

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIP C. SCHMIDT,

Defendant-Appellant.

UNPUBLISHED

December 23, 2008

No. 280127

Macomb Circuit Court

LC No. 2007-001571-FC

Before: Borrello, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to murder, MCL 750.83, and domestic violence, second offense, MCL 750.813. He was sentenced to 126 to 240 months' imprisonment for the assault with intent to murder conviction and to a 138 day jail term for the domestic violence, second offense, conviction. For the reasons set forth in this opinion, we affirm.

Testimony elicited during trial indicated that on March 9, 2007, defendant, his girlfriend Amanda Rekar, and defendant's landlord and friend, Billy Keen were consuming a substantial amount of alcohol and were smoking crack cocaine. Around 10:00 in the evening, defendant and Rekar got into a verbal altercation in the bathroom over Rekar's alleged infidelity. After being summoned to the scene by Rekar's scream for help, Keen testified that defendant was standing over Rekar and motioning as if he were punching her. According to Keen, Rekar was screaming, "I'm being stabbed. I've been stabbed three times," however Keen did not observe any injuries or blood at the scene. According to Keen, while Keen was facing Rekar on the floor, defendant returned with a steak knife and approached Keen from behind. Defendant grabbed Keen by the top of the hair and cut his neck as defendant "ran the knife from ear to ear," starting at Keen's left ear. Defendant stated, "it's time to die you son of a bitch." Keen felt like his head was being sawed off, causing him to think that he was going to die. Keen threw defendant off. Keen went back to look at Rekar who stated, "I love you for what you are doing for me." In the mean time, defendant found a second steak knife from the cutting block in the kitchen, returned to the bathroom, and stabbed Keen with "real good" force in the abdomen.

Defendant and Rekar denied most of Keen's version of events at trial, though in a statement to detective Mark Christian about the incident, defendant indicated that he was angry, not only for suspecting Rekar of infidelity, but because he felt Keen was sneaking extra cocaine to Rekar behind his back, even though defendant had "banked-rolled" the purchase of the crack

cocaine. Defendant claimed that after he began the argument with Rekar, he grabbed a knife from the kitchen before pushing Rekar into the bathroom. Defendant stated to the detective that he had made a type of cutting or stabbing motion but would never actually hurt Rekar. Further, defendant claimed that after Keen intervened, defendant obtained another steak knife. Defendant approached Keen as he turned to his right to face defendant. Defendant cut Keen's neck in a "front to back motion" because defendant feared Keen was armed with the first broken knife. However, defendant admitted that Keen's hands were empty when defendant caused the injury. Defendant noted that at this point he "realized he had gone too far."

Rekar, who was pregnant with defendant's child at the time of trial, testified that at no time during the argument with defendant was she assaulted, did she call for Keen, or was she ever on the bathroom floor. Although Rekar claimed there were no marks on her on the night of March 9, 2007, photographs entered into evidence taken around 2:00 a.m. on March 10, 2007, show a cut near Rekar's right eye. According to Christian, the mark was consistent with "either an object striking her face or her face striking an object."

Defendant's first argument on appeal is that he was deprived of a fair trial because other acts evidence was improperly admitted. Defendant argues that evidence of two prior convictions of domestic violence was improperly admitted.

"Generally, all relevant evidence is admissible, and irrelevant evidence is not." *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002); MRE 402. "MRE 401 defines relevant evidence as evidence having 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." *People v Sabin (After Remand)*, 463 Mich 43, 56-57; 614 NW2d 888 (2000) (internal quotation and citation omitted). "Relevant evidence 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *People v Fletcher*, 260 Mich App 531, 553; 679 NW2d 127 (2004), quoting MRE 403.

"[T]he Legislature now allows trial courts to admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403." *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007); MCL 768.27b. Other acts evidence pertaining to domestic violence is governed by MCL 768.27b, which provides, in part:

in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rules of evidence 403.

Thus, MCL 768.27b allows what previously would have been inadmissible propensity evidence in domestic violence cases. *Pattison*, *supra* at 619.¹ Additionally, we note in *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999), our Supreme Court stated:

The decision whether to admit evidence is in the trial court's discretion; this Court only reverses such decisions where there is an abuse of discretion. However, decisions regarding the admission of evidence frequently involve preliminary questions of law This Court reviews questions of law de novo Accordingly, when such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id.* at 488. (internal citations omitted).

The prosecution used the other acts evidence to bolster the plausibility that defendant assaulted Rekar, contrary to testimony put forth by defendant and Rekar. Evidence was used to show that defendant has a propensity during arguments, to assault females with whom he lives and while he is in an intoxicated state. In order to show defendant's tendency to assault female cohabitants when angry and intoxicated, Kimberly Miljan testified that defendant was convicted of domestic violence in 2000 and 2001. In both instances, defendant assaulted Miljan during an argument while defendant was drunk. The prosecution asserts, and we agree that the other acts evidence pertaining to prior convictions for domestic violence were "relevant to the purposes" of the present domestic violence charge.

In addition, the two prior convictions of domestic violence were more probative than prejudicial, thus satisfying MRE 403. "All evidence offered by the parties is 'prejudicial' to some extent It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified 450 Mich 1212 (1995) (emphasis supplied). Here, the other acts evidence is probative in that it contributes to prove the propensity of defendant to assault female cohabitants when intoxicated and in an argument. Defendant struck Miljan on two separate occasions while living in the same home, intoxicated and involved in an argument. The admitted other acts evidence was not unfairly gruesome, graphic or inflammatory. Weighed against the probative value, the evidence was not unfairly prejudicial.

The other acts evidence of defendant's prior domestic violence convictions was relevant to the charge of domestic violence. The contextual similarities of the domestic violence and the present circumstances weigh heavily on the side of probative value rather than unfair prejudice. Therefore, the trial court did not commit an abuse of discretion where it admitted the evidence under MCL 768.27b.² Additionally, "[E]vidence of similar misconduct is logically relevant to

¹ We note that we reach an opposite conclusion than this Court in *Pattison*, *supra*, by allowing admission of the evidence. We do so based on the fact that distinct from the facts presented to this Court in *Pattison*, the factual similarities between the charged and uncharged acts are overwhelming and the purpose of the testimony is specifically for proving acts of domestic violence as contemplated by 768.27b.

² We note that defendant argues a theory based solely upon the inadmissibility of other acts evidence under MRE 404(b). However, the other acts evidence was properly admitted under
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show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.” *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000).

Even assuming the admission of other acts evidence was error, the admission of the evidence was harmless. “[A] preserved, nonconstitutional error is not a ground for reversal unless ‘after an examination of the entire cause, it shall affirmatively appear’ that it is more probable than not that the error was outcome determinative.” *Lukity, supra* at 495-496, quoting MCL 769.26.

Here, the evidence was more than sufficient for the jury to find guilt without the other acts evidence. Testimony pertaining to the act of cutting Billy Keen’s throat provides ample proof beyond a reasonable doubt that defendant possessed the required intent to commit assault with intent to murder absent the other acts evidence. While cutting two inches deep in Keen’s neck with a steak knife exposing veins and arteries, defendant exclaimed, “it’s time to die you son of a bitch.” Similarly, Rekar and defendant’s statements directly following the incident allowed an inference that defendant committed domestic violence, even without other acts evidence. Rekar told both the 911 operator and the responding police officers that defendant attempted to stab her. Likewise, in response to questioning about forcing Rekar in the bathroom and attempting to stab her, defendant admitted to police officers that he made a cutting or stabbing motion at Rekar. In light of this, there was ample evidence to find guilt beyond a reasonable doubt. Therefore, the inclusion of other acts evidence was not outcome determinative.

Next, Defendant argues on appeal that the evidence is insufficient to sustain a conviction for assault with intent to commit murder. A claim of insufficiency of the evidence invokes a defendant’s constitutional right to due process of law, which this Court reviews de novo on appeal. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant argues on appeal there was insufficient evidence to prove beyond a reasonable doubt that he possessed the specific intent required for the charge of assault with intent to murder. “The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); MCL 753.83. “The intent to kill may be proved by inference from any facts in evidence. Because of the difficulty of proving an

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MCL 768.27b, which renders a MRE 404(b) analysis unnecessary. *Pattison, supra* at 615.

actor's state of mind, minimal circumstantial evidence is sufficient." *McRunels, supra* at 181. Circumstantial evidence of specific intent to murder can be shown by:

the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made. [*People v Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985) (quotation and citation omitted).]

Taken in a light most favorable to the prosecution, a reasonable juror could infer that defendant held the requisite specific intent to murder. The nature of the assault is shown where defendant pulled back Keen's head by the hair and cut his throat from ear to ear. While cutting Keen's throat with a steak knife defendant stated, "it's time to die you son of a bitch." The cut in Keen's neck was several inches deep leaving exposed veins and arteries. Further evidence showed defendant stabbed Keen in the side, which, without medical care, could have caused excessive bleeding and possibly death. Also, defendant was in a state of anger after arguing about infidelity with Rekar. In addition to anger, defendant's disposition was affected by alcohol consumption and the use of crack cocaine. Also, defendant left the scene before the police arrived and attempted to evade police in a motel. Leaving the scene of the crime supports an inference of consciousness of guilt. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). Moreover, the testimony as to the nature of the attack, statements made by defendant and the severity of the wounds supports an inference that defendant intended to murder Keen. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential element of intent was proved beyond a reasonable doubt.

Defendant argues that he acted in self-defense. In all claims of self-defense, an actor is excused where:

under all the circumstances, the defendant honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. As part and parcel of the "necessity" requirement that inheres in every claim of lawful self-defense, evidence that a defendant could have safely avoided using deadly force is normally relevant in determining whether it was *reasonably necessary* for him to kill his assailant. However, (1) one who is without fault is *never* obligated to retreat from a sudden, violent attack or to retreat when to do so would be unsafe, and in such circumstances, the presence of an avenue of retreat cannot be a factor in determining necessity; (2) our law imposes an affirmative "duty to retreat" only upon one who is at fault in voluntarily participating in mutual nondeadly combat; and (3) the "castle doctrine" permits one who is within his dwelling to exercise deadly force even if an avenue of safe retreat is available, as long as it is otherwise reasonably necessary to exercise deadly force. [*People v Riddle*, 467 Mich 116, 142; 649 NW2d 30 (2002) (emphasis supplied).]

In the present case, defendant did not act out of necessity. Even assuming defendant perceived a danger of death or great bodily harm when Keen attacked defendant with a steak

knife after smoking crack cocaine, defendant could have safely avoided the use of force. Defendant testified that he left Keen to obtain a steak knife from the kitchen before proceeding back to the bathroom where the altercation ensued. Under these circumstances, it was not reasonably necessary for defendant to arm himself and reenter the bathroom. Therefore defendant's argument that he acted in self-defense fails.

Affirmed.

/s/ Stephen L. Borrello
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher