STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2002
v	No. 233769 Wayne Circuit Court
LACY T. CHISOLM, Defendant-Appellant.	LC No. 00-011514-01

Before: O'Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm in the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to terms of life imprisonment without the possibility of parole for the murder conviction, one to five years for the felon in possession conviction, and two consecutive years for the felony-firearm conviction. We affirm.

Defendant lived alone in a house in Detroit that belonged to his mother, Deloras Chisolm, who lived in Chicago. The victim in this case, Paul Holmes, was Deloras Chisolm's half-brother and had been living in South Carolina, but then moved back to Detroit and into the Chisolm house. Early in the morning approximately two days later, defendant shot Holmes to death inside the house. The prosecution alleged that defendant shot the victim to death "in cold blood" because defendant was upset that Holmes had moved into the house. The prosecution argued that there had been no provocation or fight when Holmes was shot. The defense theory was that Holmes died when he and defendant were arguing and struggling over a pistol, and that Holmes' death was accidental or the result of self-defense while defendant was in fear for his life.

The victim's body was found in his car along the Lodge Service Drive. Both the car and the body, which was in the back seat, had been burned. The presence of accelerants was detected and a police expert in fire investigation opined that gasoline had been poured on the body in the car and then ignited. A pathologist testified at trial that Holmes died from a gunshot wound to his chest; because there was no carbon monoxide in his blood, the pathologist concluded that the victim was dead before the fire started. A firearms expert testified that all three recovered bullets, one from the victim's chest and two from the wall of defendant's house, were the same caliber, .38 or nine millimeter, and were fired from the same weapon. However, the particular weapon could not be determined.

Defendant testified in his own defense, stating that he and Holmes got into an argument following an evening of drinking and smoking crack cocaine. Defendant contended that Holmes pulled out a pistol and pointed it at him. During the ensuing struggle over the gun, defendant testified that the gun went off several times and then Holmes fell back on the couch. Defendant maintained that he had been struggling for his life and defending himself when Holmes was shot. Defendant, claiming that he was upset and confused, admitted that he put Holmes' body in his car and drove to the Lodge expressway, but he denied starting a fire. Defendant also admitted that he threw the pistol on top of a nearby garage.

Following a three-day trial, the jury found defendant guilty as charged. Defendant now appeals as of right.

I

On appeal, defendant first contends that in light of his defense of accident or self-defense, the trial court violated the principles set forth in *People v Harris*, 458 Mich 310; 583 NW2d 680 (1998), the rules of evidence, and defendant's due process right to present a defense when, over defendant's objection, it suppressed evidence of the victim's criminal history, including his conviction for armed robbery. We disagree.

At issue is an alleged error regarding the admissibility of evidence, which we review according to the following standard:

> The decision whether to admit evidence is within the trial court's discretion; this Court only reverses such decisions were there is an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). Accordingly, when such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. [*People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).]

MRE 404 provides in pertinent part:

> (a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
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> (2) *Character of victim of a crime other than a sexual conduct crime.* Evidence of a pertinent trait of character of the victim of the crime, other than in a

> prosecution for criminal sexual conduct, offered by an accused, or by the prosecution to rebut the same . . . .[1]

MRE 405 further provides that

> (a) *Reputation or opinion*. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.
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> (b) *Specific instances of conduct*. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Our Supreme Court examined these court rules in *People v Harris, supra*, a homicide case in which the defendant claimed that he acted in self-defense, in the context of determining the admissibility of evidence about the victim's reputation for violence and specific instances of conduct relating to his violence. The Court distinguished reputation or opinion evidence from specific instances of conduct, stating with regard to the former and MRE 404:

> The actual violent character of the deceased, even though it is unknown to the defendant, is admissible as evidencing the deceased's probable aggression toward the defendant. 2 Wigmore, Evidence (Chadbourn rev), § 246, p 60. It is now widely accepted that a defendant may show a pertinent trait of character of the alleged victim that bears on whether the victim committed an act of aggression on the particular occasion in conformity with that trait. 1A Wigmore, Evidence (Tillers rev), § 63, p 1350. This is so because, when a controversy arises regarding whether the deceased was the aggressor, a jury's persuasion may be affected by the character of the deceased because it will shed light on the probabilities of the deceased's actions. *Id*. The sole purpose for which evidence of this type is admissible is, from the victim's general turbulent or violent character, to render more probable the evidence that tends to show an act of violence at the time he was killed.
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> Because the question is what the victim probably did, not what the defendant probably thought the victim was doing, the additional element of communication to the defendant is unnecessary when using character evidence to prove the victim was the aggressor. "The inquiry is one of objective occurrence, not of subjective belief." *Id*. at 1369. See *People v Stallworth*, 364 Mich 528, 536-537; 111 NW2d 742 (1961).

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[1] Subsequent to the trial in this case, MRE 404(a)(2) was amended, effective September 1, 2001, and now limits the accused's use of evidence of the alleged victim's character to a character trait for aggression in a homicide case in which self-defense is an issue.

> In contrast, where a defendant charged with murder asserts that he killed in self-defense, his state of mind at the time of the act is material because it is an important element in determining his justification for his belief in an impending attack by the deceased. 2 Wigmore, Evidence (Chadbourn, rev), § 246, p 50. The reputation of the deceased for a violent or turbulent disposition is a circumstance that would cause such a belief. However, unlike evidence tending to show that the victim was the aggressor, the deceased's violent reputation must be known to the defendant if he is to use it to show that he acted in self-defense. "Reputation in the neighborhood where both live is sufficient with nothing more." *Id*. at 58. The strength of the deceased as well as his habitual carrying of weapons or his possession of them at the time of the affray, if known to the defendant, should be considered as properly affecting his apprehensions. *Id*. at 59. The purpose of this evidence is to show the defendant's state of mind; therefore, it is obvious that the victim's character, as affecting the defendant's apprehensions, must have become known to him, otherwise it is irrelevant. See *People v Walters*, 223 Mich 676; 194 NW 538 (1923). [*Harris, supra* at 315-317.]

With regard to specific instances of conduct, the *Harris* Court, referencing MRE 405, explained:

> As a general rule, the character of the victim may not be shown by specific instances of conduct unless those instances are independently admissible to show some matter apart from character as circumstantial evidence of the conduct of the victim on a particular occasion.
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> On the other hand, rule 405 allows specific instances of violence to be admitted only when character or a trait of character is made an essential element of a claim, charge, or defense. *Id*. [1A Wigmore, Evidence (Tillers rev), § 63.1, p 1382-1383, n 1.] See *People v Farrell*, 137 Mich 127; 100 NW 264 (1904); *People v Cooper*, 73 Mich App 660; 252 NW2d 564 (1977) (indicating that specific acts may not be shown to establish that the victim was the aggressor; specific acts, however, may be shown to establish reasonable apprehension of harm). [*Id*. at 319.]

In the instant case, the prosecutor moved in limine to suppress Paul Holmes' criminal history, which included convictions in 1995 and 1996 for assault and armed robbery. Defense counsel argued such evidence was admissible under *Harris* as character evidence and that the evidence should be admitted either by reputation or by specific instances of conduct. The trial court ultimately suppressed Holmes' criminal history except as it came in through defendant's own testimony, ruling that "*Harris* says that the defendant has to know about the victim's propensity for violence" and thus "I will only allow those crimes to be mentioned if the defendant testifies about these crimes and knew the circumstances of them." At trial, defendant testified that he knew Holmes had been "in and out of the court systems" in South Carolina and that Holmes had shot someone in the back. Defendant further testified that Holmes was running from his wife because he had taken all her money.

On appeal, defendant argues that Holmes' criminal history, particularly his conviction for armed robbery, should have been admitted pursuant to *Harris* because "[a]s an assaultive crime, admission of evidence of the armed robbery would have [been] extremely probative that Paul Holmes was the likely aggressor and that Lacy Chisolm acted in self-defense, as Chisolm claimed in his trial testimony." However, in so arguing, defendant misinterprets *Harris, supra*.

As the *Harris* Court noted, when self-defense is an issue in a criminal trial, the defense may wish to offer proof of the character of the victim for aggressiveness as circumstantial evidence of a material fact, i.e., that at the time and place of the crime, it was the victim who first attacked the defendant, thus justifying his response. *Id*. at 315-316. The evidence is offered as "propensity evidence" to show that the victim acted in conformity with this character trait on the occasion in question, and is permissible as an exception to the general rule of exclusion of character evidence to show propensity. The evidence may serve a dual purpose if the character of the victim is known to the defendant because, in addition to its admission as character proof, the evidence is also admissible on a separate theory – to show the state of mind of the defendant and thereby demonstrate the reasonableness of his response under the circumstances.

However, while MRE 404(a)(2) allows evidence of the victim's character to be admitted to prove that the victim was the aggressor, MRE 404(b) specifically prohibits evidence of other crimes, wrongs, or acts of the victim to prove that the victim acted in conformity therewith, and pursuant to MRE 405(b), specific instances of violent conduct may be admitted in order to prove character "only when character or a trait of character is made an essential element of a claim, charge or defense." *Id.* at 319. In the instant case, the victim's character for aggressiveness, as reflected in his armed robbery conviction, did not constitute an "essential element" of any substantive defense:

> "When character is not an essential element, it may be shown only by reputation or opinion evidence. . . . Hence, construed literally, Rule 405 does not permit a defendant to use specific instances to show that the victim was the aggressor since the aggressive character of the victim is not an essential element of the defense of self-defense since the aggressive character of the victim is introduced as circumstantial evidence to show that the victim committed the first or primary *act* of aggression against the defendant, which is to say that the defense of self-defense in this situation makes an act of the victim, rather than a trait of the victim's character, the material issue." [*Id*. at 319, quoting 1A Wigmore, Evidence (Tillers rev), § 63.1, p 1382-1383, n 1 (emphasis in original).]

Accordingly, MRE 405(b) is inapplicable and the trial court did not abuse its discretion in suppressing evidence of the victim's criminal history.[2] Defendant was not otherwise deprived of

[2] To the extent the trial court ruled that the victim's criminal record was admissible *if* the specific acts were known to defendant and thus reflected on his state of mind in terms of the reasonableness of his response under objective circumstances, we conclude that the trial court erred. As observed in 1 Graham, Handbook of Federal Evidence, 2002 supp, p 58, "even when known, specific instances of conduct, while admissible circumstantial evidence, are not essential elements of the claim of self-defense as character itself is not an essential element of a claim of self-defense."

the opportunity to introduce evidence concerning the victim in the form of evidence of reputation or opinion evidence. The motion in limine in question applied to the exclusion of specific instances of violence – prior convictions – by the victim. As it turned out, evidence of the victim's character was admitted through the testimony of defendant at trial, including the fact that Holmes had been in and out of the court systems and had shot someone in the back. Under these circumstances, defendant has not shown that the trial court abused its discretion in its evidentiary ruling or that he was deprived of his right to present a defense.

II

Defendant next contends that because his defense was a combination of accident and self-defense, the trial court committed error requiring reversal in instructing the jury on self-defense but not on the defense theory of accident. We disagree.

"[A] trial court is not required to present an instruction of the defendant's theory to the jury unless the defendant makes such a request." *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), modified and remanded on other grounds, 450 Mich 1212 (1995). In the instant case, defendant did not request an instruction on accident and the trial court therefore had no duty to render such an instruction sua sponte. Moreover, jury instructions are reviewed on appeal for plain error unless the issue has been preserved by an objection. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Our review of the record indicates that defendant did not object to the jury instructions as given; rather, when asked by the court if there were any objections to the reading of the instructions, defense counsel stated that he had "no objections." Pursuant to *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000), because defendant expressed satisfaction with how the jury was instructed, this issue has been waived on appeal and defendant may not seek appellate review.[3] See also *People v Tate*, 244 Mich App 553, 558-559; 624 NW2d 524 (2001). Defendant's argument in this regard is therefore meritless.

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[3] As explained by our Supreme Court in *Carter, supra* at 214-215, in the context of instructional error:

> The rule that issues for appeal must be preserved in the record by notation of objection is a sound one. *People v Carines*, 460 Mich 750, 762-765; 597 NW2d 130 (1999). Counsel may not harbor error as an appellate parachute. *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995), quoting *People v Hardin*, 421 Mich 296, 322-323; 365 NW2d 101 (1984). "Deviation from a legal rule is 'error' unless the rule has been waived." *United States v Olano*, 507 US 725, 732-733; 113 S Ct 1770; 123 L Ed 2d 508 (1993).
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> Waiver has been defined as "the 'intentional relinquishment or abandonment of a known right.'" *Carines*, *supra* at 762, n 7, quoting *Olano*, *supra* at 733. It differs from forfeiture, which has been explained as "the failure to make the timely assertion of a right." *Id*. "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights,

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Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra

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for his waiver has extinguished any error." *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996), citing *Olano, supra* at 733-734. Mere forfeiture, on the other hand, does not extinguish an "error." *Olano, supra* at 733; *Griffin, supra* at 924-926.