

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WAYMAN PATTERSON, JR.,

Defendant-Appellant.

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UNPUBLISHED

September 18, 2003

No. 239702

Macomb Circuit Court

LC No. 01-002222-FC

Before: Whitbeck, C.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant was charged and tried on one count of second-degree murder, MCL 750.317, and two counts of assault with intent to do great bodily harm less than murder, MCL 750.84. Following a jury trial, defendant was convicted of one count of involuntary manslaughter, MCL 750.321(c), and two counts of assault with a dangerous weapon, MCL 750.82. The trial court sentenced defendant to seventy-one months' to fifteen years' imprisonment for the involuntary manslaughter conviction, and to thirty-one to forty-eight months' imprisonment each for the assault with a dangerous weapon convictions. Defendant now appeals as of right. We affirm.

All the individuals in this case had been at Hot Rocks Bar, albeit not together, before the altercation. After leaving the bar, defendant and his brother came in contact with the other individuals at a BP gas station, and one of the victims, Norman Maline, allegedly broke defendant's car window. Thereafter, defendant drove through the gas station several times and hit the three victims, Michael Scott, Michael Yott, and Maline. Scott and Yott were injured. Maline was killed. It was the prosecutor's theory that defendant deliberately drove his car through the gas station with the intent to injure or kill Scott, Yott, and Maline. Defendant asserts that his sole intent was to defend his brother, who was allegedly being beaten by the other men. Defendant maintains that the injuries were accidental and in defense of his brother.

I

Defendant raises several issues on appeal. He first claims prosecutorial misconduct. The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and this Court must examine the pertinent portions of the record and evaluate the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecutor's comments must be read as a whole and evaluated in light of

defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant alleges the prosecutor improperly set forth evidence of Norman Maline's character trait for peacefulness in violation of MRE 404(a)(2).<sup>1</sup> In opening statements, defense counsel suggested that Maline, who was white, made racial slurs against defendant, who is black, before the incident. During questioning, the prosecutor questioned a witness with regard to the fact that Maline had a child with a black woman, and also elicited testimony concerning whether the witness had ever seen any signs of prejudice in Maline against black people.<sup>2</sup> A finding of misconduct may not be based on a prosecutor's good faith effort to admit evidence. *Noble, supra* at 660. The prosecutor did not question the witness regarding Maline's character trait for peacefulness. Instead, through questioning the witness, the prosecutor attempted to refute the assertion that the altercation was racially motivated. Under the circumstances, we find reversal is not warranted on this basis.

Defendant next alleges the prosecutor improperly elicited testimony from his expert witness in violation of a court order made pursuant to a stipulation by the parties. Several videotapes from the BP gas station detailing the incident were available as evidence at trial. Before trial, the parties stipulated that the officer in charge, Detective Jeffrey Pierog, would not comment on his conclusions regarding who he saw on the videotapes.<sup>3</sup> At trial, while one of the

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<sup>1</sup> MRE 404(a)(2) provides:

Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

\* \* \*

When self defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused, or evidence offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a charge of homicide to rebut evidence that the alleged victim was the first aggressor[.]

<sup>2</sup> We note that defense counsel did not immediately object to the prosecutor's line of questioning, but requested a side bar conference at which he asked that either a mistrial be declared or that he be allowed to further question the witnesses regarding the victim's character. Therefore, we address this issue as preserved.

<sup>3</sup> The trial court order stated:

It is hereby ordered the People will be precluded from introducing evidence in the form of commentary as to whom and what Detective Jeffrey Pierog has concluded to have appeared on two videotapes which purport to reflect the events of the morning 24 February 2001.

tapes was being played, the prosecutor questioned Det. Pierog concerning who he saw on the tape. Defense counsel immediately objected, stating that the prosecutor's question violated the court order. While it appears the prosecutor's questions violated the court order, we note that on cross-examination, defense counsel thoroughly questioned the witness about the videotape, including questions regarding whom the witness saw on the tape. Thus, under the circumstances, any error in the prosecutor's questioning does not warrant reversal.

Defendant also alleges the prosecutor violated defendant's constitutional rights by making disparaging comments toward defendant, defense counsel, and the defense witnesses. In particular, defendant asserts that, during trial, the prosecutor claimed defense counsel was trying to mislead the jury, defense counsel was wasting time and county money, defense counsel made improper statements, and defense counsel was rude to or interrupted witnesses. A prosecutor may not personally attack the credibility of defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996), or suggest that defense counsel is intentionally attempting to mislead the jury, *Watson, supra* at 592.

As both parties note in their briefs on appeal, this was a hotly-contested trial. The record clearly shows that both the prosecutor and defense counsel became overly-excited during trial and exchanged harsh words with each other and several witnesses. While defendant lists many instances of improper conduct on the part of the prosecutor, the record shows that defense counsel challenged only some of the conduct. Had counsel objected in a timely manner and requested a curative jury instruction, a curative instruction could have been given. Further, some of the complained-of conduct occurred outside the presence of the jury, and defendant cannot show prejudice by this conduct.

A review of the entire record shows that the trial court admonished both parties numerous times for their behavior at trial. Both defense counsel and the prosecutor bickered with one another and made remarks that were unnecessary. The trial court asked the parties to act in a civil manner and to limit the trial delays. While some of the prosecutor's comments may have been unnecessary, most were made in direct response to defense counsel's conduct or line of questioning. For example, while the prosecutor did suggest that defense counsel was attempting to mislead the jury during questioning, the prosecutor's remarks were made after defense counsel tried to impeach a witness using prior testimony, while failing to read the complete testimony in context. Under the circumstances, after reading all the prosecutor's comments in context, we find no prosecutorial misconduct for which relief is warranted.

## II

Defendant next claims that the trial court's misconduct denied defendant a fair trial. Specifically, defendant alleges he was denied a fair trial by the trial court's improper criticism of defense counsel, improper commenting on the amount of money the trial was costing the county, and improper praise of the prosecutor. While defense counsel complained about the prosecutor's behavior at trial and the way trial was proceeding, defendant did not specifically challenge the trial court's conduct at trial. Because defendant failed to properly raise the issue of judicial misconduct below, this Court may only review the matter if manifest injustice results from the failure to review. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995), citing *People v Collier*, 168 Mich App 687, 697; 425 NW2d 118 (1988).

A trial court has wide, but not unlimited, discretion and authority in controlling a trial. *Id.* Portions of the record cannot be taken out of context to show the court's bias against a defendant; instead, the entire record must be read as a whole. *Id.* "A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Id.* Further, ordinarily, comments critical of or hostile to counsel are not supportive of finding bias or partiality. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 34 (1999).

We note initially that some of the complained-of comments occurred outside the presence of the jury, and therefore, cannot be used to show the jury was unduly prejudiced by the court's conduct. Concerning defendant's remaining allegations, we find no merit to defendant's claim of judicial misconduct. Most of defendant's complaints concern the trial court's attempt to control the conduct of trial. See *Paquette*, *supra* at 341. Having reviewed the entire record and defendant's allegations, we do not believe the record as a whole shows a bias on the part of the trial court. See *id.* In addition, the jury was instructed that the trial court's rulings did not reflect the court's opinion of the case and that the jury should not base its decision on the court's rulings. Jurors are presumed to follow their instructions. See *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998). Accordingly, reversal is not warranted.

### III

Defendant next claims the trial court erred in refusing to instruct the jury regarding contributory negligence and defendant's theory of accident as a defense to the assault charges. We review de novo claims of instructional error. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). A trial court must give a jury instruction for each element of the crime or crimes charged, and when there is evidence supporting a material issue, defense, or theory, a requested instruction must also be given. MCR 2.516(B)(3); *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000), citing *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975). Even if the jury instructions were somewhat imperfect, reversal is not required if the instructions addressed the substance of the issues to be tried and sufficiently protected the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Defendant contends that evidence introduced at trial established that Maline was under the influence of alcohol and had marijuana in his system at the time of his death. According to defendant, the fact that Maline was under the influence is evidence that he was contributorily negligent in his death. Further, defendant argues that the initial actions of Maline in running up to and smashing defendant's car window, and Maline's subsequent fighting with defendant's brother and running around the parking lot thereafter, all contributed to the his death. Therefore, defendant argues the trial court should have instructed the jury on contributory negligence.

It is well established that a defendant's culpable act is not excused by the contributory negligence of the victim. While a victim's contributory negligence is a factor to consider in determining whether the defendant's negligence caused the victim's death, it is not a defense. *People v Tims*, 449 Mich 83, 96-97; 534 NW2d 675 (1995). Contrary to defendant's assertion, evidence that the victim may have been under the influence is not in itself evidence that the victim was contributorily negligent. Further, evidence that the victim smashed the defendant's window is not evidence that the victim was contributorily negligent in his own death; rather, it

may be considered evidence toward a theory of self-defense. Under the circumstances, the trial court properly found that a contributory negligence instruction was not warranted in this case.

Defendant also contends that the theory of accident was central to his case, and that the court's failure to instruct on the defense of accident with regard to the assault offenses was error. According to defendant, defense counsel continuously stressed, and its defense expert opined, that the incident was an unfortunate accident. Further, according to defendant, the fact that the prosecutor and trial court made repeated references to the amount of money the defense paid to organize the defense around the testimony of the accident reconstructionist is evidence that the theory of accident was central to defendant's defense.

We note that the fact that an accident reconstructionist was used is not evidence that the incident was merely an accident. While defendant contends that the theory of accident was central to his defense, there was little evidence produced to support an instruction on accident. In fact, most eyewitness testimony went to the contrary. However, at trial, defendant's accident reconstructionist did opine, based on the evidence available to him, that the incident was an accident. Therefore, because there was some evidence – expert testimony – that it was an accident, an instruction regarding the defense of accident may arguably have been warranted.

However, even if an applicable instruction was not given, defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002), citing MCL 769.26; *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000); *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999). Defendant's conviction "will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative." *Riddle*, *supra* at 125. Here, the failure to give the instruction was harmless error. The eyewitness testimony in this case overwhelmingly showed that defendant intentionally ran into the victims with his vehicle. A detective viewing the videotape of the incident testified that defendant appeared to be skilled enough to operate the vehicle and he appeared to be in control of the vehicle. Several witnesses, including the two victims themselves, testified that defendant drove directly at the victims and intentionally hit them. Beyond the defense expert's statement that the incident was an accident, there was no other evidence introduced that it in fact was an accident. In light of the weight and strength of the untainted evidence in this case, we are unable to conclude that it is more probable than not that the court's failure to give the accident instruction affected the outcome of this case.

#### IV

Finally, defendant claims the prosecution presented insufficient evidence to convict defendant of involuntary manslaughter and assault with a dangerous weapon. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine 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; 597 NW2d 73 (1999). This Court, however, will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478 (1991), mod 441 Mich 1201 (1992). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the

crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The element of 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 evidence is sufficient, *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Further, 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).

Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not constituting a felony and not naturally tending to cause great bodily harm, or during the commission of some lawful act negligently performed. See *People v Mendoza*, 468 Mich 527, 536; 664 NW2d 685 (2003). In other words, to establish involuntary manslaughter, the prosecution must show that an unlawful act occurred that was committed with the intent to injure or was committed in a grossly negligent manner that proximately caused the victim's death. *People v Datema*, 448 Mich 585, 606; 533 NW2d 272 (1995). Here, defendant argues only that had the jury been given an instruction regarding contributory negligence, it would not have convicted defendant of involuntary manslaughter. Because we find the court properly refused to give the contributory negligence instruction, defendant's argument is without merit. Regardless, the evidence was sufficient to support the involuntary manslaughter conviction. As noted previously, numerous witnesses testified that defendant drove around the gas station three times before driving onto the grass and intentionally hitting Maline. A detective viewing the videotape opined that defendant appeared to be in control of his vehicle. Viewing the evidence in the light most favorable to the prosecution, we find a rational trier of fact could find that the essential elements of involuntary manslaughter were proven beyond a reasonable doubt.

Assault with a dangerous weapon, or felonious assault, requires (1) an assault, (2) with a dangerous weapon, and (3) the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Defendant argues that because the trial court refused the accident instruction, the jury could not find that the incident was an accident. Further, defendant argues that at best, the evidence was equivocal and was equally consistent with the defense theory of accident as it was with the prosecution's theory.

We have already determined that even if the trial court erred in failing to give an instruction on the defense of accident, the error was harmless. In making this determination, we found the evidence presented sufficient to convict defendant of the assault charges.

Affirmed.

/s/ William C. Whitbeck

/s/ Hilda R. Gage

/s/ Brian K. Zahra