

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WAYNE ROY MCCARTY,

Defendant-Appellant.

UNPUBLISHED

December 11, 2003

No. 242792

Ingham Circuit Court

LC No. 00-076564-FC

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

A jury convicted defendant Wayne McCarty of assault with intent to commit murder¹ for pushing his wife out of a moving vehicle with the intent to kill her. He appeals as of right.² We affirm.

I. Basic Facts And Procedural History

Eyewitness testimony at the trial indicated that McCarty pushed his wife out of a truck he was driving, that she appeared almost lifeless when she hit the pavement, and that he both failed to help her and tried to stop others from doing so. The prosecutor introduced evidence that McCarty pushed or tried to push women out of moving vehicles twice before. McCarty objected to the admission of this evidence at trial and challenges it on appeal. He also challenges the presence in the courtroom of the victim, who was not a witness.

II. Other Acts Evidence

A. Standard Of Review

McCarty argues that the trial court erred by admitting evidence that he had pushed two other women, on separate occasions, out of moving vehicles. We review evidentiary questions

¹ MCL 750.83.

² The trial court sentenced McCarty outside the statutory guidelines to a prison term of 25 to 50 years. However, McCarty does not appeal the sentencing departure.

under an abuse of discretion standard.³ An abuse of discretion can be found only where an unprejudiced person considering the facts on which the trial court relied would find no justification or excuse for the ruling made.⁴

B. The Purpose For Offering The Evidence

Here, the prosecutor offered the evidence to refute McCarty's claim that his wife's fall from the car was an accident. Thus, the prosecutor offered the evidence for a purpose other than to show that McCarty had a bad character or a propensity to commit the charged crime. The evidence was relevant to a key issue at trial and, under the circumstances, did not cause undue prejudice substantially outweighing its probative value. The evidence met the criteria for admissibility under MRE 404(b) and *People v VanderVliet*.⁵

C. Effect On The Outcome

In addition, a criminal defendant can prevail on a claim of preserved nonconstitutional error only by showing that it is more probable than not that the error was outcome determinative.⁶ Assuming that the admission of the other acts evidence was erroneous, the error does not meet this standard in light of the overwhelming weight of the evidence against McCarty, including eyewitness evidence of the crime.

III. Presence Of The Victim

A. Standard Of Review

McCarty asserts that the trial court erred by permitting the victim to be present for a short part of the trial. The crux of the issue is McCarty's claim that the Crime Victim's Rights Act's authorization of the presence in courtrooms of victims is unconstitutional, because it violates the due process rights of criminal defendants. The constitutionality of a statute is a question of law that we review de novo on appeal.⁷ Further, McCarty concedes that the standard for review for this issue is one of forfeited constitutional error.⁸

B. Provisions Of The Crime Victim's Rights Act

The Crime Victim's Rights Act⁹ states that "[t]he victim has the right to be present throughout the entire trial of the defendant, unless the victim is going to be called as a witness."

³ *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

⁴ *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000).

⁵ *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

⁶ *People v Lukity*, 460 Mich 484, 495-497; 596 NW2d 607 (1999).

⁷ *Tolksdorf v Griffith*, 464 Mich 1, 5; 626 NW2d 163 (2001).

⁸ *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

⁹ MCL 780.761.

Here, the victim did not testify. Because the victim's presence was authorized by statute, we can find error only if the validity or applicability of the statute can be questioned. McCarty does not question the Act's applicability, which is in any event clear, but does make a conclusory claim that the statute violated his right to a fair trial. McCarty does not, however, cite authority to support this position. We see no merit to the argument that the victim's presence violated McCarty's constitutional right to a fair trial, particularly given that the victim's presence and identity were not revealed to the jury, that the jury was told to decide the case only on the evidence presented to it, and that any inference the jury may have drawn from the victim's appearance was merely duplicative of medical evidence.

Moreover, under the *Carines* standard, reversal is appropriate only where the defendant is actually innocent or there is serious error which affects the fairness, integrity, or public reputation of the judicial proceedings. Given the eyewitness testimony and other evidence, including the medical evidence, of McCarty's guilt, we cannot say that he is actually innocent. Nor do we see any error affecting the fairness, integrity, or public reputation of the judicial proceedings in allowing a crime victim to watch an open public trial in which the victim may be presumed to have a particular personal interest, where the victim's presence is authorized by statute.

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Pat M. Donofrio