STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2006
v	No. 262370 Kent Circuit Court
JAMES SCOTT BASKIN, Defendant-Appellant.	LC No. 04-007814-FC

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

PER CURIAM.

Defendant was convicted, following a jury trial, of voluntary manslaughter, MCL 750.321. He was sentenced as an habitual offender, second offense, MCL 769.10, to eighty-six months to fifteen years' imprisonment. He appeals as of right, and we affirm.

I

The decedent, Curtis Lindsey, was loitering at a Shell gas station in downtown Grand Rapids with his friend, Michael Kingsley, and other persons, on the night of June 20, 2004. Defendant, who was also present, became involved in an altercation with Lindsey and his companions, which culminated in defendant producing a knife and stabbing Lindsey in the chest. Lindsey was taken to the hospital, where he was pronounced dead.

Defendant was arrested near the gas station. He gave the police various accounts of what happened, but eventually told them that he drew a knife in self-defense when Kingsley and another person approached him in a threatening manner. Defendant claimed that he held out the knife to ward them off while he tried to turn sideways to escape. Lindsey then came toward him and was stabbed by accident. Defendant told the officers that he threw the knife off a freeway ramp, but the officers never found it.

Kingsley acknowledged that he did not actually see defendant stab Lindsey. He testified that he saw Lindsey fall, and then defendant ran away.

Dr. Mark Figurski, who attended to Lindsey when he was brought to the hospital, testified that Lindsey was stabbed once with a great deal of force. The knife penetrated the heart and also injured the sternum (breast bone). Dr. David Start, the forensic pathologist who performed Lindsey's autopsy, testified that Lindsey's cause of death was a stab wound to the

chest. Dr. Start found that the knife went through the "xiphoid process," or the bony part of the sternum, and penetrated Lindsey's pericardium and heart. According to Dr. Start, "it would take a significant amount of force" for a knife to go through the sternum. He considered it "very unlikely" that Lindsey walked into the knife, because the knife would have stopped at the bone if he had. On cross-examination, Dr. Start acknowledged that a person might receive this type of wound if he ran into the knife, but only if the person holding the knife offered some resistance, or if he was swinging the knife toward the victim.

Defendant testified that an altercation began at the gas station when Kingsley, Lindsey, and another man came uncomfortably close to him, and Kingsley made a threatening remark. Defendant took a knife from his pocket to ward them off. He held the knife toward them while he moved from left to right to get away from them. He stated that Lindsey was not in his line of sight as he turned with the knife and unintentionally stabbed him. Defendant stated that he believed the men were assaulting him, and he was only trying to get away from them. He described Lindsey's stabbing as a "fluke." He reiterated that he did not know that Lindsey was coming toward his knife, and that he intended only to scare off his attackers with the knife. Defendant testified that he originally lied to the police because he was ashamed to admit that he had been frightened of his assailants.

The jury acquitted defendant of an original charge of second-degree murder, but found him guilty of voluntary manslaughter. Although defendant had asked the trial court to instruct the jury on involuntary manslaughter, the trial court denied that request, stating that defendant's claim of an accidental stabbing did not comport with the definition of involuntary manslaughter.

II

Defendant argues that the evidence was insufficient to support his voluntary manslaughter conviction. When a defendant challenges the sufficiency of the evidence in a criminal case, we consider whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002). Circumstantial evidence and the reasonable inferences that arise from it can constitute sufficient proof of the elements of a crime. *People v Williams*, 268 Mich App 416, 421; 707 NW2d 624 (2005).

Voluntary manslaughter is an intentional killing committed in the heat of passion, caused by adequate provocation, without a lapse of time during which a reasonable person could control his emotions. *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003). Provocation is not an element of manslaughter, but the circumstance that negates the presence of malice. *Id.* at 536.

Defendant argues that the evidence was insufficient to permit an inference that he intentionally stabbed Lindsey, because Kingsley did not actually see the stabbing, and the physical evidence did not negate his theory of an unintentional or accidental stabbing. We disagree. The jurors could infer from Kingsley's testimony and the physical evidence that the stabbing was intentional. Dr. Start did not offer any explanations for the wound that were consistent with defendant's accidental stabbing theory. Dr. Start testified that a knife could not penetrate the xiphoid process unless the person wielding the knife used a substantial amount of force against the victim, such as by purposefully stabbing him, deliberately offering resistance,

or by swinging the knife toward him. Each of these scenarios supports an inference that defendant acted intentionally.

Viewing the evidence in a light most favorable to the prosecution, the jurors could reasonably infer that defendant deliberately stabbed Lindsey during a heated confrontation with him and two other individuals. Therefore, the evidence was sufficient to support defendant's manslaughter conviction.

III

Defendant next argues that the trial court erroneously admitted evidence of a prior violent confrontation with Forrest Andersen. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

Before trial, the prosecutor filed a notice pursuant to MRE 404(b)(2) of his intent to introduce evidence that defendant threatened Forrest Andersen with a knife a few days before Lindsey was stabbed. The prosecutor argued that the evidence was admissible to prove "motive, intent, plan, absence of mistake."

Andersen testified that he and defendant were residents at the same halfway house. Andersen related an incident on June 17, 2004, in which he and defendant had an argument and started to push each other. Andersen pushed defendant against a window, causing defendant to cut himself on the broken glass. Andersen left the area, but defendant approached him with a knife. Andersen pushed him away and left.

We conclude that any error in the admission of this testimony was harmless. The testimony added nothing prejudicial to the already admitted fact that defendant had a knife during the incident at issue, and that he pulled it out and brandished it because he was prepared to use it to protect himself.

IV

Defendant next argues that the trial court erred by allowing the prosecutor to cross-examine him about an armed robbery offense committed in 2001, when he allegedly robbed Manuel Garcia and used a box cutter as a weapon. Defendant denied robbing Garcia, and maintained that he was just whittling with a knife.[1]

Defendant argues that this line of questioning was improper impeachment under MRE 609 (impeachment with evidence of a prior conviction for an offense involving an element of theft or dishonesty), and also inadmissible under MRE 404(b). The record does not indicate that the prosecutor offered the evidence under either of these court rules, or that the trial court relied on either rule as a basis for allowing the testimony. Rather, the prosecutor cross-examined

[1] Defendant was charged with armed robbery in this prior incident, but pleaded guilty to aggravated assault and possession of a switchblade, pursuant to a plea agreement. The prosecutor did not question defendant about his plea bargain or misdemeanor convictions.

defendant, as permitted by MRE 405(a), in response to defendant's testimony, under MRE 404(a)(1), portraying himself as a frequent victim of crime.

On direct examination, defendant testified that he became frightened when Lindsey's companions approached him at the gas station, and that he brandished the knife defensively, not aggressively. Defendant attempted to bolster this testimony with character evidence, under MRE 404(a)(1), portraying himself as a fearful person who was more likely to be the victim of crime than a perpetrator. Defendant testified about his prior experiences as a crime victim. He stated that he was once shot in the leg and that the bullet was still in his leg. He also stated that his ex-girlfriend once cut him on the face when she was intoxicated, and he still had a scar. Additionally, when he was in the Navy, he was attacked by persons he did not know and was cut on the back of his neck with a knife. The trial court permitted the prosecutor to cross-examine defendant about the 2001 offense involving Garcia to rebut defendant's testimony and implied argument that he had been a victim of assaultive behavior three times, and was thus fearful of again being a victim, making it more likely that he acted defensively with respect to the instant offense.

Because defendant placed his character in issue, the prosecutor was permitted, under MRE 405(a), to inquire into relevant specific instances of conduct to rebut that evidence. *People v Lukity*, 460 Mich 484, 499; 596 NW2d 607 (1999). Thus, the trial court did not abuse its discretion in permitting the prosecutor to cross-examine defendant regarding the incident with Garcia, and the cross-examination did not implicate either MRE 404(b) or MRE 609. *Id.*

V

Defendant also argues that the trial court erred by excluding evidence of Lindsey's previous conviction for carrying a concealed weapon. We disagree.

Defendant sought to introduce evidence that Lindsey was previously convicted of carrying a nine-inch kitchen knife. Lindsey was found in possession of the knife when the police found him intoxicated in the middle of the street. He told the police officer that he carried the knife to defend himself, because he had been assaulted on three prior occasions. The trial court excluded the evidence, reasoning that the conviction did not involve an assaultive offense and, therefore, its prejudicial effect outweighed any probative value.

Defendant correctly asserts that evidence of a homicide victim's violent trait of character for aggression is admissible where a defendant claims self-defense, or where he claims that the victim was the aggressor. MRE 404(a)(2). In *People v Harris*, 458 Mich 310, 315-316; 583 NW2d 680 (1998), our Supreme Court discussed the application of this rule and MRE 405 (methods of proving character). The defendant in that case sought to introduce evidence of the victim's reputation for violence and specific instances of violent conduct. *Id.* at 312-313, 320. The Court explicated the differences between cases where the defendant claims self-defense and cases where the defendant claims that the victim was the aggressor. *Id.* at 315-318. In this case, however, evidence of Lindsey's prior conviction was not probative of the questions of self-defense or the victim's aggression. Lindsey was convicted only of possessing a weapon, in circumstances that did not suggest any propensity for aggressive behavior or a history of violence. Accordingly, the trial court did not abuse its discretion in excluding the evidence. *Manser, supra* at 31.

VI

Defendant next argues that the trial court erred in denying his request to instruct the jury on involuntary manslaughter. We review this preserved claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty. *Mendoza, supra*, 468 Mich at 536. The elements of both voluntary and involuntary manslaughter are included in the elements of murder; thus, they are necessarily included lesser offenses of murder, and qualify as "inferior" offenses under MCL 768.32. *Id.* at 541. Because defendant was charged with murder, the trial court was required to instruct the jury on both voluntary and involuntary manslaughter, upon request, if supported by a rational view of the evidence. *Id.* Involuntary manslaughter requires a finding that the victim's death was caused by an act of gross negligence. Hence, a defendant charged with murder is entitled to an involuntary manslaughter instruction, upon request, if a rational view of the evidence would have supported a finding that the victim's death was caused by an act of gross negligence. See *People v Gillis*, 474 Mich 105, 138; 712 NW2d 419 (2006).

Gross negligence in the context of involuntary manslaughter involves (1) knowledge of a situation requiring the use of ordinary care and diligence to avoid injury to others, (2) an ability to avoid harm by using ordinary care and diligence, and (3) the "failure to use care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another." *People v Albers*, 258 Mich App 578, 582; 672 NW2d 336 (2003). In other words, a defendant is grossly negligent when "the actor realizes the risk of his behavior and consciously decides to create that risk. . . . [T]he actor does not seek to cause harm, but is simply reckless or wantonly indifferent to the results." *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997) (citations and internal quotation marks omitted).

A rational view of the evidence could support a conviction of involuntary manslaughter. The jury could have concluded that defendant's conduct in pulling the knife and waving it side to side was grossly negligent. Nevertheless, because defendant was convicted of voluntary manslaughter, which is made criminal by the same statute that makes criminal involuntary manslaughter, we conclude that reversal is not warranted.

VII

Defendant argues that the trial court violated his due process rights at sentencing when it scored fifteen points for offense variable (OV) 5 (psychological injury to victim's family) of the sentencing guidelines. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Under MCL 777.35, fifteen points should be scored if "[s]erious psychological injury requiring professional treatment occurred to a victim's family," and zero points should be scored if there is no serious psychological injury to a family member. At sentencing, defendant argued that there was insufficient evidence that Lindsey's family members suffered psychological injury

as a result of his death. The trial court disagreed, noting that several family members had written letters describing how Lindsey's death affected them. In particular, defendant's sister wrote that she cried a lot, had trouble concentrating on her work, and was seeking counseling. Although defendant complains that the only evidence of psychological injury came from unsubstantiated assertions in a family member's letter, a sentencing court is not limited by the rules of evidence at sentencing, MRE 1101(b)(3), and an appellate court will not disturb a scoring decision for which there is any evidence in support. *Id.* The record adequately supports the trial court's score of fifteen points for OV 5.

Defendant also argues that the trial court erred in scoring the sentencing guidelines based on facts not found by the jury. In support of this argument, defendant relies on the United States Supreme Court's decisions in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). In these cases, the United States Supreme Court held that it is a violation of the Sixth Amendment for a sentencing court to increase a defendant's *maximum* sentence based on facts not found by a jury. However, our Supreme Court has held that these decisions do not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is fixed by statute, and the sentencing guidelines affect only the minimum sentence. *People v Drohan*, 475 Mich 140, 159-160; 715 NW2d 778 (2006). Thus, we reject this claim of sentencing error.

VIII

Finally, defendant argues that the cumulative effect of several errors deprived him of a fair trial. We review this issue to determine if the effect of several errors was so seriously prejudicial that defendant was denied a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). Because we have not found any merit to defendant's individual claims on appeal, there is no cumulative prejudicial effect.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jane E. Markey