STATE OF MICHIGAN

COURT OF APPEALS

MARTHA CANNON, Personal Representative of the Estate of THEODORE HUDSON, JR., Deceased,

Plaintiff-Appellant,

v

CINDY FELLNER, REBECCA MACARTHUR and JOHN DOE and/or MARY ROE,

Defendants-Appellees.

UNPUBLISHED
April 11, 1997

No. 184760
Wayne Circuit Court
LC No. 91-122483 NO

Before: Jansen, P.J., and Reilly and W.C. Buhl*, JJ.

PER CURIAM.

Plaintiff appeals as of right from a jury verdict finding no cause of action in this police brutality case. We affirm.

On October 25, 1990, Theodore Hudson died as the result of a cocaine overdose. Plaintiff's version of the events was that Hudson had been forced to ingest cocaine by two Michigan State Police Troopers, defendants Fellner and MacArthur. According to Fellner, she and MacArthur were en route to a coffee break when she observed a car make an improper left turn. Fellner followed the car and its driver, Hudson, who was eventually apprehended. The officers performed a background check on Hudson and learned that his driver's license had been suspended, he had a couple of traffic warrants, and an outstanding warrant for disturbing the peace. Fellner then issued Hudson two traffic citations, issued him a bond receipt and released him.

On appeal, plaintiff argues that the trial court erred in making several evidentiary rulings. This Court reviews the trial court's admission or denial of evidence for an abuse of discretion. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 361; 533 NW2d 373 (1995).

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* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff first argues that the trial court erred in allowing evidence of a February, 1990, drug arrest of Hudson, during which he allegedly placed a resealable bag of crack cocaine in his mouth to conceal it from the police. We disagree. MRE 404(b) governs admission of evidence of bad acts. "If the proponent's only theory of relevance is that the other act shows defendant's inclination toward wrongdoing in general to prove that defendant committed the conduct in question, the evidence is not admissible." *People v VanderVliet*, 444 Mich 52, 63; 508 NW2d 114 (1993). "Relevant other acts evidence does not violate MRE 404(b) unless it is the offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *Id.* at 65. In this case, Hudson's 1990 drug arrest and the fact that he placed cocaine in his mouth to conceal it from the police was not admitted to show his inclination toward wrongdoing. "[T]he intermediate inference of character" is not involved, and Rule 404(b) is not implicated. *Id.* at 64. Furthermore, we agree with the trial court that the probative value of the prior drug arrest evidence was not substantially outweighed by the danger of unfair prejudice. Thus, we conclude that the trial court did not abuse its discretion in admitting evidence concerning Hudson's act of placing a bag of cocaine in his mouth during an earlier arrest.

Next plaintiff argues that the trial court erred in disallowing evidence of an alleged Michigan State Police "drug bust" that occurred in front of Hudson's home on the night before his death. According to plaintiff's counsel's representations at the hearing on the motion in limine, a witness would testify that on the night before Hudson's death, troopers in a State Police scout car pulled a car over, searched it, and arrested the occupant, Fred Roland, in front of Hudson's house. The troopers walked up to Hudson's house and pounded on the door, but there was no response. Plaintiff's counsel argued that this evidence was relevant as a "smell" factor that intimated a reason for Fellner and MacArthur to be in the area and suggested they were looking for Hudson. Ultimately, the trial court held that the connection between the "drug bust" in front of Hudson's home and the later encounter with Fellner and MacArthur was too speculative, and therefore, inadmissible. We agree. There was no evidence linking Fellner or MacArthur to the incident. Thus, the introduction of Roland's arrest had no probative value and could result in confusion of the issues. The trial court's ruling was not an abuse of discretion.

Next, plaintiff argues that the trial court erred in disallowing evidence of the Michigan State Police Department's failure to investigate the circumstances surrounding Hudson's death. Defendants argued at the hearing on a motion in limine that the Michigan State Police Department was not a party to this case, and therefore, the department's investigation of this case was irrelevant. The trial court agreed with defendants and held that it would not permit plaintiff to present evidence or argue that, as a result of the department's failure to investigate, Hudson's mother, Martha Cannon, was forced to go out and gather witnesses. However, the trial court stated that it would allow plaintiff to: 1) present testimony as to what actually occurred during the police investigation; and 2) to present testimony about Cannon's actions after Hudson's death.

We find no abuse of discretion. After filing her original complaint, plaintiff stipulated to the dismissal of the Michigan State Police from the case. The department's actions after Hudson's death were not relevant to the individual actions of Fellner and MacArthur. The department's failure to investigate was not on trial in this case, and the introduction of such an issue to the jury may have confused the jury and distracted them from the issue at bar, i.e., Fellner's and MacArthur's alleged

misconduct. See *Clark v Seagrave Fire Apparatus, Inc*, 170 Mich App 147, 156; 427 NW2d 913 (1988) ("In excluding testimony which would have necessitated delving into a potentially confusing collateral matter, the trial court did not abuse its discretion.").

Next, plaintiff argues that the trial court erred in admitting into evidence a statement Cannon made to Dr. Mary Malufa. We disagree. About two and a half hours after Hudson's death, Malufa drafted an addendum to Hudson's medical records. In her addendum, Malufa related a statement made by Cannon in a conversation with Malufa. Cannon stated to Malufa that Hudson "was stopped by state police earlier in day . . . he swallowed three rocks of cocaine." Plaintiff objected to the admission of Cannon's statement to Malufa on hearsay grounds. The trial court concluded that Cannon's statement to Malufa was not hearsay pursuant to MRE 801(d)(2), admission by a party opponent.

According to MRE 801(d)(2)(A), a statement is not hearsay if the statement is offered against a party and is the party's own statement, in either an individual or a representative capacity. Plaintiff argues that MRE 801(d)(2)(A) does not apply because Cannon is not a party to this case because she is only the representative of Hudson's estate. However, in *Estate of Shafer v Commissioner of Internal Revenue Service*, 749 F2d 1216, 1218-1219 (CA 6, 1984), the Sixth Circuit Court of Appeals held that an executor of an estate is a party to an action within the meaning of FRE 801(d)(2)(A) -- a rule which is virtually identical to MRE 801(d)(2)(A).[1] Additionally, the *Shafer* Court stated:

> [FRE] 801(d)(2)(A) was meant to overturn the prior law which permitted admissions by a representative to be introduced only if the statements were made in the prerepresentative capacity . . . [T]he plain language of [FRE] 801(d)(2)(A) encompasses statements made in 'either [the executor's] individual or representative capacity. [*Shafer, supra*, 740 F2d 1219.]

Thus, according to *Shafer*, if a statement is offered against a party while acting in a representative capacity, there need be no inquiry as to whether the party was acting in that capacity when the statement was made to determine if the statement is a party admission. In this case, Cannon's statement constitutes a party admission under MRE 801(d)(2)(A) because Cannon is a party.

Next, plaintiff argues that the trial court erred in limiting plaintiff's counsel's cross-examination of defendants' expert witness, Phyllis Good, and Fellner. We disagree. The trial court has the discretion to control the questioning of witnesses. The determination of the scope of cross-examination is reviewed for an abuse of discretion. *Wischmeyer v Schanz*, 449 Mich 469, 474-475; 536 NW2d 760 (1995); *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 454; 540 NW2d 696 (1995). The issues plaintiff's counsel wished to raise in his questioning of Good were collateral to the issue at bar, i.e., whether defendants forced Hudson to ingest cocaine. We find no abuse of discretion.

We also conclude that the trial court did not unduly limit plaintiff's counsel's ability to cross-examine Fellner. Plaintiff argues that her counsel was disallowed from questioning Fellner on cross-

examination about the basis of the witness' belief concerning the scope of a search incident to an arrest. In particular, plaintiff's counsel asked Fellner, "Are you familiar with the case of People versus Chapman, United States Supreme Court, excuse me, Michigan Supreme Court 425 Michigan 245." The trial court did not abuse its discretion in disallowing the question. about case law. The question was irrelevant and collateral to the main issue in the case, i.e., whether Hudson was the victim of police brutality.

Lastly, plaintiff argues that the trial court erred in disallowing evidence of Official Order Number 98, a state police order that provides the procedure for traffic enforcement on "expressway patrols for expressway and suburban freeways." We disagree. Plaintiff contends that the order is relevant because, when read in conjunction with a Detroit Freeway Post document, it shows that defendants were in violation of state police policy when they were "randomly patrolling the surface streets of the City of Detroit." The trial court held that a witness would have to testify in order to establish the applicability of the order to the Detroit Post. We find no abuse of discretion. In any event, the order was irrelevant to the main issues in the case. Accordingly, the error in disallowing the evidence, if any, was harmless.

We note that plaintiff is also appealing the denial of her motion for a new trial. In her motion, plaintiff took issue with the same issues mentioned above. We review a denial of a motion for a new trial for an abuse of discretion. *Froede v Holland Ladder & Manufacturing Co*, 207 Mich App 127, 130; 523 NW2d 849 (1994). In light of our findings that the trial court did not abuse its discretion in rendering its evidentiary rulings, we conclude that the trial court did not abuse its discretion in denying plaintiff's motion for a new trial.

Affirmed. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ William C. Buhl

[1] MRE 801(d)(2)(A) contains the italicized portion of the following rule, whereas FRE 801(d)(2)(A) does not: "The party's own statement, in either an individual or a representative capacity, *except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles*."