STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2012
v	No. 302794 Oakland Circuit Court
CAMERON JAMES HUBEL, Defendant-Appellant.	LC No. 2009-227618-FH

Before: RONAYNE KRAUSE, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Defendant, Cameron James Hubel, appeals as of right his conviction for felonious assault, MCL 750.82. Defendant was initially sentenced to 270 days in jail, but his sentence was increased to 365 days in jail following resentencing. We affirm.

I. FACTS

This case stems from a dispute in an apartment building that ultimately resulted in the victim being stabbed in the stomach by defendant.

On July 2, 2009, the morning of the stabbing, the victim lived with his wife and son in apartment 204 at "Cass Lake Shores Apartment." Defendant moved into apartment 304, the apartment directly above the victim's apartment, sometime in June of 2009 with his brother Christopher Dwayne Hubel. As soon as defendant moved in, the victim had a problem with excessive noise from apartment 304, prompting the victim to speak with Christopher several times, but without successfully convincing defendant and Christopher to cease making excessive noise. Having no success in these discussions, prior to the incident on July 2, 2009, the victim called the police on multiple occasions to complain about the noise coming from apartment 304.

On July 1, 2009, at approximately 11:00 p.m., the victim was in his apartment and called the police due to significant noise coming from apartment. By the time the police arrived, at approximately 11:45 p.m., defendant and the other occupants of apartment 304 had turned all the lights off and refused to answer the door for the police. Thirty minutes after the police left, the noise started again and was even louder than it had been initially.

After the noise continued for several hours, the victim went back up to apartment 304 in the early morning hours of July 2, 2009. The victim hoped to keep the door to defendant's

apartment open until the police arrived because the police informed the victim there was nothing they could do unless the door was open. The victim banged loudly on the door of apartment 304, but defendant and his friends refused to open the door. In the apartment with defendant were his friend Justin Ritchie, Christopher, and a woman named Melody Haas. After pounding on the door for less than a minute, the victim returned to his apartment.

Sometime later, at approximately 3:30 a.m., the victim heard the door to apartment 304 open and he went back upstairs. The victim entered the apartment and while inside spoke to Haas who apologized to the victim for the noise. The victim explained that all he wanted was for defendant and his friends to keep the noise down. The victim acknowledged that he used vulgar language in making this request. According to the victim's testimony, he was standing in the doorway of apartment 304 when Christopher came out and told the victim to leave or Christopher would call the police. When the victim told Christopher to go ahead and call the police, Christopher tried to physically move the victim from the doorway. As Christopher tried to push the victim out into the hallway, the victim tried to pull Christopher out of the apartment with him, so that he would be outside when the police arrived. The victim was not armed with any kind of weapon and testified at trial that he did not threaten to kill anyone. At this point, the police were already on the way because the victim had called them before returning to apartment 304. During this struggle, Christopher and the victim began to strike each other. Christopher forcefully pushed the victim and the victim responded by punching Christopher in the lip. After a short time fighting with Christopher, defendant stabbed the victim in the lower left abdomen.

Michael Uyttendaele was staying with a friend across the hallway from apartment 304, in apartment 303, on the night of the stabbing. Uyttendaele did not know defendant or the victim but confirmed that defendant and his friends were extremely loud that night. Uyttendaele, looking through the peephole of the door of apartment 303, saw the victim arguing with the individuals from apartment 304. At first, Uyttendaele said the victim and the individuals from apartment 304 were only arguing. Uyttendaele saw someone from apartment 304, shove the victim. This resulted in a physical altercation. Uyttendaele said the victim was not the one to initiate the physical violence. After the fight started, the victim and Christopher were exchanging punches, when all of a sudden the victim screamed, "I just got stabbed." Uyttendaele confirmed that the victim was shirtless and weaponless when this occurred. Uyttendaele did not hear the victim make any kind of violent threat before he was stabbed. Uyttendaele also never saw the victim inside of defendant's apartment, but acknowledged that by the time he started watching, the victim was already talking to someone from apartment 304 and that he did not know what occurred before he started watching.

Almost immediately after the victim was stabbed, defendant fled the apartment, returning a short time later after throwing the knife he used into a nearby lake.

Approximately five minutes after the victim was stabbed, the police arrived. Officer Gulda, who had previously been dispatched to the location, was one of the officers to respond, and she arrived at around 3:35 a.m. When Gulda arrived, the victim did not have a shirt on and was holding a towel over his stomach. The victim was visibly bleeding. A short time after Gulda arrived, Gulda was allowed to enter apartment 304 and spoke with Christopher, defendant, and Ritchie. After a short discussion, defendant admitted that he stabbed the victim, but claimed he did so in self-defense. When Gulda asked where the knife was, defendant indicated he had

thrown it in a nearby lake. Gulda also inquired regarding whether Christopher needed treatment for any injuries, but Christopher declined treatment. While Christopher complained he thought he had a broken finger, Gulda did not see anything visibly wrong with Christopher's hand. The victim was sent by ambulance to the hospital and had surgery the same day.

Gulda brought defendant to the police station, where defendant was interviewed by Detective Rick Lemos. Lemos read defendant his *Miranda*[1] rights and defendant agreed to waive those rights and speak with Lemos. During the interview, defendant admitted that he stabbed the victim. Defendant, during the course of the interview, used racial slurs in referencing the victim, who is an African-American.

At trial, defendant presented a somewhat different version of events. Defendant, Christopher, and Ritchie's version of events is largely the same as that presented by the prosecution, but differs beginning with the victim coming upstairs for the second time at approximately 3:30 a.m. According to defendant, the victim was pounding at the door and said he was going to "beat the hell" out of the occupants of apartment 304. Haas went to open the door to apologize to the victim, but the victim bowled through the door and ran into apartment 304. Ritchie claimed the victim was screaming and "yelling every curse word in the book." While Ritchie said the victim was screaming at defendant, Ritchie acknowledged the victim did not put his hands on defendant. Defendant acknowledged that the victim's anger was focused on the excessive noise. Christopher then came into the living room and told the victim to leave the apartment. The victim refused to leave and Christopher started pushing the victim.

Shortly after this, the physical dispute started and the victim punched Christopher in the face. Following this, defendant and Christopher pushed the victim towards the doorway with the victim pushing against them trying to remain in the apartment. Defendant and Christopher succeeded in pushing the victim to the doorway, but were having trouble getting him out of the apartment. As defendant and Christopher tried to close the door, the victim grabbed Christopher's hand in a painful fashion, causing Christopher to scream loudly. Defendant testified that he only knew the victim had his brother by the hand and that Christopher screamed. Christopher testified that defendant had his hand and was bending two of his fingers in a painful way. In response, defendant stabbed the victim. No one disputed that defendant did not have a weapon, and defendant admitted that the fight was essentially a fist fight before he stabbed the victim. The jury found defendant guilty of felonious assault and this appeal ensued.

II. LAW AND ANALYSIS

Defendant first argues he was entitled to an instruction regarding a rebuttable presumption that he acted with the proper state of mind for self-defense or defense of others in accordance with MCL 780.951. A preserved claim of instructional error relating to self-defense instructions is a nonconstitutional error that we review to determine if it is "more probable than not that the error in question was outcome determinative. An error is deemed to have been

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

outcome determinative if it undermined the reliability of the verdict." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000) (citation omitted; quotation omitted).

We review a claim of instructional error de novo. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). Challenges to jury instructions are considered "in their entirety to determine whether the trial court committed error requiring reversal." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). However, even imperfect jury instructions "do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *Id.* The "trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

While the jury was not instructed with respect to a rebuttable presumption under MCL 780.951, the jury was instructed at length regarding self-defense:

> The defendant claims that he acted in lawful self-defense. A person has the right to use force or even take a life to defend himself under certain circumstances. If a person acts in lawful self-defense, that person's actions are justified and he is not guilty of assault with a dangerous weapon.
>
> You should consider all the evidence and use the following rules to decide whether the defendant acted in lawful self-defense.
>
> Remember to judge the defendant's conduct according to how the circumstances appeared to him at the time he acted.
>
> First, at the time he acted the defendant must have honestly and reasonably believed that he was in danger of being seriously injured. If the defendant's belief was honest and reasonable, he could act immediately to defend himself, even if it turned out later that he was wrong about how much danger he was in. In deciding if the defendant's belief was honest and reasonable, you should consider all the circumstances as they appeared to the defendant at the time.
>
> Second, a person may not kill or seriously injure another person just to protect himself against what seems like a threat of only minor injury. The defendant must have been afraid of serious physical injury. When you decide if the defendant was afraid of one or more of these, you should consider all the circumstances: The condition of the people involved, including their relative strength; whether the other person was armed with a dangerous weapon or had some other means of injuring the defendant; the nature of the other person's attack or threat, whether the defendant knew about any previous violent acts or threats made by the other person.
>
> Third, that at the time he acted, the defendant must have honestly and reasonably believed that what he did was immediately necessary. Under the law,

a person may only use as much force as he thinks is necessary at the time to protect himself. When you decide whether the amount of force used seemed to be necessary, you may consider whether the defendant knew about any other ways of protecting himself, but you may also consider how the excitement of the moment affected the choice the defendant made.

The defendant does not have to prove he acted in self-defense. Instead, the prosecutor must prove beyond a reasonable doubt that defendant did not act in self-defense.

The jury was also instructed regarding whether defendant acted in defense of others:

The defendant claims he acted lawfully to defend Christopher Hubel. A person has the right to use force or even take a life to defend someone else under certain circumstances. If a person acts in lawful defense of another, his actions are justified and he is not guilty of assault with a dangerous weapon.

You should consider all the evidence and use the following rules to decide whether the defendant acted in lawful defense of another. Remember to judge the defendant's conduct according to how the circumstances appeared to him at the time he acted.

First, at the time he acted the defendant must not have been engaged in the commission of a crime.

Second, when he acted, the defendant must have honestly and reasonably believed that Christopher Hubel was in danger of being seriously injured. If his belief was honest and reasonable, he could act at once to defend Christopher Hubel, even if it turns out later that the defendant was wrong about how much danger Christopher Hubel was in.

Third, if the defendant was only afraid that Christopher Hubel would receive a minor injury, then he was not justified in seriously injuring the attacker. The defendant must have been afraid that Christopher Hubel would be serious [sic] injured. When you decide if he was so afraid, you should consider all the circumstances: The conditions of the people involved, including their relative strength; whether the other person was armed with a dangerous weapon or had some means of injuring Christopher Hubel; the nature of the other person's attack or threat; whether the defendant knew about any previous violent acts or threats made by the attacker.

Fourth, at the time he acted the defendant must have honestly and reasonably believed that what he did was immediately necessary. Under the law a person may only use as much force as he thinks is needed at the time to protect the other person. When you decide whether the force used appeared to be necessary, you may consider whether the defendant knew about any other ways of protecting Christopher Hubel, but you may also consider how the excitement of the moment affected the choice the defendant made.

> The defendant does not have to prove that he acted in defense of Christopher Hubel. Instead, the prosecutor must prove beyond a reasonable doubt that the defendant did not act in defense of Christopher Hubel.
>
> A person can use deadly force in self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed he needed to use deadly force in self-defense.
>
> However, a person is never required to retreat if attacked in his own home, nor if the person reasonably believes that an attacker is about to use a deadly weapon, nor if the person is subject to a sudden, fierce, violent attack.
>
> Further, a person is not required to retreat if the person has not or is not engaged in the commission of a crime at the time the deadly force is used and has a legal right to be where the person is at that time and has an honest and reasonable belief that the use of deadly force is necessary to prevent imminent great bodily harm of the person or another.

The above instructions are an accurate reflection of the law. Generally, an individual may only use deadly force if:

> he 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. The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force. [*People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002).]

A defendant must have an honest and reasonable belief there was a danger of "death or great bodily harm" to himself or another. *Id.*; see also *People v Kurr*, 253 Mich App 317, 321; 654 NW2d 651 (2002). It is well established that, "an act committed in self-defense but with excessive force . . . does not meet the elements of lawful self-defense," *People v Heflin*, 434 Mich 482, 509; 456 NW2d 10 (1990), and that "[a] defendant is not entitled to use any more force than is necessary to defend himself," *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Further, once a defendant introduces evidence of self-defense, "the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 86; 777 NW2d 483 (2009) (quotation omitted); see also *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005).

Defendant argues he was entitled to a modified version of CJI2d 7.16a, based on MCL 780.951, which allows for a rebuttable presumption that a defendant acted with an honest and reasonable fear of great bodily harm or death if both of the following conditions are met:

> (a) The individual against whom deadly force or force other than deadly force is used is in the process of breaking and entering a dwelling or business premises or committing home invasion or has broken and entered a dwelling or business premises or committed home invasion and is still present in the dwelling

or business premises, or is unlawfully attempting to remove another individual from a dwelling, business premises, or occupied vehicle against his or her will.

(b) The individual using deadly force or force other than deadly force honestly and reasonably believes that the individual is engaging in conduct described in subdivision (a). [MCL 780.951(1)(a)-(b).]

This presumption is expressly applicable to circumstances under the Self-Defense Act (SDA), MCL 780.971, *et seq.* Moreover, there was some evidence that demonstrated the victim broke into defendant's residence and would not leave. The victim's own testimony supported that he was trying to unlawfully remove Christopher from the residence. "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." *Riddle*, 467 Mich at 124. Consequently, the trial court abused its discretion in denying defendant an instruction regarding a rebuttable presumption that he was acting with "an honest and reasonable belief that imminent death . . . or great bodily harm to himself or herself or another individual" if the jury found the conditions of MCL 780.951(1)(a) and (b) applied. However, reversal is not warranted unless defendant "persuade[s] the reviewing court that it is more probable than not that the error in question was outcome determinative." *Elston*, 462 Mich at 766. Consequently, we examine whether the error was outcome determinative.

It is questionable what effect defendant's proposed instruction regarding a rebuttable presumption could have had relative to the outcome of the trial. The jury was instructed that the prosecutor had to prove defendant did not act in self-defense beyond a reasonable doubt, a much higher standard of proof than that required of a rebuttable presumption. A rebuttable presumption is one that may be overcome if the evidence demonstrates that the presumption is incorrect.[2] See *People v Crawford*, 115 Mich App 516, 520; 321 NW2d 717 (1982). While the jury was not instructed regarding a rebuttable presumption, they were instructed that, "[t]he defendant does not have to prove he acted in self-defense. Instead, the prosecutor must prove beyond a reasonable doubt that defendant did not act in self-defense." Here, a substantially similar instruction was given with respect to defense of others.

In *People v Stockwell*, 68 Mich App 290, 293; 242 NW2d 559 (1976), this Court determined that where the defendant claimed he was entitled to a rebuttable presumption of insanity, but the trial court only instructed that the prosecution needed to prove the defendant was sane beyond a reasonable doubt, the instruction was "more favorable to defendant than the ones he requested." The same is true here. Defendant claims he was entitled to an instruction that there was a rebuttable presumption he acted with the proper state of mind for self-defense or

[2] Black's Law Dictionary defines a "rebuttable presumption" as: "An inference drawn from certain facts that establishes a prima facie case, which may be overcome by the introduction of contrary evidence." Black's Law Dictionary (9th ed). [MCL 780.951 does not define the phrase "rebuttable presumption," therefore, this Court may consult the dictionary to "discern the meaning of statutorily undefined terms." *People v Schultz*, 246 Mich App 695, 703; 635 NW2d 491 (2001).]

defense of others, but the jury was instructed that the prosecutor needed to prove defendant did not act in self-defense or defense of others beyond a reasonable doubt. Given the instructions, it is difficult to see how defendant was prejudiced. See *Stockwell*, 68 Mich App at 293. "Generally, jurors are presumed to follow the court's instructions." *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002); see also *People v Mann*, 288 Mich App 114, 118; 792 NW2d 53 (2010). The jury found that the prosecutor proved beyond a reasonable doubt that defendant was not acting in self-defense or defense of others and there is nothing to suggest the outcome would have changed if a rebuttable presumption instruction was given. Given that the self-defense instructions were proper except for the missing instruction regarding a rebuttable presumption, defendant cannot demonstrate it was "more probable than not that the error in question was outcome determinative." *Elston*, 462 Mich at 766. Accordingly, defendant is not entitled to a reversal of his conviction on this issue.

Defendant next argues the trial court should have excluded racist statements he made during an interview with Detective Lemos that occurred a few hours after the stabbing. The challenged testimony is included in the following exchange quoted in defendant's brief on appeal:

> DEFENDANT: Are you serious?
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> LEMOS: Yep.
>
> DEFENDANT: Why is the system so messed up dude, its [sic] fucking ridiculous.
>
> LEMOS: Well because of the seriousness I mean there's a guy in the hospital in surgery.
>
> DEFENDANT: He fucking deserved it dude, he tried kicking our fucking door down. This is fucking dumb dude. Fuck this. Take me to fucking jail then. This is fucking ridiculous I didn't do anything, just trying to help my brother. This is fucking dumb. Mother fucker is trying to kick our door down, storms in there punches my brother in the mouth, like how is that not self-defense?
>
> LEMOS: That's why.
>
> DEFENDANT: It's fucking dumb.
>
> LEMOS: It's going to the prosecutor's office, okay? The prosecutor will decide what to write, okay?
>
> DEFENDANT: Well it's fucking dumb, this is fucking stupid as fuck.
>
> LEMOS: In the mean time.
>
> DEFENDANT: I didn't do anything wrong. I was fucking protecting me and my fucking brother from getting beat up by some fucking niggar [sic].
>
> LEMOS: Well that's why the prosecutor is gonna [sic] review this.

DEFENDANT: This is fucking stupid man. The system is fucking dumb.

LEMOS: Well that's the system, no one said it's perfect.

DEFENDANT: You're taking me to jail for protecting me and my fucking brother cause [sic] some dumb ass is fucking acting crazy, trying to kick our fucking door down.

LEMOS: Well, why didn't you try and help your brother push him out of the apartment instead of stabbing him?

DEFENDANT: Because I don't fucking know him, sorry I thought I should have punched him in the face or something, I'm sorry I didn't think right. Cool take me to jail I guess I fucking deserve it cause [of] some fucking dumb niggar [sic]. That's why I fucking hate niggars [sic].

LEMOS: I'm not saying you're totally wrong, but there's four of you in the apartment, you guys could of [sic] helped your brother push him out, alright?

DEFENDANT: The guy's way bigger than me. I think I was complete self defense [sic]. Have you seen this guy? He's bigger then [sic] you.

LEMOS: No I haven't.

DEFENDANT: Well he's pretty frickin [sic] beefy, he's not like he's [sic] some scrawny little black guy.

LEMOS: Well then, that's why it's going to the prosecutors [sic] office. I can't make the decision.

DEFENDANT: Why am I going to jail? They even told me I wasn't going to jail tonight.

LEMOS: Who told you that?

DEFENDANT: The cops told me that, they told me I would not go to jail tonight. They said they we're [sic] gonna [sic] take me in to get fingerprints since I don't have an ID on me, and then they're gonna [sic] take me to jail.

LEMOS: Well that wasn't up to them to decide that.

DEFENDANT: I've been completely honest this whole thing [sic]. I've been patient, I've been completely honest to all the cops, everyone involved in this and I'm still going to jail.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). However, where the determination "involves a preliminary question of law" such as whether a court rule precludes the admission of

the evidence, review of the trial court's application of the rule is de novo. *Id.* A preserved claim of evidentiary error is a nonconstitutional error that we review to determine if it is "more probable than not that the error in question was outcome determinative. An error is deemed to have been outcome determinative if it undermined the reliability of the verdict." *Elston*, 462 Mich at 766 (citation omitted; quotation omitted).

Defendant claims the racist remarks should have been excluded from the interview played for the jury because the comments were irrelevant and, even if they were relevant, the probative value of the remarks was "substantially outweighed by the danger of unfair prejudice." MRE 403. Evidence is "relevant" where 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. "A motive is the inducement for doing some act; it gives birth to a purpose." *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000) (quotation omitted). A claim of self-defense or defense of others with respect to the use of deadly force focuses on whether defendant has an honest and reasonable belief that defendant or another is in "imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force." *Riddle*, 467 Mich at 119. A defendant's "state of mind at the time of the act is material because it is an important element in determining his justification" of self-defense. *People v Harris*, 458 Mich 310, 316; 583 NW2d 680 (1998). We acknowledge that "racial or ethnic remarks" should not be interjected into a trial "where potentially inflammatory references are intentionally injected, *with no apparent justification except to arouse prejudice*." *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995) (emphasis added).

In this case, we find the remarks were justifiably admitted because defendant's racist comments following the stabbing went to his state of mind relating to motive as to the particular victim in this case. A defendant's statement of "ill feeling" towards the victim may be relevant as to motive. *People v Cipriano*, 238 Mich 332, 336; 213 NW 104 (1927). The challenged evidence makes it more likely that defendant was acting out of dislike for the victim and less likely he was properly acting in self-defense or defense of others. This stands in contrast to the circumstances we addressed in *People v Williams*, 143 Mich App 574, 586; 374 NW2d 158 (1985), wherein we determined that it was improper to solicit evidence that the defendant had a general dislike of African-Americans. Unlike *Williams*, where there was no connection between the defendant's general comments on race and the crime committed, in this case, defendant used racial slurs specifically referencing the victim mere hours after stabbing the victim. See *id.* We find this was sufficient to establish a "valid connection" between the racist comments and the stabbing. See *id*. at 587.

We also find that the probative value of the challenged evidence was not substantially outweighed by the danger of unfair prejudice. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). While we acknowledge there was some danger of the jury giving the evidence undue weight, this danger did not substantially outweigh the significant probative value of the evidence. Further, "[a] determination of the prejudicial effect of evidence is best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony by the trial judge." *P v Gonzalez*, 256 Mich App at 212, 218; 663 NW2d 499 (2003). The trial court did not abuse its discretion in

admitting the challenged evidence. *McDaniel*, 469 Mich at 412. Accordingly, we assign no error.

Defendant's final argument is that the trial court erred in excluding evidence relating to the victim domestically abusing his son. Defendant contends the evidence was admissible under MRE 404(b) or MRE 405. A trial court's decision to admit evidence is generally reviewed for "an abuse of discretion." *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010) (quotation omitted). Further, with respect to defendant's preserved claim of nonconstitutional error regarding MRE 404(b), we review to determine if it is "more probable than not that the error in question was outcome determinative. An error is deemed to have been outcome determinative if it undermined the reliability of the verdict." *Elston*, 462 Mich at 766 (citation omitted; quotation omitted). With respect to defendant's unpreserved argument regarding MRE 405, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). To demonstrate plain error, a defendant must show: (1) error occurred; (2) the error was plain; and (3) the plain error affected his substantial rights. *Id.* at 763. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* The burden is on defendant to demonstrate prejudice. *Id.*

Defendant claimed the challenged evidence was proper to show that the victim reacted violently to disobedient youths. Generally, evidence of prior bad acts "is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). However, evidence of prior bad acts or crimes may be admissible to show "motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." MRE 404(b)(2). In order for evidence to be admitted under 404(b), the party seeking admission of the evidence must first establish the evidence "is relevant to a proper purpose under the nonexclusive list in MRE 404(b)(1) or is otherwise probative of a fact other than" the individual's "character or criminal propensity." *Mardlin*, 487 Mich at 615; see also *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995) (noting that a criminal defendant may introduce evidence under MRE 404(b) relating to prior bad acts of the victim). We find that the evidence defendant sought to admit was irrelevant and plainly was an attempt to demonstrate the victim's propensity for violence, which is inappropriate under MRE 404(b). *People v Hoffman*, 225 Mich App 103, 107-108; 570 NW2d 146 (1997). There was no proper inference that could be drawn from the evidence of the victim's act of domestic violence against his son. The only material issue was whether defendant acted properly in self-defense or defense of others, an issue the victim's conduct with his son has no bearing on. See *id.* at 108. The trial court did not abuse its discretion in excluding this evidence. We find no error.

With respect to the unpreserved argument that the evidence of the victim's violent conduct was admissible under MRE 405, evidence of specific instances of conduct may be admissible under MRE 405(b), "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct." In cases involving self-defense, the victim's specific acts of violence may be admissible where defendant demonstrates he knew of the violent act *before* the confrontation with the victim. See *People v Cooper*, 73 Mich App 660, 663; 252 NW2d 564 (1977). Such evidence is admissible because prior acts of violence known to a defendant could

have some bearing on defendant's "state of mind" for purposes of self-defense or defense of others. *Id.* at 664 (quotation omitted).

In the present case, defendant has failed to demonstrate – or even allege – that he actually knew of the violent acts before he stabbed the victim. In fact, it appears from the record that the violent act relied on – the victim's domestic abuse of his son – may have actually occurred *after* the stabbing, making it impossible for defendant to have known about the violent act at the time of the stabbing. The burden is on defendant to demonstrate plain error. Defendant has failed to do so because defendant has not shown he knew of the victim's violent act before he stabbed the victim. See *Carines*, 460 Mich at 763.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Henry William Saad
/s/ Stephen L. Borrello