STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2008
v OTHA B. SANDUSKY, Defendant-Appellant.	No. 272544 Wayne Circuit Court LC No. 05-008492-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v TANEICA ALLEN, Defendant-Appellant.	No. 273445 Wayne Circuit Court LC No. 05-008492-01

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Defendants Otha Sandusky and Taneica Allen were tried jointly before a single jury. They were each convicted of first-degree premeditated murder, MCL 750.316(1)(a), and sentenced to life imprisonment without parole. Both defendants appeal as of right. We affirm.

I. Docket No. 272544 (Defendant Sandusky)

A. Failure to Instruct on Voluntary Manslaughter

Defendant Sandusky argues that the trial court erred by denying his request to instruct the jury on the lesser offense of voluntary manslaughter. Issues of law arising from jury instructions are reviewed de novo on appeal, but a trial court's determination whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

When a defendant is charged with murder, an instruction for voluntary manslaughter must be given if supported by a rational view of the evidence. *Id.* at 137; *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). In *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991), the Court defined the crime of voluntary manslaughter:

> [I]f the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed . . . then the law, out of indulgence to the frailty of human nature . . . regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter. [Quoting *Maher v People*, 10 Mich 212, 219 (1862).]

Thus, the following elements must be established (1) the defendant killed in the heat of passion; (2) the passion must be caused by adequate provocation; and (3) there cannot be a lapse of time during which a reasonable person could control his passions. *Id*. at 388.

Even if codefendant Allen's disclosure, that she was sexually assaulted, could support a finding of adequate provocation, see *id.* at 391, a rational view of the evidence did not support a finding that there was no lapse of time between the disclosure and the victim's killing during which a reasonable person could not have controlled any passion generated by the disclosure. The travel time to the victim's house provided a "cooling off period" during which a reasonable person would have been able to resume control of his passions. See *People v Tierney*, 266 Mich App 687, 716; 703 NW2d 204 (2005).

Nor did evidence suggesting that Sandusky confronted the victim and fought with him justify a manslaughter instruction. The only evidence of a confrontation and fight before the victim was killed was Ann Allard's testimony that Sandusky told her that he confronted the victim, got into a fight with him, and then killed him. Even if this evidence would have permitted the jury to find that the victim's death was preceded by some sort of confrontation or fight, there was no evidence regarding the circumstances surrounding the encounter, i.e., whether any altercation was primarily verbal or physical, whether any words were exchanged and if so what was said, or whether the victim said or did anything that would have caused a reasonable person to lose control. Additionally, there was no evidence describing Sandusky's emotional state during any encounter with the victim. Without such evidence, there was no rational basis for the jury to find that Sandusky killed the victim in the heat of passion caused by adequate provocation. For these reasons, the trial court did not abuse its discretion by denying Sandusky's request for an instruction on voluntary manslaughter.[1]

[1] Furthermore, it is apparent that any error in failing to instruct on voluntary manslaughter was harmless. A harmless error analysis is applicable to instructional errors involving necessarily lesser included offenses. *People v Cornell*, 466 Mich 335, 361; 646 NW2d 127 (2002). Such errors are considered nonconstitutional. *Id.* at 363. "[A] preserved nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively

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B. Confrontation

Defendant Sandusky next argues that his constitutional right of confrontation was violated by the admission of nontestifying codefendant Allen's statements to Ann Allard, Julia McClain, and Detective Delgreco.

Sandusky does not challenge the trial court's determination that Allen's statements, although hearsay with respect to him, qualified for admission as statements against Allen's penal interest under MRE 804(b)(3). Instead, Sandusky only argues that the admission of the statements violated his constitutional right of confrontation. We review this issue de novo. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

A defendant has the right to confront the witnesses against him. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). Under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant is unavailable at trial and the defendant had a prior opportunity for cross-examination. *People v Jambor (On Remand)*, 273 Mich App 477, 486; 729 NW2d 569 (2007). However, the Confrontation Clause is not implicated unless the statements of the declarant are testimonial. *Davis v Washington*, 547 US 813, 821; 126 S Ct 2266; 165 L Ed 2d 224 (2006); *People v Jordan*, 275 Mich App 659, 662; 739 NW2d 706 (2007); *People v Walker (On Remand)*, 273 Mich App 56, 60; 728 NW2d 902 (2006). This is because only testimonial statements cause the declarant to be a "witness" within the meaning of the Confrontation Clause. *Davis, supra* at 821. It is the testimonial character of a statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause. *Id*.

"Testimonial" statements include prior trial testimony, pretrial statements that the declarant could reasonably expect to be used in a prosecutorial manner, and statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Crawford, supra* at 51-52; *Jambor, supra* at 487. Testimonial statements also include statements made during police interrogation, if the circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis, supra* at 821-822; *Jordan, supra* at 663.

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appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). "[W]here a defendant is convicted of first-degree murder, and the jury rejects other lesser included offenses, the failure to instruct on voluntary manslaughter is harmless." *People v Sullivan*, 231 Mich App 510, 520; 586 NW2d 578 (1998), aff'd 461 Mich 992 (2000). Here, the jury was instructed on both first-degree premeditated murder and first-degree felony murder, and also on second-degree murder as a lesser offense to both counts of first-degree murder. The jury found defendant guilty of both counts of first-degree murder, rejecting the lesser offense of second-degree with respect to both counts. Considering the jury's rejection of second-degree murder, it is not more probable than not that any error in failing to instruct on voluntary manslaughter affected the outcome.

Allen's statements to Allard and McClain were not made to police or investigative authorities, or under circumstances that would lead an objective witness to reasonably believe that the statements would be available for later use at trial. Indeed, Sandusky concedes in his brief on appeal that the statements do not qualify as testimonial. Accordingly, their admission did not implicate Sandusky's right of confrontation.

While we agree that Allen's statement to Detective Delgreco was not made in response to interrogation, that alone does not establish that the statement was not testimonial. The statement related to a past criminal event and was made to a police officer after Allen was arrested. In this circumstance, a declarant should reasonably expect that the statement would be available for use at a later trial. Accordingly, we conclude that Allen's statement to Detective Delgreco was testimonial, and its admission against defendant Sandusky violated his constitutional right of confrontation.

We also conclude, however, that the error was harmless beyond a reasonable doubt. *People v Watson*, 245 Mich App 572, 585; 629 NW2d 411 (2001). In response to Detective Delgreco's statement that Allen was involved in the murder of a man, Allen merely responded, "Well, I didn't know him that well anyway." Defendant Sandusky's principal defense at trial was that he lacked the intent to commit a premeditated killing and did not steal the victim's property. Allen's statement did not refer to Sandusky. There was nothing about the statement that was probative of Sandusky's role in the offense, his intent, or his involvement in any theft of the victim's property. It is clear beyond a reasonable doubt that the statement could not have contributed to the jury's verdict against defendant Sandusky.

C. Request for a Separate Jury

Defendant Sandusky next argues that the trial court erred by denying his request for a separate jury. We disagree. We review the trial court's decision for an abuse of discretion. *People v Harris*, 201 Mich App 147, 152; 505 NW2d 889 (1993).

The use of separate juries is a partial form of severance and is to be evaluated under the standards applicable to motions for separate trials. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994). Strong policy considerations favor joint trials in the interests of justice, judicial economy, and administration; a defendant does not have an absolute right to a separate trial. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Severance is required only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *Hana, supra* at 331, 346; MCR 6.121(C).

Defendant Sandusky argues that separate juries were required to avoid the prejudice arising from the admission of codefendant Allen's statements. As previously explained, however, Allen's statements to Allard and McClain were admissible against Sandusky without violating his confrontation rights. Further, there was no conceivable prejudice to Sandusky arising from Allen's statement to Detective Delgreco.

Sandusky also argues that separate juries were required because he and codefendant Allen presented inconsistent defenses. In order to make this showing, a defendant must provide the court with a supporting affidavit, or make an offer of proof, showing that the defenses are so

inconsistent, mutually exclusive, and irreconcilable that it "clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Hana, supra* at 346. Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice. Rather, the tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other. *Id.* at 349. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision. *Id*. at 346-347.

Sandusky defended the charges by contending that the victim was killed during a fight, after Sandusky confronted the victim about sexually assaulting his girlfriend, but the circumstances did not involve premeditation or deliberation. Allen's defense was that she only informed Sandusky of the sexual assault, and that Sandusky acted alone when he killed the victim. These defenses were not mutually exclusive or irreconcilable. The jury was not required to believe one defendant at the expense of the other. Accordingly, the trial court did not abuse its discretion in denying Sandusky's request for separate juries.

D. Photo of the Victim

Defendant Sandusky lastly argues that reversal is required because the trial court admitted a gruesome photograph of the victim's body at the crime scene. We disagree. The decision to admit or exclude photographs is within the sole discretion of the trial court. *People v Cervi*, 270 Mich App 603, 625; 717 NW2d 356 (2006).

A court should avoid admitting gruesome photographs that are designed solely to arouse the sympathies or prejudices of the jury. *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998). However, a photograph that is otherwise admissible for some proper purpose is not rendered inadmissible because of its gruesome details or the shocking nature of the crime. *Id.*

In this case, the prosecutor offered the photograph for a legitimate reason—to show the positioning of the victim's body when it was discovered. Further, the photograph was not overly gruesome. It depicted the positioning of the victim's body, but it did not show a face or blood on the body. The prosecutor declined to introduce other photographs that contained close-up shots of the victim's face. The trial court did not abuse its discretion in determining that the probative value of the photograph was not substantially outweighed by its prejudicial effect.

II. Docket No. 273445 (Defendant Allen)

A. McClain's Recorded Telephone Conversations

Defendant Allen argues that the trial court abused its discretion by denying her request for disclosure of recorded phone conversations by prosecution witness Julia McClain at the county jail, or alternatively, by conducting an in camera review of the recorded calls.

A trial court's decision regarding discovery is reviewed for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). This Court also reviews for an abuse of discretion a trial court's decision whether to conduct an in camera review of privileged materials. *People v Laws*, 218 Mich App 447, 454-455; 554 NW2d 586 (1996).

"There is no general constitutional right to discovery in a criminal case." *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). Discovery in criminal cases is constrained by the limitations expressly set forth in the criminal discovery rule, MCR 6.201. *People v Greenfield (On Rehearing)*, 271 Mich App 442, 447; 722 NW2d 254 (2006); see also *Phillips, supra* at 587-589. To obtain discovery, either (1) the subject of the discovery must be set forth in the rule or (2) the party seeking discovery must show good cause why the trial court should order the requested discovery. Absent such a showing, courts are without authority to order discovery in criminal cases. *Greenfield, supra* at 448.

MCR 6.201 provides, in pertinent part:

> (A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:
>
> * * *
>
> (2) any written or recorded statement pertaining to the case by a lay witness whom the party may call at trial. . .

The trial court did not abuse its discretion in denying Allen's request for discovery under MCR 6.201(A)(2). There was no indication that McClain made statements pertaining to this case in her recorded conversations. Further, Allen did not demonstrate good cause for obtaining discovery beyond that expressly provided by the court rule, because there was no indication that McClain discussed matters pertaining to this case in her phone conversations. The trial court reasonably concluded that Allen was embarking on a fishing expedition.

Also, the trial court did not abuse its discretion by refusing to conduct an in camera review of the records pursuant to MCR 6.201(C)(2). First, there was no showing that the requested discovery involved privileged information. Second, MCL 791.270 does not apply here because that statute applies only to correctional facilities, which by definition do not include a county jail. See MCL 791.215. Third, even if the recorded telephone calls could be considered privileged, defendant Allen failed to make the requisite showing that there was a reasonable probability that the telephone records were likely to contain material information necessary to the defense. *People v Stanaway*, 446 Mich 643, 677; 521 NW2d 557 (1994).

B. Request for a Mistrial

Next, defendant Allen argues that the trial court abused its discretion by denying her requests for a mistrial. We disagree.

A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs her ability to get a fair trial. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). We review a trial court's decision denying a request for a mistrial for an abuse of discretion. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000).

The prosecutor's question to Allard was not so prejudicial that it impaired Allen's ability to receive a fair trial. The question—"Now, Taneica told you she was there, correct?"—was not

without a factual basis considering that Allard had previously testified that Allen told her that she was "somewhat" involved. Further, Allard testified in response that Allen never told her whether she was present during the offense. Under the circumstances, the trial court did not abuse its discretion in denying Allen's request for a mistrial.

Nor did the trial court abuse its discretion by denying Allen's request for a mistrial during jury deliberations. The jury never indicated that it was deadlocked, but only stated that it was having problems with a single juror. The trial court's decision to give additional jury instructions, including the deadlocked jury instruction, rather than immediately declare a mistrial based on a hung jury, was a reasonable and principled one under the circumstances and, therefore, did not constitute an abuse of discretion. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

C. Failure to Instruct on Voluntary Manslaughter

Defendant Allen also argues that the trial court abused its discretion by denying her request for an instruction of the lesser offense of voluntary manslaughter. In support of her argument, however, she merely asserts that the evidence showed that codefendant Sandusky acted in the heat of passion. She fails to explain how a rational view of the evidence showed that her involvement was motivated by passion rather than reason. In any event, as previously explained in section I(A), a rational view of the evidence did not support a manslaughter instruction.

Furthermore, like codefendant Sandusky, the jury had the option of convicting Allen of the lesser offense of second-degree murder, but rejected that option in favor of a conviction of first-degree murder. Thus, any error in failing to instruct the jury on manslaughter was harmless. *People v Sullivan*, 231 Mich App 510, 520; 586 NW2d 578 (1998).

Affirmed.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood