STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERVIN TYRONE WINTERS, a/k/a E.T.,

Defendant-Appellant.

UNPUBLISHED
December 13, 1996

No. 188143
LC No. 94-026195-FC

Before: Fitzgerald, P.J., and Cavanagh and N.J. Lambros,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, carrying a concealed weapon, MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Subsequently, defendant pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to life imprisonment without parole for the murder conviction, three to seven-and-a-half years' imprisonment for the concealed weapon conviction, and two years' consecutive imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I

Defendant first claims that the trial court abused its discretion by granting the jury's request to view the crime scene. We disagree. The court may order a jury view of property or of a place where a material event occurred. MCR 6.414(D). Michigan courts have held "that the discretion of a trial judge may be exercised as provided by law when it is believed that a personal view of the scene would enable the jurors to comprehend more clearly the evidence already received." *People v Curry*, 49 Mich App 64, 67; 211 NW2d 254 (1973). In our opinion, the view properly helped the jurors to better comprehend the layout of the bar, to understand the testimony regarding the locations of the victim, the eyewitnesses, and the shooter, and to weigh the evidence admitted at trial. Therefore, we conclude that the trial court did not abuse its discretion in allowing the jury to view the murder scene. See MCL 768.28; MSA 28.1051; *People v Mallory*, 421 Mich 229, 245; 365 NW2d 673 (1984).

* Circuit judge, sitting on the Court of Appeals by assignment.

II

Next, defendant claims that the in-court identification of him was tainted by an impermissibly suggestive confrontation at the preliminary examination. When defendant raised this issue before trial, he claimed that an alleged photographic identification procedure was so impermissibly suggestive as to violate due process. He did not claim, as he does on appeal, that the in-court identification was tainted by an impermissibly suggestive confrontation at the preliminary examination. Because this issue is raised for the first time on appeal, it is not preserved for appellate review. *People v Daniels*, 163 Mich App 703, 710-711; 415 NW2d 282 (1987). Manifest injustice will not result from our failure to review this issue. Cf. *People v Missias*, 106 Mich App 549, 555-556; 308 NW2d 278 (1981). After evaluating the pretrial confrontation for suggestiveness under the totality of the circumstances, we conclude that even though the preliminary examination was not held until almost three years after the victim was killed, the witnesses who identified defendant at the preliminary examination, and subsequently at trial, had ample time to observe defendant prior to and during the crime. Moreover, there was an independent basis for the in-court identification of defendant by some of the witnesses. See *People v Kachar*, 400 Mich 78, 91, 95-97; 252 NW2d 807 (1977). Thus, under the totality of the circumstances, we find no error requiring reversal.

III

Defendant next claims that the trial court erred in excluding, on relevancy grounds, evidence that others had a motive to kill the victim. We disagree. All relevant evidence is admissible except as otherwise provided by the constitution or the rules of evidence. MRE 402; *People v Holliday*, 144 Mich App 560, 573; 376 NW2d 154 (1985). "Relevant evidence" means "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." MRE 401. However, even relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, waste of time, or if it is misleading to the jury. MRE 403; *Holliday*, *supra* at 573. The determination of whether evidence is relevant is within the trial court's discretion and will not be reversed absent an abuse of that discretion. *Id*.

Defendant first argues that the trial court abused its discretion in excluding evidence that the victim had killed an ex-boyfriend. We disagree. The ex-boyfriend was killed in January 1984. The victim was killed in August 1991, over seven years later. There was no substantiating evidence to support defendant's theory that the victim was killed in retaliation for the 1984 killing of her ex-boyfriend. There was no testimony placing anyone connected to the ex-boyfriend at the murder scene and no evidence was presented which suggested that anyone connected to him had ever threatened the victim. Under these circumstances, the trial court did not err in excluding evidence that the victim had been convicted of reckless homicide in Kentucky in 1984. See *id*. at 573-574.

Defendant also argues that the trial court abused its discretion in excluding the testimony of Elmer Winter, defendant's brother, regarding the victim's involvement with illegal drugs and a threatening note from a drug dealer named "Mack." We disagree. Again, there was no substantiating evidence to support defendant's theory that the victim was killed because she owed money to a drug

dealer named Mack. There was no testimony placing Mack or anyone connected to him at the murder scene. Under these circumstances, the trial court did not err in excluding the evidence. See *id*.

Defendant further contends that the trial court abused its discretion in excluding evidence that the Sanchaze family was responsible for the victim's death. We disagree. As before, there was no substantiating evidence to support defendant's theory that the Sanchaze family had the victim killed in order to force a man named Vasquez from hiding. The connection between the victim and the Sanchaze family is, at best, tenuous. There was no testimony that the Sanchaze family had ever threatened the victim or Vasquez, whom defendant alleged was the victim's boyfriend. The fact that a man whose name might have been Sanchaze was in the bar when the victim was killed is irrelevant. There is no testimony that this man knew the victim, talked to her, threatened her, or was anywhere near her when she was shot. In short, defendant did not substantiate his claim that someone connected to the Sanchaze family was responsible for the victim's death. Under these circumstances, the trial court did not err in excluding the evidence.

We also note that defendant did not substantiate his claim that, in general, someone from the "drug scene" was responsible for the victim's death. Hence, this evidence was not relevant to the charges against defendant. Nor was the fact that the victim had other black friends relevant to the proceedings. See *id*.

IV

Next, defendant claims that the prosecutor improperly asked the potential jurors questions about the specific facts involved in this case. Defendant did not object during voir dire to the questions he complains of on appeal. Moreover, defendant expressed satisfaction with the jury. Furthermore, defendant has failed to demonstrate that he was prejudiced by the allegedly improper questions. Under these circumstances, this issue is not preserved for appellate review. *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995).

V

Defendant also claims that the trial court improperly permitted the prosecution to introduce evidence of defendant's prior bad acts. Specifically, defendant claims the prosecutor should not have been allowed to introduce evidence that defendant had assaulted the victim in March 1991 or that defendant had set fire to the victim's house in May 1991.

Under MRE 404(b), 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. Such evidence may, however, be admissible to show motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when material. MRE 404(b); *People v Ullah*, 216 Mich App 669, 674; ___ NW2d ___ (1996). Evidence of another crime may be admitted if (1) it is relevant to an issue other than character or propensity, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993); *People v*

Catanzarite, 211 Mich App 573, 578-579; 536 NW2d 570 (1995). A determination of whether the evidence was more prejudicial or probative is best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony by the trial judge. *Ullah*, *supra* at 675. The erroneous admission of other-acts evidence may constitute harmless error in certain circumstances. *Id*. at 676; *People v Williamson*, 205 Mich App 592, 596; 517 NW2d 846 (1994).

The other-acts testimony was relevant to show that defendant intended to hurt or kill the victim. However, even if the admission of other-acts evidence was erroneous, we conclude that in light of the overwhelming evidence against defendant presented at trial, any error in the admission of the evidence was harmless. See *id*. Charline Merithew, Jerry Merithew, and Ernie Frohlich testified that the victim's ex-boyfriend (defendant), whom they had met the night before, came into the bar and, after trying unsuccessfully to get the victim to talk to him, exited the tavern. Jerry Merithew and Christopher Brushaber testified that immediately after the ex-boyfriend left the bar, the same man reappeared at the window located behind the victim and shot her in the back. Charline Merithew, Ernie Frohlich, Christopher Brushaber, and Ronald McDonald all testified that defendant was the man they had seen inside the bar talking to the victim immediately before she was murdered. Ernie Frohlich ran outside to confront the shooter and again observed defendant, who was holding a gun, standing at the window through which the victim was shot. Shortly after the crime was committed, a man matching defendant's description was successfully able to elude police capture in Sylvania, a town located a short distance from the Michigan Tavern.

VI

Next, defendant argues that the trial court abused its discretion in denying his motion in limine to exclude his prior convictions of robbery and unlawful use of a motor vehicle. We disagree.

Because robbery is a theft offense, evidence of such a conviction is admissible under MRE 609 if the probative value of the evidence outweighs its prejudicial effect. *People v Allen*, 429 Mich 558, 606; 420 NW2d 499 (1988); *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). Although the dates of defendant's prior convictions are not contained in the record, in general, robbery convictions have lower probative value with regard to the question of veracity than other theft offenses would have. *Id*. at 146. However, theft is an element of robbery and "an indicator that defendant is of dishonest character and may not testify truthfully." Therefore, the robbery conviction had some probative value. Moreover, there would be little prejudice to defendant because of the difference between the prior robbery conviction and his current convictions of first-degree murder, carrying a concealed weapon, and felony-firearm. *Id*. at 147. Moreover, the importance of defendant's testimony to the decisional process was low. Defendant raised an alibi defense and presented alibi witnesses. His testimony was not required to put his alibi into evidence. *Allen*, *supra* at 610-612.

Unlawful use of a motor vehicle, a misdemeanor punishable by imprisonment for not more than two years, MCL 750.414; MSA 28.646, is a crime involving dishonesty. *People v Hayward*, 127 Mich App 50, 63; 338 NW2d 549 (1983). Hence, the trial court properly denied defendant's motion to exclude evidence of this conviction. *Id*. at 63-64.

VII

Defendant next argues that the trial court abused its discretion in admitting certain "hearsay" testimony. Specifically, defendant claims that the trial court improperly applied the medical treatment hearsay exception, MRE 803(4), when it admitted the victim's statement, made to her doctor in connection with the March 1991 beating she suffered, that her "boyfriend" beat her up.

Hearsay is generally not admissible. MRE 802. However, there is an exception for statements made for purposes of medical treatment or medical diagnosis in connection with treatment. MRE 803(4); *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). Nevertheless, a declarant's hearsay identification of the person responsible for the declarant's condition may not be admitted under MRE 803(4), as the identity of the assailant is not reasonably necessary to the examining physician's treatment of the injured declarant. *People v LaLone*, 432 Mich 103 113-114; 437 NW2d 611 (1989). Therefore, the trial court erred in admitting the victim's statement that her "boyfriend" beat her up. However, we conclude that the error was harmless in light of the overwhelming nature of the evidence presented against defendant at trial. See *McElhaney*, *supra* at 283.

Defendant next contends that Toledo police officer Philip Kulakoski should not have been permitted to testify that the warrant prepared after the March 1991 assault upon the victim was for defendant. This testimony was admitted under the business records exception to the hearsay rule. The business records exception allows the admission of "memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrence, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the [report]." MRE 803(6); *People v Bettistea*, 173 Mich App 106, 125; 434 NW2d 138 (1988). Defendant claims that the victim was not a police officer and that the information she supplied to Officer Kulakoski was not in the regular course of her business; hence, Officer Kulakoski should not have been allowed to testify that defendant was named in the assault warrant. Even assuming that defendant is correct, any error in the admission of Officer Kulakoski's testimony was harmless in light of the overwhelming nature of the evidence presented against defendant at trial. See *McElhaney*, *supra* at 283.

Lastly, defendant argues that the trial court abused its discretion in admitting the testimony of Darrell Bonnough, a fire investigator for the Toledo Fire Department, that three days before her death the victim told him she was "scared" of defendant. This testimony was admitted under the hearsay exception for then-existing state of mind. MRE 803(3). The general rule in Michigan is that statements indicative of the declarant's state of mind are admissible when state of mind is an issue in the case. *People v White*, 401 Mich 482, 502-503; 257 NW2d 912 (1977); *People v DeWitt*, 173 Mich App 261, 268; 433 NW2d 325 (1988). The victim's state of mind three days before she was killed was arguably relevant to this case. However, even assuming that the victim's statement was inadmissible hearsay, as defendant contends, any error in its admission was harmless in light of the overwhelming nature of the evidence presented against defendant at trial. Cf. *People v Stubl*, 149 Mich App 42, 47-48; 385 NW2d 719 (1986).

As to defendant's claim that the testimony of Sgt. Walter Carlson of the Monroe County Sheriff's Department that someone at the scene told him "that it was her boyfriend that might have been involved" was inadmissible hearsay, we disagree. Sgt. Carlson's testimony does not fit the definition of hearsay contained in MRE 801(c). Sgt. Carlson's testimony was not offered for the truth of the matter asserted, but rather was admitted to explain why Sgt. Carlson took certain actions. In any event, any error in the admission of this testimony was harmless. It was defense counsel who first raised the issue that someone in the bar told police that it was the victim's boyfriend who shot her. On cross-examination of Charline Merithew, defense counsel asked Merithew, "[I]n fact, wasn't it you that said it was the boyfriend?" Merithew responded affirmatively. Hence, by the time Sgt. Carlson testified, defendant had already elicited testimony that someone told the police that the victim's boyfriend (defendant) was the shooter.

VIII

Next, defendant claims that the trial court erred in failing to instruct the jury on the lesser offense of voluntary manslaughter. We disagree.

A homicide may be reduced to voluntary manslaughter if the circumstances surrounding the killing demonstrate that malice was negated by adequate and reasonable provocation, that the killing was done in the heat of passion, and that there was not a lapse of time during which a reasonable person could control his passions. *People v Pouncey*, 437 Mich 382, 387-388; 471 NW2d 346 (1991). The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason. Additionally, "the provocation must be adequate, namely, that which would cause the reasonable person to lose control." *Id*. at 389. Because voluntary manslaughter is a cognate lesser included offense of murder, a trial court must instruct on manslaughter if the evidence presented at trial could support a conviction of the lesser offense. *Id*. at 387-388.

Having reviewed the record, we conclude that the evidence presented at trial did not indicate that defendant was in a highly inflamed state of mind, his ability to reason had been blurred by passion, or his emotional state had reached such a level that he was unable to act deliberately. *Id*. at 390. According to the witnesses' testimony, defendant appeared to be fairly calm throughout the entire incident, even after he shot the victim. Moreover, any provocation in this case would have consisted mainly of words, which courts have generally held do not constitute adequate provocation. *Id*. at 391. Furthermore, there is no indication that defendant saw that Jerry Merithew initially had his arm around the victim. Even if defendant had observed that display of affection, it would have been insufficient provocation to cause a reasonable person to lose control and kill someone. Because the evidence introduced at trial did not support a finding that defendant acted in the heat of passion with adequate provocation, the trial court was not required to instruct the jury on voluntary manslaughter. *People v Etheridge*, 196 Mich App 43, 55; 492 NW2d 490 (1992).

Defendant also claims that the trial court erred in giving a jury instruction on flight because there was insufficient evidence of flight in this case. Defendant did not object to this instruction below. Defendant simply requested that the trial court instruct the jury that the "perpetrator" ran away from the

bar instead of instructing the jury that the "defendant" ran away. Defendant did not claim below, as he does on appeal, that there was insufficient evidence of flight to support the above instruction. Because defendant failed to object to this instruction on the ground raised on appeal, appellate review is precluded absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993). In any event, our review of the record reveals that sufficient evidence was presented at trial to support the giving of the flight instruction.

Lastly, defendant claims that because evidence of defendant's prior bad acts was inadmissible at trial, the trial court erred in instructing the jury with CJI2d 4.11. We have already concluded that any error in the admission of the prior bad acts testimony was harmless in light of the overwhelming evidence presented against defendant at trial. Therefore, any error in the trial court's instructing the jury with regard to how they should consider the prior acts evidence was likewise harmless.

IX

Finally, defendant argues that the trial court erred in denying his motion for a directed verdict with respect to the charge of carrying a concealed weapon. Specifically, defendant claims that because nobody in the bar saw any evidence of a gun, there was no evidence. presented on concealment. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

Viewing the trial evidence in a light most favorable to the prosecution, there was evidence from which a jury could infer that defendant's gun was concealed. Immediately after leaving the bar, defendant pointed a gun through the bar window and shot the victim. As defendant indicates, none of the witnesses testified that they observed a gun on his person when he was inside the bar. Therefore, the jury could easily have inferred that the gun must have been concealed on or about defendant's person while he was inside the bar, as he used it to shoot the victim immediately upon exiting the bar. See *id.*

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros