STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTY SUE NEFF,

Defendant-Appellant.

UNPUBLISHED
January 11, 2000

No. 206498
Ingham Circuit Court
LC No. 96-070583-FC

Before: Hoekstra, P.J., and McDonald and Meter, JJ.

PER CURIAM.

Defendant was convicted by jury of conspiracy to commit kidnapping, MCL 750.157a; MSA 28.354(1); MCL 750.349; MSA 28.581, and second-degree murder, MCL 750.317; MSA 28.549. She was sentenced to concurrent prison terms of thirty-five to sixty years for the conspiracy conviction and forty to sixty years for the murder conviction. Defendant appeals as of right. We affirm.

Defendant first argues on appeal that the trial court violated her due process right to present a defense by excluding expert testimony regarding battered woman syndrome. We disagree. We review a trial court's decision regarding admission of expert testimony on battered woman syndrome for an abuse of discretion. *People v Christel*, 449 Mich 578, 587; 537 NW2d 194 (1995); *People v Daoust*, 228 Mich App 1, 10; 577 NW2d 179 (1998). "An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification for the ruling made." *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

Short of adopting the battered spouse syndrome, our Supreme Court, in *Christel*, *supra* at 591, stated that it "will permit testimony regarding specific behavior where relevant and helpful to the factfinder." The *Christel* Court explained that, generally, expert evidence is needed when a witness' actions or responses are incomprehensible to the average person, such as a complainant's prolonged tolerance of physical abuse accompanied by attempts at hiding or minimizing the effect of the abuse, delays in reporting the abuse to the police or friends, or denying or recanting allegations of abuse. *Id.* at 592-596. The Court further indicated that only when the aforementioned or similar facts are in issue

and expert testimony would be helpful in evaluating a witness' testimony is evidence of the battered woman syndrome permitted. *Id*. at 593, 597.

Here, the record reveals that the trial court engaged in the appropriate analysis when determining whether to admit expert testimony on battered woman syndrome. Although some basis for such testimony may have been present, the necessary factual underpinnings for admission are lacking. This is neither a traditional case of battered woman syndrome where the abused acts against or protects her current batterer, see *Christel*, *supra*, nor is expert testimony needed to understand the threat that defendant's ex-husband made to her when displaying for her the decapitated head of the victim. Jurors need no expert testimony to be able to evaluate whether defendant was forced, under duress, to assist her ex-husband in concealing the murder after he showed her the victim's severed head, pointed a gun to her head and raped her. Under the facts and circumstances of this case, battered woman syndrome testimony is inapplicable and unnecessary. Accordingly, we find no abuse of discretion.

Defendant next argues that the trial court violated her sixth and fourteenth amendment rights by giving an "accomplice" instruction to the jurors, telling them to be careful about accepting the exculpatory testimony of defendant's ex-husband, who testified for the defense. We disagree. We review jury instructions in their entirety to determine if error requiring reversal exists. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). In addition to the standard jury instructions, a trial court may give instructions on applicable law not covered in the standard jury instructions. See MCR 2.516(D)(4). "Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Perez-DeLeon*, *supra*, quoting *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Defendant's reliance on *Cool v United States*, 409 US 100; 93 S Ct 354; 34 L Ed 2d 335 (1972), is misplaced.[1] Contrary to defendant's assertion, the United States Supreme Court in *Cool*, *supra*, does not condemn the use of a cautionary instruction when an accomplice testifies for the defense. Indeed, the Court implicitly held that an accomplice testimony instruction directed at the testimony of a defense witness does not constitute constitutional error. See *id.* at 103. The Court observed that, in general, accomplice instructions "represent no more than a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity." *Id.* In *Cool*, *supra* at 103-104, the Court explained that the defendant's constitutional right to present exculpatory evidence of an accomplice was violated not because an accomplice instruction was given, but because the instruction impermissibly excluded relevant evidence unless the jury makes a preliminary determination that it is extremely reliable, and had the effect of reducing the prosecution's burden of proof.

In the present case, when defendant's ex-husband testified on her behalf, he had already pleaded guilty to first-degree murder with regard to the killing of defendant's current husband, and had been sentenced to life imprisonment without parole. As a defense witness, defendant's ex-husband exonerated defendant, the mother of his four children, from any wrongdoing, claiming that she had no advance knowledge or involvement in the kidnapping and murder. Per the prosecution's request, the trial court delivered a modified accomplice instruction modeled after CJI2d 5.6, which in its original form instructs on accomplice testimony when the accomplice is a witness for the prosecution, stating to

the jury that it should consider an accomplice's testimony more cautiously than that of an ordinary witness. Here, we conclude that the trial court's instruction "represent[s] no more than a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity." *Cool*, *supra* at 103. Regardless of whether the prosecution or the defense calls an accomplice to testify, the testimony has inherent unreliability problems, and thus the cautionary instruction is applicable.[2] We find no error.

Next, defendant argues that the trial court violated both the rules of evidence and her confrontation clause rights by allowing the prosecution to introduce hearsay testimony that the victim stated that defendant was going to kill him. Specifically, defendant contends that the trial court abused its discretion by admitting evidence of the victim's statements concerning his fears because the statements are hearsay, and that MRE 803(3) does not apply because the victim's state of mind was not in issue. We agree that the trial court erred in allowing such testimony; however, we find the error harmless. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). "[I]t is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

In Michigan, the general rule is that statements indicative of the declarant's state of mind are admissible when such is an issue in the case. *People v White*, 401 Mich 482, 502-503; 257 NW2d 912 (1977); see also *People v Furman*, 158 Mich App 302, 315; 404 NW2d 246 (1987). The *White* Court explained that, usually, a victim's state of mind is in issue in a homicide case if the defendant asserts a claim of self-defense as justification for the killing, suicide or accidental death. *White*, *supra* at 504. In such cases, evidence that the victim feared the defendant is relevant because it suggests that it is unlikely that the victim was an aggressor, or that the death was a suicide or an accident. *Id*. In this case, none of these defenses nor any analogous defenses were raised. Defendant never claimed that the victim said or did anything that exculpated her or excused, justified or mitigated her alleged guilt. See *id.* at 505. Rather, defendant's claim was simply that she did not commit the crime, and, in fact, had nothing to do with the crime. Therefore, the victim's state of mind is not an issue and, pursuant to *White, supra*, the evidence was improperly admitted.[3]

Because this is an evidentiary error, it must be analyzed as a preserved, nonconstitutional error. Our Supreme Court recently held that "a preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Lukity*, *supra* at 495-496, quoting MCL 769.26; MSA 28.1096. The Court explained that this inquiry "'focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.'" *Id*., quoting *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). Defendant bears the burden to demonstrate that such an error resulted in a miscarriage of justice. *Lukity*, *supra* at 493-494. Because the untainted circumstantial evidence against defendant, as a whole, was strong and substantial, it affirmatively appears that it is more probable than not that the error was not outcome determinative. We find the error harmless.

Defendant also argues that the trial court violated her due process clause right to a fair trial by admitting into evidence semi-nude and erotic photographs of her. We disagree. It is within the sole discretion of the trial court to admit or exclude photographs, *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, modified 450 Mich 1212 (1995), and the trial court's decision will not be disturbed on appeal absent an abuse of discretion, *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). With all photographic evidence, the proper inquiry is whether the probative value of the evidence is substantially outweighed by unfair prejudice. *Mills, supra*.

Upon review of the record, it is apparent that the photographs were relevant. Defendant was charged with conspiring with her ex-husband and a friend to kill the victim. To constitute conspiracy, two or more persons must have voluntarily agreed to effectuate commission of a criminal offense. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). Because of the clandestine nature of criminal conspiracies, identifying the participants of an unlawful agreement is often difficult. *People v Justice*, 454 Mich 334, 347; 562 NW2d 652 (1997). As such, direct proof of the conspiracy is not essential; rather, proof may be derived from the circumstances, acts, and conduct of the parties, and inferences may be made because such evidence sheds light on the coconspirators' intentions. *Id.*

In the present case, the nature of the relationship between defendant and her ex-husband, as well as the circumstances surrounding his reasons for escaping prison to murder the victim, were clearly relevant to proving a conspiracy. The photographs shed light on their relationship, given that the professionally taken photographs of defendant nude, semi-nude or wearing lingerie, posing in a sexual manner, were some of those delivered to defendant's ex-husband while he was incarcerated in West Virginia. Less than two weeks after the photographs in question were delivered to defendant's ex-husband, he escaped from the prison, and the photographs were found in his luggage when he was arrested weeks after the killing of the victim. Further, given defendant's general denial of guilt, all the elements of the crime of conspiracy were in issue. *Mills, supra* at 69-70.

Defendant contends that the photographs were unfairly prejudicial because they were erotic, exposed her breasts, and portrayed her as a loose woman, and that the prosecution could have simply told the jury what the photographs entailed. However, "unfair prejudice" does not mean "damaging," as any relevant evidence will be damaging to some extent. *Mills, supra* at 75-76. In addition, this Court has held, in other contexts, that photographs are not inadmissible merely because they are shocking, even though they may tend to arouse the passion or prejudice of the jurors. *People v Howard*, 226 Mich App 528, 549-550; 575 NW2d 16 (1997); *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994). Further, photographs are not excludable simply because a witness can orally testify about information contained in them. *Mills, supra* at 76. Because the photographs were otherwise admissible for a proper purpose, to help demonstrate the alleged conspiracy between defendant and her ex-husband, they need not be rendered inadmissible merely because they display sexual or erotic images. Here, the trial court undertook the appropriate analysis, determining that the probative value of the photographs of defendant outweighed the danger of unfair prejudice, and limited the admission to two photographs where the defendant is wearing lingerie and one photograph in which defendant's breasts are exposed, excluding another topless photograph as cumulative.

To the extent that defendant argues that this case is analogous to the bar against the presentation of photographs and other evidence of a rape victim's sexuality, her argument is without merit. First, this is not a criminal sexual conduct case, but a murder case. Second, defendant is not a rape victim, but a criminal defendant. Moreover, the rape shield statute, see MCL 750.520j(1); MSA 28.788(10)(1), which may provide the foundation to exclude such photographs where the accused is on trial, was designed to protect and shield the sexual privacy of an alleged *victim of rape*, as opposed to a criminal defendant. *People v Arenda*, 416 Mich 1, 10-11; 330 NW2d 814 (1982); *People v Khan*, 80 Mich App 605, 613-614; 264 NW2d 360 (1978). As such, defendant's argument in this regard is completely inapplicable to this case.

In sum, although the photographs may be described as erotic or sexual, they are material to the relationship between defendant and her ex-husband, and we conclude that the trial court did not abuse its discretion in determining that they are not unfairly prejudicial.

Finally, defendant argues that the trial court erred in imposing a fifteen-year upward departure on her sentence. Defendant essentially argues that the trial court failed to justify the upward departure from the guidelines range of ten to twenty-five years for the second-degree murder conviction because its stated reasons are either already embodied within the guidelines, are irrelevant to sentencing, or are disputed by the jury's verdict. We disagree. We review a defendant's sentence for an abuse of discretion. *People v Cervantes*, 448 Mich 620, 626; 532 NW2d 831 (1995); *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). A sentence constitutes an abuse of discretion if the sentence 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, 635-636, 654; 461 NW2d 1 (1990); *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995).

Departures from the judicial guidelines should alert appellate courts to the possibility of violation of the principle of proportionality. *Milbourn*, *supra* at 660. However, a court may depart from the guidelines when, in its judgment, the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime. *Id*. at 657. The crucial test is not whether the sentence departs from, or adheres to, the recommended range under the sentencing guidelines, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). A court upwardly departing from the sentencing guidelines must provide its reasons for doing so at the time of sentencing. *People v Fleming*, 428 Mich 408, 417-418, 426; 410 NW2d 266 (1987).

The trial court properly provided its reasons, at length, supporting its decision that the guidelines did not adequately embody the nature, severity and circumstances of this crime. See *id.* Contrary to defendant's argument, the court's reliance on factors already considered in the guidelines is not an abuse of discretion, as a court may justify an upward departure by reference to factors considered within the guidelines that are inadequately weighed. *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998). The court also relied on the impact of defendant's crime on the victim and on the victim's family, which is a proper criterion. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).

Defendant's claim that the court's reliance on her "prolonged participation in the event" and her supposed manipulation of both her ex-husband and her friend are improper considerations because the jury rejected those theories when it acquitted her of first-degree murder is without merit.[4] Although a trial court may not make an independent finding of guilt for an offense for which defendant has been acquitted and then sentence a defendant on the basis of that finding, it may consider the evidence admitted during trial as an aggravating factor in fashioning an appropriate sentence. *Id*.

In sum, we have reviewed the record and we find that the trial court based defendant's sentence on appropriate factors and adequately explained its reasons for the upward departure from the sentencing guidelines. Accordingly, we find no error.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Gary R. McDonald
/s/ Patrick M. Meter

[1] Likewise, defendant's reliance on *People v Reed*, 453 Mich 685; 556 NW2d 858 (1996), is misplaced. *Reed* is inapplicable to facts in the present case. In *Reed, supra* at 691-694, unlike here, the defendant and the accomplice were tried jointly before a single jury and the accomplice testified in his own defense. Under these facts, an instruction to the jury to view the accomplice's testimony more cautiously than that of an ordinary witness would have prejudiced the accomplice's defense and would have been error requiring reversal. *Id.* at 694. Further, contrary to defendant's indication that *Reed, supra*, stands for the proposition that such an instruction is only appropriate when the accomplice testifies for the prosecution, the *Reed* Court did not limit application of the accomplice instruction to prosecution witnesses, but explained why an accomplice instruction is deemed necessary for a witness testifying for the prosecution.

[2] Several federal courts have addressed the issue and ruled that there is no error in giving an accomplice instruction when the accomplice's testimony favors the defendant. See, e.g., *United States v Urdiales*, 523 F2d 1245, 1248 (CA 5, 1975); *United States v Nolte*, 440 F2d 1124, 1126 (CA 5, 1971) (cited with approval in *Cool, supra*, at 103); *United States v Bolin*, 35 F3d 306, 308 (CA 7, 1994)("There is sound reason for a jury to examine closely the testimony of a former accomplice because his credibility is suspect, no matter which side has called him to testify or whether his testimony is exculpatory or inculpatory").

[3] In allowing the divorce attorney's testimony about the statement that the victim made about defendant, the trial court relied on *People v Fisher*, 449 Mich 441, 450-453; 537 NW2d 577 (1995). Although our Supreme Court has indicated, through its holding in *Fisher, supra*, that a decedent's state of mind does not have to be at issue before hearsay is admitted under MRE 803(3), see *People v Riggs*, 223 Mich App 662, 704-705; 568 NW2d 101 (1997), the evidence in this case does not fit into the factual situation presented in the aforementioned "marital discord" cases. Here, the statements were not admitted to show some effect they had on defendant where marital discord, motive, or premeditation was at issue. Nor did the statements show why the victim took any action relevant to defendant's

motive. As such, the holding in *White* is controlling here. Thus, it was error to admit the hearsay statements into evidence under the authority of *Fisher*, *supra*.

[4] To the extent that defendant suggests that the trial court inappropriately considered the fact that she brought her children into the courtroom in an alleged attempt to arouse sympathy from the jury, we find her argument without merit. Defendant presents no authority to support this assertion. Contrary to defendant's indication, a trial court may properly consider a defendant's conduct during trial. See, e.g., *People v Ahumada*, 222 Mich App 612, 617; 564 NW2d 188 (1997) (trial court properly considered that the defendant feigned an injury to extricate himself from trial).