

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 11, 2012

v

ROBERT TRAMAINE HATHORN,
Defendant-Appellee.

No. 305716
Muskegon Circuit Court
LC No. 10-059906-FH

Before: TALBOT, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of obstructing resisting and obstructing a police officer, MCL 750.81d(1); and obstructing a parole officer, MCL 750.479(2). The trial court sentenced defendant as a fourth habitual offender to 42 months to 15 years imprisonment. Defendant appeals by right. We affirm.

Defendant argues that the trial court erred in admitting Deputy John Yax's testimony as other acts evidence under MRE 404(b). Yax testified regarding an incident that occurred in September 2003. Yax stated that he and other officers arrested defendant as defendant was leaving a vehicle. Yax stated that as he approached, defendant "faced myself and Officer Anderson, made eye contact with us, then turned 180 degrees and took a couple of steps, just start[ed] to run away." Yax pursued defendant and immediately took him to the ground, at which point defendant struggled and refused to put his arms behind his back.

Defendant argues that Yax's testimony was inadmissible under MRE 404(b). We review for an abuse of discretion the trial court's decision regarding the admissibility of other acts evidence. *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *Id.* A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

MRE 404(b) provides in part:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity,

intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), prior acts evidence (1) must be offered for a proper purpose, (2) must be relevant, and (3) applying MRE 403, the probative value of the evidence must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Additionally, when requested, the trial court may provide a limiting instruction under MRE 105. *Id.*

Yax's testimony that defendant resisted arrest in the past was highly probative of defendant's intent or absence of mistake or accident in this case. Defendant's theory of the case was that he did not know the individuals chasing him were a police officer and parole officer because they were wearing plain clothes. Defendant's theory placed his intent to obstruct the officers at issue and whether he acted purposefully, that is, not by accident or mistake because he misjudged the situation. Evidence that defendant resisted arrest on a prior occasion was relevant in light of defendant's defense.

We conclude the trial court did not abuse its discretion by determining that the probative nature of this evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Unfair prejudice may occur when marginally probative evidence might be given undue or preemptive weight by the jury. *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The challenged evidence in this case was that defendant attempted to turn and run away from an officer wearing a black turn-out uniform with the letters "POLICE" written across the front. This evidence was relevant to refute defendant's claim that he did not intend to resist or obstruct a police officer or public official because he did not know that the individuals were police officers or public officials. The evidence was highly probative because it related directly to defendant's claimed defense. Importantly, the trial court instructed the jury concerning the proper use of other acts evidence. Jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and there is nothing to indicate that the jurors failed to heed their instructions. Accordingly, the trial court did not abuse its discretion.

Defendant next argues that he was denied his right to a unanimous verdict on both charges because the trial court failed to give a special unanimity instruction to jury. Defendant waived this issue by expressing his satisfaction with the jury instructions below. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2003). Therefore, our review is limited to defendant's argument that counsel was ineffective for failing to request a special unanimity instruction. "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant argues that counsel was ineffective for failing to request a special unanimity instruction because there were three separate acts in this case, each of which were sufficient to satisfy the elements of MCL 750.81d(1) and MCL 750.479(2). Specifically, defendant argues that the jurors could have believed that he violated the above statutes when he (1) got into an SUV that drove away as officers were approaching him, (2) left the SUV and ran from the officers, or (3) struggled after being tackled by the officers. Defendant's argument is unpersuasive. "[T]o protect a defendant's right to a unanimous verdict, it is the duty of the trial court to properly instruct the jury regarding the unanimity requirement." *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994). A general unanimity instruction to the jury satisfies this duty, even when alternative acts are presented as evidence of the actus reus of a single criminal offense, "unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." *Id.* at 524.

The acts cited by defendant are not materially distinct. All three acts constituted part of the same criminal transaction that occurred within minutes of each other. Further, defendant did not offer a separate defense to each of the acts. Rather, his theory was that he did not know that the individuals chasing him were a police officer and parole officer and believed that he was being robbed. The primary issue before the jury was to determine defendant's credibility. There was no reason to believe that the jurors might be confused or disagree about the factual basis of defendant's guilt. Therefore, counsel was not ineffective for failing to request a special unanimity instruction. The standard unanimity instruction was sufficient to protect defendant's right to a unanimous verdict.

We affirm.

/s/ Michael J. Talbot
/s/ Jane E. Markey
/s/ Michael J. Riordan