STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2008
v	No. 274097 Washtenaw Circuit Court
ROBERT LEE GREEN, JR., Defendant-Appellant.	LC No. 05-001581-FC

Before: Wilder, P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant Robert Green of second-degree murder,[1] first-degree home invasion,[2] and unlawfully driving away an automobile (UDAA)[3]. The trial court sentenced Green as a second habitual offender[4] to concurrent sentences of 45 to 60 years' imprisonment for the second-degree murder conviction and two years and four months to five years' imprisonment for the UDAA conviction, to be followed by a consecutive sentence of 13 years and four months to 20 years' imprisonment for the first-degree home invasion conviction. Green appeals as of right. We affirm.

I. Basic Facts And Procedural History

Green's convictions arise from the stabbing death of Jennifer Bennett, his on-again-off-again girlfriend and the mother of his child. On September 13, 2005, Bennett and three coworkers went to Bennett's home to retrieve her children's birth certificates. The coworkers remained in the car while Bennett went into the house. While she was inside, one of her coworkers heard screaming, but was unable to determine where the screaming was coming from. When Bennett emerged from the house, she was covered in blood and holding a large knife. She told her coworkers to call 911 before she collapsed. Bennett was later pronounced dead at the

[1] MCL 750.317.

[2] MCL 750.110a(2).

[3] MCL 750.413.

[4] MCL 769.10.

hospital. In a statement to the police, Green admitted being in Bennett's home and taking a knife out of her hand, but claimed that he did not remember what happened thereafter. He maintained that he next remembered driving Bennett's vehicle on the freeway and that his hands were bleeding and there was blood on his clothing.

II. Other Acts Evidence

A. Standard Of Review

Green argues that the trial court improperly admitted other acts evidence involving his possession of a knife and a threatening remark made more than one year before Bennett's death. We review for an abuse of discretion the admission of other acts evidence.[5] An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes.[6]

B. Legal Standards

MRE 404(b)(1) governs the admission of prior bad acts evidence. Whether other acts evidence is admissible under MRE 404(b)(1) depends on four factors. First, the evidence must be offered for a permissible purpose, i.e., one other than showing character or a propensity to commit the charged crime.[7] Second, the evidence must be relevant under MRE 402.[8] Third, unfair prejudice must not substantially outweigh the probative value of the evidence under MRE 403.[9] Fourth, the trial court, if requested, may provide a limiting instruction to the jury under MRE 105.[10] A decision on a close evidentiary question cannot be an abuse of discretion.[11]

C. Applying The Standards

We conclude that the trial court did not abuse its discretion by admitting the other acts evidence. Bennett's friend, Jennifer Elayyan testified that on July 9, 2004, she assisted Bennett in retrieving a van that Bennett had loaned Green and that he refused to return. Bennett and Elayyan picked up the van from Green's place of employment when they knew he would not be there. While cleaning out the vehicle, they discovered a large kitchen knife under the driver's-side floor mat. Elayyan told Bennett that Green intended to kill her. Later that day, after Green discovered that Bennett had retrieved the vehicle, he appeared at her home. Green was very

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[5] *People v Johnigan*, 265 Mich App 463, 466-467; 696 NW2d 724 (2005).

[6] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[7] *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

angry, pounded on the door, and screamed for Bennett to open the door. When asked about the knife found in the van, Green initially responded that it was for protection but then stated that if "he couldn't have her, nobody could."

Elayyan's testimony was admissible under MRE 404(b)(1) to show Green's motive, intent, scheme, plan, and absence of mistake or accident.[12] Such evidence was relevant because Green was charged with open murder, which allows for a possible conviction of first-degree murder, requiring that the prosecutor prove Green's intent to kill Bennett. The evidence was also relevant to establish Green's motive; that is, that if Bennett did not want to be with him, he would ensure that she would not be with someone else. Moreover, the evidence was relevant to counter Green's statement to the police that he did not intend to hurt Bennett. Thus, Elayyan's testimony was admissible for a purpose other than to show Green's character and was relevant to the charges against him.

Further, the evidence was not unfairly prejudicial. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury."[13] "The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself."[14] The probative value of the evidence was relevant to rebut Green's theory that his actions were unpremeditated and merely responsive to Bennett's provocation of him. Thus, the evidence was not marginally probative, but was probative of whether Green committed first- or second-degree murder, or whether he committed manslaughter, as defense counsel argued in his closing argument. Further, the trial court's limiting instructions protected Green's right to a fair trial.[15] Therefore, we conclude that the prejudicial effect of the evidence did not substantially outweigh its probative value.

III. Hearsay

A. Standard Of Review

Green contends that the trial court erred by admitting hearsay testimony that he went into Bennett's house and stole her purse a few days before her murder. We review for an abuse of discretion a trial court's decision regarding the admission of evidence.[16]

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[12] Under MRE 404(b)(1), evidence of other crimes may be admissible to show "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."

[13] *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

[14] *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998).

[15] *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).

[16] *Aldrich*, *supra* at 113.

B. Legal Standards

MRE 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is generally not admissible at trial.[17] A statement that does not constitute hearsay, however, may be properly admitted.[18]

C. Applying The Standards

Green argues that the following testimony of Judith Bennett, Bennett's mother, was inadmissible hearsay evidence:

> *Q*. Okay. Again, we're gonna—we're talking about September of 05. At some point, did you receive a phone call from your daughter about concerns that she had regarding [Green]
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> *A*. Yes.
>
> *Q*. And, what did that involve?
>
> *A*. She thought that he had gotten into the house and stole her purse.
>
> *Q*. Do you remember when that took place?
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> *A*. I believe it was 9-9.
>
> *Q*. Okay.
>
> *A*. September 9th.

This testimony was not hearsay because it was not offered to prove the truth of the matter asserted; that is, that Green went into Bennett's home and stole her purse. Rather, it was offered to show why Bennett changed the locks on her home two days later, on September 11, 2005. Because the testimony was not hearsay, the rule against hearsay did not preclude its admission.[19] Moreover, the evidence was relevant to the first-degree home invasion charge because it showed that Green did not have Bennett's permission to be inside the house. Relevant evidence is generally admissible.[20]

To the extent that Green argues that Judith Bennett's testimony constituted other bad acts evidence inadmissible under MRE 404(b)(1), his claim is erroneous because the evidence was

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[17] MRE 802.

[18] See *People v Fisher*, 449 Mich 441, 450; 537 NW2d 577 (1995).

[19] *Fisher*, *supra* at 450.

[20] MRE 402; *People v Fletcher*, 260 Mich App 531, 553; 679 NW2d 127 (2004).

neither offered nor admitted on this basis. Further, the probative value of the evidence was not substantially outweighed by unfair prejudice. Even if the jury believed that Green went into Bennett's home and stole her purse, such an act is not so outrageous as to give rise to a danger that the jury would accord it undue or preemptive weight.[21] Thus, MRE 403 did not preclude admission of the evidence.

IV. Exclusion Of Evidence

A. Standard Of Review

Green argues that the trial court's exclusion of e-mail messages that Green sent to Bennett shortly before her death violated the rules of evidence and denied him his rights to a fair trial and to present a defense. We review for an abuse of discretion a trial court's decision regarding the admission or exclusion of evidence.[22] We also review for an abuse of discretion whether proposed evidence has been properly authenticated reviewed.[23] However, we review de novo constitutional issues.[24]

B. The Prosecutor's Argument

The prosecutor argues that the e-mail messages are hearsay but then concedes that they may fall under the hearsay exception pertaining to Green's then existing mental, emotional, or physical condition. Nonetheless, the prosecutor contends that the trial court properly excluded the e-mail messages on the basis that they could not be properly authenticated.

C. The Authentication Requirement

MRE 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Green argues that the authenticity of the e-mail messages was established by his statements to police officers during his interrogation concerning certain messages and informing the officers of e-mail addresses of himself and Bennett. He also contends that the authenticity of the messages was established by the fact that Detective Mark Neumann retrieved the computer that was used to send the e-mail messages from the home of Green's mother.

Arguably, Green's statements to police officers concerning particular e-mail messages that he sent were sufficient to authenticate those specific messages. Green's discussion of the e-mail messages tended to show that he sent them. Thus, Green's recorded statements to the police

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[21] *Crawford*, *supra* at 398.

[22] *Aldrich*, *supra* at 113.

[23] *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004).

[24] *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

discussing particular e-mail messages, played before the jury, was arguably sufficient to support a finding that the messages were what Green claimed they were.

Nevertheless, Green has not established error warranting reversal. He appears to focus his argument on a particular e-mail message that he sent six days before Bennett's death. In the message, Green talks about an incident that occurred a few days before in which he was served with a personal protection order at Bennett's home after she apparently consented to him coming there. He indicates in the message that once he was at the house, Bennett began a "false" argument with him and called the police.

It is unclear from the record whether Green discussed this particular message with police officers during his interrogation. Even if he did, however, and the authenticity of the message was established, the message adds little support to Green's case. The message makes clear that the relationship between Green and Bennett was of the on-again-off-again sort, and Green stated in the message that "your attitude changes every fifteen minutes." The message, however, does not tend to support Green's theories of the case. It does not indicate whether he was welcome in Bennett's home at the time of the offense, several days later. Moreover, it does not shed light on whether Green acted in self-defense or whether he was guilty of only voluntary manslaughter as he claims. Therefore, even if the trial court erred by excluding the particular message in question, the error was harmless beyond a reasonable doubt.[25]

V. Instruction On Self Defense

A. Standard Of Review

Green argues that the trial court erroneously refused to instruct the jury on self-defense. We review for an abuse of discretion a trial court's determination whether a jury instruction is applicable to the facts of a case.[26]

B. Legal Standards

Generally, jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights.[27] When a defendant requests a jury instruction on self-defense and the evidence supports such a theory, a trial court is required to give the instruction.[28] "As a general rule, the killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he honestly and reasonably believes that he is

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

[26] *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

[27] *Aldrich*, *supra* at 124.

[28] *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002).

in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force."[29]

C. Applying The Standards

Here, there was no evidence that Green honestly and reasonably believed that he was in imminent danger of death or serious bodily harm. In a statement to the police, Green indicated that immediately before the incident he was standing on the basement stairs and that Bennett was standing at the top of the stairs holding a knife. According to Green, when Bennett asked him to leave the house, he grabbed her wrist, took the knife from her, and pushed her. He denied that she threatened him with the knife or came after him with it. He further denied that she cut his hand with the knife. Therefore, the evidence did not support a self-defense instruction, and the trial court did not abuse its discretion by ruling accordingly.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[29] *Id*. at 119.