

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LAMAR ELLIS,

Defendant-Appellant.

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UNPUBLISHED

February 29, 2000

No. 202293

Ingham Circuit Court

LC No. 96-071030-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, conspiracy to commit murder, MCL 750.157a; MSA 28.354(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the murder conviction, forty to eighty years' imprisonment for the conspiracy conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Fifteen-year-old Kenyata Duke was killed at his home during a shooting that was targeted at Kenyata's father, Kenneth Duke ("Duke"). Evidence showed that gunshots were fired through the closed front door at the Duke residence. The prosecution claimed the shooting was motivated by Cedrick Sams' dissatisfaction with a heroin product sold to him by Duke, and relied on the doctrine of transferred intent for the murder charge. Defendant was linked to the shooting by his own statements and by evidence that he was engaged in drug sales and related enforcement activities with others, including at least one codefendant, Cedrick Sams, and a key prosecution witnesses, Byron Moore. Defendant was tried jointly with two codefendants, Darren Butler and Cedrick Sams (hereafter "Butler" and "Sams"). Butler and defendant had a single jury, while a separate jury was seated for Sams. Butler was found not guilty. Sams' jury was unable to reach a verdict, but Sams was convicted at a retrial of the murder and conspiracy charges. Defendant's motion for new trial, based in part on alleged inconsistencies in Byron Moore's testimony at Sams' retrial with regard to his reasons for testifying, was denied by the trial court.

On appeal, defendant first challenges the trial court's decision to allow the prosecution to introduce evidence of a statement that he made to a detective before being advised of his *Miranda*<sup>1</sup> rights. However, because the detective never testified regarding the statement before the jury, we find this issue is moot and, therefore, decline to address it. *People v Greenberg*, 176 Mich App 296, 302; 439 NW2d 336 (1989); *Contesti v Attorney General*, 164 Mich App 271, 278; 416 NW2d 410 (1987).

Defendant next claims that evidence that Garcia Nelson was beaten several hours before the victim was shot was improperly admitted by the trial court. We will reverse a trial court's evidentiary decision only where there is an abuse of discretion. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). An abuse of discretion occurs when an unprejudiced person, considering the facts upon which the trial court acted, would say there was no justification or excuse for the ruling. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). A trial court's misidentification of the grounds for admission of evidence during trial does not necessarily require overturning its decision to allow the evidence. *People v Vandelinder*, 192 Mich App 447, 454; 481 NW2d 787 (1992).

Here, the trial court analyzed this evidentiary issue at trial under MRE 404(b), but its decision denying defendant's motion for a new trial recognized, consistent with the prosecution's view, that the evidence could also be analyzed outside the "other acts" context of MRE 404(b) to show the whole story of what occurred. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Upon considering both approaches, we hold that the court did not abuse its discretion in allowing the evidence of the beating.

The proximity of time between the meeting to discuss drug business held by Sams, Byron Moore and defendant (at which "squashing" the victim's father was discussed) and the actual shooting of the victim, together with the materiality of evidence concerning defendant's concerted drug enforcement activities during this time period, demonstrates that the evidence was relevant because it would assist the jury in analyzing the events that led up to the victim being shot under a theory of transferred intent. *Sholl, supra*; MRE 401.

Even if the evidence of the other act involved an intermediate character inference, it satisfied the standards for MRE 401 and MRE 404(b), because the ultimate inference was truly probative of something other than defendant's propensity to commit or to conspire to commit murder. While perhaps a fine line of distinction, the evidence was properly admitted because its relevancy rested with the explanation for violent behavior, and not to show that defendant acted in conformity with his character for violence. *People v Crawford*, 458 Mich 376, 391, 397; 582 NW2d 785 (1998); *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). Further, it was not an abuse of discretion for the trial court to allow the evidence under the balancing test for probative value and unfair prejudice in MRE 403, regardless of whether MRE 404(b) is implicated.

Our holding that defendant has not established evidentiary error renders it unnecessary to address defendant's claim that the admission of the evidence violated defendant's due process rights. In any event, defendant's failure to brief the merits of this constitutional claim constitutes an abandonment

of the issue. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992). See also *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

Defendant next challenges the admission of testimony regarding a statement made by Butler about it being easy to kill. We view defendant's claim that "citations of law in the previous point are equally applicable here" as an attempt to argue that the statement constitutes other-acts evidence subject to MRE 404(b), but decline to address it because it is inadequately briefed. *Goolsby, supra* at 655 n 1. Although defendant has briefed his claim that evidence of Butler's statement should have been excluded because its emotional impact on the jury caused unfairness, we find this issue was not preserved for appeal because defendant did not object to this evidence on this ground at trial. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Further, we hold that defendant has not established plain error affecting his substantial rights. MRE 103(d); *People v Cairnes*, 460 Mich 750; 597 NW2d 130 (1999). The fact that the jury acquitted Butler belies defendant's claim that the jury would convict based on the emotional impact of Butler's statement.

Defendant next challenges the trial court's decisions to exclude extrinsic evidence proffered by the defense for impeachment purposes. Because defendant has inadequately briefed this claim, we could decline to consider it. *Goolsby, supra* at 655 n 1. In any event, based on the argument that is presented, we are not persuaded that the trial court abused its discretion in excluding the evidence. The record supports the trial court's determination that the proposed impeachment evidence pertained to collateral matters. MRE 608(b); *People v Rosen*, 136 Mich App 745; 358 NW2d 584 (1984); *People v Guy*, 121 Mich App 592, 604-605; 329 NW2d 435 (1982). This is particularly so with regard to the proffered evidence of Sams' cellular phone, which the trial court sought to exclude, in part, to prevent a trial on the secondary issue involving cellular phone cloning. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

Defendant next challenges the trial court's failure to give jury instructions on lesser included offenses. Defendant argues that this issue was preserved because it was presented to the trial court in his motion for new trial and that omission of the instructions resulted in a denial of due process. In general, granting a new trial does not implicate issues of constitutional magnitude and is permissive in nature. *People v Lemmon*, 456 Mich 625, 634 n 8; 576 NW2d 129 (1998). Under MCL 770.1; MSA 28.1098 and MCR 6.431(B), the "operative principles regarding new trial motions are that the court 'may,' in the 'interest of justice' or to prevent a 'miscarriage of justice,' grant the defendant's motion for new trial." *Lemmon, supra* at 634-635. A trial court may also order a new trial on any ground that would support appellate reversal of a conviction. MRE 6.431(B). The trial court's decision on a motion for new trial is reviewed for an abuse of discretion. *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). An abuse of discretion occurs when the reasons given by the trial court are inadequate or not legally recognized. *Id.* at 580.

Here, the trial court's denial of a new trial based on defendant's failure to request the jury instructions was legally recognized. To preserve a claim of error based on lesser included offenses, it is necessary to request the instructions at trial. Cf. *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996). Absent a request, a defendant must show manifest injustice. *Id.* at 274. Manifest injustice occurs where an omitted instruction pertains to a basic and controlling issue in the case.

*People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997) Giving due regard to the jury's failure to convict defendant of second-degree murder, despite having an opportunity to so, we hold that defendant has not established manifest injustice. Hence, the trial court did not abuse its discretion in denying a new trial on this ground.

Defendant next contends that the trial court abused its discretion in ordering a joint jury trial for himself and Butler. We disagree. Defendant did not establish mutually exclusive or irreconcilable defenses. *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994), mod 447 Mich 1203 (1994); *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). Further, the closing argument made by Butler's attorney did not constitute the requisite prejudice. *Hana, supra* at 346-347.

Defendant next challenges the admissibility of evidence regarding certain statements and conversations made after the victim was shot. Defendant argues that the statements were not admissible as coconspirator statements under MRE 801(d)(2)(E) because the conspiracy ended with the shooting. We find it unnecessary to apply MRE 801(d)(2)(E) to defendant's own statement made after he arrived at Byron Moore's apartment or to his subsequent conversation with Byron Moore because, as the trial court correctly observed when denying defendant's motion for a new trial, the statements constituted admissions of a party-opponent, admissible under MRE 801(d)(2)(A). Further, Byron Moore's statements to defendant during their conversation were admissible under the rule of completeness, which is based on the premise that "a thought or act cannot be accurately understood without considering the entire context and content in which the thought was expressed." *People v McReavy*, 436 Mich 197, 214-215; 462 NW2d 1 (1990).

With regard to the evidence of conversations between Byron Moore and Sams after the shooting, we note that the trial record contained evidence that the conspiracy did not end with the shooting because the object of the conspiracy involved drug-related enforcement targeted at the victim's father and the wrong person was unknowingly shot. Further, the conversation between Sams and Byron Moore advanced or promoted the object of the conspiracy by conveying information about the wrong person being shot. With this information, the coconspirators could determine whether to proceed with their common enterprise or to fully abandon their objective. Examined in this context, it was not an abuse of discretion for the trial court to allow the evidence. *People v Bushard*, 444 Mich 384, 394-395; 508 NW2d 745 (1993) (Boyle, J.); *People v Centers*, 141 Mich App 364, 374; 367 NW2d 397 (1985), rev in part on other grounds 453 Mich 882 554 NW2d 10 (1996). Even if there was error in admitting evidence of the conversations between Byron Moore and Sams, the error was harmless under the standards for preserved nonconstitutional error because, evaluated in the light of untainted evidence, it is not more probable than not that a different result would have resulted without the error. *Lukity, supra*. Defendant's conclusion that evidentiary error of a constitutional magnitude occurred is not briefed and, hence, is not considered. *Kent, supra* at 210.

Defendant next argues that he was deprived of his right to a speedy trial and to the benefits of the 180-day rule in MCL 780.131; MSA 28.969(1). We find no merit in defendant's statutory claim because the 180-day rule does not apply to inmates incarcerated in county jails. *People v Patterson*, 170 Mich App 162, 166; 427 NW2d 601 (1988) remanded on other grounds 436 Mich 197; 462

NW2d 1 (1990). Further, we are not persuaded that defendant has established any basis for remand for a hearing on the reasons for delay. *Patterson, supra* at 169; *People v Gambrell*, 157 Mich App 253, 259; 403 NW2d 535 (1987). We are satisfied from the record that defendant was not deprived of his constitutional right to a speedy trial. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997).

Finally, defendant claims that the trial court abused its discretion in failing to grant a new trial as a result of Byron Moore's testimony at the retrial for Sams regarding his incentive for testifying. We disagree. Regardless of whether this issue is analyzed in the context of newly discovered evidence or the prosecutor's duty of disclosure, defendant has not established that the trial court abused its discretion in denying a new trial. *People v Lester*, 232 Mich App 262; 591 NW2d 267 (1998); *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992); *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993).

Affirmed.

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

<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).