STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ABBAS ABDOUSH,

Defendant-Appellant.

UNPUBLISHED
October 20, 2005

No. 256015
Wayne Circuit Court
LC No. 98-004881

Before: Owens, P.J., and Fitzgerald and Schuette, JJ.

PER CURIAM.

Following a bench trial in 1999, defendant was convicted of second-degree murder, MCL 750.317, and sentenced to a prison term of fifteen to twenty-five years. Defendant appealed, but the appeal was dismissed because it was not timely filed. Defendant thereafter filed a motion for relief from judgment, which was denied. This Court subsequently denied defendant's delayed application for leave to appeal the denial of his motion for relief from judgment. This case is now before us on remand from our Supreme Court for consideration as on leave granted. *People v Abdoush*, 470 Mich 872; 687 NW2d 292 (2004). We affirm.

I. FACTS

Defendant's conviction arises from allegations that on January 25, 1998, at approximately 1:30 a.m., he intentionally struck the victim while driving a van, and that the injuries to the victim caused her subsequent death. Two witnesses observed the victim standing on Michigan Avenue in Detroit, talking to someone in a van. As the victim walked away from the van, the driver attempted to hit her. The van continued on Michigan Avenue, made a U-turn, came back toward the victim at a high rate of speed, hit the victim, "ran over her," and continued driving. One witness wrote down license plate number PLL 903. Upon arriving at the scene, the police found the victim lying facedown in the street and gurgling. The police observed, inter alia, deep tire marks veering across Michigan Avenue in the direction of the victim's body, "yaw" marks indicating that a vehicle had made a sudden turn at a high rate of speed, and plastic debris scattered throughout the entire lane. No one could identify the driver of the van.

After emergency personnel resuscitated the victim and took other emergency measures, the victim was transported to the hospital in critical condition. When the victim arrived in emergency, she was comatose and had multiple injuries, including several facial lacerations, a mandible fracture, a

zygoma fracture, a femur fracture, and abdominal injuries, including injuries to the small intestine, large intestine, bladder, mesentery, and the supporting structures of the intestines. Dr. Kurt Kravolich, who was qualified as a medical expert, testified that he was one of the victim's treating physicians. According to Dr. Kravolich, the victim underwent an exploratory laparotomy, a craniotomy, and a surgical repair of her femur fracture. Dr. Kravolich indicated that the hospital staff improperly inserted an intravenous line in the victim's groin area that created fluid in her abdomen, which caused him to operate on her abdomen. The victim was in stable condition following the surgeries.

On February 1, 1998, approximately four days after being struck by the van, the victim unexpectedly suffered a stroke and died. Dr. Kravolich indicated that the victim had regained consciousness on January 26, became weak on January 29, and was "clinically brain dead" by January 30. Dr. Kravolich indicated that the stroke was caused by damage to the internal carotid artery, i.e., "blocking of the artery." The victim's "dissection began at a point two centimeters above bifurcation of the common carotid artery which . . . put[] it very high in the neck behind the jaw." There were no external injuries apparent on the victim's neck. Dr. Kravolich testified that the dissection of the carotid artery is consistent with the facial injuries the victim sustained.

Dr. Sawait Kanulen, the Wayne County chief medical examiner, testified as an expert in forensic pathology, and concluded that

> there were multiple injuries, especially in the face area, multiple fracture of the face and bones and injury also cut the right carotid artery. The right carotid artery was cut so there's no blood to the brain so half of the brain was dead and swelling and the deceased, she also has a broken leg and also abdominal injuries and then the cause of death was due to those multiple injuries, head and legs and then abdominal injuries.

Dr. Kanulen concluded that the cause of death was homicide, and that the victim's injuries, including the internal carotid artery dissection, were consistent with the victim being hit by a van. Dr. Abdul J. Alkhafaji, defendant's medical expert, agreed that the cause of death was a stroke as a result of a carotid artery injury. He testified that when arriving at the emergency room, the victim's injuries were not life threatening, that the victim had improved after receiving reparative procedures, and that she "possibly" could have survived with proper medical treatment. Dr. Alkhafaji essentially opined that the carotid artery injury could have occurred by the improper insertion of a needle into a blood vessel in the area of the carotid artery. He noted that carotid artery injuries are rare unless there is a fracture of the cervical spine and, here, there was no cervical spine injury that could have caused the dissection. Dr. Alkhafaji testified at length regarding the medical treatment the victim received, and concluded that the victim's death was the result of medical errors.

In March 1998, defendant was arrested after the police discovered that he was the driver of the van. Sadik Gabril testified that, in January 1998, he sold defendant a van. Kevin Hermz, defendant's co-worker who observed the sales transaction, testified that before trial, defendant called him and told him not to say anything about the van. Mohammed Al-Siamer testified that, on the day before the incident, defendant borrowed his license plate (PLL 903) to drive a recently purchased van. When the license plate was not returned in two hours as Al-Siamer expected, he unsuccessfully attempted to locate defendant around midnight. Between 6:00 and 7:00 a.m., Al-Siamer went to defendant's home, observed damage on the front of the van, blood on the ground, and blood on the van's front bumper and rim. According to Al-Siamer, defendant stated that, on the previous night, he had hit someone on

Michigan Avenue when the person suddenly appeared in front of him. Defendant showed Al-Siamer blood on the van's headlight, fender, and wheel. In response to Al-Siamer's inquiry about defendant reporting the incident, defendant allegedly said that he did not think the person would die and that he was going to wash the van. Eventually, Al-Siamer told the police that he loaned his license plate to defendant, and that defendant stated that he hit a person. The police observed the van in front of defendant's house, and noted that the debris collected from the crime scene was consistent with the damage to the van.

II. SUFFICIENCY OF THE EVIDENCE

Defendant challenges the trial court's denial of his motion for relief from judgment on the basis that the evidence was insufficient to convict him of second-degree murder.[1] We disagree.

A. Standard of Review

This Court reviews a trial court's ruling on a motion for relief from judgment for an abuse of discretion, and the findings of fact supporting its ruling for clear error. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). The trial court may not grant a motion for judgment relief if the motion alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal or in a prior motion, unless the defendant demonstrates good cause for failing to raise such grounds before, and demonstrates actual prejudice from the alleged irregularities. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001); MCR 6.508(D)(3)(a) and (b). In a conviction following a trial, "actual prejudice" means that "but for the alleged error, the defendant would have had a likely chance of acquittal." MCR 6.508(D)(3)(b)(i).

B. Analysis

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's determination of the weight of the evidence or the credibility of the witnesses. *Id.* at 514. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). 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).

The elements of second-degree murder are: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001) (citation omitted).

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[1] The trial court summarily denied defendant's motion for relief from judgment on this basis, and implicitly relied on its findings and conclusions made after trial.

Defendant challenges only the finding that the victim's death was caused by his actions, and contends that an intervening medical error was the sole cause of the victim's death.[2] A defendant's conviction may be sustained only "where there is a reasonable and direct causal connection between the injury and death." *People v Flenon*, 42 Mich App 457, 460; 202 NW2d 471 (1972). "The determination of proximate cause or of the existence of an independent intervening cause of death is an issue for the [trier of fact]." *People v Herndon*, 246 Mich App 371, 399 n 62; 633 NW2d 376 (2001) (citation omitted).

If a third party's "independent act" "intervenes between the act of a criminal defendant and the harm to a victim, that act may only serve to cut off the defendant's criminal liability where the intervening act is the sole cause of harm." *People v Bailey*, 451 Mich 657, 677; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996). "In the medical treatment setting, evidence of grossly negligent treatment constitutes evidence of a sole, intervening cause of death. Anything less than that constitutes, at most, merely a contributory cause of death, in addition to the defendant's conduct." *Id.* at 679; see also *Herndon*, *supra* at 399-400. Further, "[i]ntervening medical error is not available as a defense to a defendant who has inflicted a mortal wound upon a victim." *People v Thomas Williams*, 107 Mich App 798, 802; 310 NW2d 246 (1981), rev'd on other grounds 413 Mich 940 (1982). In *People v Cook*, 39 Mich 236, 240 (1878), our Supreme Court explained:

> In a case where the wound is not mortal, the injured person may recover and thus no homicide have been committed. If, however, death do [sic] result, the accused will be held responsible, unless it was occasioned, not by the wound, but by grossly erroneous medical treatment. But where the wound is a mortal one . . . the reason which permits the showing of a death from medical treatment does not exist.

See also *Herndon*, *supra* at 400-401.

Viewed in a light most favorable to the prosecution, a rational trier of fact could find that the victim's death was caused by defendant's act of hitting her with his van. The trial court, as the trier of fact, concluded that there "was a reasonable and direct causal connection between the injury and death and that intervening medical error, if there was any, is not available as a defense in this case because the wound was a mortal wound." (Appendix B, p 52.) Evidence was presented that defendant intentionally ran over the victim with his van while driving at a high rate of speed. The victim was lying facedown and struggling to breathe when emergency personnel arrived. As a result of being struck by defendant's van, the victim suffered multiple injuries, including facial fractures of the mandible and zygoma, other acute external and internal injuries to her face, a femur fracture, and injuries to the small and large intestines, bladder, and mesentery. The medical examiner, as well as Drs. Kravolich and Alkhafaji, indicated that the subsequent stroke that the victim suffered was a result of an internal carotid artery dissection.

Both the medical examiner, Dr. Kanulen, and plaintiff's expert, Dr. Kravolich, testified that a carotid artery dissection injury was consistent with the type of massive facial injuries the victim

[2] At the hearing on defendant's motion for relief from judgment, defense counsel argued that "the death was caused by medical malpractice."

sustained from being struck by a van, particularly the fractured mandible. Dr. Kravolich further testified that a carotid artery dissection occurs in 1 out of 150 automobile accidents. He explained that the force of the van pushed the victim's head backward and stretched the carotid artery to the extent that it caused a dissection separation of the artery. He noted that the force is applied to the head, not the neck so "the most common clinical picture in someone with a blunt carotid injury is facial, head and face injuries, not direct trauma to the neck." He indicated that, although the victim was seemingly improving from the initial injuries and trauma, the stretching caused the formation of a flap in the artery that was not externally visible, and which continued to grow and eventually "plug[ged] off" the artery. Dr. Kravolich opined that, even if medical personnel had discovered the carotid artery injury, it was surgically inaccessible because of the location of the artery, which was "at a high level up behind the jaw."

Further, as noted by the trial court, both defendant's medical expert and plaintiff's medical expert unequivocally testified that, without medical treatment, the victim would have died from the injuries sustained from being struck by defendant's van. In particular, Dr. Kravolich testified that the victim would not have survived had emergency personnel not inserted an endrotracheal tube to assist her breathing, and that her blood loss would have also been fatal if left untreated. He further testified that, even with medical assistance, the victim could not have survived the carotid artery injury. Although Dr. Alkhafaji opined that the victim's carotid artery injury might have occurred as a result of an intervening medical error, he acknowledged that a dissection could occur over time and eventually become a complete occlusion. Dr. Alkhafaji further indicated that the victim suffered "fatal" injuries as a result of being struck by a van and, if left untreated, would not have survived more than six to eight hours. From this testimony, viewed in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant inflicted a mortal wound on the victim, and that there is a reasonable and direct causal connection between his actions and the victim's death.

Furthermore, the evidence supports the trial court's conclusion that, even if the victim's injuries could be considered nonfatal, there was no evidence to support a finding that grossly erroneous medical treatment caused the victim's death. "If thoroughly and extraordinarily incompetent medical care killed the victim, it would break the chain of causation, absolving the defendant of criminal liability." *Herndon*, *supra* at 400. But ordinary medical negligence is foreseeable and, therefore, does not cut off criminal liability. *Id*. at 400 n 66, citing *People v Webb*, 163 Mich App 462, 465; 415 NW2d 9 (1987) ("[t]he concept of an intervening cause is predicated upon foreseeability. For instance, a doctor's negligence in treating a wounded victim is foreseeable, therefore, it cannot be used by a defendant to exonerate himself from criminal liability for the wounding of the victim.")

The defense asserted that medical personnel may have improperly placed a needle in the wall of a blood vessel that caused the carotid artery injury. Despite defendant's assertion of medical error, defendant's own expert testified that no one committed malpractice. Additionally, during his testimony, Dr. Kravolich indicated that the victim's dissection occurred behind the jaw, and explained where on the neck an intravenous puncture in that area would have been made. He then testified "with reasonable medical certainty," that a needle could not have caused the injury because "the tear was very high." In short, although defendant speculates that the victim's carotid artery dissection was caused by medical personnel improperly placing a needle in the area of the carotid artery, there was simply no evidence that "thoroughly and extraordinarily incompetent medical care killed the victim." *Herndon*, *supra* at 400.

Defendant also contends that the evidence was insufficient because no autopsy was performed and therefore the "exact" cause of death cannot be determined.[3] The medical examiner and both medical experts testified that the victim died from a carotid artery injury, which severed the blood supply to the brain. The medical examiner and plaintiff's expert testified that the victim's carotid artery injury was consistent with injuries caused by a pedestrian being hit with a van. The trier of fact was entitled to accept or reject any of the evidence presented, *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999), and "the prosecution need not negate every reasonable theory of innocence, but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence is presented." *People v Fetterley*, 229 Mich App 511, 517; 583 NW2d 199 (1998). In sum, the evidence was sufficient to sustain defendant's conviction for second-degree murder.

The evidence was sufficient to support defendant's conviction of second-degree murder; thus, defendant cannot demonstrate the actual prejudice necessary to support his motion for relief from judgment. The trial court did not abuse its discretion by denying defendant's motion for relief from judgment on this basis. MCR 6.508(D)(3)(b).

III. EXPERT WITNESS

Defendant also argues that the trial court erred by refusing to qualify his witness as an expert in trauma surgery. We disagree.

A. Standard of Review

The qualification of a witness as an expert and the admissibility of expert witness testimony are in the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *People v Phillips*, 246 Mich App 201, 203; 632 NW2d 154 (2001); *People v Peebles*, 216 Mich App 661, 667; 550 NW2d 589 (1996). An abuse of discretion will only be found "if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). 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).

B. Analysis

At trial, defendant called Dr. Alkhafaji to testify regarding the victim's injuries, cause of death, and the necessity of an autopsy. The trial court qualified Dr. Alkhafaji as "an expert in the field of general surgery . . . because [it was] satisfied he has sufficient knowledge to be able to do so." Subsequently, the trial court sustained the prosecutor's objection to Dr. Alkhafaji giving an opinion on the conclusions made by the medical examiner, and the need for an autopsy to determine cause of death.

Admissibility of expert testimony is governed by a three-part test: (1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or

[3] The victim's family did not want an autopsy performed.

assist in determining a fact in issue; and (3) the evidence must be from a recognized discipline. *Peebles*, *supra* at 667-668. The version of MRE 702 in effect at the time of trial provided:[4]

> If a court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, *a witness qualified as an expert by knowledge, skill, experience, training, or education*, may testify thereto in the form of an opinion or otherwise. [Emphasis added.]

We cannot conclude that the trial court's decision to qualify Dr. Alkhafaji in general surgery only was an abuse of discretion. Dr. Alkhafaji testified that he was board certified in general surgery. He stated that his specialty was general surgery, not trauma surgery, and he was not certified in the area of trauma surgery. Dr. Alkhafaji could not answer with what frequency he had seen victims of major trauma cases since receiving his general surgery certification in 1972, or even within the last five years, noting that other surgeons in his office generally handle those cases. Furthermore, Dr. Alkhafaji was not a pathologist, or certified in that area. On this record, the trial court did not abuse its discretion when it ruled that Dr. Alkhafaji was not qualified to opine whether the medical examiner's conclusion on the cause of the victim's death was correct, or whether an autopsy was necessary to determine the cause of death.

We also reject defendant's claim that the trial court's evidentiary ruling deprived him of his constitutional right to present a defense. A defendant's constitutional right to present a defense and call witnesses in his defense is guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). But the right to present a defense is not absolute. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). The accused must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. *Hayes, supra*.

The trial court's ruling did not amount to a blanket exclusion of all evidence regarding the cause of death, or otherwise limit defendant's opportunity to present a defense. In fact, although the court qualified Dr. Alkhafaji in the field of general surgery, it allowed him to testify extensively about the victim's condition, treatment, and possible cause of death. Moreover, contrary to defendant's implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Therefore, we are not persuaded that the trial court abused its discretion by excluding the challenged evidence.[5]

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[4] MRE 702 was amended effective January 1, 2004.

[5] We also note that, given that Dr. Alkhafaji provided extensive testimony during which he indicated that the victim would have died from her initial injuries, if left untreated, and that no one committed medical malpractice, it is highly improbable that his being qualified as an expert in trauma surgery would have affected the outcome of the trial. *People v Lukity,* 460 Mich 484, 495-496; 596 NW2d 607 (1999) (a preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative).

For these same reasons, defendant cannot demonstrate the actual prejudice necessary to warrant relief from judgment and, therefore, the trial court did not abuse its discretion by denying defendant's motion for relief from judgment. MCR 6.508(D)(3)(b).

IV. SENTENCE

We reject defendant's final claim that he is entitled to resentencing because his fifteen-year minimum sentence is disproportionate.[6]

A. Standard of Review

This Court reviews sentencing decisions for an abuse of discretion. A sentence constitutes an abuse of discretion if it violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

B. Analysis

Defendant's fifteen-year minimum sentence is within the guidelines recommended range of eight to twenty-five years; thus, it is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994). Although a sentence within the guidelines range could be disproportionate, *Milbourn, supra* at 661, defendant has failed to demonstrate any unusual circumstances to overcome the presumption of proportionality.[7] Defendant is not entitled to resentencing.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette

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[6] Because the offense of which defendant was convicted occurred before January 1, 1999, the former judicial sentencing guidelines apply to this case. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).

[7] In challenging the proportionality of his sentence, defendant notes that he has no prior felony convictions, that he disputes the one misdemeanor conviction, and that he had experienced difficulties in his life as detailed in an Amnesty International report. The record shows that the trial court considered those factors in imposing a sentence near the middle of the guidelines range, and stated that it "won't consider [the disputed misdemeanor conviction] in making [its] determination."