

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JOHN WATKO,

Defendant-Appellant.

UNPUBLISHED

May 4, 2004

No. 244934

Wayne Circuit Court

LC No. 01-012944-01

Before: Wilder, P.J. and Hoekstra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant concurrently to twenty-five to fifty years in prison for the second-degree murder conviction and twenty to forty years in prison for the assault with intent to murder conviction, with two consecutive years in prison for the felony-firearm conviction.¹ We affirm.

I. Evidentiary Issues

Defendant first argues that the trial court erred in sustaining a number of the prosecutor's objections to testimony on the basis of relevance. We disagree. As defendant did not make an offer of proof at trial, these issues are unpreserved and are viewed for a plain error affecting defendant's substantial rights. MRE 103(a)(2); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

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 discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact of consequence to the

¹ The trial court also sentenced defendant to a concurrent term of one to five years in prison for his guilty plea to possession of a firearm by a felon, MCL 750.224f.

action more probable or less probable than it would be without the evidence. MRE 401. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence. MRE 403.

A. Cross-examination of Victim

The trial court did not err in excluding testimony regarding whether the victim owned more than one house in the same area of Detroit. Defendant asserts that the trial court's curtailing of the victim's cross-examination in this way prevented defendant from establishing that the victim sold cocaine, which in turn prevented defendant from establishing his motive for going to the victim's house in the early morning hours, i.e., to buy cocaine to keep him awake to hunt deer. But when defense counsel asked the victim whether he sold cocaine, the victim said he did not. Thus, even if the victim testified that he owned more than one house, which may have a tendency to show that he sold drugs on a large scale, it would not change the victim's testimony that he did not sell cocaine as defendant claimed. The trial court's exclusion of this testimony does not constitute plain error.

The trial court also did not err in limiting the victim's cross-examination on whether the victim sold cocaine and whether the victim's girlfriend used cocaine before the shooting. Defendant argues that, by limiting these questions, the trial court precluded defendant from pursuing the theory that defendant's intent to purchase cocaine, rather than a vendetta, brought him to the victim's house. But the record illustrates that defense counsel pursued this theory by asking the victim a number of questions on the topic. The victim answered the questions clearly and unequivocally by denying that he sold cocaine. Defendant made no offer of proof regarding what would have been uncovered if defendant had been permitted to continue his line of questioning and how this testimony would have served to exonerate defendant. Without such evidence, defendant cannot establish error in its exclusion. Further, the trial court's exclusion of testimony regarding whether the victim's girlfriend used cocaine was not error as the testimony was not relevant. Even if it was relevant, the trial court's exclusion could not have affected defendant's substantial rights where there was additional testimony at trial that the victim's girlfriend had cocaine in her system the morning she died.

The trial court also court did not err in excluding testimony regarding state forfeiture laws. Defendant argues that the testimony regarding the forfeiture laws would have served to explain the victim's motivation for lying about selling cocaine out of the house, i.e., that if the victim told the truth, that he sold cocaine, his property would be subject to forfeiture. But the victim had already testified that he sold marijuana, which also put him at risk of forfeiture. Therefore, the testimony regarding the forfeiture laws was irrelevant to the victim's credibility.

Nor did the trial court err in curtailing defense counsel from asking the victim about whether he bragged to defendant about fighting. There was no error affecting defendant's substantial rights where he asked the nearly identical question earlier during cross-examination and received an answer from defendant. Defendant's allegation of error is without merit.

B. Defendant's Prior Drug Purchases

Defendant further argues that the trial court erred in excluding the testimony of two witnesses who would have testified that they accompanied defendant to the victim's house on two prior occasions where defendant purchased drugs. Again, we disagree.

Defendant argues that the witnesses' testimony was necessary to buttress the defense theory that defendant went to the victim's house to buy drugs and not to shoot the victim. But defendant's offer of proof was that the two witnesses would testify that they accompanied defendant to the victim's house to buy *drugs*, not cocaine. While relevant in that it makes it more likely that defendant went to the victim's house to buy drugs on the morning of the shooting, the testimony could be excluded as a waste of time or needless presentation of cumulative evidence where defendant testified that he went to the victim's house to buy drugs, the victim testified that he sold drugs, i.e., marijuana, and the victim's son testified that defendant had been at the house several times before hanging out and doing drugs. A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). Therefore, while the evidence may have been marginally helpful to defendant's case, its exclusion was not an abuse of discretion.

C. Victim's Reputation for Violence

Defendant also challenges the trial court's exclusion of evidence of the victim's reputation for violence. We find the issue to be without merit.

Generally, a victim's character may not be shown by specific instances of conduct unless those instances are independently admissible to show some matter apart from character as circumstantial evidence of the conduct of the victim on a particular occasion. *People v Harris*, 458 Mich 310, 319; 583 NW2d 680 (1998). But, where a murder defendant's theory is self-defense, character evidence tending to show the victim's violent character should be admitted to show: (1) that the victim was the likely aggressor, and (2) the defendant acted out of self-defense. *Id.* at 315-321. The specific acts must be known to defendant to make them relevant to defendant's state of mind. *Id.* at 316.

In support of his claim that he acted in self-defense, defendant sought to introduce evidence of the victim's reputation for violence through two witnesses. The trial court allowed one of the witnesses to testify that the victim had a reputation for violence which was exacerbated by the use of drugs and alcohol. The trial court's exclusion of the second witness's testimony was not an abuse of discretion where the second witness testified that he met the victim on only two occasions and that he did not live in Michigan. According to this testimony, the second witness' contacts with the victim were very limited and there was a scant basis for the second witness's familiarity with the victim's reputation for violence in his community. Further, even if the trial court erred in excluding the second witness' testimony, such error did not prejudice defendant where the first witness testified that the victim had a reputation for violence. *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 763 (1993).

With regard to the trial court's exclusion of evidence of specific acts of violence, there was no offer of proof by defendant that defendant was aware of the particular incident which he sought to introduce. Without an awareness on defendant's part of this specific act of violence,

the testimony was irrelevant to defendant's state of mind at the time of the shooting. *Harris, supra*, at 316. Therefore, the trial court did not abuse its discretion in excluding the testimony.

D. Defendant's Pre-Arrest Silence

Defendant next argues that the trial court erred in admitting his testimony about his failure to assert his defense at the time of his arrest. We disagree.

Whether the prosecutor's cross-examination of defendant regarding his silence upon arrest violates the Due Process Clause of the Fourteenth Amendment is a constitutional issue. *People v Alexander*, 188 Mich App 96, 102; 469 NW2d 10 (1991). Constitutional issues are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

When a defendant testifies at trial, the privilege against self-incrimination is waived and the defendant may be impeached with both pre-arrest silence and post-arrest pre-*Miranda*² silence without violating the Fifth Amendment. *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276 (1990). The Fourteenth Amendment protects a defendant's right to remain silent by precluding the use of a defendant's silence following *Miranda* warnings. *Alexander, supra*.

Defendant argues that the prosecution failed to establish whether its questions about defendant's silence concerned the time period before *Miranda* warnings were given to defendant, and therefore, the case should be remanded to the trial court for a determination. Defendant cites *Alexander, supra*, in which this Court held that if the prosecutor's questions concerned post-*Miranda* warning silence, the issue was a constitutional one. *Id.* at 104. If the prosecutor's questions concerned pre-arrest/pre-*Miranda* warning silence, the issue was evidentiary. *Id.*

Here, it is clear from defendant's own testimony that the time period in question was pre-arrest. The following exchange took place at trial:

Q. Did you run to the police?

A. When I seen the police, I turn towards them, yes, I did. I was asking for help.

Q. You were asking for help. Didn't tell them what happened, though, did you?

A. No.

Because the record clearly indicates that time period at issue was pre-arrest, a strictly evidentiary issue is posed.

The evidence was properly admitted because it was relevant and not more prejudicial than probative.

² *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966).

[T]he common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted and, therefore, that silence may be relevant and probative for impeachment purposes where it would have been natural and expected under the circumstances for the defendant to have asserted the fact or story he relates during trial. [*Alexander, supra* at 103, citing *People v Cetlinski*, 435 Mich 742, 760-761; 460 NW2d 534 (1990).]

If defendant had shot the victims in self-defense as he argued, it would have been natural for defendant to have told the police immediately that the victim had pulled a gun on him and that the victim's son had assaulted him. Indeed, it would have been unnatural for him not to inform the police. Defendant's silence about the events, upon first contact with the police, is relevant to his consciousness of guilt.

Defendant argues that the evidence of his silence to the police was inadmissible as it was more prejudicial than probative. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice MRE 403. "Unfair prejudice" does not mean "damaging." Any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). Evidence that is unfairly prejudicial is evidence that injects considerations extraneous to the merits of the case, i.e., bias, sympathy, anger, or shock. *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994). Defendant's testimony that he did not tell the police what had occurred at the victim's house did not inject any of these matters into the trial. Therefore, the evidence was not unduly prejudicial. The trial court was within its discretion in allowing the prosecutor to question defendant about his pre-arrest silence regarding the shootings.

II. Flight Instruction and Ineffective Assistance of Counsel

Finally, defendant argues the trial court erred in giving a jury instruction concerning defendant's flight from the scene of the shooting. We disagree as any objection was waived by defendant when defendant indicated agreement with the trial court's jury instructions. *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). Thus, any error is extinguished. *Id.*

Furthermore, defendant's contention that his counsel's failure to object to the flight instruction constituted ineffective assistance of counsel is without merit. The instruction was supported by testimony that, after the shooting, defendant ran down the stairs, out the door and

down the street. Under these circumstances, counsel's failure to object did not constitute performance below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly