STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 12, 2005
v	No. 254862 Macomb Circuit Court
DEREK JAMES NASH, Defendant-Appellee.	LC No. 03-001349-FH

Before: Judges O'Connell, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for involuntary manslaughter, MCL 750.321. Defendant was sentenced as a fourth habitual offender to eleven years and ten months' to forty years' imprisonment. We affirm.

Defendant first argues that the trial court improperly excluded evidence of the victim's criminal history and prior acts of violence, denying him a fair trial. We disagree.

This Court reviews a decision to admit other acts evidence under MRE 404(b) for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only if an unprejudiced person considering the facts on which the trial court acted would say that there is no justification or excuse for the trial court's decision. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). "A trial court's decision on a close evidentiary question cannot 'by definition' be an abuse of discretion." *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001) (citation omitted). A preserved nonconstitutional evidentiary error will not merit reversal unless it involves a substantial right, and, on review of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome-determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

In defendant's motion for discovery, he requested that the court order the prosecutor to produce the criminal records of all witnesses that the prosecution was planning to call. At the motion proceeding, defense counsel argued that he wanted to introduce the facts underlying the victim's criminal history pursuant to MRE 404(b). MRE 404(b) states that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," but the rule allows such evidence to be admitted for other, limited purposes. The trial court precluded production of the victim's criminal records unless defendant could introduce evidence that defendant was aware of reputation or character evidence

of the victim's violent propensities. The trial court also precluded introduction of prior instances of the victim's violent behavior unless defendant was aware of the specific acts.

At trial, defense counsel contended that the victim was an aggressive and violent drunk, and through direct examination of defendant and the victim's mother as well as cross examination of several prosecution witnesses, defense counsel managed to introduce evidence of the victim's previous aggressive and violent behavior and criminal history, despite the trial court's ruling on defendant's motion. Defense counsel attempted to use this evidence to argue that the victim also became aggressive and violent on the night in question. This is precisely the use of other acts evidence that MRE 404(b) prohibits. Defense counsel also attempted to introduce evidence of the victim's prior acts of violence to impeach prosecution witnesses; however, the prosecution never elicited any character evidence with regard to the victim's reputation for peacefulness. Therefore, there was no testimony to impeach with evidence of other bad acts.

In any event, it is unnecessary to determine whether the trial court abused its discretion in excluding the other acts evidence because the exclusion of the evidence does not warrant a new trial because any resulting error was harmless. MCL 769.26; *Lukity, supra,* at 495. The victim's propensity for aggressiveness and violence is relevant only under a theory of self defense to show that defendant reasonably feared for his safety. Although defendant now claims on appeal that he argued alternative theories of self defense and accident at trial, a review of the record indicates that defendant expressly denied that he was defending himself when he struck the victim.

The prosecutor cross-examined defendant about his self-defense story, but defense counsel objected, stating, "Judge, he never said his story was to defend himself. The prosecutor is mischaracterizing the evidence. He's never used the word 'defend.'" Defendant testified numerous times, on both direct and cross examination, that he wrestled with the victim and may have hit him,[1] not because he had to defend himself, but because the victim was "out of line." On cross examination, defendant testified as follows:

Q. You were wrestling around because [the victim] was out of line; is that right?

A. Yes, ma'am.

Q. And because you didn't want him to have anymore to drink?

A. Yes, ma'am.

Q. Did you adopt [the victim] at some point, become his father?

A. No, ma'am.

[1] Defendant's testimony on whether he hit the victim is somewhat inconsistent in that defendant first said, "I may have hit him once or twice." Defendant later said, "I don't really know exactly where I hit him or if I hit him at all. I know I grabbed him."

Q. So when you – when [the victim] hit you in the head and you were wrestling around you weren't defending yourself?

A. No, I was just trying to get control of him.

Q. So you weren't afraid of [the victim]?

A. No, ma'am.

Because defendant did not claim at trial that he acted in self defense, evidence of the victim's prior acts of violence were not relevant to any fact that is of consequence to the determination of guilt. The trial court's ruling to preclude evidence of the victim's criminal record and past instances of violent behavior was, therefore, not outcome-determinative, and reversal is not warranted. *Lukity, supra,* at 495-496.

Next, defendant argues that the prosecutor presented insufficient evidence to prove beyond a reasonable doubt that he was not acting in self defense. We disagree.

This Court reviews a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether sufficient evidence was presented at trial to sustain a criminal conviction, this Court views the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723-724; 597 NW2d 73 (1999). Intent may be inferred from all the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987), and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Although the penalty for involuntary manslaughter is codified, MCL 750.321, the definition is found in common law. *People v Herron*, 464 Mich 593, 604; 628 NW2d 528 (2001). In *Herron*, the Court stated:

> This Court has defined the common-law offense of involuntary manslaughter as "the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty." [*Id.* (citations omitted).]

Therefore, in order to convict defendant of involuntary manslaughter, the prosecution had to prove beyond a reasonable doubt that the victim died as a result of defendant's committing an assault and battery against the victim with a specific intent to injure him. See CJI2d 16.10.

On appeal, defendant correctly argues that, once evidence of self defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). However, no evidence of self defense was introduced and, as pointed out in our analysis of the previous issue, defendant did not even claim

that he was acting in self defense. The prosecution, therefore, was not required to prove beyond a reasonable doubt that defendant did not act in self defense. In any case, the jury is not obligated to believe defendant's testimony, even if another witness did not contradict it. *People v Jackson*, 390 Mich 621, 624-625; 212 NW2d 918 (1973).

Defendant testified that he was not defending himself against the victim, but rather, he was wrestling with the victim and may have hit him because the victim was "out of line." Shawn Slanec testified that he saw defendant kneel on top of the victim and hit him at least four times. The medical examiner testified that the victim died as a result of a subdural hemorrhage that could only have been sustained in a beating, not from falling down on a windowsill or out of bed, as defendant suggested. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant committed an assault and battery on the victim with the intent to injure him, causing death as a result.

Affirmed.

/s/ Peter D. O'Connell
/s/ Jane E. Markey
/s/ Michael J. Talbot