

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEBORAH ROBINSON,

Defendant-Appellant.

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UNPUBLISHED

August 19, 2004

No. 246821

Wayne Circuit Court

LC No. 01-10868-01

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Defendant Deborah Robinson appeals as of right from her conviction by a jury of felonious assault, MCL 750.82. The conviction resulted from her striking of the victim, Richard Brooks, with her truck. The trial court sentenced her to a prison term of six months to four years. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court erred by precluding reputation or specific acts evidence regarding the victim's violent character based on defendant's failure to show, during her trial testimony, that she knew of the victim's violent character. We disagree.

This Court reviews trial court decisions regarding the admission or preclusion of evidence using an abuse of discretion standard. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Moreover, preserved nonconstitutional errors are presumed harmless under MCL 769.26 and cannot be grounds for reversal unless examination affirmatively reveals that it is more probable than not that the error was outcome-determinative. *People v Whittaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001).

We conclude that the proffered evidence was irrelevant because the defendant faced a charge of felonious assault and presented a defense of accident. It was therefore well within the trial court's discretion to preclude the character evidence, the result of which, in any event, did not undermine the reliability of the verdict.

The relevance of evidence of a victim's aggressive character depends on whether it is in issue as a terminal point of proof of an essential element of a charge, claim, or defense or

whether it falls within an exception to MRE 404(a)'s propensity rule. MRE 404(a)(2), as amended in 2001, creates an exception for the admission of circumstantial character evidence of the victim only "[w]hen self-defense is an issue in a charge of homicide[.]"

Defendant's sole defense was accident. Therefore, the MRE 404(a)(2) exception did not apply, and nor did any other exceptions to the general rule excluding propensity evidence. Moreover, the relevance of the victim's propensity for aggression to a defense of accident is tenuous at best and cannot be considered an essential element of a charge, claim, or defense. Thus, the trial court did not err in its preclusion of testimony pertaining to the victim's character.

Defendant relies on *People v Harris*, 458 Mich 310; 583 NW2d 680 (1998), to support her claim that testimony regarding the victim's violent character is admissible, at least by reputation evidence, when known to the defendant and relevant to the defendant's state of mind. Our Supreme Court's holding in *Harris*, however, corresponds to the current version of MRE 404(a)(2), because the defendant in *Harris* was convicted of first-degree murder after raising the defenses of self-defense and intoxication in addition to accident. *Harris, supra* at 313, 320. Because defendant herein was not charged with homicide but rather felonious assault and based her defense solely on accident without any mention of self-defense, *Harris* is distinguishable. Additionally, defendant's contention that the victim's reputation for aggression need not be brought out by defendant's testimony is moot given our above analysis. The trial court therefore did not abuse its discretion by precluding reputation or opinion testimony regarding the victim's aggressive character.

Assuming, arguendo, that the court below did err in its failure to admit defendant's reputation testimony, defendant has failed to establish that it is more probable than not that the error was outcome-determinative and thereby undermined the reliability of the verdict; thus, any error on the part of the trial court must be presumed harmless under MCL 769.26 and MCR 2.613(A). See also *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).

Michigan's "harmless error jurisprudence[] requires error to be classified as constitutional or nonconstitutional and as preserved or unpreserved." *People v Cornell*, 466 Mich 335, 363 ; 646 NW2d 127 (2002). Constitutional errors that are structural in nature are subject to automatic reversal. *Id* at 363 n 16. Structural constitutional error is limited under *Neder v United States*, 527 US 1, 9; 119 S Ct 1827; 144 L Ed 2d 35 (1999), to matters in which the criminal trial is rendered "fundamentally unfair" or an "unreliable vehicle for determining guilt or innocence," such as situations involving the complete deprivation of defense counsel or trial before a biased judge.

Nonstructural constitutional errors are grounds for reversal unless the prosecution can show that the error was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). A restriction on the right to present relevant evidence violates the due process clause only where the restriction "offends some principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental." *Montana v Egelhoff*, 518 US 37, 43; 116 S Ct 2013; 135 L Ed 2d 361 (1996).

The trial court's preclusion of character testimony did not prevent defendant from presenting her defense of accident. It did not constitute structural error and did not impinge upon any substantial, *constitutional* right.

As defendant's constitutional rights were not implicated by the trial court's particular evidentiary ruling, the burden of proof shifts to defendant to prove that it is "more probable than not" that the error was outcome-determinative. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001); see also MCR 2.613(A) and MCL 769.26. Defendant has not met her burden of proving that a change in the outcome of the trial resulted from the trial court's preclusion of character testimony. Indeed, preclusion of character testimony regarding the victim's character for violence, even if the testimony were admissible under MRE 404(a)(2), is nevertheless harmless error when the jury can find that the defendant had a reasonable fear of the victim based on other admitted evidence. *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 763 (1993).

During trial, defendant presented evidence by way of her own testimony and that of her son that the victim threw an empty bottle at and eventually jumped on the truck defendant was driving on the date in question. Defendant also presented evidence by way of the testimony of her companion, Mr. Nolden, that the victim had a reputation in the community as a "hard head" and that he and the victim engaged in prior confrontations. In addition, the prosecution offered the victim's testimony in which he admitted to using profane language directed toward defendant on at least one prior incident. Based on such admitted evidence, the jury could reasonably find, absent the precluded testimony of further character witnesses, that defendant experienced rational apprehension of the victim. Thus, any error by the court with regard to its failure to admit the evidence in question was not outcome-determinative and must be presumed harmless. See MCL 769.26.

Defendant next argues that the trial court erred in its imposition of a prison sentence because it disregarded the presentence report's recommendation for probation and based its sentencing, at least in part, on defendant's assertion of innocence during allocution.

We conclude that resentencing is unwarranted because the trial court imposed a minimum sentence within the guidelines range to which both parties had agreed. Further, the court did not improperly consider defendant's refusal to admit guilt.

Sentencing within the appropriate guidelines range is not reviewed on appeal "absent an error in the scoring of the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). If the trial court departs from the sentencing guidelines, resentencing is appropriate only when the reviewing Court finds that the trial court imposed a disproportionate sentence without a substantial and compelling reason for the departure. MCL 769.34(11); MCL 769.34(3); *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003).

During sentencing, both parties agreed to a five to twenty-three months sentencing guidelines range. The trial court sentenced defendant to a minimum term of incarceration of six months. Since the upper limit of the recommended minimum sentence range exceeded eighteen months and the lower limit was less than twelve months, it was within the court's discretion to impose imprisonment with a minimum term of six months. MCL 769.34(4)(c)(i); see also, generally, *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). Although the court may have imposed an intermediate sanction under MCL 769.34(4)(c)(ii) and thereby reduced the sentence to a lesser punishment with a one-year county-jail maximum, the statute does not require the imposition of this intermediate sanction. This Court must affirm the sentence, as the

minimum sentence imposed fell within the guidelines range. MCL 769.34 (10); *People v Garza*, 469 Mich 431, 432-433; 670 NW2d 662 (2003).

With regard to defendant's allocution issue, it has been held that resentencing is appropriate if a sentencing court erroneously considers the defendant's failure to admit guilt by either asking the defendant to admit guilt or offering the defendant a lesser sentence in exchange for an admission of guilt. *People v Drayton*, 168 Mich App 174, 178-179; 423 NW2d 606 (1988). It has been held that resentencing is not required if the record shows that the trial court merely considered evidence of a lack of remorse in determining an individual's potential for rehabilitation. *Id.* at 178.

Defendant relies on the plurality opinion of *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987), to contend that her sentencing was based at least in part on an erroneous consideration of her maintenance of innocence during allocution. The sentencing record does not substantiate defendant's contentions under the *Wesley* lead opinion's three-factor test. *Id.* at 713. *Wesley's* first factor contemplates the defendant's maintenance of innocence after conviction. The record here indicates that defendant initially maintained her innocence by stating, "I still plead the Fifth, not guilty." The court was then forced to request that defendant clarify her statements regarding whether or not she accepted responsibility for her actions, as her responses were confusing and seemed to be contradictory. At no time did the court trigger *Wesley's* second factor by attempting to get the defendant to admit guilt. Moreover, we conclude that the court's exchange with defendant regarding defendant's statement that "... maybe I shouldn't have turned [the truck] around" pertains to defendant's seeming lack of remorse for endangering the lives of the victim and her son and does not bear on defendant's alleged maintenance of innocence. Finally, it does not appear from the record that had defendant clearly admitted guilt, the sentence would have been less severe (*Wesley's* third factor). Defendant has failed to demonstrate error, and resentencing is not required.

Affirmed.

/s/ Jane E. Markey  
/s/ Patrick M. Meter

I concur in result only.

/s/ Kurtis T. Wilder