

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 20, 2011

v

RYAN MICHAEL-JEROME KOTCH,

Defendant-Appellant.

No. 299111
Oakland Circuit Court
LC No. 2010-009129-AR

Before: SAWYER, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted of misdemeanor domestic assault, MCL 750.81(2). He was sentenced to two years' probation. The circuit court affirmed defendant's conviction, and defendant was granted leave to appeal by this Court. We affirm.

I

Defendant and his girlfriend had a verbal argument at their apartment. As the argument escalated, defendant's brother came over to help defendant remove the victim from the apartment. When defendant and his brother tried to pack his girlfriend's clothes, his girlfriend grabbed or hit defendant's brother, who responded by pushing her to the ground and holding her down. Defendant got involved and picked up the victim, placed her over his shoulder, and took her to the outside hallway.

Witnesses claimed that they heard the victim screaming from the hallway for help from the neighbors. Despite defendant's denial, the victim testified that defendant dragged her by her hair. However, the victim's testimony was backed by a witness who claimed that defendant did have ahold of the victim's hair when he removed her from the apartment. Defendant and his brother briefly left the apartment when the neighbors intervened, but they returned when the police were at the apartment. Defendant was then arrested for the incident.

II

Defendant first contends that the trial court erred in refusing to read the jury a self-defense or defense-of-others instruction. We disagree.

This Court reviews a trial court's decision on whether a jury instruction was necessary based on the applicable facts for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). This Court defers to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Defendant requested that CJI2d 7.22, use of non-deadly force in defense or defense of others, be read to the jury, but the trial judge declined. Under this jury instruction, to claim self-defense or defense of others, defendant must have reasonably believed that he had to use force to protect himself or another from imminent unlawful use of force by another. CJI2d 7.22. The force used must be proportional to the danger. *Id.* Jury instructions must not exclude material issues or defenses if there is evidence to support them. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

Defendant did offer evidence, although limited, that should have allowed the jury to consider the self-defense or defense-of-others instruction. There was testimony that the victim had attempted to hit defendant's brother. The testimony also indicated that the verbal argument was ongoing and had even escalated after defendant's brother arrived at the apartment. Defendant indicated that the victim was verbally attacking defendant and his brother. Furthermore, defendant's brother testified that the victim had backhanded him. Based on this testimony, defendant did provide some evidence to support his request for a self-defense or defense-of-others instruction.

However, defendant must show that the instructional error was outcome determinative. MCL 769.26; *People v Hawthorne*, 474 Mich 174, 181; 713 NW2d 724 (2006). Based on an entire examination of the record, it must "affirmatively appear that it is more probable that not that the error was outcome determinative." *Hawthorne*, 474 Mich at 181-182. An outcome-determinative instructional error is one that "undermines the reliability of the verdict." *Id.*

Here, defendant has not shown that it is more probable than not that the error was outcome determinative. Defendant did not testify that he picked her up and removed her because he believed she was going to use unlawful force against him or his brother. Instead, he testified that he did so to diffuse the situation. Defendant also testified that, even when the victim was punching him in the back, she was not hurting him. As the trial judge noted, the victim was significantly smaller than defendant. Testimony indicated that the victim was less than five-feet tall and weighed less than 100 pounds. Because of their size over the victim, defendant was able to pick her up and place her over his shoulder, even while she was resisting, and defendant's brother was able to hold her to the ground. Therefore, defendant produced no testimony to establish a reasonable belief of imminent unlawful force to show that his actions were in self-defense or defense of others.

III

Defendant also argues that the trial court incorrectly instructed the jury when they were deadlocked. We disagree.

This Court reviews claims of instructional error de novo. *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004). This Court reviews a trial court's decision on whether a

jury instruction was necessary based on the applicable facts for an abuse of discretion. *Gillis*, 474 Mich at 113. This Court defers to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Maldonado*, 467 Mich at 388. An unpreserved issue should be reviewed for plain error, and this Court should only reverse upon a plain error that substantially affects the fairness or integrity of the judicial proceedings. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1992).

Defendant has failed to show that the trial judge abused his discretion in not providing a deadlocked-jury instruction. The trial judge clearly believed that the jury was not deadlocked; instead, he needed to determine whether a verdict would be reached that night or if the jury should be adjourned until the next day. The jury had only been deliberating for a couple of hours up until the time of the judge's instructions.

Defendant also argues that the trial judge's instructions were coercive. Because the issue was not preserved, defendant had to establish plain error that substantially affected the trial. The trial judge only responded to the jury's indication that they were having difficulties coming to a conclusion. In response, the trial judge indicated that there was not much testimony, that they had to apply the law as given, and that they needed to come to a conclusion that they believed in. The trial judge never indicated that the jury needed to decide the case either way. Defendant has not shown that a deadlocked instruction was necessary or that the instructions were coercive.

IV

Next, defendant contends that the trial court erred in precluding defendant from cross-examining the victim about or testifying to the victim's past acts of violence. We disagree.

This Court reviews cross-examination limitations for abuse of discretion. *People v Brownridge*, 459 Mich 456, 464-465; 591 NW2d 26 (1999). For a trial court's determination on evidentiary issues, this Court's review is limited to abuse of discretion. *Id.* at 460. This Court defers to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Maldonado*, 467 Mich at 388.

Under MRE 404(b), evidence is inadmissible if it is used solely for a person's character or criminal propensity. *People v Marlin*, 487 Mich 609, 615; 790 NW2d 607 (2010). To be allowed, the party attempting to use the evidence must show that the evidence has a proper purpose, is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998).

Defendant here has alleged no proper purpose for the victim's past violent acts. At trial, defendant indicated that it was to be used to prove her violent character, which is inadmissible under MRE 404(b). On appeal to this Court, defendant simply contends that the facts elicited during the trial suggest that the evidence is admissible for a proper purpose. The trial judge concluded that this evidence was not relevant to the case on hand. Because defendant has not shown that the evidence was proffered for a proper purpose, defendant has failed to establish that the trial judge abused his discretion in not allowing evidence of the victim's past violence under MRE 404(b).

Furthermore, the alleged error would be harmless. Evidentiary error does not require reversal unless the error was outcome determinative. MCL 769.26. As both the trial court and circuit court found, and we agree, the self-defense and defense-of-others instructions were not available to defendant. Therefore, any preclusion of testimony supporting the self-defense or defense-of-others arguments would be harmless as it is not outcome determinative.

V

Finally, defendant contends that the trial court incorrectly precluded two defense witnesses from testifying to past acts of violence by the victim or statements made by the victim. We disagree.

For a trial court's determination on evidentiary issues, this Court's review is limited to abuse of discretion. *Brownridge*, 459 Mich at 460. This Court defers to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Maldonado*, 467 Mich at 388.

Under MRE 404(b), evidence of other crimes, wrongs, or acts is inadmissible if it is used solely for a person's character or criminal propensity. *Marlin*, 487 Mich at 615. To be allowed, the party attempting to use the evidence must show that the evidence has a proper purpose, is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. *Starr*, 457 Mich at 495.

Again, defendant has given no proper purpose for the past acts of violence by the victim, either at trial or in his brief to this Court. Without a proper purpose for the evidence under MRE 404(b), defendant has not shown that the trial judge's decision was outside the range of principled outcomes.

Furthermore, the preclusion of defendant's witnesses was harmless. Evidentiary error does not require reversal unless the error was outcome determinative. MCL 769.26. Because defendant's proffered witnesses were offered to testify to the victim's past violent acts, the evidence was to be used to support defendant's fear of the victim for a self-defense or defense-of-others argument. Defendant was not able to argue self-defense or defense of others. Because there was no self-defense or defense-of-others instruction read to the jury, the trial judge's preclusion of defendant's witnesses was harmless and does not require reversal.

Affirmed.

/s/ David H. Sawyer
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause