

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRICK J. RAY,

Defendant-Appellant.

UNPUBLISHED

November 13, 1998

No. 196018

Recorder's Court

LC No. 95-010731

Before: Gage, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082 to fourteen to twenty-two years' imprisonment for the second-degree murder conviction, and two years' imprisonment for the felony-firearm conviction, the sentences to run consecutively. We affirm.

Defendant's first issue on appeal is that the trial court erred in admitting bad acts evidence under MRE 404(b). We disagree. We review a trial court's admission of evidence under an abuse of discretion standard. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

In order to admit evidence of other bad acts under MRE 404(b), "the evidence must be offered for a proper purpose under MRE 404(b), it must be relevant under MRE 402, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403, and the trial court may, upon request, provide a limiting instruction to the jury." *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998), citing *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993).

In the present case, the prosecution offered the bad acts of defendant in the form of a photograph with white powder on a black tray, asking a witness if he knew what baking soda in the photograph was used for, and whether the witness was aware that drugs were sold out of the house in which defendant lived. The prosecution offered the evidence to establish that the victim was killed

because he owed defendant money from prior drug transactions.¹ Therefore, the evidence was offered for a proper purpose as it was offered to show motive. MRE 404(b).² Furthermore, the evidence was relevant. Defendant's theory of the case was that the killing was in self-defense. However, if defendant killed the victim because of drug debts, this evidence would be relevant to rebut defendant's claim of self-defense. MRE 402. Finally, the evidence of defendant's other bad acts is not more prejudicial than probative. The evidence is not minimally damaging in logic as it gives a motive for the killing, negates defendant's theory of self-defense and it is not unfair to allow the prosecution to use such evidence. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). Therefore, the trial court did not abuse its discretion in admitting evidence of other bad acts.

Defendant also argues that the prosecution violated MRE 402(b)(2) in failing to give notice of its intent to use evidence of defendant's prior bad acts. However, defendant has failed to preserve this issue for appeal as this was not objected to at trial. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995).

Defendant's next issue on appeal is that the trial court erred in admitting photographs at trial because the photographs were more prejudicial than probative. We disagree. We review a trial court's admission of photographic evidence for an abuse of discretion. *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991).

"Photographic evidence is admissible if relevant, pertinent, competent, and material to *any* issue in the case." *Id.* "Photographs are not inadmissible merely because they may be gruesome and shocking; however, the trial court should preclude those which could lead the jury to abdicate its truth-finding function and convict on passion." *Id.*

Defendant objected to four photographs that were admitted at trial. Two of the photographs depict the area in which the victim was killed. The photographs show the kitchen area, a spent casing, and blood on the floor. The victim's body is not present in the photographs. The other two photographs to which defendant objected depict a tray with white powder, baggies, and a razor blade on it. The photographs are clearly not the type which would lead a jury to abdicate its truth-finding function. Therefore, the trial court did not abuse its discretion in admitting the photographs.

Defendant next claims the trial court erred in failing to instruct the jury on past violence by the victim. We disagree. We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). "Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction." *Id.*

The trial court's instruction on self-defense permitted the jury to consider all of the circumstances as they appeared to defendant at the time he shot the victim. This instruction adequately covered the general reputation of the victim and informed the jury that they could consider this in deciding defendant's claim of self-defense. Therefore, the trial court did not err in refusing to give the instruction on past violence by the victim.

Defendant's final issue on appeal is that the verdict was against the great weight of the evidence and the trial court erred in failing to grant a new trial on this ground. We disagree. This Court reviews a trial court's decision regarding a grant of a new trial for an abuse of discretion. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997). When reviewing a claim that a verdict is against the great weight of the evidence, the question is whether the verdict was manifestly against the clear weight of the evidence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). A jury's verdict may be vacated only when "it does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *Id.*

As recently established by our Supreme Court, [a] trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. [*People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).]³

The elements of second-degree murder are:

(1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm. [*People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996).]

A review of the proofs in this case shows the following: a witness testified that she heard defendant discuss how he killed the victim; another witness testified that he did not see the victim with a gun on the night he was shot; an officer testified that the crime scene was in place and nothing appeared to be unusual or overturned; the medical examiner stated that the wounds showed that the victim's side was facing defendant when he was shot and the head wound was consistent with a wound that would be inflicted while the victim was on the ground; and, another witness saw defendant fire shots at the victim. Therefore, the trial court did not abuse its discretion in failing to grant defendant a new trial as the conviction was not against the great weight of the evidence.

Affirmed.

/s/ Hilda R. Gage

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

¹ The prosecution abandoned this theory after the questioning of the witnesses. It appears that none of the witnesses could corroborate this notion that the victim and defendant were selling drugs in some manner. The prosecution did not expound on this theory in either his opening statement or closing argument.

² We note that defense counsel did not ask for a limiting instruction as to how the bad acts evidence was to be applied by the jury. While counsel did make a motion in limine and other necessary objections to preserve this issue for appeal, counsel's failure to request the limiting instruction leaves us with the conclusion that the bad acts testimony was not of substantial consequence.

³ This ruling is to be prospectively applied to cases not yet final as of March 24, 1998. *Id.* at 648. As such, in the present action, we will apply the new standard outlined in *Lemmon*.