STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v

File No. 05-24604-AR
HON. PHILIP E. RODGERS, JR.

MARK MARSHALL MESSING,

Defendant/Appellant.
/

Alan R. Schneider (P32121)
Jennifer Tang-Anderson (P54337)
Attorneys for Plaintiff/Appellee

Michael H. Dettmer (P12709)
Attorney for Defendant/Appellant

DECISION AND ORDER ON APPEAL

Factual Background

The Defendant/Appellant Mark Marshall Messing ("Messing") was arrested on August 16, 2004 at a campaign rally for President George W. Bush that was held at the Civic Center in Traverse City. Messing, who is an attorney, testified that he was at the rally to provide potential representation to an individual who had indicated that she might participate in a peaceful act of civil disobedience and requested that he be present to represent her.

Defendant's client was arrested when she and a number of others moved hand-in-hand through police tape that was blocking South Civic Center Drive as the President's motorcade sped by. Messing identified himself as an attorney and requested that he be allowed to assist his client. During a verbal exchange with State Police Troopers Dave Buck and Josh Collins, Messing stepped over a police barricade. Although he was told several times to return to the other side of the barricade, Messing refused. Grand Traverse County Sheriff's Detectives Paul Postal and Christopher Oosse placed Messing under arrest.

Procedural History

Messing was arrested and booked on a charge of disorderly conduct. He was later charged in Count I with attempting to assault, resist or obstruct Trooper Collins, contrary to MCL 750.92, and in Count II with disorderly person - jostling or roughly crowding people unnecessarily in a public place, contrary to MCL 750.167(1)(l).

On October 28, 2004, the Defendant filed a Motion for Bill of Particulars requiring the Prosecutor to provide the Defendant with a bill of particulars "describing the essential facts of the alleged offense." The Prosecutor responded that the Defendant "has been provided with all of the evidence in the People's possession in this case." The Defendant's Motion was denied. The Defendant also filed a Motion for Discovery. In response, the Prosecutor advised that the information had either already been provided or there was none.

On December 20, 2004, the Defendant presented a proposed stipulated bill of particulars to the Prosecutor which she did not sign. On January 20, 2005, the Court granted the Prosecutor's motion to amend the information to add a third count for attempting to assault, resist or obstruct Grand Traverse County Sheriff's Detective Paul Postal. According to Postal's incident report, when he arrested Messing, "[t]he man tightened his left arm up."

On February 20, 2005, the Defendant submitted another proposed bill of particulars to the Prosecutor. With respect to Count III, the essential facts described by the People were that the Defendant was "told by Detective Postal to 'get back behind the barrier' and when he failed to obey such an order, he was placed under arrest and physically resisted same." Again, the Prosecutor refused to sign a proposed bill of particulars.

The Defendant filed a Motion to Dismiss Counts I and III which the trial court indicated it would rule upon at the close of the prosecution's case.

Following a jury trial that was held on February 24 and 25, 2005, the Court dismissed Counts I and II. Count III was submitted to the jury and the jury returned a verdict of guilty. The Defendant filed a Motion for a Directed Verdict of Acquittal or, alternatively, Motion for a New Trial. On May 11, 2005, the Court denied these motions. The Defendant was sentenced to 24 months, non-reporting probation. He filed a claim of appeal. The State did not appeal any issue. The Court entertained the oral arguments of counsel on October 3, 2005 and now issues this written decision and order.

Issues

I. Whether the trial court erred by refusing to apply the law expressed in *People v Bender*.

II. Whether the trial court erred by failing to instruct the jury to disregard all the evidence introduced as to the dismissed counts.

III. Whether the trial court erred in denying the Defendant's motion for a new trial.

IV. Whether MCL 750.81d is unconstitutionally vague and overbroad as applied in this case.

V. Whether the trial court erred by ruling that the Defendant could not testify regarding his character and by ruling that police reports were inadmissible.

VI. Whether the Defendant received a fair trial.

I.

People v Bender

The defense in this case was based on the Defendant's role as an arrestee's attorney and his quest to fulfill his oath as an attorney by speaking with his client after she was arrested and while she was being held in a police vehicle at the scene. The Defendant contends that the trial court erred when it did not apply the law expressed in *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996) and recognize his duty under the Fifth Amendment to consult with his client to protect his client's Fifth and Sixth Amendment rights. Instead, he claims that the trial court misinterpreted his defense as a claim of special privileges by virtue of his being an attorney.

The Prosecutor's position is that *Bender* is inapplicable because there is no right to counsel during an arrest and the rights set forth in the Sixth Amendment are personal to the accused, not to counsel. Further, the sanction for a violation of *Bender* is to prevent the use of any statements made by the accused.

In *Bender*, our Supreme Court held that the police must inform a suspect when retained counsel is available for consultation. In *People v Sexton*, 458 Mich 43, 54; 580 NW2d 404 (1998), the Court pointed out, however, that the ultimate holding of the Court in *Bender* was not that the rule was required by either Const 1963, art 1, § 17 or § 20. In an opinion by Chief Justice Brickley, joined by Justices Levin, Cavanagh, and Mallett, the majority expressly refrained from justifying *Bender* by applying constitutional provisions. Rather, the majority felt

that it would be more appropriate to approach the law enforcement practices that were at the core of the case in the same manner as the United States Supreme Court approached the constitutional interpretation task in *Miranda*; namely, by announcing a prophylactic rule. *Bender* at 620-621. This new per se rule of criminal procedure was implemented to insure that "our system of criminal justice remains accusatorial and not inquisitorial in nature." *Id* at 623.

The Court's holding in *Bender* is not a rule of criminal procedure that is mandated by the United States Constitution. To the contrary, the United States Supreme Court's holding in *Moran v Burbine*, 475 US 412; 106 S Ct 1135; 89 L Ed 2d 410 (1986) specifically held that failure of the police to inform a defendant of a lawyer's efforts to contact him does not violate either the Fifth Amendment right to silence or the Sixth Amendment right to counsel.

The remedy for failing to follow the procedural rule announced in *Bender* is suppression of any statement made by the suspect. A confession obtained by the police while the suspect's retained attorney is waiting to contact his client is a preclusion per se of the suspect's knowing and intelligent waiver of his rights to remain silent and to counsel. *Sexton, supra*, at 53.

The Defendant contends that the trial court's absolute failure to give instructions or allow evidence as to the duties owed by the police to the arrestee resulted in unfair prejudice to Defendant and a very substantial miscarriage of justice. In short, it is the Defendant's position that he was convicted for fulfilling his oath as a lawyer and complying with his professional responsibilities.

The Defendant's position is faulty. The rights protected by *Bender* are the rights of the arrestee and the remedy for a violation is suppression of any statement made by the arrestee. While an attorney has a duty to counsel his client, he is not required to break the law in order to do so. Once he announces his availability, his obligation has been fulfilled. His client's rights are protected. Nothing his client says thereafter will be admissible. Thus, the trial court did not err in limiting the evidence regarding the law announced in *Bender*.

II.

Instruction Regarding Dismissed Counts

At the close of the prosecution's case, the trial court dismissed Count I – attempt to assault, resist or obstruct Trooper Collins and Count II – disorderly person – jostling in a crowd. The trial court instructed the jury that Counts I and II had been dismissed, that they were not to

speculate as to why they were dismissed and that the case would proceed as to Count III on the attempted resisting and obstructing count involving Detective Postal.

The Defendant contends that, while the trial court did not instruct the jury to disregard the testimony regarding the two dismissed counts, it limited the Defendant's testimony to only Count III – "what happened during the arrest" and declined to provide the jury with the Defendant's proposed, modified CJI2d 7.22 instruction - Attorney, Defense of his Client - on the *Bender* issue. Thus, the Defendant contends that the jury was allowed to consider all of the trial testimony and "was given free rein to convict Defendant based on irrelevant and prejudicial testimony unrelated to the charge that remained."

The Defendant admits that he did not object to the trial court's instruction regarding dismissal of Counts I and II, but he claims that he was not afforded an opportunity to object.

When a defendant does not object to the jury instructions given by the judge, reversal is not warranted unless manifest injustice resulted. *People v Harless*, 78 Mich App 745; 261 NW2d 41 (1977); *People v Hall*, 77 Mich App 456; 258 NW2d 517 (1977). A trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

"When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002).

It is the function of the trial court to clearly present the case to the jurors and instruct them on the applicable law. Jury instructions must therefore include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. Even if the instructions are somewhat imperfect, reversal is not required if the instructions fairly presented the issues to be tried and were sufficient to protect the rights of the defendant. *People v Hawthorne*, 265 Mich App 47, 51; 692 NW2d 879 (2005).

The record indicates that the trial court discussed the instruction it gave the jury regarding dismissal of Counts I and II with counsel and there was no objection. In addition, given this Court's ruling with regard to the *Bender* issue, the Defendant cannot show that the trial court's failure to instruct on that issue was error.

III.

Motion for New Trial

The Defendant filed a Motion for Direct Verdict of Acquittal or, in the Alternative, Motion for a New Trial. The trial court denied the motion, saying:

> And I think what it came down to in the case was Officer Postal's testimony and Mr. Messing's testimony and the video. And the jury, based upon the decision, believed Officer Postal and believed the video represented the prosecutor's position that there was a resisting of some sort. And the Court finds that based upon the testimony of Officer Postal and the video that there was a basis for that and that is not gonna [sic] be overturned.

The Defendant argues on appeal that the trial court used the wrong standard of review when it denied his motion. The Defendant contends that the court applied an improper "any evidence" standard, rather than the "miscarriage of justice" standard.

The Prosecutor does not specifically address this issue in her brief. Instead, she argues that the verdict has not resulted in a miscarriage of justice.

MCR 6.431(B) states:

> On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made part of the record.

MCR 6.431 took effect on October 1, 1989. The note accompanying this rule states:

> Subrule (B) substantially modifies the statutory standards for granting a new trial set forth in MCL 770.1; MSA 28.1098 and applied by the courts. See *People v Hampton*, 407 Mich 354, 372 -373; 285 NW2d 284 (1979). The statute provides that the trial court may grant a new trial (1) "for any cause for which by law a new trial may be granted," or (2) "when it appears to the court that justice has not been done . . ." Although the court rule repeats in stylistically revised language the first standard, it substitutes a new second standard: "because [the trial court] believes the verdict has resulted in a miscarriage of justice." What substantive difference, if any, exists between the new standard and the former standard is left to be addressed by case law.

The issue presented is rooted in the difference between the standard for granting a new trial and that required to grant a directed verdict of acquittal. Due process commands a directed verdict of acquittal when there is an absence of "sufficient evidence to justify a rational trier of

fact in finding guilt beyond a reasonable doubt," *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979), citing *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979). If the evidence presented by the prosecution in the light most favorable to the prosecution, up to the time the motion is made, is insufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt, a directed verdict or judgment of acquittal must be entered. *Hampton, supra* at 368.[1]

The operative principles regarding new trial motions are that the court "may," in the "interest of justice" or to prevent a "miscarriage of justice," grant the defendant's motion for a new trial. *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998).

A trial court may grant a new trial if it finds the verdict was not in accordance with the evidence and that an injustice has been done. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). A motion for a new trial based upon the great weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *Lemmon, supra* at 642. The trial court's denial of a motion for a new trial based on the great weight of the evidence is reviewed for an abuse of discretion. *Abraham, supra* at 269.

The Defendant argues that the verdict is not in accordance with the evidence and that an injustice has been done because the trial court never expressly ruled on his motion for a bill of particulars.

Count III was added by amendment in January of 2005 after Trooper Collins completed an incident report at the behest of the Prosecutor. The Defendant again renewed his request for a bill of particulars. At the hearing on the Defendant's Motion to Dismiss Counts I and III that was held on February 17, 2005, the Prosecutor said:

> Your Honor, at the first conference we had in chambers it was my understanding that you were considering ordering a bill of particulars and you decided to wait. The last time that I remember that we met it was in the jury room, the Defendant, both attorneys and you were present and at that time my recollection was that we did specifically discuss what I expected the witnesses to prove which is essentially it's in the police report but I did answer questions from the Defendant himself, as well as from his attorney and I thought it was very clear. And it seems like it is clear to them because in the arguments counts one

[1] The trial court applied this standard in dismissing Counts I and II, from which no appeal has been taken.

and three, I believe are the ones that they're most concerned about as far as being vague and I'm not sure how much clearer it can be then. You were given a lawful order - - this is count one, you were given a lawful order by either Detective Sergeant Buck or Detective Sergeant Collins and you refused that order, that order being to stay back behind the police barricade, that's it.

* * *

And then as to the third count, that was the one that was added at the last hearing that I believe that the Defendant was arraigned as to count three with regards to Detective Postal and that is a physical resistance and I believe that was discussed as well and that's very simple and a more traditional physical resistance to an arrest and, again, I understand the Defendant wants to contend the lawfulness of the arrest and that's fine, but I don't know how - - what else I can do to make it more clear about what it is. It's an arrest, he physically resisted, either he did or he didn't, and that's what we'll see at trial, I guess.

After this offer by the Prosecutor, the Court said, "I think you just got your bill of particulars on the record." (MD Tr 12.) Thus, the verbal bill of particulars as to Count III that was delivered on the record consisted of an oral charge of "physical resistance," or at best resistance as described in a police report, i.e., "tightened his left arm up."

The purpose of a bill of particulars is to specifically set forth, in appropriate instances, the means, manner, or method adopted or employed by an accused. In other words, what acts of his are claimed to constitute the crime. *People v Margiles,* 246 Mich 459; 224 NW 605 (1929).

Denial of a bill of particulars may constitute reversible error if the record demonstrates prejudice arising therefrom. *People v Missouri,* 100 Mich App 310, 331; 299 NW2d 346 (1980), lv den 411 Mich 1039 (1981). Failure to order a bill of particulars constitutes reversible error only in the event of an abuse of discretion which results in the defendant being deprived of a fair trial. *People v Tenerowicz,* 266 Mich 276; 253 NW 296 (1934). Thus, the issue is whether the Defendant received a fair trial.

In her opening statement, with respect to Count III, the Prosecutor said:

[W]hat I expect the evidence will show is that the Defendant, while at one point perhaps was inviting the police to arrest him by saying, "Go ahead and arrest me," when it came down, actually, to it, there was a physical resistance. **I don't expect you're gonna [sic] see that on the video tape.** It'd be really nice, as I said, if everything was on video but that just isn't life. So, you'll have parts of that but you're gonna [sic] have to couple it with the testimony and that is the evidence you're gonna [sic] get as to that charge. [Emphasis added.]

In his August 16, 2004 Probable Cause Arrest Form, Detective Postal stated:

Two protestors rushed the police baracade [sic]. Mr. Messing indicated by yelling that he wanted to represent the protestors who where arrested. Mr. Messing was ordered 3 to 40 times by the above listed officers to return behind the police baracade [sic]. Mr. Messing was advised by D/Sgt Josh Collins that if he did not return behind the baracade [sic] he would be arrested. Mr. Messing replied yelling, "I'm not going to, you can just arrest me now" Messing put his own hands behind his back and started walking towards the officer.

In his August 17, 2004 Incident Report, Detective Postal wrote:

I observed a white male circle around the protesters towards the corner of the police barricade. I walked over to where the state police troopers were at near the corner of the police barricade. The white male was now on the other side of the police barricade inside the police line. I observed two uniform state police troopers ordering the white male to return back to the other side of the police barricade.

The male stated, "No I will not, those people have a right to representation." The two troopers continued politely asking the man to return back behind the police barricade. He again said he was not going to. The Troopers requested three to four times for the man to return behind the barricade.

I requested Sergeant CHRIS OOSSE'S assistance. The man asked, "What's going to happen to me if I don't." The uniform trooper advised the man he would be arrested. The man said, "I'm not going to, you can arrest me now."

The uniformed trooper looked behind me and nodded his head up and down. I approached the man and told him he was under arrest. I ordered the man to put his hands behind his back. **The man already had his hands behind his back. I secured his left arm behind his back with a reverse gooseneck hold.** Sergeant Oosse did the same to his right arm.

The man tightened his left arm up. I advised him to stop resisting. He complied and I escorted him in a left arm escort position to the sheriff's arrest transport vehicle. [Emphasis added.]

During the trial, Trooper Buck testified that he did not know anything about the charge that the Defendant resisted Detective Postal's arrest. (Tr 85.)

On direct examination, Trooper Collins testified that he several times requested that the Defendant step back behind the barricade and the Defendant refused, interfering with his ability to maintain the peace and control the traffic. (Tr 95.) On cross examination, Trooper Collins

testified that he was not assaulted, battered, wounded, physically resisted or obstructed. But, on re-direct, Trooper Collins testified regarding the arrest of the Defendant:

> He was about a foot or so away from me at that time, **he became aggressive and reared his arm up** and it appeared that he was, in my opinion, was trying to either grab my uniform and actually I thought he might've been trying to rip my name tag off of my uniform, you know, probably trying to identify who I was for a future complaint. Detective Postal had to then apply additional force to get his arm back and they escorted him from the area. [Emphasis added.]

The Prosecutor then played the video and confirmed with Trooper Collins that the "gesture" shown on the video tape was when he believed the Defendant was "grabbing for him."

On re-cross examination, **Trooper Collins admitted that there was no mention of this "gesture" in the police report that he filed on January 18, 2005**. The report simply said: "Detective Postal and his partner secured Mr. Messing's hands at which time Mr. Messing began to resist their holds."

The Prosecutor then offered the testimony of Detective Postal. Detective Postal testified that, when he was arresting the Defendant, the Defendant brought his arm up and he could feel the muscles in his arm tightening. That is when Detective Postal "grabbed his wrist and put it behind his back and secured his left wrist in what we call a reverse gooseneck hold." He wasn't going to "let him assault Sergeant Collins, myself, or other - -." He also testified that the Defendant again "tightened up his arm" as he was being escorted to the police vehicle.

On cross-examination, **Detective Postal admitted that there was no mention of any resisting in the Probable Cause Arrest Form** and the only mention of resisting in his initial incident report was after he "secured his left arm behind his back with a reverse gooseneck hold", "[t]he man tightened his left arm up."

Detective Oosse also testified for the People. Even though he had control of the Defendant's right arm during the arrest, he did not observe what Detective Postal was doing. He also testified that he never saw the Defendant's left arm come up.

In her closing argument, the Prosecutor indicated that she would show the jury the video again "one more time to point out **the People's theory on why lifting an arm up during an arrest is enough to constitute either a full blown resisting obstructing or the attempt, which is charged.**" (Tr 92.)

Even though the Defendant made several requests for a bill of particulars, his request was never granted and he was never told that the "raising up of his left arm" was the act of physical resistance upon which his prosecution was based. Up until the time that Trooper Collins testified on re-direct examination, the Defendant had only been told that he was charged with "physical resistance." Thus, the Defendant was unprepared to defend against a charge of resisting arrest by raising up his left arm in an assaultive gesture toward Trooper Collins. The prejudice to the Defendant is obvious from the fact that the Defendant was able, with this information, to produce a stop action DVD and still photographs which show that he had his wallet in his left hand and that Detective Postal had a grip on his left arm, both under the armpit and at the wrist, that suggest it was a practical impossibility for the Defendant to "grab at" Trooper Collins.

As the court said in *People v Darden*, 230 Mich App 597; 585 NW2d 27 (1998):

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense--a right to his day in court--are basic in our system of jurisprudence. *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948). A defendant's right to adequate notice of the charges against the defendant stems from the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment. See *People v Jones*, 395 Mich 379, 388; 236 NW2d 461 (1975).

In this case, the Prosecutor failed to satisfy her obligation to provide the particulars of the offense and thus provide the Defendant with adequate notice of the charge against him. In fairness to the Prosecutor, she seemed surprised by the testimony of the officers as it was inconsistent with the police reports and her view of the video - - at least as she described it in her opening remarks.

The jury had to decide whether the Defendant resisted arrest. Detective Postal's testimony that the Defendant raised his left arm up in an assaultive gesture toward Trooper Collins was corroborated by Trooper Collins, but contradicted by other lay witnesses, his own written incident report, the Prosecutor's opening statement, and the stop action DVD. The Defendant's credibility was challenged by the introduction of Exhibit C, a photograph showing him in a very poor light. This photograph was offered at trial in connection with the Count II charge of disorderly person – jostling and is discussed in more detail in Section V below. Suffice it to say, the photograph is divorced from Count III in time and was found by the trial

judge to be insufficient proof of the jostling charge for that charge to go to the jury. No proper purpose for the photograph was articulated at the oral argument as it would relate to Count III.

Therefore, the Defendant was unduly prejudiced by the combination of the lack of notice of what acts were claimed to constitute the crime of resisting arrest and by the irrelevant, unflattering photograph. The trial court erred by denying the Defendant's Motion for a New Trial.

IV.

Constitutionality of MCL § 750.81d

The Defendant claims that MCL § 750.81d is unconstitutionally vague and overbroad as applied in this case because it criminalizes protected First Amendment activities. This Court reviews de novo a challenge to the constitutionality of a statute under the void-for-vagueness doctrine. *People v Tombs*, 260 Mich App 201, 217-218; 679 NW2d 77; (2003), quoting *People v Beam*, 244 Mich App 103, 105; 624 NW2d 764 (2000). "A statute may be challenged for vagueness on three grounds: (1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; (3) its coverage is overbroad and impinges on First Amendment freedoms." *Id* at 218, citing *People v Howell*, 396 Mich 16, 20; 238 NW2d 148 (1976), and *Grayned v Rockford*, 408 US 104, 108-109; 92 S Ct 2294; 33 L Ed 2d 222 (1972)." "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *Id*, citing *Howell, supra* at 21 and *United States v Nat'l Dairy Products Corp*, 372 US 29; 83 S Ct 594; 9 L Ed 2d 561 (1963).

Whether MCL § 750.81d is void for vagueness or overbroad was addressed by our Supreme Court in *People v Vasquez*, 465 Mich 83; 631 NW2d 711 (2001). In *Vasquez*, the defendant was charged with resisting and obstructing. The issue was whether conduct of lying to a police officer about his name and age, constituted an "obstruction" within the meaning of Michigan's "resisting and obstructing" statute. The Court held that Michigan's "resisting and obstructing" statute does not proscribe any manner of interference with a police officer. It also does not proscribe only conduct that poses a threat to the safety of police officers. Rather, it proscribes threatened, either expressly or impliedly, physical interference and actual physical interference with a police officer.

Thus, MCL § 750.81d does not infringe upon constitutionally protected First Amendment rights. A person cannot physically interfere with a police officer by verbal expression alone.

V.

Evidentiary Errors

A.

Character Evidence

The Defendant contends that he was prejudiced by the trial court's refusal to allow him to testify about his background, qualifications and character. Pursuant to MCR 404(a), evidence of the accused's character to prove that he acted in conformance with that character is admissible. The so-called "mercy rule," found in MRE 404(a)(1), allows a criminal defendant an absolute right to introduce evidence of his character to prove that he could not have committed the crime. *People v Whitfield*, 425 Mich 116; 388 NW2d 206 (1986); *People v Flaherty*, 165 Mich App 113; 418 NW2d 695 (1988). But, under MRE 405(a), the accused can only present favorable character evidence in the form of reputation testimony.

From the transcript it appears that the Defendant was offering more than reputation testimony. The trial court properly sustained the objection.

B.

Admissibility of Police Reports

The Defendant claims that the trial court erred when it refused to admit the reports of the testifying officers that were offered under MRE 803(5) and MRE 801(d)(2) because "none of the reports make any mention of the Defendant's raising of his arm in what was characterized as an assaultive gesture toward Trooper Collins."

The decision whether to admit evidence is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. However, where, as here, the decision involves a preliminary question of law, which is whether a rule of evidence precludes admissibility, the question is reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Police reports generally contain hearsay, MRE 801(c), and, pursuant to MRE 802, they are not admissible unless they fit within at least one category of the allowable exceptions

outlined in MRE 803 and 804. MRE 803(8) expressly excludes police reports from those public records and reports that are admissible as exceptions to the hearsay rule.

Admissibility in this case was sought under MRE 803(5), which states that a report may be read into evidence if it is used to refresh a witness' memory, but may only be received as an exhibit if offered by an adverse party.

In *People v Daniels*, 192 Mich App 658, 667-668; 482 NW2d 176 (1992), the Court held:

> The following foundational requirements must be met before a memorandum or writing may be admitted into evidence under the recorded recollection exception to the hearsay rule:
>
> Documents admitted pursuant to this rule must meet three requisites: (1) The document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matter is fresh in his memory. *People v J D Williams*, 117 Mich App 505, 508-509; 324 NW2d 70 (1982), rev'd and remanded on other grounds 412 Mich 711; 316 NW2d 717] (1982).

The police reports in this case were not used to refresh the officers' memories. Instead, they were used for impeachment purposes to show inconsistencies between the reports and the officers' trial testimony. MRE 801(d) controls the admissibility of such statements and requires that they be inconsistent with the witness' testimony at trial and be given under oath. Police reports are not statements made under oath. Therefore, they are not admissible under MRE 801(d). The trial court properly refused to admit them as exhibits.

VI.

Fair Trial

A prosecutor has discretion to bring any charges supported by the evidence. *People v Yeoman*, 218 Mich App 406, 413-414; 554 NW2d 577 (1996). In this case, the Defendant was arrested and booked on a charge of disorderly conduct. Later a two-count information was filed charging the Defendant with attempted resisting, assaulting, obstructing Trooper Collins and disorderly person, jostling – unnecessary crowding. Six months later, in January of 2005, after

Trooper Collins filed an incident report at the behest of the Prosecutor, the information was amended to include a charge of attempted resisting, assaulting, obstructing Detective Postal.

The Defendant claims that he was charged with and tried for disorderly person – jostling without a factual basis, contrary to MCR 2.114(D), because the Prosecutor wanted to present a sympathetic victim and "elicit prejudicial statements toward Defendant," which deprived him of a fair trial.

> Sergeant McCarthy described the jostling incident in his police report as follows:
>
> . . . I observed as [the protesters] walked under the police barrier tape towards the street. I positioned myself in front of the demonstrators and yelled, "Back!" They did not respond and as they reached the curb area, I pushed them back in to one another, ultimately pushing the group to the ground under the barrier tape.

As a result of this incident, an elderly woman was knocked over backwards in her wheelchair. Even though the Prosecutor represented to the trial court that she would prove the jostling charge through her witnesses (MD Tr 13), **none of her witnesses was able to testify that the Defendant was in any way involved in jostling or responsible for knocking over the elderly woman.**

The Prosecutor nonetheless offered a photograph into evidence (Exhibit C) that does not show the Defendant involved in the jostling. It merely shows the Defendant in the vicinity and depicts the Defendant in a very pejorative light. He appears to be standing over the elderly woman shouting at law enforcement officers. He appears to be an angry, out-of-control political protester. The photograph was admitted and published to the jury.

The trial court dismissed the Count III jostling charge at the close of the Prosecutor's case because there was no evidence from which a rational trier of fact could find Messing guilty beyond a reasonable doubt.

In order to be admissible, evidence must be relevant to an issue or fact of consequence at trial. MRE 402. In addition, the trial court must determine whether evidence, although relevant, is nonetheless inadmissible under MRE 403 because its probative value is 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).

In the instant case, the Prosecutor introduced a photograph showing the Defendant in the vicinity of the elderly spectator who was knocked over backward in her wheelchair and

published it to the jury. No factual basis for the jostling charge had been established. In addition, the scene in the photograph was not temporally connected to the resisting charges so it was not relevant to the attempted resisting charges.

The photograph depicts the Defendant in a very pejorative light as an angry, out-of-control, political protester. It is unduly prejudicial because there was no testimony to this effect offered at trial. In fact, Detective Postal testified that it "depicts Mr. Messing yelling that he was an attorney and wanted to represent the two girls that were just arrested." The photograph was inadmissible under MRE 402 because it was not relevant to any charge for which a factual basis had been presented. In addition, it was inadmissible under MRE 403 because any probative value was substantially outweighed by the danger of unfair prejudice.

The Defendant was prejudiced by the trial court admitting the photograph. The prejudice was compounded by the fact that the credibility of the witnesses was crucial to the jury's determination of whether the Defendant attempted to resist arrest by Detective Postal by "raising his left arm up." As the trial court said when it denied the Defendant's Motion for Directed Verdict of Acquittal or, alternatively, for a New Trial, "what it came down to in the case was Officer Postal's testimony and Mr. Messing's testimony and the video."

As noted above, Detective Postal wrote the following in his initial police report:

> **The man already had his hands behind his back. I secured his left arm behind his back with a reverse gooseneck hold.** Sergeant Oosse did the same to his right arm.
>
> **The man tightened his left arm up. I advised him to stop resisting. He complied and I escorted him in a left arm escort position to the sheriff's arrest transport vehicle.** [Emphasis added.]

Detective Postal testified as follows at trial:

> I walked up and grabbed Mr. Messing's left elbow **and I grabbed his left wrist in what we in police call a standard escort position** . . . Mr. Messing brought his arm up and tightened the muscles in his arm and at that point, I grabbed his wrist and I pulled it back and I pulled it down behind his back. I didn't know what he was doing, but he was reaching up towards Sergeant Collins's chest area. **So I pulled it behind his back into a - - -what we call a reverse gooseneck hold . . . as we were walking back to the Sheriff's department corrections vehicle he tightened his arm up again and that's when I applied pressure to a certain pressure point on his wrist while I'm holding him in that reverse gooseneck hold, telling him to stop resisting.**

In his incident report, Detective Postal stated that he immediately secured the Defendant's "left arm behind his back with a reverse gooseneck hold" and then "escorted him in a left arm escort position" to the sheriff's vehicle. At trial, Detective Postal testified that he first grabbed the Defendant's left elbow and wrist in a "standard escort position" and only after the Defendant "brought his arm up and tightened the muscles in his arm" did he use a "reverse gooseneck hold."

The Defendant testified at trial that "the arm went up because [Detective Postal] had control of the arm . . . as part of this reverse gooseneck hold . . . I'm not denying my arm went up . . . but I'm saying that Detective Postal was the one who moved it up . . . Once he grabbed this arm this way and the other hand was grabbed by two hands of the officer I didn't have any control."

The Court has reviewed the DVD of the arrest and the stop-action DVD and still photographs produced by the Defendant in support of his Motion for a Directed Verdict of Acquittal or, alternatively, for a New Trial. These are consistent with the Defendant's testimony. The stop-action DVD, in particular, shows that Detective Postal's initial incident report was correct and that he had control of the Defendant's arm when he testified at trial that the Defendant's arm was raised up in an assaultive gesture toward Trooper Collins. Therefore, the Court must conclude that the prejudicial photograph unduly influenced the jury to doubt the credibility of the Defendant.

The conviction should be and hereby is reversed and the case is remanded to the District Court for a new trial on Count III, only. The evidence is to be limited to evidence that is relevant to the charge of the attempted resisting and obstructing of arrest by Detective Postal. Exhibit C is inadmissible at the new trial.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 10/28/05