

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMY EARL RONE, SR.,

Defendant-Appellant.

UNPUBLISHED

August 13, 1999

No. 205527

Muskegon Circuit Court

LC No. 96-139452 FC

Before: Hoekstra, P.J., and Saad and R. B. Burns*, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316; MSA 28.548, for the stabbing death of his wife, and he was sentenced to life without parole. It is undisputed that defendant stabbed his wife several times, in the presence of their young grandson, and left her to bleed to death in the street. The central issue at trial was defendant's state of mind when he stabbed his wife. Plaintiff introduced testimony to show that defendant had abused his wife and threatened to kill her in the past, arguing that the killing was premeditated. Defendant argues that much of this testimony was inadmissible hearsay and that the killing was not premeditated. He further argues that the trial court erred when it refused to grant a mistrial after witnesses offered inadmissible testimony. While we agree that the trial court erred in admitting the testimony, we find the error harmless. Furthermore, we find the trial court's decision to deny defendant's motion for a mistrial to be within its discretion. Accordingly, we affirm.

I

Plaintiff filed a pretrial motion to admit evidence under MRE 404(b). Plaintiff hoped to use the evidence to show that defendant had abused decedent and threatened to kill her if she ever tried to leave him. Much of the testimony was indirect. Specifically, the decedent's friends and family testified that decedent had told them about threats and past incidents of abuse. The trial court ruled that the evidence was admissible as 404(b) evidence, and that the testimony concerning decedent's statements to her friends was evidence of decedent's state of mind, admissible under MRE 803(3).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Because the trial court admitted the testimony in question as evidence of decedent's state of mind, it could not be used as substantive evidence of defendant's prior bad acts. Doing so would require that the statements in question be taken for the truth of the matter asserted, that defendant in fact abused decedent. Here, the trial court admitted the hearsay testimony as evidence of the truth of the matter asserted and justified its admission as evidence of decedent's state of mind. The trial court misapplied MRE 803(3). When testimony is admitted as evidence of a decedent's state of mind, that is all it can be used to show. Here, the prosecutor's own motion demonstrates beyond doubt that the evidence was admitted to show that defendant had in fact abused and threatened decedent.¹

The trial court erred even if the evidence had been used merely to show decedent's state of mind. Here, decedent's state of mind was not relevant at the time of the ruling, so any evidence justified solely under MRE 803(3), as evidence of decedent's state of mind, should not have been admitted. A decedent's state of mind is not usually relevant in a murder trial unless the defendant asserts self-defense or a similar defense. *People v White*, 401 Mich 482, 504; 257 NW2d 912 (1977). At the time of the trial court's ruling, defendant had not asserted self-defense, and it was at that point that the trial court admitted the otherwise hearsay testimony under MRE 803(3). The trial court compounded its error when it failed to limit the purposes for which the jury could consider the evidence.²

Nonetheless, we find that the error was harmless. Appellate courts should not reverse a conviction unless the error was prejudicial. MCR 2.613(a), MCL 769.26; MSA 28.1096. See also, *People v Mateo*, 453 Mich 203, 210, 212; 551 NW2d 891 (1996); *People v Robinson*, 386 Mich 551, 562; 194 NW2d 709 (1972), after remand 48 Mich App 253; 210 NW2d 372. Plaintiff offered substantial direct testimony at trial that defendant had abused and threatened decedent, including testimony from decedent's young grandson, who witnessed the killing. In addition to the eyewitness testimony, the couple's daughter testified that she heard her father threaten to kill her mother, and she saw him physically abuse her. The hearsay evidence was merely cumulative.

Therefore, while we conclude that the trial court erred in allowing the 803(3) testimony to be admitted and used as substantive evidence of defendant's prior bad acts, we find that the error was harmless in light of the additional, direct testimony.

II

Defendant next argues that the trial court erred in refusing to grant him a mistrial when, on two occasions, inadmissible testimony was introduced. "The decision to grant or deny a mistrial motion lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion." *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). We consider whether defendant received a fair trial, not whether his trial was free from all irregularities. *Id.* at 289.

Defendant points to testimony by decedent's sister that decedent was a Jehovah's Witness. The prosecutor introduced the testimony as evidence of decedent's temperament. Defendant claims that, under MRE 610 and MCL 600.1436; MSA 27A.1436, this testimony was improper, and he should be given a new trial. However, both of those provisions seek to prevent the use of religious belief to bolster or attack a witness' credibility. Obviously, decedent was not testifying, so evidence

that she attended a particular church could not bolster her credibility. However, the trial judge correctly held that the testimony was not relevant and issued the appropriate curative instruction. We find no abuse of discretion in his decision not to grant a mistrial.

III

Finally, defendant argues that the trial court erred in refusing to grant his motion for a mistrial after the decedent's mother testified that defendant had been incarcerated for an unrelated offense. However, the testimony was part of a nonresponsive answer, and the prosecutor had clearly warned his witness that she was not to mention defendant's prior incarcerations. An unresponsive volunteered answer to a proper question is not cause for a mistrial. *Lumsden, supra*, 168 Mich App 286, 299. We find no abuse of discretion.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Henry William Saad

/s/ Robert B. Burns

¹ Prior to trial, plaintiff moved for the admission of the evidence described above under MRE 404(b) to "demonstrate the defendant's motive and intent to murder Janice Rone." In its written motion, plaintiff listed the evidence in question:

- 1) Threats by the Defendant in the months preceding the homicide;
- 2) Assaultive acts by the defendant in the months preceding the homicide such as throwing a drink in the victim's face, urinating on her, and assaulting the victim with a knife;
- 3) The defendant's refusal to leave the home when requested by the victim in the days preceding and on the day of the homicide. [Plaintiff's brief in support of its motion to introduce other acts testimony pursuant to MRE 404(b), p 8].]

While plaintiff acknowledged that some of the evidence had to be admitted under MRE 803(3), it did not appear to recognize that such evidence was only admissible to show Janice's state of mind. Rather, plaintiff's brief in support of its motion shows its intention to introduce the testimony for the truth of the matter asserted. This understanding of plaintiff's intended use of the hearsay testimony is bolstered by discussions between trial counsel and the trial court during the hearing on plaintiff's motion. The trial court specifically held that evidence showing that Janice feared defendant would not be admissible unless defendant asserted self-defense, because her state of mind was not relevant unless defendant asserted that Janice attacked him.

² We have reviewed plaintiff's extensive arguments that this evidence was properly admitted and find them to be without merit. For example, plaintiff relies heavily on *People v Fisher*, 449 Mich 441; 537 NW2d 577 (1995) for the proposition that this evidence was admissible as evidence of marital discord.

However, in that case, the statements testified to were admissible to show their effect on the defendant-husband. Nothing here suggests that defendant was present when the decedent told her friends and family that defendant abused her, or that she planned to leave him. In addition, while one could reasonably argue that the statements showed some marital discord, we fail to see how such discord is relevant in this case. Even if we could, the jurors were not instructed that they were to consider the evidence for this limited use.

Furthermore, plaintiff cites a litany of cases wherein a decedent's statements that he or she feared the defendant were considered admissible to negate a defense of self-defense, suicide, or accident. (Plaintiff's brief, pp 28-30). However, at the time of the ruling, defendant had asserted none of these defenses. In addition, the evidence was admitted for the truth of the matter asserted, not as evidence of decedent's state of mind.

Plaintiff also argues that the evidence was admissible under the residual hearsay exception, MRE 803(24). However, that rule requires that the evidence in question be more probative on the point for which it is offered than any other evidence that plaintiff can procure through reasonable efforts. Because additional non-hearsay evidence was available, we find this argument unpersuasive.