STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT D. BENTON,

Defendant-Appellant

UNPUBLISHED
April 4, 1997

No. 177842
Oakland Circuit Court
LC No. 94-131608

Before: Fitzgerald, P.J., and MacKenzie and Taylor, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548. He was sentenced to life in prison without parole. Defendant now appeals as of right, and we affirm.

Defendant's conviction arose from the stabbing death of his girlfriend, Barbara Sanders, on December 5, 1993. Sanders' neighbors saw defendant beating Sanders a couple hours before her death. Defendant's nieces testified that defendant was very upset with Sanders that evening and took a hammer from their home. Moreover, the neighbors heard a commotion from Sanders' apartment, which sounded like Sanders and a man arguing. Two people identified the man's voice as being defendant's. After the voices dissipated, a neighbor telephoned the police, who subsequently discovered Sanders lying dead in her apartment.

At the time of the attack, Sanders' car was parked in the driveway, but was missing afterward. The car was found a few months later parked less than a hundred feet from an apartment where defendant's brother lived.

I

Defendant first argues that the trial court erroneously instructed the jury that there was evidence that he hid after the crime and that they could infer from that a guilty state of mind. Because defendant did not object to the trial court's instruction, the issue is not preserved for appellate review absent manifest injustice. *People v Hess*, 214 Mich App 33, 36; 543 NW2d 332 (1995). We find no

manifest injustice since there was evidence that defendant may have taken Sanders' car after the murder and was not seen thereafter by his nieces, neighbors, or friends. Moreover, the police could not find him until February 9, 1994. Therefore, we find that the trial court's instruction was supported by the evidence.

II

Officer Carmen Gackstetter testified that Clayton Harvey told her that defendant said he was going to kill Barbara Sanders. However, Harvey denied that defendant told him he was going to kill Sanders and claimed that he did not make such a statement to Gackstetter. Defendant argues that the trial court should have sua sponte instructed the jury that they could only consider Officer Gackstetter's testimony for purposes of impeachment and not as substantive evidence, and that he was denied effective assistance of counsel by his attorney's failure to request such an instruction.

When a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement. *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). The purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement--not to prove the contents of the statement. *Id*. Because defendant did not request that the court give a cautionary instruction, this Court's review is limited to the issue whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995); MCL 768.29; MSA 28.1052.

Although it would have been beneficial for the court to give an instruction that Officer Gackstetter's testimony could only be considered for impeachment purposes, defendant does not point to any authority to establish that the court was required to sua sponte give the instruction. Furthermore, we find no support in the record for defendant's assertion that the prosecutor argued that this testimony regarding the statement should be considered as substantive evidence. Therefore, there was no miscarriage of justice when the trial court failed to give a limiting instruction and defendant was not denied effective assistance of counsel when his attorney failed to request such an instruction. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

III

Defendant next argues that the police intimidated Regina and Sylina Benton into providing damaging testimony against him. We disagree.

In reviewing an issue of witness intimidation, this Court examines the pertinent portion of the record and evaluates the alleged wrongful acts in context on a case-by-case basis. *People v Clark*, 172 Mich App 407, 409; 432 NW2d 726 (1988). This Court has strongly condemned prosecutorial intimidation of witnesses. *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992). Although the issue of prosecutorial intimidation usually arises in the context of alleged intimidation of defense witnesses, this Court has also condemned intimidation by the prosecution of its own witnesses. *Clark, supra* at 409. Threats from law enforcement officers may be attributed to the prosecution. *Stacy, supra* at 25.

On April 20, 1994, defendant filed an in pro per motion in which he argued that the prosecution incited Regina and Sylina Benton to commit perjury during the preliminary examination. Before trial began, the court conducted an evidentiary hearing on defendant's motion. Both Regina and Sylina testified that they told the truth at the preliminary examination and that no one made gestures toward them during their testimony or had intimidated them. The trial court thereafter denied defendant's motion.

At trial, defense counsel elicited from Sylina that when the police talked to her on the night of Sanders' death, they told her: "You know more than what you're telling us." Sylina stated that the police "said if we don't answer any questions, we have to answer them at the police station."[1] The police came to Sylina's home once that night and then came back the next morning. Sylina did not tell the police that defendant took a hammer from her home when they questioned her the night that Sanders was killed, but she told them the next morning. However, that does not establish that she was intimidated or that she lied about defendant taking a hammer, particularly in light of her testimony at the evidentiary hearing that she testified truthfully and was not intimidated.

Similarly, defense counsel elicited from Regina that the police spoke with her approximately five times and continually accused her of not telling them everything she knew. Regina stated that the police told her "if [she doesn't] go to court, they can put [her] in jail, and hold [her] until this trial over [sic] with." Regina told members of her family that the police made her feel like she was lying to them. Regina was not sure if she told the police on the night of the murder that defendant took a hammer with him, or if she told them during subsequent questioning. However, Regina testified that she was telling the truth in court and that neither the prosecutor nor police asked her to lie. Thus, there was no indication that the police intimidated Regina. Accordingly, we find that defendant was not denied a fair trial because the police did not intimidate Regina or Sylina Benton.

IV

Defendant next argues that he was denied the right to confront and cross-examine Clarence Garvin because the court did not allow him to question Garvin about Garvin's fourteen-year-old girlfriend who had a child with Garvin. Defendant contends that he should have been allowed to question Garvin about this "criminal" act to impeach his credibility. We disagree.

The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id*.

Clarence Garvin testified that he heard Sanders fighting with defendant in her apartment on the night she was killed.[2] However, on the night of the murder, Garvin did not tell the police what he heard. He first told the police what he knew the week that trial began because he had been subpoenaed. He stated that the reason he did not speak to the police sooner was because he did not care what happened. However, defense counsel attempted to question Garvin about the fact that his fourteen-

year-old girlfriend had a child to establish that he was concerned about statutory rape charges and therefore had a reason to lie to the police. The trial court determined that the circumstances surrounding Garvin's girlfriend were irrelevant to the issue whether he was lying about what he heard coming from Sanders' apartment. The prosecutor requested that the court instruct the jury that Garvin had no criminal record and no charges pending against him and defense counsel agreed.

Generally, all relevant evidence is admissible. MRE 402. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. The fact that Garvin had a child with a fourteen-year-old was not relevant to whether he testified truthfully that he heard defendant fighting with Sanders in her apartment on the night she was killed. Nor was it relevant that Garvin knew he could go to jail for impregnating his fourteen-year-old girlfriend. Those facts do not have any tendency to make Garvin's testimony that he heard defendant's voice more or less probable. Moreover, defendant had the opportunity to impeach Garvin's credibility by other means to establish that his testimony was not believable.[3] Accordingly, the trial court did not abuse its discretion in refusing to admit that evidence. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995).

V

Defendant next argues that the trial court abused its discretion in allowing the prosecution to endorse Reggie Princeton as a witness during trial because good cause for the late endorsement was not established. A trial court's decision to allow a late endorsement of a witness is reviewed for an abuse of discretion. *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992).

Clayton Harvey testified that defendant told him that he beat Sanders up because he caught her sleeping with Princeton. Harvey further testified that Princeton lived upstairs from him. However, contrary to defendant's assertion, there is no indication that Harvey told this to the police or that he testified to such at the preliminary examination. Thus, there is no suggestion that the police and prosecutor had any reason to know the identity of Reggie Princeton or where he lived before Harvey testified at trial. Once Harvey so testified, the police located Princeton. Consequently, there was good cause for his addition to the witness list during trial. MCL 767.40a(4); MSA 28.980(1)(4); *People v Burwick*, 450 Mich 281, 294, 298; 537 NW2d 813 (1995). Accordingly, the trial court did not abuse its discretion in allowing the late endorsement.

VI

Defendant next argues that the trial court abused its discretion in denying his motion for a mistrial because Melinda Jackson, Officer Diana Peters, and David Woodford violated the court's sequestration order by discussing their testimony during trial. We disagree.

This Court reviews a trial court's grant or denial of a mistrial for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial. *Id*.

At the request of a party or on its own initiative, the court may order witnesses excluded so that they cannot hear the testimony of other witnesses. MRE 615; *People v Jehnsen*, 183 Mich App 305, 308; 454 NW2d 250 (1990). If a witness violates the sequestration order, the court has discretion to exclude the witnesses' testimony. *People v Nixten*, 160 Mich App 203, 209; 408 NW2d 77 (1987).

The sequestration order issued by the court only prohibited witnesses from being present in the court room during the testimony of other witnesses. The court only cautioned that Detective Carpenter, the officer in charge of the case, should not discuss the case with any of the witnesses during trial since he would remain present in the court room. A sequestration order alone does not automatically put the witnesses on notice that they are not to discuss their testimony. *People v Davis*, 133 Mich App 707, 714; 350 NW2d 796 (1984). Where the trial court is not requested to caution the sequestered witnesses not to discuss the evidence, the sequestration order is not violated by such discussion, and therefore the court does not abuse its discretion in permitting the witnesses to testify. *Id*. Thus, it is not apparent in this case that Melinda Jackson, David Woodford, or Officer Peters violated the sequestration order because it did not prevent them from discussing the case outside of the court room.

Moreover, defendant has not demonstrated that he was prejudiced by the discussion among Peters, Jackson and Woodford. A defendant who complains on appeal that a witness violated the lower court's sequestration order must demonstrate that prejudice resulted. *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996). There is no indication that these witnesses fabricated their testimony in order to support Officer Peter's testimony regarding the method she used to look for evidence. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

VII

Defendant next argues that he was denied effective assistance of counsel because his attorney failed to move to suppress the in-court identification of defendant by Michele Piper. Because defendant did not move for a new trial or an evidentiary hearing, this Court's review is limited to deficiencies apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

The need to establish an independent basis for an in-court identification arises where the pretrial identification is tainted by improper procedure or is unduly suggestive. *Barclay*, *supra* at 675. The first-time identification of a defendant at trial is not necessarily inherently suggestive. *People v Fuqua*, 146 Mich App 133, 143-144; 379 NW2d 396 (1985) criticized on other grounds, 434 Mich 498 (1990). Michele Piper was the residential manager of Hidden Pines Apartments, the complex in which defendant's brother, Bruce Benton lived. She testified that she saw defendant at Bruce's apartment sometime after Sanders' murder. Because Piper did not identify defendant before trial, there was no pretrial taint that required the establishment of an independent basis for her in-court identification. Therefore, defendant has not established that Piper's identification of him during trial was improper.

VIII

Defendant next argues that the testimony of Detective Gerald Hopkins, in which he stated that various witnesses testified consistently with earlier statements they had given to the police, was improper bolstering. Because defendant did not object to this testimony, the issue is not preserved. MCR 103(a)(1). However, this Court may take notice of plain errors that affect the substantial rights of a party, even if no objection was made at trial. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). An error affects the substantial rights of a defendant if it affected the outcome of the proceedings. *Id*. at 552-553.

As a general rule, neither a prosecutor nor anyone else is permitted to bolster a witness' testimony by referring to prior consistent statements of that witness. *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987). Even if we were persuaded, Detective Hopkins improperly bolstered the witnesses' credibility, we would not reverse because there was ample other evidence against defendant from which the jury could have determined beyond a reasonable doubt that he murdered Sanders. *People v Mateo*, 453 Mich 203; 551 NW2d 891 (1996). Accordingly, the admission of Detective Hopkins' testimony did not affect defendant's substantial rights.

IX

Defendant next argues that comments by the prosecutor during rebuttal closing argument that the evidence was unrefuted and undisputed shifted the burden of proof to him and violated his right to remain silent. Because defendant did not object to the prosecutor's comment at trial, appellate review is precluded unless failure to review the issue would result in a miscarriage of justice or a cautionary instruction could not have cured the prejudicial effect. *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996).

By stating that certain evidence was unrefuted and undisputed, the prosecutor implied that defendant did not introduce any contradictory evidence. However, the prosecutor did not comment on defendant's failure to testify or that he was the only person who could have refuted the evidence. Evelyn Smith Hadley testified that defendant told Sanders that he would cut her throat if she called the police. Officer Gackstetter testified that Clayton Harvey told her that defendant said he was going to kill Sanders. Defendant could have refuted or disputed this evidence without testifying if he provided evidence to contradict the testimony of Hadley or Gackstetter. Therefore, we believe that the prosecutor's comments were not improper. *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995).

Moreover, even if the prosecutor's comments were improper, they could have been cured with a cautionary instruction. In fact, the court instructed the jury that the prosecution had the burden of proving each element of the crime beyond a reasonable doubt and that defendant was "not required to prove his innocence or do anything." The court also instructed the jury that defendant had the absolute right not to testify and that they could not consider that fact in reaching a verdict. Lastly, the court instructed the jury that the attorney's comments were not evidence. *People v Bahoda*, 448 Mich 261,

281; 531 NW2d 659 (1995). Accordingly, failure to review the prosecutor's alleged improper comments will not produce a miscarriage of justice.

X

Finally, defendant argues that the cumulative effect of the errors at trial require reversal of his conviction. We disagree. *Id.* at 292-293, n 64.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Clifford W. Taylor

[1] Defense counsel also elicited that Sylina had children and apparently attempted to imply that she would have wanted to avoid being taken to the police station by telling the police what they wanted to hear.

[2] Garvin was twenty years old and had an eighth grade education.

[3] For instance, Garvin testified that defendant fought with Sanders for approximately two-and-a half hours on the night she was killed, whereas the other witnesses stated that they fought for a few minutes.