STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 28, 2000
v	No. 215843 Shiawassee Circuit Court
THOMAS PATRICK PUTNAM, Defendant-Appellant.	LC No. 98-001609-FC

Before: Doctoroff, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. He was sentenced to a term of six years and eight months to ten years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that evidence of his prior bad acts should not have been admitted at trial. We disagree. The decision whether to admit evidence is within the sole discretion of the trial court and will be reversed only where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists when an unbiased person, considering the facts upon which the trial court relied, would conclude that there was no justification or excuse for the decision. *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000).

Evidence of an individual's other crimes, wrongs, or bad acts is inadmissible to prove a propensity to commit such acts. MRE 404(b); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Other acts evidence may, however, be admissible for other purposes if a four-prong test is satisfied: (1) the evidence must be offered for a proper purpose under MRE 404(b); (2) it must be relevant under MRE 402, as enforced through MRE 104(b); (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice; and (4) the trial court may, upon request, provide a limiting instruction to the jury. *Starr, supra* at 496; *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." MRE 401. The third prong of the test requires nothing more than the balancing process illustrated in MRE 403. *Starr, supra* at 498. Finally, the fourth prong of the test merely provides that the trial court may give a limiting instruction. *Id*.

Here, the trial court properly admitted evidence of two prior bad acts. Testimony regarding a prior incident in Lapeer in which defendant assaulted his girlfriend, the victim, was admissible to show intent and absence of mistake. MRE 404(b)(1); *Starr, supra* at 495. The victim testified that after she and defendant left a party in Lapeer and were arguing in her car, defendant stopped the car in the middle of the road and assaulted her. This evidence refuted defendant's testimony that the injuries inflicted on the victim as a result of the incident giving rise to this case were accidental rather than intentional. The testimony regarding defendant threatening the victim with a serrated knife on a separate occasion was also properly admissible to show intent and absence of mistake. MRE 404(b)(1); *Starr, supra* at 495. The victim testified that defendant had previously threatened her with a knife by waving it in front of her while yelling at her and by stabbing it into the table. This evidence also tended to show that defendant intentionally stabbed the victim rather than accidentally stabbing her during a struggle for the knife. Thus, the prior acts were offered for a proper purpose under MRE 404(b), satisfying the first prong of the *VanderVliet* test. *Starr, supra* at 496-497; *VanderVliet, supra* at 55.

The evidence was also relevant pursuant to MRE 402, satisfying the second prong of the *VanderVliet* test. *Starr, supra* at 497; *VanderVliet, supra*. The testimony regarding the Lapeer incident made it more probable that defendant attacked the victim when the car was stopped in the middle of the road. Because defendant had assaulted the victim previously in similar circumstances, the evidence made it more likely that he intended to assault her, rather than accidentally stabbing her as defendant claimed. Moreover, the testimony regarding the serrated knife incident made it more probable that defendant threatened the victim with the knife and waved it in front of her in the car rather than cutting himself with it as he claimed because he had previously threatened her with a knife in a similar manner.

The evidence also satisfies the third prong of the *VanderVliet* test, which requires that the probative value of the evidence not be substantially outweighed by unfair prejudice. *Starr, supra* at 498; *VanderVliet, supra*. The testimony was probative in showing the nature of the relationship between defendant and the victim, and this background was necessary for the jury to determine the ultimate issue in the case, whether defendant intended to stab the victim or whether the stabbing was accidental. Furthermore, defendant responded to the victim's testimony about the prior acts by explaining his version of the events. Additionally, the evidence could not have unfairly prejudiced defendant because he was acquitted of the offense charged and was convicted of a lesser offense. As such, the jury was able to focus on and determine the issues in the case notwithstanding the testimony of defendant's prior bad acts.

Further, the trial court gave two cautionary instructions to the jury regarding the proper use for the other acts evidence, thus satisfying the fourth prong of the *VanderVliet* test. *Starr, supra* at 496; *VanderVliet, supra*. On this record, the other acts evidence was properly admitted.

Defendant next argues that the trial court should have sua sponte instructed the jury regarding the defense of intoxication. We disagree. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error, and even if somewhat imperfect, no error exists if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995); *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). "The instructions must include all elements of the charged

offense and must not exclude material issues, defenses, and theories, if there is evidence to support them." *Daniel, supra* at 53. A trial court's failure to instruct the jury on any point of law is not grounds for setting aside a conviction unless the instruction was requested by the defendant. *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999); *People v Gomez*, 229 Mich App 329, 332; 581 NW2d 289 (1998). Because defendant did not request an instruction regarding the defense of intoxication, we review this issue only to determine if manifest injustice exists. *Gomez, supra* at 332.

An instruction regarding the defense of intoxication should be given only where the facts of the case would allow the jury to conclude that the defendant's intoxication was so great as to render him incapable of forming the requisite intent. *People v Mills*, 450 Mich 61, 82; 537 NW2d 909, modified 450 Mich 1212 (1995); *Gomez, supra*. In the present case, the record is devoid of any evidence that defendant was so intoxicated that he was incapable of forming the intent to commit the offense. *Mills, supra* at 82-83; *Gomez, supra* at 334. Both the victim and defendant testified that they had consumed alcohol for a number of hours prior to the stabbing and that they were intoxicated. Notwithstanding defendant's intoxication, however, he did not maintain at trial that he was so drunk that he was unable to engage in intentional or deliberate conduct. In fact, in response to the prosecutor's questioning, defendant testified that, although he was intoxicated, he was in control of all his faculties and he knew what he was doing. Therefore, according to defendant's own testimony, his level of intoxication was not so great as to render him incapable of forming the requisite intent to commit assault with intent to do great bodily harm. *Mills, supra* at 82; *Gomez, supra* at 332.

Furthermore, the jury instructions included all elements of the charged offense and did not exclude relevant issues, defenses, or theories. *Daniel, supra*. Defendant's theory of defense at trial was that of accident rather than intoxication, and the jury was properly instructed on defendant's theory of accident. Therefore, the instructions as given fairly presented the issues to be tried and sufficiently protected defendant's rights. *Bell, supra*; *Daniel, supra*. Consequently, no manifest injustice resulted from the trial court's failure to give the jury instruction regarding intoxication. *Gomez, supra*. In addition, defendant argues that defense counsel was ineffective for failing to request a jury instruction on the defense of intoxication and failing to object when such an instruction was not given. Given our above analysis, these failures at trial did not constitute ineffective assistance of counsel. See *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000) ("We presume that a defendant has received effective assistance of counsel and a heavy burden of proving otherwise rests on a defendant.").

Defendant next argues that the verdict was against the great weight of the evidence. We disagree. Defendant preserved this issue for appeal by moving for a new trial in the lower court. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). We review a trial court's grant or denial of a motion for a new trial for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). An abuse of discretion exists when the trial court's denial of the motion was manifestly against the clear weight of the evidence. *Id.*

A verdict is against the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28;

592 NW2d 75 (1998). Furthermore, a verdict may be vacated only if it is not reasonably supported by the evidence and is more likely attributable to causes outside the record, such as passion, prejudice, sympathy, or some extraneous influence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). This Court may not attempt to resolve credibility questions anew, but rather, credibility questions should be left to the trier of fact. *Lemmon, supra* at 646; *Gadomski, supra*.

To establish the offense of assault with intent to commit great bodily harm less than murder, a prosecutor must prove: (1) an attempt or offer with force or violence on the part of the defendant to do corporeal hurt to another (i.e., an assault), and (2) the intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325, amended 453 Mich 1204 (1996); *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). As such, assault with intent to commit great bodily harm is a specific intent crime. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997).

The evidence presented at trial did not preponderate heavily against the verdict. The evidence showed that on the night of the stabbing, defendant and the victim had a lengthy and intense argument both inside and outside a bar. Their argument continued in the parking lot of a coffee shop and during their ride afterward. Defendant took a knife out of his pocket, opened the blade, and waved it at the victim while he threatened to kill her. The victim wanted to get out of the car, but defendant refused to stop, so she reached over and shifted the car into park, and then she felt the air being sucked out of her and her neck was wet. Defendant admitted to a couple in a nearby house that he stabbed his girlfriend, and he told a police officer that he "did something bad" to her and that he was turning himself in. This evidence refuted defendant's theory of accident and substantiated the prosecutor's theory that the stabbing was intentional. On this record, reasonable jurors could have found that defendant intended to stab the victim. The evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *Lemmon, supra* at 642; *Gadomski, supra*. As such, the trial court did not abuse its discretion by denying defendant's motion for a new trial.

Defendant next argues that there was insufficient evidence to support his conviction because there was no evidence that he intended to harm the victim. Given our above analysis, we conclude that the evidence, when viewed in the light most favorable to the prosecution, was sufficient to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

Finally, defendant argues that his sentence violates the principle of proportionality. Considering the circumstances of the defense and defendant's prior criminal record, defendant's sentence for assault with intent to do great bodily harm less than murder does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Joel P. Hoekstra
/s/ Jane E. Markey