STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAA TOMA,

Defendant-Appellant.

UNPUBLISHED
June 17, 1997

No. 193947
Oakland Circuit Court
LC No. 93-125447-FH

Before: Corrigan, P.J., and Michael J. Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of delivery of more than 50 grams but less than 225 grams of a controlled substance, and was sentenced to ten to twenty years' imprisonment. He now appeals as of right. We affirm.

Defendant was charged with selling cocaine to an undercover police officer on December 12 and 15, 1992. He was acquitted of charges arising out of the first transaction, and convicted of charges arising out of the second transaction.

Defendant first argues that he was denied a fair trial when the trial court permitted defense witness Keith Kashat to exercise his privilege against self-incrimination without ascertaining whether the testimony would in fact be incriminating. He argues that the witness' only legitimate risk of self-incrimination was based on his fear of being charged with perjury, and that is not sufficient to invoke the Fifth Amendment. We disagree.

The Fifth Amendment to the United States Constitution and its Michigan counterpart, Const 1963, art 1, § 17, provide that no person shall be compelled to be a witness against himself in a criminal trial. *People v Schollaert,* 194 Mich App 158; 486 NW2d 312 (1992). A witness may not invoke the privilege merely on his own assertion that his answer may incriminate him. Rather, it is for the trial court in its discretion to determine whether the witness must answer. *Mason v United States,* 244 US 362, 366; 37 S Ct 621, 61 L Ed 1198 (1917). A trial court may compel a witness to answer a question only where the court can foresee, as a matter of law, that such testimony could not incriminate the witness. *People v Dyer,* 425 Mich 572, 578-579; 390 NW2d 645 (1986). In order to protect a defendant's rights when a potential witness plans to assert a testimonial privilege, the trial court must first determine whether the witness understands the privilege and must provide an adequate explanation if the

witness does not. The court must then hold an evidentiary hearing outside the presence of the jury to determine the validity of the witness' claim of privilege. If the court determines that the assertion of the privilege is valid, the inquiry ends and the witness is excused. *People v Paasche,* 207 Mich App 698, 707; 525 NW2d 914 (1994).

In the present case, the trial court applied an incorrect legal standard when it expressed the view that it was for the witness to determine whether or not he may invoke the Fifth Amendment privilege. However, on review of the record, we find that Kashat's assertion of the Fifth Amendment privilege was valid. At an entrapment hearing that was held before the trial, Kashat invoked the privilege in response to questions that referred to whether or not he was a drug dealer, whether or not he knew a supplier named Moe, and whether or not he approached police with information in an attempt to garner favorable treatment for himself. On this record, the trial court could not have found, as a matter of law, that Kashat's responses to questions would not incriminate him. *Dyer*, *supra* at 578-579. Where a trial court reaches the correct result for the wrong reason, its decision need not be reversed on appeal. *In re People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993). The trial court correctly permitted Kashat to assert his Fifth Amendment privilege.

Defendant next argues that Kashat asserted his Fifth Amendment privilege as a result of the prosecutor threatening him with a perjury charge. However, defendant did not raise this issue in the trial court. Because we find no manifest injustice will result, we decline to review this issue. *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992).

Defendant next argues that the trial court erred in instructing the jury that the defense of duress required a threat of imminent harm, and that a threat of future harm is insufficient. Based on the abundance of Michigan case law that adopts the threat of immediate harm as a requirement for the defense of duress, we find that the jury instruction was proper. See *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975); *People v Merhige,* 212 Mich 601, 610-611; 180 NW 418 (1920); *People v Blair*, 157 Mich App 43, 51; 403 NW2d 96 (1987); *People v Hubbard,* 115 Mich App 73, 78; 320 NW2d 294 (1982).

Defendant next argues that the trial court abused its discretion in admitting the testimony of a police witness regarding information she received from an informant. Cynthia Fellner testified that she did not arrest defendant after the transaction on December 12, because she had information that defendant and his brother were dealers of large quantities of cocaine, and she wanted to arrange for larger transactions at a later date. Defendant argues that this testimony was inadmissible because it was hearsay as well as irrelevant and highly prejudicial. We disagree.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id.* Generally relevant evidence is admissible, and irrelevant evidence is not. MRE 402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable that it would be without the evidence. MRE 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403.

The content of an informant's tip generally is inadmissible as hearsay. *People v Starks*, 107 Mich App 377, 383; 309 NW2d 556 (1981). It is not admissible for the purpose of showing an officer's state of mind if the state of mind was not a fact of consequence to the determination of the action. *People v Wilkins*, 408 Mich 69, 73; 288 NW2d 583 (1980).

In the present case, defense counsel commented in his opening statement that the police were attempting to build defendant up from a less serious charge of delivery of less than 50 grams of cocaine to the more serious charge of delivery of under 250 grams of cocaine. Therefore, defendant placed the officer's state of mind in issue by his remarks in his opening statement. Defendant argues that, even if he did open the door to testimony regarding Fellner's motivation for setting up a second transaction, the trial court "closed the door" when it sustained the prosecution's objection to his statement. However, it appears from the record that the court sustained the objection only as to defense counsel's reference to penalty. Therefore, the trial court did not abuse its discretion in allowing Fellner's testimony regarding informant information.

Finally, defendant argues that the trial court abused its discretion by admitting rebuttal evidence regarding the contents of a police report because it was hearsay and extrinsic evidence of a collateral matter.

Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party. *Id.* at 399. The test of whether rebuttal evidence was properly admitted is whether it was properly responsive to evidence introduced or a theory developed by the defendant. *Id.*

The prosecution called Trooper Fellner as a rebuttal witness. She testified that she ran a criminal history check on Morris Bolis which indicated that he had been born in Iraq and not Syria as defendant had testified. We find that the evidence of Morris Bolis' criminal record was properly responsive to defendant's theory that he sold cocaine to Fellner under the duress of threats by an unidentified man named "Moe." Defendant attempted to distinguish between "Moe" and Morris Bolis by stating that Bolis was Syrian, rather than Chaldean, and that Bolis would not have been involved in criminal activity. Therefore, it was properly introduced as rebuttal evidence.

Defendant further argues that Fellner's testimony was hearsay and not within an exception, and was therefore inadmissible under MRE 802. The criminal record was hearsay because it was an out of court statement offered to prove the truth of the matter asserted. MRE 801(c). Therefore, the trial court erred in overruling defendant's objection. However the error was harmless. Defendant could not establish the defense of duress regardless of whether or not he established the identity of "Moe" because the only threat he alleged was a threat of future harm. Because the evidence regarding Morris Bolis' birthplace was only relevant to the identify of "Moe," its admission did not effect the outcome of defendant's trial.

Affirmed.

/s/ Maura D. Corrigan
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra