STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HORACE WALLACE,

Defendant-Appellant.

UNPUBLISHED
December 1, 2005

No. 256303
Wayne Circuit Court
LC No. 03-014017-01

Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of assault with intent to murder, MCL 750.83, and one count of felonious assault, MCL 750.82. Defendant was sentenced to two terms of life in prison for the assault with intent to murder convictions, and two to four years in prison for the felonious assault conviction. We affirm.

Defendant first argues that the trial court abused its discretion in allowing the prosecution to impeach his testimony with evidence of a previous conviction. We disagree.

We review for a clear abuse of discretion the trial court's decision to admit evidence of a defendant's other crimes, wrongs, or acts. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Under MRE 404(b)(1), such evidence is inadmissible "to prove the character of a person in order to show action in conformity therewith," although it may be admitted for a nonexhaustive list of other purposes. See *People v Sabin* (*After Remand*), 463 Mich 43, 55-59; 614 NW2d 888 (2000). MRE 609 limits admission of such evidence for impeachment of a defendant's general credibility, but not for impeachment or rebuttal of a defendant's specific trial testimony. *People v Taylor*, 422 Mich 407, 414-415; 373 NW2d 579 (1985). All evidence must be relevant under MRE 401, and its probative value must not be "substantially outweighed by the danger of unfair prejudice" under MRE 403.

Defendant extensively testified that he never threatened the victim, Arlene Murray, or the children in any way, on this occasion or on any occasion. He characterized Arlene as violent and himself as the victim of ongoing violence. Defendant specifically stated that he had never been aggressive and that he "would never do anything like" stabbing Arlene. The trial court allowed the prosecutor to ask defendant if he had "ever been convicted of assault with intent to do great bodily harm," to which defendant responded affirmatively. The evidence was relevant because it contradicted defendant's claim that he was never violent. MRE 401. The bland and neutral way

in which the evidence was presented raised no specter of unfair prejudice. MRE 403. The trial court's statement that the testimony was permissible to impeach defendant's general credibility and his testimony that he had a nonviolent character was incorrect, but the inquiry was admissible to impeach his testimony that he had never engaged in violence. *Taylor, supra* at 414-417. Because the trial court reached the right result, we need not disturb its ruling. *People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

Defendant next argues that the evidence was insufficient to support a finding of guilt beyond a reasonable doubt on the assault with intent to commit murder charges, and he apparently simultaneously argues that the verdict on those charges was against the great weight of the evidence. We disagree with the former, and we decline to address the latter. Defendant makes no overt argument concerning his felonious assault conviction.

"Criminal defendants do not need to take any special steps to preserve a challenge to the sufficiency of the evidence." *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). However, defendant did not argue that the verdict was against the great weight of the evidence in his motion for a new trial, so the issue is unpreserved. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Defendant's argument on appeal is so inadequate that we must also consider that issue abandoned. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Instead, we construe this as a claim solely of insufficient evidence, wherein we view the evidence, including circumstantial evidence and reasonable inferences, "in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

The elements of assault with intent to murder are "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). A specific intent to kill must be present. *People v Brown*, 267 Mich App 141, 148; 703 NW2d 230 (2005). The intent to kill may be proven by inference from any facts in evidence. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

There was sufficient evidence to allow a rational jury to conclude that defendant committed the crime of assault with intent to murder Arlene. Defendant assaulted Arlene when he took a knife and began stabbing her. The repeated stabbing in different areas of her body, the fact that prior to the assault he left her presence to retrieve the knife before returning, his verbal statement that he intended to kill her, and his aggressive and violent demeanor could all lead a rational factfinder to conclude that he specifically intended to kill her. Likewise, there was sufficient evidence that defendant committed the crime of assault with intent to commit murder Arlene's son Jermaine. Defendant hit and pushed Jermaine, he attempted to choke him, and he stabbed Jermaine in the chest and again in the back. Defendant also made the statement that he intended to kill the entire family. All of this could lead a rational fact finder to conclude that he specifically intended to kill Jermaine. There was sufficient evidence to support the jury's conclusion that defendant was guilty beyond a reasonable doubt of assault with intent to murder both Arlene and Jermaine.

Defendant next argues that the trial court erred in refusing to instruct the jury on felonious assault as a lesser included offense of assault with intent to murder. We disagree.

We review de novo whether an instruction is required for a necessarily included lesser offense. *People v Brown*, 267 Mich App 141, 145; 703 NW2d 230 (2005). A necessarily included lesser offense must be completely subsumed by the greater offense, so commission of the greater offense requires commission of all elements of the lesser offense. *People v Walls*, 265 Mich App 642, 645; 697 NW2d 535 (2005). Felonious assault, MCL 750.82, and assault with intent to commit murder, MCL 750.83, "share the common element of assault and are, therefore, of the same class and category." *Brown*, *supra* at 148. However, felonious assault requires possession of a dangerous weapon. *Walls*, *supra* at 646. Because this element is not found in assault with intent to commit murder, it is a cognate offense. *Id*., 645. The trial court properly refused to give a lesser included offense instruction on felonious assault. *Id*., 646.

Defendant argues that the trial court erred in refusing to give an instruction on mitigating circumstances. We disagree.

"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). Defendant sought to have the trial court read CJI2d 17.4, which instructs the jury that "If the assault took place under circumstances that would have reduced the charge to manslaughter if the person had died, the defendant is not guilty of assault with intent to commit murder." Voluntary manslaughter requires proof of such provocation that a reasonable person would lose control and proof that there was insufficient time for a reasonable person to regain that control. *People v Hawthorne*, 265 Mich App 47, 58; 692 NW2d 879 (2005). However, the only provocation was Arlene's refusal to give defendant five dollars, at which point defendant retrieved a knife and made the initial attack. Even if he acted out of passion, we do not find a refusal to hand over five dollars sufficient provocation. The requested instruction on mitigating circumstances was not supported by evidence of adequate provocation, so the trial court's refusal to give it was appropriate.

Affirmed.

/s/ Alton T. Davis
/s/ E. Thomas Fitzgerald

I concur in result only.

/s/ Jessica R. Cooper