# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 22, 2008 |
| v | No. 278619<br>Eaton Circuit Court |
| JEFFERY SHANNON LUTZ,<br><br>Defendant-Appellant. | LC No. 06-020282-FH |

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of false report of a felony, MCL 750.411a(1)(b); discharging a firearm at an emergency vehicle, MCL 750.234c; reckless use of a firearm, MCL 752.863a; and making a false report to a police radio station, MCL 750.509. He was sentenced to five years' probation with 60 days in jail, community service, and restitution. For the reasons set forth in this opinion, we affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant argues that the prosecutor committed misconduct in opening statement by referring to "suicide messages" that defendant left on the voice mail associated with his estranged wife's cell phone. Defendant further argues that the trial court abused its discretion by denying his motion for a mistrial based on this alleged prosecutorial misconduct.

Defendant's preserved claim of prosecutorial misconduct is reviewed de novo to determine whether he was denied a fair and impartial trial. *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003). A trial court's resolution of a motion for a mistrial is reviewed for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005).

A good-faith effort by a prosecutor to admit evidence does not constitute misconduct. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). Accordingly, this Court has found that where the prosecutor acted in good faith, an isolated reference to proposed evidence in opening statement that was later held inadmissible by the trial court did not deny the defendant a fair trial. *People v King*, 215 Mich App 301, 306-307; 544 NW2d 765 (1996).

Initially, we note that testimony from Detective Declerq relating what defendant's wife told him about voice mail messages left by defendant would not have been barred by either the marital communications privilege or the spousal privilege. Our Supreme Court has held that the

marital communications privilege provides protection only against a spouse being questioned as a sworn witness about a marital communication and, accordingly, does not preclude introduction of the marital communication through other means. *People v Fisher*, 442 Mich 560, 575; 503 NW2d 50 (1993). Indeed, the Court specifically held that the marital communications privilege was inapplicable to hearsay statements from a police detective about statements made by a defendant's spouse. *Id*. at 575-576. Thus, the marital communications privilege would not have precluded the prosecution from eliciting testimony from Detective Declerq relating what defendant's wife told him about a statement made by defendant. Similarly, the distinct spousal privilege generally protects a person from being compelled to testify against his or her spouse. See MCL 600.2162; see also *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004) ("The spousal privilege provides that one spouse may not be examined in a criminal prosecution of the other spouse without the *testifying* spouse's consent, except under certain specified circumstances.") (emphasis in original). Therefore, the spousal privilege was inapplicable to the contemplated testimony from Detective Declerq.

The prosecutor reasonably could have believed that testimony from Detective Declerq relating that, within one hour of the detective having called defendant and told him that he recovered a potentially incriminating gun, defendant's wife contacted the detective and told him about getting suicidal messages from defendant would have been admissible. At a minimum, it is reasonably arguable that the statement from defendant's wife to Detective Declerq would have been within the scope of a present sense impression under MRE 803(1). Under MRE 803(1), a statement is not barred by the hearsay rule if it describes or explains an event or condition and is made "while the declarant was perceiving the event or condition, *or immediately thereafter*" (emphasis added). From the context, it is reasonable to infer that defendant's wife contacted Detective Declerq quickly after hearing the suicidal messages from defendant to seek help in preventing defendant from committing suicide. Because a statement made "even several minutes after the event observed" can qualify for admission as a present sense impression under MRE 803(1), *People v Bowman*, 254 Mich App 142, 145; 656 NW2d 835 (2002), it is plausible to believe that hearsay exception would have applied in this circumstance. If the present sense impression exception applied, the content of defendant's wife statement relating statements by defendant would not have been barred by the hearsay rule because defendant's own statements would constitute admissions of a party-opponent. See MRE 801(D)(2)(A) (except for certain circumstances not applicable here excluding a party's own statement offered against a party from the definition of hearsay); see also MRE 805 (hearsay within hearsay "is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules"). The prosecutor reasonably could have believed that evidence that defendant made suicidal statements within an hour of being informed that the police had recovered a potential item of evidence against him was relevant as evidence of defendant's consciousness of guilt.

The trial court ultimately held that it would not allow admission of evidence of defendant's suicidal messages because they were more prejudicial than probative. However, this was a discretionary decision by the trial court to exclude the messages under MRE 403, which provides in relevant part that "evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice."[1] But the prosecutor could not have known that the trial court would exercise its discretion in this manner, because it is reasonable to believe that evidence of defendant's expressions of a suicidal intent shortly after being confronted with the police having recovered potentially incriminating evidence was substantially probative as evidence of consciousness of guilt. Accordingly, in light of the lack of any apparent reason to conclude that the prosecutor acted in bad faith, we conclude that the prosecutor did not commit misconduct in referring to the proposed evidence at issue in his opening statement because he did so based on a good-faith belief that it was properly admissible.

Defendant refers vaguely to the attempt to admit evidence of the voice mail messages as violative of his right to confrontation. However, the Confrontation Clause does not bar evidence of nontestimonial statements. See *Davis v Washington*, 547 US 813, 821; 126 S Ct 2266; 165 L Ed 2d 224 (2006) (explaining that only testimonial hearsay is subject to the Confrontation Clause). Even statements made in response to police interrogation are nontestimonial when the circumstances objectively indicate that "the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id*. at 822. Thus, testimony from Detective Declerq that defendant's wife contacted him about suicidal messages left for her by defendant would not have been barred by the Confrontation Clause because, viewed objectively, the circumstances indicate that her statements to the detective were primarily made to obtain police assistance with regard to an ongoing emergency, i.e., to obtain police assistance in preventing defendant from committing suicide.

In sum, defendant has not established that the prosecutor committed misconduct in his opening statement. It follows that the trial court did not abuse its discretion in denying defendant's motion for a mistrial on this basis.

Affirmed.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello

[1] Actually, taking its words literally, the trial court was overly generous to defendant by excluding evidence based merely on a determination that its probative value was outweighed by its prejudicial effect rather than based on a determination that its probative value was *substantially* outweighed by the danger of unfair prejudice.