STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC DESHAUN MUNSON,

Defendant-Appellant.

UNPUBLISHED
December 29, 1998

No. 196257
Macomb Circuit Court
LC No. 95-002905 FH

Before: Jansen, P.J., and Holbrook, Jr., and MacKenzie, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of involuntary manslaughter, MCL 750.321; MSA 28.553, fleeing and eluding a police officer resulting in great bodily harm or death, MCL 750.479a(5); MSA 28.747(1)(5), and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). He was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to twenty to thirty years' imprisonment for the manslaughter conviction, four to eight years' imprisonment for the fleeing and eluding conviction, and one year of imprisonment for the possession of marijuana conviction. Defendant appeals as of right. We affirm, but remand to the trial court to order production of voir dire transcripts.

Defendant first argues that he should have been provided with transcripts of the jury voir dire. We agree.

Once a state has established appellate review in criminal cases, a defendant cannot be denied access to the process because of indigency. *People v Najar*, 229 Mich App 393, 400; 581 NW2d 302 (1998). This Court in *People v Bass (On Rehearing)*, 223 Mich App 241, 255; 565 NW2d 897 (1997)[1] stated:

> Where a state grants criminal defendants an appeal as of right, it must also provide indigent defendants with an attorney to represent them on appeal. Under the Due Process Clause of the Fourteenth Amendment, a criminal defendant is entitled to the effective assistance of counsel in his first appeal of right. [*Id.* at 258, citation omitted.]

* * *

> . . . The standards for appointed appellate counsel require that counsel assert claims of error that are supported by the record and possess arguable legal merit. In order to faithfully discharge the duties imposed by the Appellate Defender Commission and the Supreme Court, counsel must have access to transcripts of all the proceedings so that all issues of legal merit can be raised. Although appellate counsel could contact trial counsel and inquire about voir dire, information obtained from trial counsel is not a substitute for a transcript because trial counsel's memory may be faulty, trial counsel may not be aware that an error occurred during voir dire, or trial counsel may be the target of the defendant's claim of error. We therefore conclude that a transcript of voir dire must be provided in all cases where appointed appellate counsel was not the indigent defendant's trial counsel. Accordingly, in this case, we find that defendant is entitled to a transcript of the voir dire testimony, to determine if any justifiable claims of error occurred during the voir dire. [*Id*. at 260, citation omitted.]

In this case, defendant's appellate counsel was appointed and was not the same attorney who represented him at trial. Therefore, pursuant to *Bass*, he must be provided a transcript of jury voir dire. MCR 6.425(F)(2)(a)(i). Accordingly, we remand to the trial court to order that defendant be provided with transcripts of the jury voir dire. If appellate counsel finds appealable error in the voir dire, counsel may appeal the allegations of error to this Court. However, any appeal taken at that point will be strictly limited to alleged errors apparent in the voir dire transcripts.

Defendant next argues that certain remarks made by the prosecutor during opening statement were improper. Because defendant did not object to the prosecutor's comments that he alleges were improper, appellate review of improper prosecutorial remarks is precluded, unless failure to review the issue would result in a miscarriage of justice or if a cautionary instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant does not explain why he believes the prosecutor's comments were improper. Our review of the prosecutor's comments reveal that they were not improper and no miscarriage of justice will result for not further reviewing this issue.

Defendant next argues that he was improperly prohibited from testifying because the trial court removed him from the courtroom during his trial. Whether a defendant is denied his right to testify by his removal from the courtroom or his waiver to be present during his trial is a constitutional question. This Court reviews constitutional questions de novo. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997).

> The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.' The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony.

> In fact, the most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony.
>
> Even more fundamental to a personal defense than the right of self-representation is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness. [*People v Solomon*, 220 Mich App 527, 533-534; 560 NW2d 651 (1996).]

However, a defendant's right to testify is not without limitation. *Id*. at 534. "[T]he right may 'bow to accommodate other legitimate interests in the criminal trial process.'" *Id*.

An accused defendant in custody has the fundamental right to be present at every stage of trial where substantial rights may be affected, including a jury view of the crime scene. A defendant may waive the right to be present at a jury view by affirmative consent, by failure to appear at the view when he is at liberty to, or by disorderly or disruptive conduct at trial precluding continuation of the trial in his presence. *People v King*, 210 Mich App 425, 432-433; 534 NW2d 534 (1995). This Court reviews a criminal defendant's absence from part of a trial to ascertain whether there is any reasonable possibility of prejudice. *Id*. at 433.

Defendant repeatedly told the trial court that he wanted to go back to the jail. The trial court attempted to respond to defendant's concerns and instructed him several times to maintain his demeanor. Because defendant refused to behave appropriately, and told the trial court to return him to the jail, the trial court properly instructed that he be removed from the courtroom. There was nothing preventing defense counsel from informing the trial court that defendant wished to testify before the close of proofs, or even requesting that proofs be reopened so that he could testify. There is no indication that the trial court would not have allowed defendant to return to the courtroom for the purpose of testifying. Thus, defendant has not established that his absence from part of his trial prejudiced him or that it precluded him from being able to testify. Accordingly, defendant was not denied his right to testify by the trial court's order to remove him from the courtroom for inappropriate behavior.

Defendant next argues that the jury was confused when it returned its verdict and implies that the jury was uncertain whether to convict him of voluntary or involuntary manslaughter.

Inconsistent verdicts may be cause for reversal when it is evident that the jury was confused, did not understand the instructions, or did not know what it was doing. *People v McKinley*, 168 Mich App 496, 510; 425 NW2d 460 (1988). When the court clerk read the jury's verdict, she stated: "We, the jury, make the following findings of fact. Count 1, guilty of voluntary of involuntary manslaughter." We believe that the court clerk misspoke when she stated "of voluntary" and corrected herself by immediately repeating "of involuntary manslaughter." There is nothing to indicate that the jury convicted defendant "of voluntary of involuntary manslaughter." The trial court never instructed the jury regarding voluntary manslaughter and the verdict form indicates that the jury found defendant guilty of involuntary

manslaughter. Accordingly, the record does not support defendant's contention that the jury was confused when it returned its verdict.

Defendant next argues that the trial court abused its discretion in admitting evidence that in 1990, he fled after being stopped by the police and later was "convicted by plea" of fleeing and eluding. A trial court's decision to admit evidence will not be reversed absent an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). To find an abuse of discretion, the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id.*

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. MRE 404(b)(1). However, evidence that is relevant to an issue other than a defendant's criminal propensity may be admitted if the danger of undue prejudice is not substantially outweighed by its probative value. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Specifically, evidence of other acts is admissible to prove motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident. MRE 404(b)(1).

The first question that must be addressed is whether the prosecutor has articulated a proper noncharacter purpose for the admission of defendant's prior fleeing and eluding conviction. *People v Crawford*, 458 Mich 376, 386; 582 NW2d 785 (1998). The prosecutor claims that the evidence was admissible to prove defendant's knowledge that he was being stopped by the police, his intent, and his "modus operandi." Knowledge and intent are included among MRE 404(b)'s laundry list of proper purposes. However, a common pitfall in MRE 404(b) cases is the trial courts' tendency to admit the prior misconduct evidence merely because it has been offered for one of the rule's enumerated proper purposes. *Crawford, supra* at 387. In other words, mechanical recitation of the list set forth in MRE 404(b) without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b). If it were, the prosecutor could routinely admit character evidence by simply calling it something else. *Crawford, supra* at 387. Relevance is not an inherent characteristic, nor are prior bad acts intrinsically relevant to motive, opportunity, intent, preparation, plan, etc. Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. *Id*. at 387-388. "In order to ensure the defendant's right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else. The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized." *Id*. at 388.

Pursuant to MRE 401, evidence is relevant if two components are present, materiality and probative value. Materiality is the requirement that the proffered evidence be related to any fact that is of consequence to the action. *Crawford, supra* at 388-389. A fact that is of consequence to the action is a material fact and materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. *Id*. at 389. The proffered evidence must be probative of something other than the defendant's propensity to commit the crime. If the prosecutor

fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded, notwithstanding its logical relevance to character. *Id*. at 390.

All elements of a criminal offense are "in issue" when a defendant enters a plea of not guilty. Because the prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate any of the elements, the elements of the offense are always "in issue" and, thus, material. *Id*. at 389. The prosecution does not explain whether it sought to introduce evidence of defendant's prior fleeing and eluding conviction to show knowledge and intent for the fleeing and eluding charge or for the involuntary manslaughter charge. Therefore, we examine both charges.

Involuntary manslaughter is defined as an unlawful act, committed with the intent to injure in a grossly negligent manner, that proximately causes death. *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997). The following elements must be established to show gross negligence: (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; and (3) the omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. *Id*. at 503. Moreover, MCL 750.479a; MSA 28.747(1) provides in relevant part:

> (1) A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the vehicle, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude the police or conservation officer.
>
> * * *
>
> (5) If the violation results in the death of another individual, an individual who violates subsection (1) is guilty of first-degree fleeing and eluding, a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

We believe the trial court abused its discretion in admitting evidence that defendant fled and eluded a police officer in 1990. The trial court admitted the evidence on the basis of the prosecution's assertion that it was used to show knowledge and intent. The prosecutor did not explain why defendant's previous intent to flee was material to whether he committed fleeing and eluding or involuntary manslaughter in the present case. Defendant did not claim that he did not know he was being stopped by a police officer, nor did he claim that he did not flee or intend to flee. Absent such an assertion, there is no logical thread linking defendant's previous conviction for fleeing and eluding to the current charge for fleeing and eluding. Moreover, the elements of involuntary manslaughter do not require proof that defendant knew he was being stopped by the police or that he was fleeing or intending to flee from the police. The prosecutor was merely required to prove that, while committing

the unlawful act of fleeing and eluding, defendant essentially knew that he could avert danger to others by the exercise of ordinary care and diligence and that he failed to do so when it was apparent that the result was likely to prove disastrous to another. The sole fact that defendant previously fled and eluded a police officer, without more, is not related to any fact that is of consequence to the action and it is not probative of anything other than his propensity to commit the crime.

However, we find that the trial court's error in admitting the evidence of defendant's prior fleeing and eluding conviction was harmless. "Error requires reversal only if it is prejudicial. The prejudice inquiry 'focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.'" *Crawford, supra* at 399-400. The trial court specifically instructed the jury that it could not consider the evidence of defendant's 1990 conviction to conclude that defendant is a bad person or that he is likely to commit crimes and that the jury must be convinced by all the evidence, beyond a reasonable doubt, that defendant committed involuntary manslaughter. Moreover, police officer Kenneth Cazabon testified that defendant fled from him at a very high speed, was driving in the center of the freeway and caused numerous cars to swerve to avoid hitting him, and attempted to exit from the freeway at such a high rate of speed that he could not control his car. Defendant's loss of control over the car could have been avoided by the exercise of ordinary care and diligence and proximately caused the victim's death. The disastrous result to one of defendant's passengers by his omission to use ordinary care and diligence was also apparent. In addition, although evidence of the prior conviction was prejudicial in regard to defendant's fleeing and eluding charge because it merely showed his criminal propensity toward that crime, we note that defendant does not appear to contest that he committed that offense. Therefore, even without the admission of evidence that defendant was previously convicted of fleeing and eluding, the result of the proceeding would have likely been the same.

Defendant next argues that the trial court abused its discretion in allowing the admission of evidence that his driver's license had been suspended. However, defendant did not object to the admission of this evidence at trial and, therefore, it is unpreserved. MRE 103(a)(1).

Moreover, no substantial right of defendant was affected. MRE 103(a)(1). Defendant relies on MRE 609(a); however, evidence that defendant's license had been suspended was not evidence that he had been convicted of a crime, nor was defendant asked, as a witness, whether his license was suspended. Therefore, MRE 609(a) is not applicable. Further, there was ample other evidence to establish that defendant was guilty of involuntary manslaughter beyond a reasonable doubt.

Defendant next argues that the trial court abused its discretion in allowing police officers York and Cazabon to testify that fleeing and eluding a police officer was a dangerous act, and Sergeant Reaves to essentially testify that defendant's fleeing the police caused the victim's death. However, defendant did not object at trial to the admission of this testimony and his claim of error is not preserved for appellate review. MRE 103(a)(1).

Again, no substantial right of defendant was affected by the admission of this testimony. MRE 103(a)(1). The testimony did not likely affect the outcome of the case because the jury heard ample evidence that defendant drove at a high rate of speed in order to flee and elude the police and he was

not able to control his vehicle on the exit ramp at that rate of speed, which caused the accident. The jury could use their common sense and knowledge to determine that defendant's attempt to flee from the police was dangerous and ultimately grossly negligent.

Defendant lastly argues that the trial court erred in considering lack of remorse as a factor in imposing its sentence because that is the same as penalizing defendant for refusal to admit guilt. Our Supreme Court has clearly held that a defendant's lack of remorse is a legitimate consideration in determining a sentence. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995); see also *People v Calabro*, 166 Mich App 389, 396; 419 NW2d 791 (1988). Accordingly, the trial court properly considered defendant's lack of remorse in imposing its sentence.

Affirmed, but remanded for the production of voir dire transcripts. We retain jurisdiction to permit defendant to file a supplemental brief regarding any alleged error in the jury voir dire after the voir dire transcripts are produced. We further order that the jury voir dire transcripts be filed with the Court of Appeals within ninety-one days of the issuance of this opinion. Defendant shall file his supplemental brief within twenty-eight days after the filing of the jury voir dire transcript, and the prosecutor shall file the response brief within fourteen days after the filing of defendant's supplemental brief.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie

[1] After initially staying the precedential effect of this opinion, *People v Bass*, 456 Mich 851 (1997), our Supreme Court ultimately vacated that stay with respect to the issue of the availability of voir dire transcripts in circumstances where, as here, appellate counsel did not also represent defendant during the trial. *People v Bass*, 457 Mich 865 (1998). Moreover, the Supreme Court amended, without notice, MCR 6.425(F)(2)(a)(i), specifically eliminating the rule's exclusion of the jury voir dire transcript from those transcripts that must be provided unless certain circumstances are applicable.