elements of these offenses. We review defendant's claims de novo to determine whether, as a matter of law, the trial court should have deemed the offenses provided under the local ordinances lesser included offenses of statutory resisting and obstructing. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

Only offenses that are wholly encompassed by the greater offense are necessarily included lesser offenses. *Mendoza, supra* at 532-533, citing *Cornell, supra* at 357. The creation of noise, which by its title is necessarily an element of loud, vociferous, or boisterous conduct, is not included as an element of the offense of resisting, obstructing, or opposing a person performing a duty on the face of MCL 750.81d. See also *People v Ventura*, ___ Mich App ___; ___ NW2d ___ (Docket No. 248064, rel'd 6/10/2004) (holding that the MCL 750.81d does not include element of proving that arrest was lawful). Further, defendant provides nothing but the bald assertion that the elements of the offense of "disorderly person" or "disorderly conduct" under the local ordinance are wholly encompassed by MCL 750.81d to support his claim that the ordinance provided a lesser included offense to resisting and obstructing. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant has not established that the trial court erred when it denied his request for additional jury instructions.

Affirmed.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Peter D. O'Connell