# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHANIEL AMON SOUTHWELL,

Defendant-Appellant.

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UNPUBLISHED
December 20, 2002

No. 234459
Mecosta Circuit Court
LC No. 00-004556-FC

Before: Sawyer, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial conviction for second-degree murder, MCL 750.317, for which he was sentenced to 25 to 50 years' imprisonment. We affirm.

The first issue on appeal is whether the trial court abused its discretion in excluding evidence of specific instances of violence by the deceased victim. Defendant failed to preserve this evidentiary issue for review because he did not raise this issue at trial, and did not, by offer of proof or otherwise, make the substance of the evidence known to the trial court. MRE 103(a)(2); *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994). Therefore, our review is limited to plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

This Court reviews a trial court decision on whether to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Defendant claimed self-defense, and, therefore, claimed the right to question witnesses about past violent acts of the deceased victim. Defendant claims this right springs from *People v Harris*, 458 Mich 310; 583 NW2d 680 (1998), the Michigan Rules of Evidence, and defendant's constitutional right to present a defense.

The *Harris* Court held that, in general, specific instances of conduct may *not* be shown unless character is an essential element of the claim, charge, or defense. When character is not an essential element, only reputation or opinion evidence may be used to show character. *Id.* at 319. The *Harris* Court used self-defense as an example, noting that, "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"; rather, in self-

defense, "an act of the victim, rather than a trait of the victim's character, [is] the material issue." *Id*., quoting 1A Wigmore, Evidence (Tillers rev), § 63.1, pp 1382-1383 n 1.

In the present case, the trial court allowed admission of reputation evidence, but excluded past instances of violence by the deceased victim. Therefore, the trial court's ruling was in conformance with the *Harris* decision and MRE 405. Thus, there was no error.

In fact, defendant's argument seeks to admit more evidence than what defendant sought at trial. Following the prosecutor's objection at trial, defense counsel did not argue that he had a blanket right to question the witness on specific prior acts of violence. Rather, he argued that he should be able to get into specific acts only if the witness denied knowledge of the reputation. Defense counsel conceded that in putting a reference to a specific act in the question which lead to the objection was putting "the cart ahead of the horse" and that he should have waited for the denial by the witness if there was one. Because ultimately the witness testified that she was told of the victim's reputation (but did not observe anything herself), presumably defendant would not have gotten into the matter any further anyway.

Even assuming there had been error, the record indicates that the witness had little to offer defendant's defense. The witness knew the victim for only one year, and she had never seen him commit a violent act. Further, defendant was permitted to cross-examine the witness about the victim's reputation for violence and temper, and additional testimony concerning the victim's reputation was admitted from another witness' testimony. Finally, defendant testified regarding the victim's reputation, and defendant also testified about the victim's past acts of violence. Therefore, the record does not support defendant's claim that he was prejudiced or denied the right to a defense when the court precluded questions about the deceased victim's past instances of violence.

Defendant next claims that the trial court abused its discretion when it scored offense variable 6, intent to kill or injure, MCL 777.36, at twenty-five points. Defendant argues the court should have scored ten points because the death occurred both within a combative situation and in response to victimization. Defendant objected to the scoring of OV 6 at his sentencing hearing; therefore, this issue is preserved for appeal. MCR 6.429(C); *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999).

Provided permissible factors were considered, this Court reviews a trial court's sentencing for abuse of discretion. *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983), overruled in part on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). The pertinent subsections for OV 6, MCL 777.36(1)(b) and (c), read:

> (b) The offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result. 25 points
>
> (c) The offender had intent to injure or the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm or there was gross negligence amounting to an unreasonable disregard for life. 10 points

An additional pertinent instruction on scoring OV 6 is listed in MCL 777.36(2)(b) and reads:

> Score 10 points if a killing is intentional within the definition of second-degree murder or voluntary manslaughter, but the death occurred in a combative situation or in response to victimization of the offender by the decedent.

Defendant argues that the death occurred in a combative situation because the decedent threatened defendant, then either body slammed or forced defendant to the floor, and the stabbing occurred immediately after. However, evidence on the record supports the trial court's finding that the decedent had disengaged fighting and that the combative situation had ceased. Several witnesses testified that the victim had ceased fighting, turned, and was walking away when defendant jumped on the victim's back and stabbed him. Therefore, the trial court did not abuse its discretion in finding that the combative situation, within the meaning of MCL 777.36(2)(b), had ceased at the time of the stabbing.

Defendant cites *People v Rodriguez*, 212 Mich App 351; 538 NW2d 42 (1995), to support his claim that the trial court should have found there had been a combative situation. However, *Rodriguez* is not helpful to defendant's position because this Court upheld the *Rodriguez* trial court's determination that there was *not* a combative situation within the meaning of MCL 777.36(2)(b). This Court upheld Rodriquez' score of twenty-five points for intent to kill or injure, even though the victim died during a fight with the defendant. *Rodriguez, supra* at 353-354. This Court found that fighting, by itself, cannot create a "combative situation" within the meaning of MCL 777.36(2)(b), because this would create the absurd result that an aggressor would be awarded a lower sentence merely because his victim defended himself. *Rodriguez, supra* at 354.

Defendant also argues that the death occurred in response to his victimization by the decedent, and he claims this is supported by the decedent's large size, his skill in boxing, and his violent history. However, evidence on the record indicated that defendant was trying to pick a fight with the victim that evening, not the other way around. Therefore, the trial court did not abuse its discretion in determining that the stabbing did not occur in response to a victimization of defendant.

Finally, defendant argues that, even if properly scored, his sentence of twenty-five to fifty years is disproportionate. Defendant offers no legal authority to support overturning the lower court's sentence, but merely announces his position and offers policy reasons, such as the expense of his incarceration, without arguing how his sentence is disproportionate to other offenders similarly situated. By not arguing how his sentence is disproportionate, a defendant waives a claim regarding the proportionality. *People v Hill*, 221 Mich App 391, 397; 561 NW2d 862 (1997). In any event, defendant's twenty-five-year minimum sentence is within the statutory guidelines' recommendation of fifteen to twenty-five years or life, MCL 777.61. Therefore, this Court may not review for proportionality. MCL 769.34(10); MCL 769.34(11).

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Michael J. Talbot