

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL W. ANDREWS,

Defendant-Appellant.

UNPUBLISHED

November 21, 2000

No. 215200

Wayne Circuit Court

Criminal Division

LC No. 98-005425

Before: Jansen, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was thereafter sentenced to the mandatory term of life imprisonment for the first-degree murder conviction and the mandatory term of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right and we affirm his convictions, but remand for the limited purpose of correction of the presentence investigation report.

This case arises from the shooting death of Justin Issa, the seventeen-year-old son of defendant's ex-girlfriend, Karen Issa, on April 19, 1998, in the city of Detroit. On the night of the killing, Justin was sitting in a chair near a living room window that faced the driveway of the Issa residence when someone fired several shots through the window, killing Justin. The prosecution's theory was that defendant killed Justin in retaliation for intervening in an altercation between defendant and Karen and forcibly removing defendant from the Issa residence earlier that day. Defendant presented an alibi defense in which he asserted that he was at the home of Angel Wells when Justin was shot. Further, defendant claimed that the person who was driving his car on the night of Justin's murder was Jerome Reed, thus implying that Reed was the killer. Wells, however, testified that defendant told Wells that he killed Justin, and a neighbor, Tim Carroll, testified that he saw defendant and his car near the Issa residence only moments before the shots that killed Justin were fired.

I

Defendant first argues that the trial court abused its discretion by allowing Karen Issa to testify about defendant's history of assaulting her.

The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). To be admissible under MRE 404(b), other acts evidence must be admitted for a proper purpose under MRE 404(b), it must be relevant under MRE 402, the probative value of the evidence must not be outweighed by unfair prejudice, and the trial court may, upon request, provide a limiting instruction to the jury. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000); *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).

Under the first requirement, the prosecution argued that the evidence of past fights between defendant and Karen related to defendant's motive in murdering Justin because Justin had been his mother's protector against defendant. Further, the prosecution argued that it should not be limited to the assaults that occurred on the day of Justin's murder because motive develops over time. The trial court agreed. We also agree and, thus, conclude that there was a proper purpose for the evidence. We also conclude that the evidence was relevant because our Supreme Court has held that evidence of marital discord is relevant to motive. *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). The evidence of such discord in the present case was relevant to demonstrate defendant's hostility toward Justin for intervening during altercations between defendant and Karen. Here, the evidence was highly probative of motive, and of premeditation and deliberation, elements that were clearly in issue. Further, we believe that the danger of unfair prejudice was minimal, especially because, "[w]ithout such evidence, the factfinder would be left with a chronological and conceptual void regarding the events." *VanderVliet, supra*, p 81. Therefore, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Accordingly, the trial court did not abuse its discretion in admitting the other acts evidence.¹

II

Next, defendant raises several arguments concerning various instructions given by the trial court.

A

Defendant first contends that the trial court's instructions regarding the use of prior inconsistent statements prevented the jury from using certain impeachment evidence as substantive evidence.

In line with his theory that he was not the person who drove to the Issa residence on the night of Justin's murder, defendant argued that Carroll's description of the person he saw on the night of Justin's murder fit the description of Reed, and that Reed had access to and was known to use defendant's car. At trial, Wells initially testified that the first time he had ever seen Reed drive defendant's car was the day of Justin's murder. When defense counsel reread Wells'

¹ The trial court did not give a limiting instruction; however, none was requested.

preliminary examination testimony, Wells testified that he remembered answering affirmatively that he had seen Reed driving defendant's car on several previous occasions.

On appeal, defendant argues that the trial court's instructions regarding the use of prior inconsistent statements did not make it clear to the jury that prior inconsistent statements that were made under oath could be used as substantive evidence. Defendant further argues that as a result of the confusing instructions, the jury was prevented from considering defendant's defense that Reed was the person whom Carroll saw near the Issa residence shortly before hearing gunshots.

As a general rule, an out-of-court statement offered for the truth of the matter asserted is hearsay. *People v Chavies*, 234 Mich App 274, 281-282; 593 NW2d 655 (1999). However, under MRE 801(d)(1)(A), an out-of-court statement is not hearsay if the declarant testifies at the trial, is subject to cross-examination concerning the statement, the statement is inconsistent with the declarant's testimony, and the statement was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding. *Id.* Although we are not bound by federal case law construing FRE 801(d)(1)(A), it is persuasive given the identical wording of the Michigan and federal rules. See *Chavies*, *supra*, p 282. Federal courts have noted that prior inconsistent statements that satisfy FRE 801(d)(1)(A) are not hearsay, and are therefore admissible as substantive evidence. See *Firemen's Fund Ins Co v Thien*, 8 F3d 1307, 1311, n 10 (CA 8, 1993); *United States v Day*, 789 F2d 1217, 1221-1223 (CA 6, 1986); *United States v Castro-Ayon*, 537 F2d 1055, 1057-1058 (CA 9, 1976). Here, the trial court's instructions did not explain to the jury that a prior inconsistent statement that is used to impeach a witness' trial testimony can also be used as substantive evidence if the out-of-court statement satisfies the requirements of MRE 801(d)(1)(A). The instruction concerning prior inconsistent statements was, therefore, erroneous.

However, "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." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999), quoting MCL 769.26; MSA 28.1096. We believe that it cannot be reasonably said that the error here was more probably than not outcome determinative because, although the testimony was connected to defendant's theory of defense, it is not dispositive of the question of the shooter's identity. The trial court's erroneous instruction precluded the jury from considering as substantive evidence the testimony that Wells had seen Reed, at some time previous to the night in question, driving defendant's car. That testimony says nothing about who was actually driving defendant's car on the night the victim was shot. In light of Carroll's eyewitness identification of defendant as the person driving that car only minutes before the shots, and Wells' testimony that defendant told him that he had shot Justin, we find that the error does not require reversal.

B

Defendant's next claim of instructional error is that the trial court's reasonable doubt instruction was improper. Defendant did not object to this instruction below. Further, there is no error upon our review of the reasonable doubt instruction, much less plain error, inasmuch as the United States Supreme Court upheld a very similar instruction to that used by the trial court in the present case. *Victor v Nebraska*, 511 US 1, 21-22; 114 S Ct 1239; 127 L Ed 2d 583 (1994).

Further, reading the reasonable doubt instruction in its entirety, we conclude that it leaves no doubt in our minds that the jury understood that the burden was placed upon the prosecutor and what constituted a reasonable doubt. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Therefore, no plain error occurred and defendant is not entitled to any relief in this regard. *People v Grant*, 445 Mich 535, 547-550; 520 NW2d 123 (1994).

C

Defendant next argues that the trial court erred in its instructions to the jury because it reduced the burden of proof to the question of whether defendant was present at the time the crime was committed and thus removed from the jury's consideration the essential elements of the crime. Defendant did not object to this instruction below.

We find that the instruction, read as a whole, "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). Defendant's argument seeks to establish error through piecemeal extraction. Taken alone, the challenged instruction seems to reduce the necessary proof down to one question—was defendant present? However, the challenged instruction was specifically addressing only the alibi issue, and that is the question to which an alibi is addressed. The trial court also instructed the jury that "[t]he prosecutor must prove beyond a reasonable doubt that the crime was committed and that the defendant was the person who committed it." Further, immediately following the alibi instructions, the trial court told the jury that "there are certain elements that the statute requires" and explained to the jury the elements of first-degree murder and second-degree murder. Therefore, defendant has not established plain error and is not entitled to relief. *Grant, supra*.

D

Defendant next argues that the trial court's instructions on first- and second-degree murder were confusing and misleading. Defendant also argues that these instructions improperly informed the jury that to convict defendant of second-degree murder, it had to affirmatively find a lack of premeditation. More specifically, defendant argues that it is not an essential element of second-degree murder that the act be done without premeditation. Rather, a defendant could premeditate doing great bodily harm to doing an act that creates a high risk of death or great bodily harm, without necessarily premeditating an actual specific intent to cause the victim's death.

Defendant did not object to the trial court's instructions on the elements of first- and second-degree murder.² Although this is an issue of constitutional dimension, we are required to

² We note that the trial court's instructions on the elements of first- and second-degree murder are somewhat confusing and rambling. The trial court did not appear to utilize the standard criminal jury instructions. However, we also agree with the prosecutor that the transcript appears to be replete with typographical errors, especially because defense counsel did not object to some rather obvious "misstatements." Unfortunately, the written transcripts are all this Court has to review of the trial.

find that a plain error occurred and that the error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

Regardless whether the instruction here is erroneous, defendant's argument must ultimately fail because even if error is established, he can show no prejudice resulting from such error. Defendant's sole defense theory at trial was alibi, that is, he claimed that he was not the person driving his car near the Issa residence at the time of the killing and that he did not shoot Justin. However, once the jury determined that defendant was indeed the shooter, it could properly find that defendant was guilty of first-degree murder, rather than second-degree murder, because we believe that the jury was properly instructed on what constitutes premeditation and deliberation. Therefore, even if the trial court's instruction that the jury had to find a lack of premeditation to convict defendant of second-degree murder was wrong, it did not in this case affect defendant's substantial rights because the jury obviously found that defendant indeed acted with premeditation and deliberation and that specific element was properly given to the jury.

Consequently, we cannot conclude that any error in the trial court's instructions concerning the elements of first- and second-degree murder affected the outcome of the trial.

III

Defendant's final issue on appeal is that he is entitled to have the inaccuracies in his presentence investigation report stricken. Because the trial court accepted defendant's assertion that the information in the report indicating that he had two prior felony convictions was inaccurate, we remand for the sole purpose of having the trial court strike or correct the challenged information in the presentence report. MCR 6.425(D)(3); MCL 771.14(6); MSA 28.1144(6); *People v Newson (After Remand)*, 187 Mich App 447, 450; 468 NW2d 249 (1991).

Affirmed in part, and remanded for correction of the presentence investigation report. Jurisdiction is not retained.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff

I concur in result only.

/s/ Peter D. O'Connell