

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHERYL LYNN PAGE,

Defendant-Appellant.

UNPUBLISHED

January 15, 2004

No. 242737

Berrien Circuit Court

LC No. 2001-405492-FC

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. She was sentenced to 20 to 60 years' imprisonment on the murder conviction, along with a consecutive two-year prison term on the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's first argument on appeal is that the trial court committed error mandating reversal when it admitted other acts evidence introduced through the testimony of a former neighbor of defendant. Defendant maintains that this evidence was not relevant and unfairly prejudicial.

The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). Moreover, even if properly preserved, error in the admission of other acts evidence does not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative, and the defendant bears the burden of establishing that a miscarriage of justice has occurred because of the error. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

MRE 404(b) provides that:

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.

In *People v VanderVliet*, 444 Mich 52, 63; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994), our Supreme Court held that other acts evidence cannot be admitted solely to show a “defendant’s inclination to wrongdoing in general to prove that the defendant committed the conduct in question[.]”¹ The evidence must be offered for a proper purpose under MRE 404(b) and be admissible under MRE 401-403 regarding relevancy and unfair prejudice. *VanderVliet*, *supra* at 55.

In the present case, the other acts evidence was introduced ostensibly to show defendant’s intent or state of mind at the time of the shooting, specifically to negate defendant’s claim that she acted in self-defense or in a state of excitement. Although we question the relevancy of the evidence and whether it reflected an attempt to show criminal propensity, the prosecutor’s argument in support of admittance was not devoid of merit where defendant’s state of mind was clearly at issue. We cannot conclude, giving the required deference to the trial court, that admission of the evidence constituted an abuse of discretion. Further, given the numerous eyewitness accounts of the shooting, the limited significance of the evidence, a limiting instruction, and the jury’s focus during deliberations, as indicated in various notes to the trial court, defendant has failed to show that it is more probable than not that, assuming error, the error was outcome determinative.

Defendant next argues that the trial court violated her right to a fair trial when it questioned witnesses, and that trial counsel was ineffective by failing to object to this questioning. We disagree.

Throughout the course of the two-day trial in this case, the trial court regularly questioned witnesses at the conclusion of the parties’ questioning. It is this conduct of the trial court that defendant challenges on appeal.

A defendant in a criminal trial is entitled to expect a neutral and detached magistrate. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). Accordingly, while a trial court may question a witness in order to clarify testimony or elicit additional relevant information, MRE 614(b), the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994). A trial court may not assume the prosecutor’s role with advantages unavailable to the prosecution, such as the right to ask leading questions. *Id.* The principal limitation on a court’s discretion over matters of trial conduct is that its actions not pierce the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50;

¹ “Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith.” *VanderVliet*, *supra* at 65. “There is no rule limiting admissibility to the specific exceptions set forth in Rule 404(b).” *Id.*

549 NW2d 1 (1996). Moreover, it is not the number of questions asked by the court that is crucial to appellate review, but rather the content of the questions and their possible impact on the jury. *People v Smith*, 64 Mich App 263, 267; 235 NW2d 754 (1975). The test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case. *Cheeks, supra* at 480. This Court has stated that as long as the questions posed by the court would be appropriate if asked by either party and do not give the appearance of partiality, a trial court is free to ask questions of witnesses that assist in the search for truth. *Davis, supra* at 52.

Here, the trial court's questions cannot be deemed to have unjustifiably aroused suspicion in the mind of the jury concerning the witnesses' credibility, nor did they express partiality to defendant's detriment. The court's questions were clearly posed in a neutral manner. There is nothing in any of the questions cited by defendant that would suggest that the court believed one party over the other, or that the court preferred one party over the other. Rather, the court's questions were simple, straightforward, and to the point, and were completely devoid of language suggesting any bias. Further, the trial court's questions neither added to nor distorted the evidence previously introduced by the questioned witnesses.

The questions posed by the trial court throughout the trial were without question relevant to the issues in dispute and were intended by the court to clarify those issues. Additionally, defendant has failed to identify an instance where the trial court's questions were intimidating or argumentative in nature, or any occasion where the court's questions demonstrated prejudice, unfairness, or partiality on the court's part. Instead, we opine that, just as in *Davis, supra* at 52, while the witnesses' answers may have contradicted defendant's claims, the questions themselves did not unjustifiably arouse jury suspicions regarding any witness' credibility. The questions posed by the trial court would have been appropriate if asked by either party and did not give the appearance of partiality. Under these circumstances, we find that the trial court's questioning of the witnesses was appropriate and, therefore, did not pierce the veil of judicial impartiality. Accordingly, the trial court did not deprive defendant of her right to a fair trial when it questioned witnesses throughout the trial. Moreover, because the trial court did not err in questioning witnesses, trial counsel's failure to object to the court's questioning did not constitute ineffective assistance of counsel, because counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that the trial committed plain error that affected defendant's substantial rights when it gave a legally incorrect instruction regarding the law of self-defense, and that trial counsel was ineffective for failing to object to the instruction.

Initially, we find that defendant has waived for appeal the question of the trial court's alleged incorrect instruction of the jury, because defendant expressly approved of the instructions given by the court, and one who waives his rights under a rule, by intentionally relinquishing or abandoning that right, may not then seek appellate review of a claimed deprivation of that right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

As for defendant's ineffective assistance of counsel argument, we find no basis for reversal. The challenged instruction merely touched on self-defense for a brief moment and dealt chiefly with the jury's consideration of other acts evidence. The trial court was attempting

to alert the jury that the other acts evidence could only be considered for a limited purpose, i.e., to show a state of mind or intent contrary to self-defense. The court's reference to the term "purposefully," while arguably incorrect in the context used, was essentially benign. We highly doubt that the instruction created any confusion on the jury's part regarding the law of self-defense, where the court extensively and correctly instructed the jury on self-defense, and where the jury clearly understood that self-defense constituted a purposeful act as indicated in its notes to the court.²

This Court has held that even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). In the present case, the trial court instructed the jury extensively on the question of self-defense, including reading in its entirety CJI2d 7.15, which instruction concerns the use of deadly force in self-defense. Given the court's in-depth explanation of self-defense, the fact that defendant herself acknowledged the correctness of the jury instructions specifically and substantively addressing self-defense, and the extremely brief reference to self-defense in the challenged instruction, we find that the jury instructions as a whole fairly presented to the jury the issues tried and sufficiently protected defendant's rights. Moreover, as noted above, the jury clearly understood that self-defense is a purposeful act. Therefore, we conclude that, assuming counsel should have objected to the instruction at issue, the failure to object was not so prejudicial that there is a reasonable probability that but for counsel's error the trial outcome would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant's final argument on appeal is that the prosecution failed to introduce evidence sufficient to prove beyond a reasonable doubt that the victim's death did not occur under circumstances that mitigated the crime to manslaughter. Stated differently, defendant is essentially arguing that there was insufficient evidence to support a finding of malice and a lack of justification or excuse, and therefore, insufficient evidence to support a conviction for second-degree murder.

In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Moreover, circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460

² We are hesitant to even identify the instruction as being erroneous, where the trial court simply stated that the jury could consider the other acts evidence "to show that the defendant specifically meant to introduce this gun into this situation, that is, that the defendant acted purposefully, that is, not out of self-defense." While self-defense constitutes a purposeful act, the phraseology used by the trial court does not necessarily indicate that self-defense cannot be purposeful.

Mich 750, 757; 597 NW2d 130 (1999). Further, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To sustain a conviction for second-degree murder, the prosecution must prove four elements beyond a reasonable doubt: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998).

The prosecution introduced a substantial amount of evidence, which evidence suggested that the circumstances under which defendant killed the victim were not such as would mitigate the offense to manslaughter. Five witnesses for the prosecution testified that, after defendant fired the first shot, the victim fell to the ground, at which time defendant continued to fire shots into the victim's body while standing over her. Further, even defendant's sister, testifying on defendant's behalf, admitted that she could not say for certain if all of the shots were fired while the victim was still standing. Additionally, four witnesses testified that, while defendant's first shots were aimed at the victim's torso, her final shots were aimed at the victim's head. One witness advised the court that after firing shots into the torso, defendant took a step forward before firing at the victim's head, and the witness stated that defendant had continued to pull the gun's trigger even after the gun stopped actually firing. A police officer testified that, while the scene of the crime was contaminated at the time he arrived and, therefore, he could not be certain that objects on the porch had not been disturbed in some way, the positions in which he located the four bullet casings and one live bullet on the porch suggested that defendant was walking as she fired. Further, two witnesses stated that after defendant fired the first shot, the victim no longer was choking defendant or threatening her in any way.

Given that this Court must consider the evidence presented at trial in a light most favorable to the prosecution, must construe all evidentiary conflicts in favor of the prosecution, and should leave questions of credibility and intent to the trier of fact to resolve, the evidence was sufficient to support a finding that defendant acted with malice and without justification or excuse, and therefore, there was sufficient evidence to support a conviction for second-degree murder.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot