

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL ALLEN BERNARD,

Defendant-Appellant.

UNPUBLISHED

February 8, 2007

No. 264825

Kent Circuit Court

LC No. 04-004787-FC

Before: Murphy, P.J. and Smolenski and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for the premeditated murder of his ex-wife, Mimi Bernard, contrary to MCL 750.316. Defendant was sentenced to life in prison without the possibility of parole and ordered to pay \$33,854.68 in restitution. Because we find no errors warranting reversal, we affirm.

I.

Defendant first argues that he was deprived of his Sixth Amendment right to the assistance of counsel when the police searched his cell before trial and seized privileged material. He further argues that the trial court should have remedied this violation by dismissing the charges against him or, in the alternative, by disqualifying the prosecutor and the officers involved in the search from participating in the prosecution. Defendant contends that this error warrants dismissal of the case. We disagree.

This Court reviews a trial court's decision whether to grant a motion to dismiss for an abuse of discretion. *People v Stone*, 269 Mich App 240, 242; 712 NW2d 165 (2005). However, this Court reviews the trial court's factual findings for clear error and reviews de novo the constitutional questions underlying the trial court's decision. *People v Russel*, 471 Mich 182, 187; 684 NW2d 745 (2004).

On January 13, 2005, the trial court held a status conference. At the status conference, the trial court indicated that defendant's trial counsel had informed it that law enforcement officers had earlier in the day searched defendant's cell and taken documents belonging to defendant. Defendant's trial counsel told the court that she believed that the documents that were taken from defendant's cell were copied and brought to the hearing. Defendant's trial counsel stated a belief that the seizure of the documents, which may have contained work

product, constituted serious misconduct and requested that the court take custody of the copies until the matter could be sorted out. The prosecutor then revealed that two copies of the documents from defendant's cell had been made and were present in the court. Based on this, the Court ordered one copy to be turned over to defendant's trial counsel and the other to be sealed and retained by the court. The court further stated that it would give defendant's trial counsel time to brief and file a motion concerning the matter and indicated that it would be willing to hold an evidentiary hearing.

Defendant later moved for dismissal of the claims against him based on the purportedly illegal search of his cell and the unconstitutional interference with his Sixth Amendment right to counsel. In the alternative, defendant asked the court to suppress the documents and recuse the Kent County Prosecutor Attorney's Office and the officers involved in the search from participating in defendant's prosecution.

The trial court held an evidentiary hearing on the search of defendant's cell in February 2005. At the hearing, the prosecuting attorney assigned to defendant's case testified that she did not ask detectives Gates and McAlary to search defendant's cell. However, she stated that at multiple points throughout the investigation, the detectives inquired about whether they could search defendant's cell. She said she told them that under Michigan law they could search defendant's cell. She said the detectives did not indicate when they were going to perform a search. The prosecutor stated that she never discussed with the detectives what they could or could not take or copy.

The prosecutor said that Gates called her in the late morning of January 13, 2005 from defendant's jail cell. She stated that Gates told her he saw police reports in the cell with defendant's handwriting in the margins. She said Gates inquired about whether the materials might be privileged and that she responded by stating that she could not say without seeing the documents. She also testified that she told Gates he could not take the documents. She said she told him to make two copies of the documents and bring them to court. She testified that she has not been in defendant's cell or seen the copied documents.

Gates testified that he and McAlary went to defendant's cell and searched it on the morning in question. Gates said that he had previously discussed searching defendant's cell with the prosecutor, but did not call before hand to tell her about the search on that day. Gates said that they wanted to search defendant's cell for mail that might not have been copied by the jail staff and other evidence for the case. Gates said he noticed a stack of papers under defendant's bed. He said the front page was a police report with marginal notations in defendant's handwriting. Gates stated that he took the documents to the copy room and left McAlary to complete the search. Gates said he then contacted the prosecutor and asked her what she wanted him to do. He said he did not look through the stack.

Gates testified that the prosecutor told him to make copies of all the papers and bring them to the court hearing scheduled for later that day. Gates said he made the copies by placing the documents in the copier's feeder. Gates said that after he made one copy he returned the originals to defendant. Gates stated that the copies never left his possession from the time he made them until they were brought to court.

In an opinion and order issued in February 2005, the trial court found that Gates and McAlary searched defendant's cell without a warrant and removed a stack of documents. The court further found that McAlary and Gates became concerned about whether the documents were privileged and contacted the prosecuting attorney for guidance. The court also specifically found that the detectives did not intentionally read the contents of the documents and that there was no evidence that anyone else had the opportunity to read the documents. From this, the trial court concluded that the documents had not been substantially reviewed in any way by the prosecutor's office or the sheriff's department. However, the trial court found that some of the documents were clearly privileged and that others were likely privileged by virtue of the annotations on them. Finally, the trial court also found that the remaining documents were likely privileged by virtue of their association with other privileged documents.

After reviewing its findings, the trial court determined that the search itself was legal because defendant had no reasonable expectation of privacy in his cell. The trial court acknowledged that defendant still had a Sixth Amendment right to the assistance of counsel that protected privileged documents and work product as well as his direct communications with his trial counsel. However, it concluded that, because the detectives and the prosecutor did not review the seized materials, defendant's Sixth Amendment rights were not violated. Therefore, the trial court determined, it was not necessary to dismiss the charges against defendant or recuse the detectives and the Kent County Prosecutor's office from prosecuting defendant. Nevertheless, the trial court did determine that the seized documents should all be suppressed in order to prevent a possible Sixth Amendment violation.

The Sixth Amendment to the United States Constitution guarantees an accused the right to assistance of counsel for his defense. *United States v Morrison*, 449 US 361, 364; 101 S Ct 665; 66 L Ed 2d 564 (1981). "This right, fundamental to our system of justice, is meant to assure fairness in the adversary criminal process." *Id.* An essential part of the right to effective assistance of counsel is privacy of communication between the accused and his counsel. *United States v Brugman*, 655 F2d 540, 546 (CA 4, 1981); *United States v Rosner*, 485 F2d 1213, 1224 (CA 2, 1973).

In *Weatherford v Bursey*, 429 US 545; 97 S Ct 837; 51 L Ed 2d 30 (1977), the Supreme Court recognized that government intrusion into confidential attorney-client communications may violate a defendant's Sixth Amendment right to effective assistance of counsel. However, not every intrusion into the attorney-client relationship will implicate the right to effective assistance of counsel. *Id.* at 558. Instead, the existence of a Sixth Amendment violation "depends on whether the intrusions were purposeful and whether the prosecution, either directly or indirectly, obtained evidence or learned of defense strategy from the intrusions." *Arizona v Pecard*, 196 Ariz 371, 377; 998 P2d 453 (1999), citing *Weatherford, supra* at 558.

We conclude that there is no indication that defendant was prejudiced by what occurred. The trial court found that none of the documents had been substantially reviewed by the detectives involved in the search or the prosecutor. Further, the original documents were immediately returned to defendant and one copy was turned over to defendant's trial counsel and the other sealed within a short time after they were made. As a result, the prosecution was not able to avail itself of any of the information contained within the documents. Hence, there was no prejudice. Likewise, although the search of defendant's cell was intentional, the trial court found that the purpose behind the search was to find evidence and not to intercept attorney-client

communications. The trial court also found that the detectives inquired into the legality of a warrantless search for evidence prior to conducting it and were told by the prosecutor that the search was likely legal. Given that the current state of the law supports this conclusion, see *Hudson v Palmer*, 468 US 517, 525-526; 104 S Ct 3194; 82 L Ed 2d 393 (1984) and *People v Phillips*, 219 Mich App 159, 161-162; 555 NW2d 742 (1996), the search cannot be characterized as blatant misconduct. The prosecutor advised the detectives that they could search defendant's cell in reasonable reliance on current authority and the detectives stated a legitimate reason for the search. Furthermore, once the search was underway, the detectives recognized the potentially sensitive nature of the documents and properly secured the documents until such time as the trial court could determine whether the documents could be used. Hence, any intrusion was at most inadvertent and done in a good faith belief in the propriety of the actions taken.

There was no error warranting the requested relief.

II.

Defendant next argues that he was denied a fair trial when the trial court permitted several prosecution witnesses to offer their opinion that defendant was guilty. Because this prejudicial testimony likely affected the outcome of the trial, defendant further argues, his conviction should be reversed and a new trial ordered. We disagree.

In the present case, the prosecution elicited testimony from several witnesses concerning the witnesses' belief that defendant was the person who killed Mimi. Although defendant's trial counsel did object to some of this testimony, until defendant's daughter Melanie testified, defendant's trial counsel did not object to the testimony as improper opinion testimony or testimony that infringed on the exclusive province of the jury. After defendant's trial counsel objected to his daughter's opinion testimony, the prosecution agreed not to ask similar questions. Thereafter, the trial court prevented further testimony of this nature.

It is a "settled and long-established rule that a witness cannot express an opinion concerning the guilt or innocence of a defendant." *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). Rather, the issue of an individual's guilt or innocence is a question solely for the jury. *People v Suchy*, 143 Mich App 136, 149; 371 NW2d 502 (1985). Therefore, it was error to permit these witnesses to express their opinion as to defendant's guilt. However, defendant's trial counsel did not object to the majority of the testimony cited and, when she did object, she did not object on the basis that the proffered testimony was impermissible opinion testimony concerning defendant's guilt or innocence. Because an objection on one ground is insufficient to preserve a claim of error on another ground, *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), these claims of error are all unpreserved.

An unpreserved constitutional or nonconstitutional error is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). In order to warrant relief based on an unpreserved claim of error, "three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines*, *supra* at 763. Under the third requirement, the defendant bears the burden of demonstrating that the error was prejudicial, "i.e., that the error affected the outcome of the lower court proceedings." *Id.* Even if each of these requirements is

met, it is still within the discretion of an appellate court to decline to reverse. *Id.* Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when it seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

In the present case, it was plain error for the trial court to permit the improper opinion testimony. However, after carefully examining the record, we conclude that defendant has not met his burden of demonstrating that the admission of this testimony affected the outcome of his trial.

The testimony and record evidence admitted at trial clearly indicated that defendant despised Mimi and harbored a belief that she was responsible for all his recent misfortunes. The testimony and record evidence also indicated that defendant was obsessed with money and would go to extreme lengths in order to keep money from Mimi. Defendant's obsession with keeping money from Mimi is exemplified by defendant's own testimony, contrary to virtually all the other testimony and evidence, that the impetus for the dissolution of his marriage was a dispute over how to use savings bonds that had been set aside for the kids' education. Indeed, defendant testified that, when he learned that Mimi had used \$3,000 of the more than \$50,000 in bonds to pay some of defendant's son's tuition, he had the safety deposit box where the bonds were stored drilled open and removed them to a location where Mimi "would have no control over them." Testimony and record evidence also established that, at one point during the divorce, defendant attempted to obtain payments of \$75 from his children in order to resolve a dispute with Mimi over \$450. Melanie testified that she was actually frightened by defendant's request and called her mother to express her fear. E-mail records indicate that Mimi was so concerned by Melanie's call that she left work early in order to be at home with Melanie.

Testimony and evidence indicated that defendant also repeatedly attempted to have his child support reduced and had gotten significantly behind on his child support payments, despite the fact that he had a substantial 401(k) available to meet his obligations. When his efforts failed, testimony established that defendant became angry towards Mimi and expressed a desire to kill her. Defendant even left angry messages on the answering service of the court reporter who presided at his hearings and went so far as to call the reporter at her home.

Testimony established that a show cause hearing was held to address defendant's failure to pay child support and that Mimi had asked the court to seize defendant's child support arrearage from his 401(k). The court ordered over \$27,000 to be taken from defendant's 401(k) to bring the payments to date and ensure future payments. This amount was far greater than the \$450 and \$3000 that had already led defendant to take extreme and unusual measures against Mimi and his children. Indeed, defendant's girlfriend testified that she told Mimi that this show cause hearing would be defendant's "breaking point." Testimony by a Friend of the Court (FOC) lawyer also established that, if Mimi died and defendant got custody of his son Jeff, defendant's child support arrearage would be erased and defendant would no longer have to pay child support. Further, testimony established that after this hearing, defendant attempted to withdraw his entire 401(k), but was prevented when the FOC placed a hold on it. Hence, the evidence established that defendant had a strong motive to kill Mimi.

In addition, evidence established that the timing of Mimi's murder was consistent with defendant's motive and that defendant had the means and opportunity to commit the murder.

Evidence established that the hearing that would finalize the withdrawal of funds from defendant's 401(k) was to be held on Friday, April 4, 2003. Mimi was murdered late on the night of Wednesday, April 2, 2003 and was not discovered until the morning of Thursday, April 3, 2003. Hence, the timing of the murder fits with defendant's motive to prevent Mimi from getting his 401(k) money.

Defendant's downstairs neighbor testified that she heard defendant loudly pacing at about 10:30 p.m. on the night of Wednesday, April 2, 2003. She also testified that she heard him pounding in the kitchen. These noises stopped sometime after 10:30 p.m. Testimony also established that defendant was seen in his Jeep in the parking lot of his apartment complex at around that time. One of the investigating detectives testified that test drives showed that defendant lived less than five minutes from Mimi's home. Additionally, Mimi's son Jeff testified that he went to bed around 10 p.m. on April 2, 2003 and that when he went to bed he saw Mimi using the Internet. A computer expert testified that the last user initiated action on Mimi's computer occurred at approximately 10:51 p.m. This evidence indicates that Mimi was likely murdered shortly after defendant left his home on the night of April 2, 2003.

Testimony concerning Mimi's injuries and the nature of her death also tended to suggest that Mimi's murder was motivated by rage. Testimony established that there was no evidence that Mimi's killer entered her home, but rather likely stayed within the confines of the garage. Likewise, there was no sign that Mimi was robbed or sexually assaulted. In addition, Mimi was brutally stabbed at least fifteen times in her neck. The stab wounds were concentrated within a 3 and ½ inch by 4 and ½ inch area and were so forceful that two wounds went entirely through her neck and others penetrated her spine. Two other stab wounds were with such force that they penetrated her sternum and one of her ribs.

Although there was no forensic evidence directly implicating defendant in Mimi's murder, there was significant forensic evidence that was consistent with defendant being the perpetrator. First, defendant was discovered with fresh injuries to his hand and shin on the day after Mimi's murder that were consistent with a violent struggle. Likewise, although defendant stated that he did not drive his Jeep on the night of Mimi's murder, blood was found in his Jeep above the door handle and near the switch for turning on the Jeep's lights. Second, there were bloody footprints at the scene of Mimi's murder that indicate that the killer likely had blood on his shoes. Testimony established that bloody shoe prints were made by a sport shoe or tennis shoe. Multiple witnesses testified that defendant habitually wore tennis shoes. Yet on the morning after Mimi's murder, defendant no longer had his tennis shoes. Defendant testified that he disposed of the tennis shoes on the same night Mimi was murdered. Third, a search of defendant's apartment revealed that defendant had a kitchen knife set that was missing one of its knives and testimony by the forensic pathologist established that Mimi's injuries were consistent with such a knife. Finally, as the bloody footprints established, the perpetrator likely had blood splattered on his person after the murder. Defendant's neighbor testified that defendant normally did not shower in the morning, but that she heard him shower on the morning after Mimi's murder.

The evidence of the timing of Mimi's murder, defendant's motive and opportunity to commit the murder and the forensic evidence presented constitute significant evidence of defendant's guilt. However, the jury also heard extensive testimony concerning defendant's actions and statements after Mimi's murder, including several taped conversations with officers

and his children, and had the opportunity to listen to defendant's trial testimony. When combined with the evidence of defendant's motive and opportunity to commit the murder as well as the evidence concerning the timing of the murder and the forensic evidence, these statements are overwhelming evidence of defendant's guilt.

Defendant made a variety of statements to the police and members of his family throughout the investigation into Mimi's death and at trial. Some of the statements purportedly explaining the existence of incriminating circumstantial evidence are so contrived that they actually reinforce the inference of guilt to be drawn from the evidence. For example, defendant told the police that his regular shoes were his dress loafers, despite the fact that defendant's children testified that he habitually wore tennis shoes. When confronted with this evidence, defendant explained that he uses the word "shoes" to refer to "dress shoes" and only refers to tennis shoes as "sneakers." Hence, the footwear he normally wears are "sneakers," but the "shoes" he normally wears are his dress shoes. When asked what happened to his tennis shoes, defendant told the police that he decided to throw them out on the day of Mimi's murder because he intended to buy a new suit. Originally, defendant told the police that he disposed of the tennis shoes early in the day, but defendant later stated that he wore his tennis shoes to the store and must have thrown them out on his second trip to the dumpster later in the day. Despite visiting the dumpster twice in one day, a search of defendant's apartment revealed that his trash receptacles had trash in them. Further, when asked why he would throw his shoes out before actually replacing them, defendant explained that he would have to wear dress shoes to get fitted for the new suit he planned to buy on the weekend and, therefore, there was no need to retain the tennis shoes. The absurdity of this explanation inexorably leads to the conclusion that defendant was concealing the real reason for disposing of his shoes. Defendant had similarly incredible explanations for the fresh injuries found on him the morning after Mimi's murder, for his failure to seek any contact with his family after Mimi's death or attend her visitation or funeral, and for the dust on his loafers.

In addition to these contrived explanations, defendant denied having a problem with Mimi, denied having a problem with paying child support, denied that he ever threatened to kill Mimi, denied being angry with Mimi over the child support proceedings, denied that he had a problem with the court taking more than \$27,000 from his 401(k) and denied that he wanted custody of Jeff after Mimi's death. These denials were made in direct contradiction to significant evidence to the contrary. Witness testimony, court records and defendant's own statements and e-mails indicate that defendant repeatedly tried to lower his child support payments and became very angry when he was unable to do so. The evidence also showed that defendant expressed a desire to kill Mimi to more than one person and that he was obsessed with keeping money from her. In addition, there was ample evidence that defendant continued to fight the release of his 401(k) funds to pay child support even after Mimi's murder and that he assumed that he would get custody of Jeff after Mimi's death. Because these statements are so thoroughly contradicted by the weight of the remaining testimony and evidence, these denials actually undermine defendant's credibility and permit an inference of consciousness of guilt.

Defendant also implicated several persons as Mimi's potential killer. At one point he claimed that the judge handling the child support issues was having a lesbian affair with Mimi and must have killed her. He also claimed that a FOC lawyer must have murdered Mimi. Another time he indirectly implicated Mimi's sister. He also indicated that one of his sons might

have murdered Mimi. Finally, at trial, defendant presented a defense that suggested that Mimi might have been murdered by someone she dated after her divorce. Defendant's willingness to implicate his own children and to make wild accusations against others also undermined defendant's credibility.

Finally, the tape of defendant's telephone conversation with his eldest son Brian is compelling evidence of defendant's consciousness of guilt. Throughout the conversation, defendant repeatedly attempted to redirect the conversation away from Mimi's death. Indeed, at one point he began to discuss property that he purportedly left at Mimi's home that he wanted Brian to know about. However, Brian always returned to the subject and pleaded with his father to "tell me that you didn't do it?" Finally, defendant told his son, "I'll tell you what I told the police. . . . I said I didn't do it. I said I was working here at home." Defendant's equivocal statements and refusal to directly deny killing Mimi was tantamount to a confession of guilt. This evidence, taken in its entirety, is overwhelming evidence of defendant's guilt.

Defendant has not met his burden of persuasion concerning the prejudicial nature of this testimony. Therefore, the admission of this testimony does not warrant reversal. *Carines, supra* at 763. Furthermore, even if defendant had satisfied the prejudice requirement, we would decline to exercise our discretion to reverse in this case. *Id.* at 763, 772-773.

III.

Defendant next argues that the prosecutor engaged in a deliberate pattern of misconduct by attempting to "divert the jury's attention from the lack of rationally persuasive evidence to the seemingly unanimous family feeling blaming Defendant for the victim's death." However, defendant presents this argument without any real analysis. Defendant merely recites a series of general authorities that are applicable to prosecutorial misconduct cases and refers to the facts stated under Issue II. Because this issue was insufficiently developed, we conclude that defendant has abandoned it on appeal. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). However, even if we were to address this issue and conclude that the trial court's elicitation of opinion testimony was improper, for the reasons already stated under Issue II above, we would conclude that any error was harmless. See *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). Therefore, reversal is not warranted on this basis.

IV.

Defendant next argues that his trial counsel was constitutionally ineffective for failing to object to Mimi's sister's testimony that Mimi told her that defendant "would not shoot her from a distance because he would want to do it up close and personal, where she would know that it was him doing it." Defendant contends that this testimony likely affected the outcome of the trial and, therefore, warrants reversal. We disagree.

Defendant argues on appeal that his trial counsel should have objected to this testimony on the ground that it was inadmissible hearsay. See MRE 802. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c). In the present case, it was the prosecution's theory that Mimi feared defendant and would not have placed herself in jeopardy by opening her door to defendant absent some compelling reason. The prosecution further theorized that

defendant got Mimi to open the door by convincing her that he was trying to serve her with papers related to the hearing scheduled for Friday. The prosecution proffered this theory in part to explain why eight blank folded sheets of paper were found at the scene of the murder with a bloody footprint. Hence, Mimi's belief that defendant was dangerous and would not permit him to "get up close and personal" was relevant to show that Mimi would not have opened the door for defendant absent some compelling reason, such as to receive court papers related to the upcoming court hearing. Therefore, this statement was properly admissible for a reason other than to prove the truth of the matter asserted and, hence, was not hearsay. MRE 801(c). Because this testimony was properly admissible, defendant's trial counsel could not be faulted for failing to object to it. *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

There was no error warranting reversal on this basis.

V.

Finally, defendant contends that his trial counsel was constitutionally ineffective for failing to object to testimony by two witnesses that Mimi told them that defendant had threatened to kill her. Defendant further contends that he was deprived of a fair trial as a result of these failures to object. We disagree.

Almost every witness who knew Mimi testified that Mimi was afraid of defendant and several testified concerning defendant's threats to kill Mimi. In addition, two of Mimi's friends testified that Mimi told them that defendant had threatened to kill her. Although defendant acknowledges that his counsel placed a continuing objection on the record prior to the testimony of these witnesses, defendant contends that this objection did not encompass testimony concerning statements by Mimi that defendant threatened her. Hence, defendant concludes that his counsel failed to properly object to this hearsay testimony and that this failure fell below an objective standard of reasonableness under prevailing professional norms and deprived him of a fair trial. We disagree with defendant's contention that the continuing objection did not apply to this testimony.

At trial, Mimi's neighbor testified that Mimi had expressed a fear of defendant. She then testified that Mimi had asked her to take care of her (Mimi's) cat while she was out of town. She stated that she asked her husband to accompany her to Mimi's home because of the concerns Mimi had expressed about defendant. The prosecution then asked the neighbor about Mimi's state of mind and defendant's trial counsel objected. The trial court excused the jury and explained,

All right. We had a side-bar just before I sent the jury out. [Defendant's trial counsel] is objecting to testimony about the state of mind evidence of Mimi Bernard and the statements of witnesses related to that. I asked for a side-bar because I thought that the witness had already told what her state of mind was, but apparently there was an actual declaration by the decedent to this witness that she was afraid that she, being Mimi Bernard, was afraid that Paul Bernard was going to kill her.

After this, the prosecution argued that Mimi's statement to the witness was not being offered to prove the truth of the matter asserted and, therefore, was not hearsay, or alternatively that it was

admissible under MRE 803(3). Defendant's trial counsel countered that any statement would be inadmissible hearsay and that she had a continuing objection to testimony of that nature. The trial court noted that the objection was to testimony that Mimi "either, a, feared . . . the defendant, or, b, what she may have said about whether she thought the defendant was going to kill her" The court then ruled that the testimony would not be hearsay and, even if it were, it would be admissible under MRE 803(3).

This record clearly indicates that defendant's trial counsel placed a continuing objection to both testimony by witnesses that Mimi was afraid of defendant and to testimony by witnesses that Mimi told them that defendant had threatened to kill her. Therefore, defendant's trial counsel did in fact object and defendant's claim to the contrary is without merit.

There were no errors warranting reversal of defendant's conviction.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly