STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN DURDEN, a/k/a JOHN DURDEN, JR.,

Defendant-Appellant.

UNPUBLISHED
August 22, 2000

No. 214946
Kent Circuit Court
LC No. 98-000788-FC

Before: Zahra, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316; MSA 28.548, and sentenced to life imprisonment without parole. He appeals as of right, and we affirm.

This appeal arises from the stabbing death of William McCaleb on January 6, 1998 in Grand Rapids. The McCaleb stabbing was one of four stabbings that occurred in the same area in a three-day period - - one three days before the McCaleb incident, and two the night of the McCaleb incident. Two of the other victims survived and testified at the trial of the instant case, and one, Alton Grayson, died. Defendant gave a statement concerning all four incidents. The surviving victims testified, and defendant admitted in his statement, that on both occasions the victims had approached defendant's car after defendant inquired about the availability of crack cocaine. After the victims entered the car and delivered crack to defendant, defendant put his hand in his pocket, withdrew a knife, and stabbed the victims in an effort to get them out of the car without paying them. As to Grayson, the other victim that died, defendant told police that Grayson was one of a group of men who had beaten him badly sometime during the prior month, and that when Grayson entered defendant's car and they recognized each other, they argued, Grayson hit defendant in the nose, and defendant responded with his knife, to get Grayson out of the car. Defendant initially told the police that his girlfriend's children were with him at the time of the Grayson incident. However, it later became clear that the children were with him during the instant McCaleb incident, which occurred earlier in the day.

Defendant admitted to stabbing McCaleb. Additionally, defendant's girlfriend's seven-year-old son, who was in the car, testified that defendant stabbed the man in the car. In his statement to police, defendant claimed that he had met McCaleb once before when McCaleb gave him $200 of drugs to

sell; that instead of selling the drugs he used them himself; that he was supposed to meet with McCaleb to pay him $100; that when he told McCaleb that he had been robbed (an excuse for not having the money), McCaleb confronted him verbally and then seemed to be going for a weapon; and that defendant became fearful for his own and the children's safety, and stabbed McCaleb in the chest before McCaleb could get to him. McCaleb then opened the car door, defendant punched him, and McCaleb slipped out of the car. Defendant heard a clink on the ground when McCaleb slipped out of the car; however, no weapon was found. At the conclusion of his statement, defendant explained that he thought he was just "ganking"[1] his victims; he had not intended to really hurt or kill them; he only wanted to show them that he had a knife and to get them out of the car. The statement can be understood as pertaining to all the victims, including McCaleb, or only to the victims defendant admitted to "ganking."

Defendant contends that the trial court abused its discretion in allowing admission of the other stabbings. We disagree. The prosecutor explained in a pretrial hearing that he wanted to introduce evidence of five other stabbings. He argued that the evidence was admissible to (1) show scheme, plan, or system, because defendant lured drug dealers into his car, where he stabbed them, (2) show absence of mistake or accident, (3) refute defendant's claim of self-defense, and (4) show what occurred leading up to the McCaleb murder. The court excluded evidence of two of the five attacks, noting that they were dissimilar to the McCaleb stabbing and that defendant had denied committing these offenses. However, the court allowed the other three offenses to be used at trial.

MRE 404(b) allows admission of other crimes, wrongs, or acts; it provides a list of reasons which are among the proper purposes for such evidence. This list is illustrative, not exhaustive, of the purposes for which such evidence may be used. *People v Sabin (After Remand)*, __ Mich __ ; __ NW2d __ (Docket No. 114953, issued 7/27/00), slip op at 12. Evidence of other crimes, wrongs, or acts is admissible when it is (a) offered for a proper purpose other than the defendant's character or propensity to commit the crime, (b) relevant to an issue of fact of consequence at trial, and (3) sufficiently probative to prevail under the balancing test of MRE 403. *Id.*, slip op at 11.

Defendant argues that the prosecution could not use the evidence to prove that the murder took place in the course of a larceny because this is not one of the enumerated exceptions under MRE 404(b)(1). However, as noted, this list is illustrative, not exhaustive. Defendant also contends that the prosecutor's articulation of the reasons for admission of this evidence was the "shotgun" approach criticized in *People v Golochowicz*, 413 Mich 298, 315; 398 NW2d 518 (1982). Indeed, a mechanical recitation of the purposes listed under MRE 404(b)(1) is insufficient to show the reasons for admissibility. *People v Crawford*, 458 Mich 376, 386-387; 582 NW2d 785 (1998). However, in this case, the prosecutor identified permissible uses of similar acts testimony and explained the reason for the need for the evidence, and the relevance of the evidence to material issues. The prosecutor did precisely what *Golochowicz* and *Crawford* call for; he related the proffered evidence to the case being tried, and explained why it was needed.

[1] "Ganking" apparently referred to taking the drugs without payment.

The evidence was properly permitted to show a scheme, plan, or system, and as relevant to the issues of intent and self-defense. The evidence that defendant picked up three other drug dealers within the same time period for the purpose of purchasing or taking drugs, and that all three were evicted from the car by defendant's stabbing them is probative on the question what happened in the instant incident. There was no impermissible inference to character in the use of the evidence. In addition, we conclude that the probative value of this evidence was not substantially outweighed by the potential for unfair prejudice. The trial court discussed the probative value of this evidence, as well as the relatively low probative value of the two excluded offenses. Defendant argues that the trial court failed to refer to the expected testimony and evidence in the case. He notes a small portion of the court's findings, in which it referred to its experience after the *VanderVliet*[2] case was remanded from our Supreme Court. We find no error. The balancing test under MRE 403 simply requires that the court determine whether the jury is likely to be misled by the evidence or to use it for an improper purpose. *VanderVliet, supra* at 74-75. The court made such a determination in the present case. We find no abuse of discretion.

Defendant further argues that the evidence was insufficient to support his conviction. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201; 489 NW2d 748 (1992). In this case, there was direct evidence that defendant stabbed McCaleb; he admitted to it, and Corey Kempenaar testified that he saw the stabbing. However, there was no direct evidence of the circumstances under which the offense occurred. Circumstantial evidence, along with reasonable inferences drawn therefrom, may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). In this case, the prosecution used evidence of the other three stabbings, which occurred close in time and location to the present offense, to circumstantially show that the offense was committed in the course of committing or attempting to commit theft. Further, no weapon was found to support defendant's claim that McCaleb had some sort of weapon. Additionally, although defendant maintained that he attacked McCaleb in self-defense after McCaleb became displeased when defendant could not pay for drugs given him earlier, defendant's statement was challenged as incredible. The prosecutor argued that it was unlikely that a drug dealer would simply front a stranger $200 of drugs to sell. Further, defendant's statement supported a finding that he obtained some drugs during the relevant time period, and that his references to a friend named Toby were a cover-up for the incident with McCaleb.[3] Lastly, defendant's statement regarding "ganking" his victims could be understood as applying to McCaleb. We conclude the evidence was sufficient to support an inference of larceny or attempted larceny, and to defeat a finding of self-defense.

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[2] *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994).

[3] At some point in his statement, defendant told police that he obtained some drugs from his friend Toby, that he "messed" around and "played" with Toby, and that this must have been what Corey saw.

Defendant raises two challenges to the jury instructions. We review claims of error in jury instructions by examining the instructions in their entirety. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id*. First, he contends that the trial court's instruction to the jury on the evidence of other stabbings was improper. We disagree. When evidence is introduced under MRE 404(b)(1), the court may, upon request, give the jury a limiting instruction under MRE 105. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). The instruction given by the trial court is substantially the same instruction found in CJI2d 4.11. Defendant argues that the instruction was improper because it authorized the jury to use the evidence to consider whether defendant murdered McCaleb in the course of stealing drugs. Evidence of other acts may be used to prove an element of the offense. *People v Biggs*, 202 Mich App 450, 452-453; 509 NW2d 803 (1993). The challenged instruction did not authorize the jury to convict defendant on the basis of the other acts evidence; it authorized the jury to consider whether this evidence, if believed, tended to support the conclusion that defendant murdered McCaleb in the course of stealing drugs.

Next, defendant contends that the court's instructions on self-defense should have been more extensive. We disagree. The instructions as given followed CJI2d 7.15 and 7.20. Defendant argues that the instructions should have informed the jury that a successful claim of self-defense negates the element of malice. Defendant's characterization is incorrect. An "imperfect self-defense" claim, if successful, negates the element of malice. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). This defense, however, is available when the defendant would have been entitled to raise self-defense had he not been the initial aggressor. *Id*. As the trial court in this case correctly instructed, a successful claim of self-defense excuses the defendant's actions. Defendant also argues that the jurors should have been told in greater detail that if they either believed defendant's claim of self-defense, or the evidence raised a doubt in their minds as to whether defendant acted in self-defense, they would be required to acquit. We see no error; the jury was instructed that defendant did not have to prove self-defense, and that the prosecutor had to prove beyond a reasonable doubt that defendant did not act in self-defense.

Defendant contends that trial counsel was ineffective. We disagree. To establish a claim of ineffective assistance of counsel, defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant claims that counsel was ineffective for failing to preserve his claims of error on the issues previously discussed. As we have already noted, these claims are without merit. Counsel has no duty to make meritless objections, *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997), and defendant cannot show prejudice.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Joel P. Hoekstra