

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUSSELL ALLEN,

Defendant-Appellant.

UNPUBLISHED

June 9, 2000

No. 212699

Kent Circuit Court

LC No. 97-006308-FC

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548. He was thereafter sentenced, as a third habitual offender, MCL 769.11; MSA 28.1083, to life imprisonment without the possibility of parole. Defendant appeals as of right and we affirm.

This case arises out of the shooting death of Amanda Salas in the evening of March 29, 1997. Salas was shot in the head three times with a .22-caliber handgun while she was standing in the driveway of her residence in the city of Grand Rapids. Salas was the girlfriend of Tomika Shaw, the codefendant in this case. It was the prosecutor's theory that Salas was prepared to inform the police about Shaw's drug dealing, and that Shaw hired defendant Russell Allen to kill Salas. Defendant Allen contended that he did not shoot Salas, but that she was shot by another person and defendant specifically advocated that Tobias Allen shot Salas. Defendant and Shaw were charged with first-degree murder and Shaw was also charged with conspiracy to commit murder. Defendant and Shaw were tried together before separate juries and both were found guilty as charged following a twenty-day trial.¹

I

Defendant first argues that he was denied a fair trial by the introduction of his out-of-court statement concerning a dream. He contends that this statement was unreliable and involuntary. Defendant objected to this testimony below and later moved for a mistrial based on the introduction of the statement. The trial court allowed the testimony and denied the motion for mistrial. The decision whether evidence is admissible is within the trial court's discretion and

should be reversed only where there is an abuse of discretion. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). A trial court's decision regarding a motion for mistrial is also reviewed for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). A mistrial should be granted only for an irregularity that is prejudicial to the defendant's rights and impairs the defendant's ability to receive a fair trial. *Id.*

After the shooting occurred, defendant was spending the night at the home of Laura Riddle. Riddle testified that during the night she was awakened by defendant crying and that defendant woke up and said, "She was after me, and that she is all bloody." Defendant then asked another woman to hold him and he went back to sleep. Riddle also testified that she told the same woman the following day that she "heard the dream he had." The trial court then instructed the jury in the following manner:

Ladies and gentlemen, I want to say a word to you about some of this testimony, because I am a little puzzled by it, and I want to make a comment about it.

You have heard some testimony that this witness overheard Russell Allen talking to Amy about someone being all bloody or something, and later it is described as a dream, although he is awake when he is saying these things to her. I would ask you to consider that testimony with caution. It's a little hard to describe. People have many dreams, and they dream sometimes about things which they have not done, as we all know, but things that bother them. So I would ask you to consider that when you are considering that testimony.

Defendant cites a number of cases from other jurisdictions uniformly holding that statements made by a declarant while asleep are inadmissible, largely on the bases that such statements are involuntary, unreliable, and lack probative value. However, the distinguishing fact in those cases is that the statement was made while the declarant was still asleep. In the present case, it is uncontroverted that defendant was awake when he made the statement. In *People v Kidd*, 591 NE2d 431 (Ill 1992), there was conflicting evidence as to whether the defendant was asleep or awake when the witness heard the statement. The court remanded the case to the trial court and stated that it would have to make a preliminary finding of fact that the defendant was awake for the statement to be admissible. *Id.*, p 445.

In *State v Tyler*, 840 P2d 413 (Kan 1992), on the other hand, the court held that it was an abuse of discretion to admit evidence of the defendant's sleep-induced dream to prove his state of mind because such evidence is too speculative to be reliable. Although the defendant's statement was not part of the actual dream because the defendant was awake when he made the statement, the court found that it was so closely related to the dream that it lacked probative value. *Id.*, p 426. The court concluded by finding the error to be harmless because, based on its review of the trial, the evidence would not have changed the outcome. *Id.*

We agree with the court in *Tyler* that the evidence of defendant's dream, and his statement following that dream even though he was awake when he made the statement, lacks probative value. The statement was made immediately upon defendant awakening and was clearly induced by the dream. "Such evidence is too speculative to be reliable." *Id.*, p 426. However, based on the trial court's

limiting instruction to the jury, and its acknowledgment that people dream about things that they have not done, and based on the weight and strength of the untainted evidence (there was considerable evidence that defendant was hired by Shaw to kill Salas and that defendant in fact shot her), we hold that the error was harmless. We cannot conclude that Riddle's testimony concerning defendant's statement about his dream had such an effect as to undermine the reliability of the verdict. In other words, it is not more probable than not that a different outcome would have resulted without the error. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

II

Defendant next argues that he was denied a fair trial when the trial court admitted Salas' diary pursuant to MRE 803(3) (then existing mental, emotional, or physical condition) because Salas' state of mind was not at issue. Before trial, defendant moved in limine to preclude admission of Salas' diary. The trial court ultimately allowed some of the diary to be admitted and copies of the diary were given to the jury as an exhibit. The trial court's decision to admit this evidence is reviewed for an abuse of discretion. *Lukity, supra*, p 488. However, a decision regarding the admission of evidence involving a preliminary question of law, such as whether a rule of evidence precludes admissibility of the evidence, is a question of law that is reviewed de novo. *Id.*

The trial court admitted portions of Salas' diary and gave a limiting instruction:

Insofar as [the diary] is relevant to this case, it is being admitted for a very limited purpose. There will be statements in it which appear to be factual statements, such as Mr. Shaw deals drugs. It is not being admitted to prove the truth of these things, but what is being admitted to show is Amanda Salas' state of mind, what her intention was, what her state of mind at that time was relative to her relationship with Mr. Shaw. It doesn't prove what he was doing, but you may consider it to determine what her intention was, what her state of mind was relative to that relationship. And it's allowed in only for that limited purpose.

MRE 803(3) provides that a statement of a declarant's then existing state of mind is not excluded by the hearsay rule even if the declarant is available as a witness. In the present case, contrary to defendant's assertion, the victim's state of mind was at issue because the theory of the case was that codefendant Shaw, who had been involved in a romantic relationship with the victim, hired defendant to kill the victim because she was going to inform the police that Shaw was dealing drugs. The diary tended to show that the victim intended to turn in Shaw for his illegal drug activities. Thus, the diary supported the prosecution's theory about motive.

The trial court did not abuse its discretion in admitting the diary under MRE 803(3).² In the present case, motive was clearly an issue and the statements in the diary satisfy the exception to the hearsay rule because they are statements of the declarant's then existing state of mind (intent, plan, and mental feeling). MRE 803(3); *People v Fisher*, 449 Mich 441, 450-451; 537 NW2d 577 (1995) (where marital discord, motive, and premeditation were all at issue, oral and written statements of the victim wife were admissible under the state of mind exception to the hearsay rule).

III

Defendant next argues that the prosecution's repeated questioning of one of its main witnesses, Tobias Allen, concerning any consideration he was to receive on an unrelated murder charge in return for his testimony against defendant denied him a fair trial. Defendant did not object to any of the questions put forth by the prosecutor in this regard, but defendant contends that this issue is of "constitutional magnitude." We find no error.

Allen was an important prosecution witness and was in jail awaiting trial for the murder of another individual at the time of trial in this matter. During trial, the prosecutor asked Allen if the prosecutor's office had made any promises to him regarding the unrelated murder charge, asked if he had received anything from the prosecutor's office pertaining to the murder charge, asked if any promises or inducements were given him since he had been charged with murder, asked if he was aware of anything that "should be coming your way" as a result of his testimony, and asked again if the prosecutor's office had promised him anything in regard to the charges he faced. Allen denied every time that he had been promised anything in exchange for his testimony with regard to his murder charge. Defendant never objected to any of these questions or responses.

Defendant contends that even though no definite promises had been given to Allen, he "surely expected leniency" in his own case and was in fact granted leniency by the sentencing court as a consequence of his testimony against defendant and codefendant Shaw. It is defendant's contention that the jury was given a false impression of what Allen received in exchange for his testimony, in violation of the prosecution's duty to disclose. The facts, however, are that Allen was in jail awaiting trial on a charge of open murder for the August 1997 killing of another person and assault on a corrections officer. Allen also had an earlier charge pending against him for delivery of cocaine. Allen testified that he received a promise from the prosecutor that if he testified truthfully against defendant and codefendant Shaw, the prosecutor would recommend probation on the drug delivery charge. Allen also stated that in return for his testimony at the preliminary examination and at trial, a prosecutor and two police detectives would help him obtain a personal recognizance bond in connection with the drug delivery charge.

Allen ultimately pleaded guilty to second-degree murder and was sentenced after this trial. The sentencing court, who is the same trial judge who presided in the present case, stated that the prosecutor did not make any recommendation with regard to leniency for Allen for testifying and that there were no agreements to this effect. The sentencing court stated that because Allen helped to solve a very serious case of first-degree murder, it would "do something in light of what [Allen] did." Allen was sentenced to eighteen to thirty-five years for second-degree murder.

The general rule is that where an accomplice or coconspirator has been granted immunity or other leniency to secure testimony, it is required for the prosecutor and trial court, if that fact comes to the court's attention, to disclose such fact to the jury upon request of defense counsel.³ *People v Wiese*, 425 Mich 448, 455; 389 NW2d 866 (1986); *People v Woods*, 416 Mich 581, 602; 331 NW2d 707 (1982); *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976). Because Allen was not sentenced pursuant to any sentence agreement or promise of leniency and because Allen was

sentenced after the trial in this matter, there is no error and there is certainly no violation of the prosecutor's duty to disclose. The fact that the sentencing court chose to sentence Allen perhaps to a more lenient sentence because he testified in this present case does not lead to the conclusion that any false impression was given to the jury. In fact, the court specifically stated that Allen was not sentenced pursuant to a sentence recommendation or that there was any sentence agreement. Rather, the sentencing court appears to have simply exercised its discretion and taken into account all relevant considerations when it sentenced Allen on his separate murder conviction.

There is no record support for defendant's contention that the prosecutor violated its duty to disclose a promise of leniency to Allen because there was no promise, nor was there any reasonable expectation of such leniency. *Atkins, supra*, pp 173-174.

IV

Defendant next contends that he was denied a fair trial when the prosecution elicited testimony from Tobias Allen that while he was in jail, he was called a "snitch," that his life had been threatened, and that he was assaulted, and that it was also error for the prosecution to elicit testimony that Allen had no prior felony convictions. Defendant further argues that the prosecution improperly elicited testimony from Joann Hennrick that her daughter Amy told her that Amy's life had been threatened because it was improper impeachment testimony.

A

Allen testified, without objection, that since he had been in jail, he had been threatened, stabbed, and called a snitch. Because this evidence constitutes unpreserved, nonconstitutional error, defendant must show a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 549-550; 520 NW2d 123 (1994). In *People v Sheldon*, 407 Mich 539, 543; 287 NW2d 176 (1980), the Court held that it was improper for the prosecutor, over defense counsel's objection, to elicit testimony from the complainant that the defendant's brother had threatened her. The Court specifically held that the testimony had no probative value because there was no connection to the defendant and it was improper rebuttal because it did not disprove prior testimony or refute evidence bearing on an issue in the case. See also, *People v Scobey*, 153 Mich App 82; 85-86; 395 NW2d 247 (1986) (testimony of the complainant's friend's mother and a school counselor that the complainant told them that the defendant had abused her after the alleged assault was held to be improperly admitted as irrelevant because the subsequent actions of the witnesses were not matters at issue); *People v Johnson*, 113 Mich App 650, 654-655; 318 NW2d 525 (1982) (where the defendant sought to introduce testimony concerning alleged threats made by a complaining witness to the brother of a defense witness in an attempt to keep favorable testimony for the defendant from being presented, but there was no direct link to the defendant, the testimony was held to be inadmissible as lacking in probative value, irrelevant, and a waste of time); but compare *People v Clark*, 124 Mich App 410, 412; 335 NW2d 53 (1983) (testimony of a prosecution witness that he had been threatened by the defendant's brother was admissible for a limited purpose, to explain the prior inconsistent statement of the witness and a limiting instruction could have been given to protect the defendant from any prejudice).

To the extent that Allen's testimony in this regard is plain error because there was no indication that the threats were in any way connected to defendant and did not tend to prove any element of the crime charged against defendant, defendant must still show that the testimony was prejudicial. We find no prejudice because the jury was made well aware of Allen's own criminal background, thus affecting his credibility in defendant's favor. Had Allen not testified to these alleged threats, we do not believe that the outcome of the trial would have been different. *Grant, supra*, pp 552-553.

B

With regard to the testimony from Allen concerning his lack of a criminal record to bolster his credibility, defendant again did not object. The prosecutor elicited testimony from Allen that the drug delivery charge was his first felony arrest and that before that charge he had not been convicted of a felony. Although the lack of a criminal record is not admissible to prove the honesty or bolster the credibility of a witness, *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), there was considerable evidence in this case that regardless of the lack of any prior felony convictions, Allen had been involved in illegal drug activities, illegal possession of guns, and was being held on a murder charge. Under these circumstances, there is no error because Allen's credibility was clearly an issue for the jury and the jury was well informed of Allen's criminal activities.

C

Defendant also argues that the trial court abused its discretion in allowing Joann Hennrick to impeach her daughter's testimony (that Amy in fact had been threatened) because this was impeachment on a collateral matter and inadmissible. Amy Hennrick, defendant's girlfriend at the time of Salas' murder, testified at trial that she had not been threatened since this case arose and that she did not tell her mother that she had been threatened. Joann Hennrick later testified that Amy told her that her life had been threatened because she was saying too much in this case and was testifying in court. Amy did not tell her mother who had threatened her. Defendant objected on the grounds of hearsay, but the trial court permitted it on the grounds of impeachment. The trial court also instructed the jury that the testimony could only be used to impeach Amy, but not to prove that her life had been threatened.

Generally, a witness may not be contradicted regarding collateral, irrelevant, or immaterial matters. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). Since the alleged threats were not tied to defendant, they would constitute a collateral matter. However, any error was not prejudicial in light of the trial court's limiting instruction and the testimony was not emphasized. In focusing on the weight and strength of the untainted evidence and the very slight error that occurred here, we cannot conclude that the result of the trial court would have been any different had Joann Hennrick not testified about the alleged threats against her daughter. *Lukity, supra*, p 495.

V

Defendant next argues that he was denied a fair trial by the prosecution's tactic of asking witnesses how many children codefendant Shaw had fathered and with how many different women. Defendant contends that such evidence was inflammatory character evidence that had no relevance to

the murder charge. Defendant did not object to any of these questions below, thus he must again show that this unpreserved, nonconstitutional error was a plain error that affected his substantial rights. *Carines, supra*, p 763.

Although we agree with defendant that the questions were improper, and certainly irrelevant since they proved nothing with respect to the charges in this case, we conclude that the error was harmless because defendant's substantial rights were not affected. The conduct concerned codefendant Shaw, and not defendant, and defendant has, thus, failed to show that the error affected the outcome of his trial or was prejudicial. *Grant, supra*, pp 552-553.

VI

Lastly, defendant argues that he was denied a fair trial when the trial court permitted the prosecution to endorse an unlisted witness nine days into trial.

On February 11, 1998, the prosecutor moved to endorse a witness, Curt Anthony McCoy, who was defendant's cellmate at the Kent County jail. McCoy wrote a letter to a prosecutor setting forth some detail about a conversation that McCoy had with defendant on February 4, 1998. Defendant objected to allowing McCoy to testify, however, the trial court granted the prosecutor's motion and informed defense counsel that he would have an opportunity to interview McCoy before he testified. On February 12, 1998, defense counsel was given a half hour to interview McCoy.

MCL 767.40a(4); MSA 28.980(1)(4) provides that a prosecutor may add from the witness list that the prosecutor intends to call at trial at any time upon leave of court and for good cause shown or by stipulation of the parties. Defendant clearly did not stipulate, thus, the question is whether good cause was shown. Our Supreme Court has held that the statute has eliminated the prosecutor's burden to locate, endorse, and produce unknown persons who might be *res gestae* witnesses. *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995).

In the present case, we find that there was good cause for the late endorsement of the witness. McCoy was not a witness to the crime; rather, he was merely defendant's cellmate who had conversation with defendant about defendant's involvement in the crime. According to McCoy, he did not receive the information until February 4, 1998, he wrote the letter to the prosecutor the following day, the prosecutor received the letter on February 9, 1998, a police officer was sent to interview McCoy on February 10, 1998, and the prosecutor moved for endorsement of the witness on February 11, 1998. Moreover, the trial court permitted defense counsel to interview McCoy before he testified. Under these circumstances, the late endorsement

of the witness was clearly for good cause shown and the trial court did not abuse its discretion in permitting the witness to testify. *Id.*, pp 289, 291.

Affirmed.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Jeffrey G. Collins

¹ Tomika Shaw also appealed his convictions as of right and this Court recently affirmed his convictions. *People v Shaw*, unpublished opinion per curiam of the Court of Appeals, issued February 29, 2000 (Docket No. 211825).

² Further, we note that several witnesses testified from their own knowledge that codefendant Shaw was selling drugs and Tanya Salas, the victim's sister, testified that the victim threatened to inform the police of codefendant Shaw's drug dealing. Thus, the statements in the diary were merely cumulative to witnesses' testimony and any error would be harmless.

³ We note that the trial court instructed the jury in the following manner:

The defense also alleges that Tobias Allen is seeking some consideration on open murder charges pending against him. The prosecution denies that there is any agreement in that case for leniency, and there is no evidence of any such agreement. Defendant is alleging that Tobias Allen is hoping that his testimony may result in some benefit to him in the future. You may consider this. The maximum possible penalty for murder is life in prison.