

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN CARL SCHUTT,

Defendant-Appellant.

UNPUBLISHED
November 9, 1999

No. 214559
St. Clair Circuit Court
LC No. 95-002092 FH

Before: Cavanagh, P.J., and Doctoroff and O’Connell, JJ.

PER CURIAM.

Defendant appeals, by leave granted, his jury trial conviction of two counts of assault with the intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to concurrent terms of seven to fifteen years’ imprisonment for the convictions. We affirm.

The prosecution alleged that defendant assaulted Richard Yeagley and Gerald Jefferson outside a bar after closing time. Defendant contends that the trial court erred when it excluded Dr. Michael Paul’s testimony regarding Jefferson’s blood alcohol level on the ground that it was not relevant. We agree. A trial court’s decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

According to MRE 401, evidence is relevant if it is material and if it has probative value. *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Evidence is material if it is related to any fact that is of consequence to the action. MRE 401; *Crawford, supra* at 388. Evidence has probative value if it tends “to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without evidence.” *Id.* at 389-390. The party seeking admission of the evidence has the burden of showing its relevancy. *People v Sabin (On Remand)*, 236 Mich App 1, 8; ___ NW2d ___ (1999).

Here, the evidence was material because it related to Jefferson's credibility. Jefferson's credibility was an important issue at trial due to his identification of defendant as the man that hit him. The evidence had probative value because evidence that Jefferson had a high blood alcohol content made it more probable that he mistakenly identified defendant as the person that approached him on his left side immediately before he was hit, whereas evidence that Jefferson had a low blood alcohol content would have made it less probable that he mistakenly identified defendant. Thus, we conclude that evidence of Jefferson's blood alcohol content was relevant, and that the trial court abused its discretion in excluding the evidence on the ground that it was not relevant.

The prosecutor argues that the proffered testimony was irrelevant because Jefferson already admitted under oath that he had been drinking on the night of the assault. However, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). While relevant evidence may be inadmissible under MRE 403 on the ground that its probative value is substantially outweighed by considerations such as the needless presentation of cumulative evidence, the fact that other, similar evidence was admitted does not affect the determination of whether the evidence at issue was relevant.

Although the trial court abused its discretion in excluding Dr. Paul's testimony regarding Jefferson's blood alcohol level, we conclude that the error was harmless. Contrary to defendant's position, the error was not of constitutional magnitude. Because the error was a preserved, non-constitutional error, reversal is required only if the error was prejudicial. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). "[T]he effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id.* In other words, the defendant has the burden to prove more probable than not that the error is outcome determinative. *Id.* at 495-496. On this record, it was not.

Patrick Essenmacher, the cab driver, testified that defendant was the man who hit Jefferson and knocked him out. Essenmacher also testified that defendant was wearing red shorts on the night of the assault. Jefferson testified that defendant was wearing red shorts and approached him on his left side before he was assaulted. The jury could have concluded on the basis of Essenmacher's testimony that defendant was the man who assaulted Jefferson. Furthermore, although the trial court excluded evidence of Jefferson's blood alcohol content, Jefferson admitted that he had been drinking and was intoxicated at the time of the assault. Therefore, defendant has not shown that it was more probable than not that the results of the trial would have been different had the trial court not excluded Dr. Paul's testimony regarding Jefferson's blood alcohol content. The error was harmless and does not require reversal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell