

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DALE ALLEN ARENDSSEN,

Defendant-Appellant.

UNPUBLISHED

December 12, 2006

No. 264032

Jackson Circuit Court

LC No. 04-005601-FC

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of second-degree murder, MCL 750.317, one count of operating a motor vehicle under the influence (OUIL) causing death, MCL 257.6254, one count of operating a motor vehicle with license suspended causing death, MCL 257.9044, and one count of failing to stop at the scene of a personal injury accident, MCL 257.617A. He was sentenced, as a third habitual offender, MCL 769.11, to 400 to 600 months' imprisonment for his second-degree murder conviction, 15 to 20 years' imprisonment each for his OUIL causing death and driving while licensed suspended causing death convictions, and 205 days for his conviction for failure to stop at the scene of a personal injury accident. Defendant appeals as of right his convictions and sentences. We affirm.

Several witnesses testified at trial that at approximately 6:00 p.m. on November 26, 2004, the vehicle defendant was operating struck the rear of a vehicle operated by Patricia Lindsey as Lindsey was waiting to turn left into a gas station. Lindsey's passenger, Linda Bostedor, suffered a broken wrist and sprained ankle as a result. Defendant did not stop at the scene of that accident. Rather, he drove around Lindsey's vehicle, striking the curb, before veering back across traffic and into the gas station. Defendant then drove around the gasoline pumps and reentered the roadway, traveling in excess of the speed limit. He continued driving away from the scene, crossing the roadway's double yellow center line on three occasions, the last of which caused him to strike head on a vehicle driven by Floyd Allion. Allion's car was subsequently struck in the rear by a second vehicle. Allion's wife, Beverly, later died as a result of injuries sustained during the collisions. Immediately following the collisions, defendant was observed to be slurring his speech, and he smelled of intoxicants. Defendant informed officers that he consumed four or five beers before the accident. Defendant's blood alcohol level was determined to be .20 grams per 100 millimeters of blood when he arrived at the hospital.

I

Defendant first argues on appeal that the trial court abused its discretion by granting plaintiff's motion to admit evidence of two prior drunk driving offenses from 1994 and 1997. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Id.*¹

MRE 404(b) governs the admissibility of evidence of other crimes, wrongs or acts, and in relevant part provides:

(1) 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

As our Court explained in *People v Werner*, 254 Mich App 528, 539; 659 NW2d 688 (2002):

MRE 404(b) is intended to exclude character evidence, or evidence that would lead the jury to convict a defendant on the basis of his past conduct rather than on evidence of his conduct for the instant offense. The rule excludes evidence if it is not relevant to anything other than the defendant's character or propensity to commit bad acts. However if the evidence is relevant to some other issue, it is admissible under MRE 404(b). [Citations omitted.]

To be admissible under MRE 404(b), evidence of other acts by the defendant: (1) must be offered for a proper purpose; (2) must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *Lewis v LeGrow*, 258 Mich App 175, 208; 670 NW2d 675 (2003). A proper purpose is one other than to establish defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). Evidence is relevant if it has any tendency to make the existence of a fact

¹ Plaintiff asserts that defendant has waived appellate review of this issue by stipulating that he was convicted of the 1994 and 1997 offenses. However, this is not a case where defendant introduced the evidence of his prior convictions, as in *People v Rodgers*, 248 Mich App 702, 716; 645 NW2d 294 (2001). Rather, defendant entered into a stipulation that he had been so convicted, to avoid testimony establishing that fact, only after the trial court ruled that his 1994 and 1997 convictions would be admissible. Thus, we disagree that defendant waived this issue.

that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. Further, as our Supreme Court explained in *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995), "unfair prejudice" does not merely mean "damaging," because any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists only when there is a tendency for the jury to give evidence undue or preemptive weight, or when it would be inequitable to allow its use. *Id.* at 75-76; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

Before trial, plaintiff moved to admit evidence of defendant's prior drunk driving convictions, including those from 1994 and 1997. Plaintiff argued that the prior convictions were relevant to establish malice. Plaintiff asserted that these prior convictions put defendant on notice that his driving while drunk could be dangerous and thus, that his continuing to drive while under the influence was excessively reckless. Defendant opposed admission of his prior convictions, asserting that they were not relevant, because the circumstances of those offenses did not equate with the instant case and they were too far in the past. The trial court ruled that defendant's drunk driving offenses in 1994 and 1997 were admissible. The trial court reasoned that, because these two prior offenses involved defendant driving erratically while intoxicated, they showed that defendant lacked regard for the consequences of his drunk driving. Thus, the trial court concluded that these prior offenses were material to the charged offenses in that they were evidence that defendant willfully and wantonly disregarded the likelihood that death or great bodily harm could result from his choosing to drink and drive. Further, the trial court noted that admission of these prior offenses precluded defendant from falsely portraying himself as an unfortunate person that happened, on one occasion, to drink too much and then drive causing an accident. The trial court excluded mention of other prior offenses committed by defendant, as well as mention of defendant's prior incarceration for drunk driving offenses.

Following this ruling, police officer Robert Mossing was permitted to testify, at trial, that in April 1994, the vehicle defendant was operating crossed the center line and nearly struck his patrol car head on. Mossing took evasive action to avoid colliding with defendant, and he then apprehended defendant, who smelled of intoxicants, failed field sobriety tests, and was driving without a valid license. Defendant was subsequently convicted of operating under the influence. Similarly, police officer David Stamler was also permitted to testify, at trial, that, in January 1997, he observed defendant swerving within his lane of travel and then cross both lanes without signaling in order to make an "extremely wide" turn, nearly striking the curb. Stamler apprehended defendant, who smelled of intoxicants and failed field sobriety tests. Defendant was subsequently convicted of operating under the influence.

On the record before us, we find that the trial court did not abuse its discretion in admitting evidence relating to the prior drunk driving incidents. First, the evidence was not offered to establish defendant's character to show his propensity to commit the offense. Rather, it was offered for the permissible purpose of showing that defendant possessed the requisite degree of malice for second-degree murder. The evidence was also logically relevant to the disputed element of malice because it established defendant's knowledge of the effects of intoxication on his driving ability. MRE 401. That is, this evidence helped the prosecution establish that defendant drove his vehicle while intoxicated on November 26, 2004, in willful and wanton disregard of the safety of others on the roadway. Defendant knew that, on previous occasions, his intoxication caused him to drive erratically, including weaving and crossing the

center road line into oncoming traffic. Finally, there is no indication on the record that the jury gave the evidence preemptive weight, or that the evidence had any undue tendency to move the jury to decide the instant case on an improper or emotional basis. *Mills, supra* at 75-76. Thus, we conclude that the trial court did not abuse its discretion in admitting the challenged evidence.

II

Defendant next argues on appeal that there was insufficient evidence to convict him of leaving the scene of a personal injury accident, because the trial court mistakenly referred to a passenger in the Allion vehicle, instead of the passenger in the Lindsey vehicle, when instructing the jury on the elements of this offense. Defendant asserts that there was no evidence that he left the scene of the accident involving the Allion vehicle, and therefore, that there was insufficient evidence presented at trial to convict him of this offense, as it was defined by the trial court during jury instructions.

When determining whether there was sufficient evidence presented to support a verdict, this Court reviews the evidence *de novo*, in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004); *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). Defendant was charged with leaving the scene of an accident causing injury to Patricia Lindsey and/or Linda Bostedor. Testimony presented at trial clearly established that defendant struck the rear of Lindsey's vehicle, causing injury to Bostedor, and that defendant did not stop at the scene of that accident. Indeed, defendant presented no evidence to the contrary at trial, and he does not assert otherwise on appeal. Thus, the evidence was legally sufficient to support the conviction.

The gravamen of defendant's argument therefore does not appear to be that there was insufficient evidence to support a conviction on the crime charged. Rather, he argues that his conviction for leaving the scene of a personal injury accident must be reversed because the trial court mistakenly instructed the jury that, in order to convict him of this offense, it must find that "[d]efendant knew or had reason to know that he had been involved in an accident that resulted in personal injury to Patricia Newton," who was a passenger in the Allion vehicle. It was clear throughout the trial, however, that defendant was charged with failing to stop at the scene of his collision with the Lindsey vehicle, and not the Allion vehicle. And, the evidence that he failed to stop at the scene of his collisions with the Lindsey vehicle is unequivocal. More importantly, at trial, defense counsel affirmatively indicated that he had no objection to the instructions as given. In *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004), our Court held that the defendant's "affirmative statement that there were no objections to the jury instructions constituted express approval of the instructions that waived appellate review on appeal." Under the circumstances, we conclude that any claim of error based on the trial court's misidentification of the injured party from defendant's first collision with the Lindsey vehicle as Patricia Newton is waived. *Id.* And, even if we considered the unpreserved error, there is not plain error requiring reversal. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

III

Defendant argues on appeal that the trial court erred in considering his lack of remorse during sentencing. However, "while a sentencing court cannot, in whole or in part, base its

sentence on a defendant's refusal to admit guilt, evidence of a lack of remorse can be considered in determining an individual's potential for rehabilitation.” *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987); *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). Thus, resentencing is required only if it is apparent that the court erroneously considered the defendant's failure to admit guilt. To determine whether a sentencing court considered a defendant's failure to admit guilt, this Court will consider the defendant's maintenance of innocence after conviction, attempts by the sentencing judge to get the defendant to admit guilt, and indications that if the defendant admitted guilt, he would have received a less severe sentence. *Wesley*, *supra* at 713; *Spanke*, *supra* at 650. As noted in *Wesley*, *supra* at 713, the presence of these factors indicates that the sentence is likely to have been improperly influenced by defendant's refusal to admit guilt. “If, however, the record shows that the court did no more than address the factor of remorsefulness as it bore upon defendant's rehabilitation, then the court's reference to a defendant's persistent claim of innocence will not amount to error requiring reversal.” *Id.*

In sentencing defendant, the trial court noted that defendant did not offer any apology for his conduct to the Allion family. The trial court also noted defendant's lack of remorse for his actions during its assessment of defendant's rehabilitative potential.² There is no indication in the record, and defendant does not assert on appeal, that the trial court impermissibly considered defendant's failure to admit guilt. The trial court made no attempt to convince defendant to admit his guilt, and there is no indication that defendant would have received a lesser sentence if he had done so. The trial court merely mentioned defendant's lack of remorse in the context of assessing his rehabilitative potential and then sentenced defendant within the appropriate guidelines range. Therefore, defendant is not entitled to resentencing.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder

² The trial court stated:

Well, it's rather clear, Mr. Arendsen, that you are a danger to society. You have no regards for other people. You have no remorse over what occurred here to this family. As long as you're outside and free, it's rather clear that you will drink and that you will drive. You had a .20. Certainly willfully drinking after you know that you've had lots of other problems with regards to drinking. And obviously the best thing for society is to make sure that you stay out of society for the rest of your life.