

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL DAVID GIBBS,

Defendant-Appellant.

UNPUBLISHED
September 9, 2008

No. 274003
Ingham Circuit Court
LC No. 04-001541-FC

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and sentenced to life imprisonment without parole. Defendant appeals as of right. We affirm defendant's conviction for first-degree murder, but vacate the portion of the judgment of sentence requiring defendant to pay attorney fees and remand for consideration of defendant's ability to pay.

The victim, Tammie Dubay, a paraplegic, was defendant's girlfriend. In the early morning hours of July 14, 2004, a surveillance camera captured defendant arriving at and, a short time later, departing from Dubay's apartment complex. At approximately 4:45 a.m., the victim's mother, Margaret Dubay, received a telephone call from her granddaughter, Crystal, the victim's seven year-old daughter. Crystal tearfully told Margaret that Dubay was gone. Crystal explained that she had seen defendant lift Dubay from her wheelchair and carry her to his pickup truck. Margaret immediately drove over to Dubay's apartment. Shortly thereafter, defendant, wearing a leather coat, along with gloves and a hat, appeared at Dubay's apartment. After claiming that Dubay was with friend, who was unknown to either Crystal or Margaret, and that he would get her, he quickly left. Margaret never heard from or saw defendant again that day. Later that evening, Dubay's body, covered by a blanket, was found on the side of Cornell Road. She had been strangled by her wheelchair's power cord.

I. Dubay's Out-of-Court Statements

Defendant first claims on appeal that the trial court erred in admitting various statements Dubay had made to friends and Capital Area Transit Authority (CATA) employees under the "state of mind" hearsay exception, MRE 803(3). We agree the trial court abused its discretion in admitting many of Dubay's statements.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A preliminary question of law regarding the admissibility of evidence is reviewed de novo. *Id.*

Hearsay, an out-of-court statement used to prove the truth of the matter asserted, MRE 801(c), is not admissible except as provided by the Michigan Rules of Evidence. MRE 802. Under MRE 803(3), the following hearsay statements are admissible:

[S]tatements of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Statements relating to past events are specifically excluded under MRE 803(3) as statements of "memory or belief to prove the fact remembered or believed." *People v Moorer*, 262 Mich App 64, 73; 683 NW2d 736 (2004).

Several witnesses testified that in the month before she was killed, Dubay expressed a fear of defendant. These statements of Dubay were properly admitted under MRE 803(3) because they related to Dubay's then existing state of mind, her fear of defendant. However, we agree with defendant that the trial court abused its discretion in admitting Dubay's statements to these same witnesses that defendant prohibited her from seeing any CATA drivers, that defendant informed her she was fat and needed to lose weight, that defendant asked her to move to Jackson, that defendant gave her an engagement ring, that she believed defendant attempted to kill her, and that she asked defendant to leave her home because he had been drinking. These statements relate to past events, rather than Dubay's state of mind.¹

We also agree with defendant that Dubay's out-of-court statements were not admissible under MRE 804(b)(6). In order for hearsay to be admissible under MRE 804(b)(6), the prosecution must establish that (1) defendant engaged in wrongdoing, (2) the wrongdoing was intended to make the declarant unavailable, and (3) the wrongdoing made the declarant unavailable. *People v Jones*, 270 Mich App 208, 217; 714 NW2d 362 (2006); see also *Giles v California*, __ US __; 128 S Ct 2678; __ L Ed 2d __ (2008) (explaining that FRE 804(b)(6) codifies the common law forfeiture by wrongdoing doctrine, which only permits the admission

¹ We acknowledge that statements of a party opponent are not hearsay, MRE 801(d)(2), and, therefore, defendant's statements to Dubay are not hearsay. However, Dubay's recitations of defendant's statements to the witnesses constitutes a second level of hearsay, which, to be admissible, must meet the requirements of a hearsay exception.

We also reject plaintiff's argument that Dubay's statement that she believed defendant had tried to kill her, said while she was nervous, shaky, and near tears, was admissible under MRE 803(2), the excited utterance exception. Although the statement may be used to prove the existence of a startling event or condition, *People v Barrett*, 480 Mich 125, 127-128; 747 NW2d 797 (2008), there was no other evidence establishing when, where, or how this startling event occurred.

of uncontroverted testimony upon a showing that the defendant intended to prevent the witness from testifying). No evidence indicated that defendant engaged in any wrongdoing with the intent to make Dubay unavailable as a witness at trial.

II. Impeachment of Louella Bibbins by Prior Inconsistent Statement

Defendant next claims that the trial court erred in admitting extrinsic evidence of Louella Bibbins's prior inconsistent statements because the statements were used as a springboard to bring in an alleged confession by defendant to Dubay's murder. We agree.

Bibbins, defendant's aunt, testified that she spoke with defendant on the telephone in the early afternoon of July 14, 2004, and that defendant told her Dubay was "missing." According to Bibbins, defendant did not tell her that Dubay was dead or that he would get pinned for her death. She specifically denied telling Officers Andrew McCready or Scott Despins either of these statements during their separate questioning of her on July 14 and July 19. Thereafter, pursuant to MRE 613(b), the prosecution introduced, over defendant's objection, extrinsic evidence of Dubay's prior inconsistent statements to McCready and Despins. This extrinsic evidence included a video recording of Despins's interview with Bibbins in which Bibbins can clearly be heard saying that defendant told her during their telephone conversation that Dubay was "dead" and that he would get "pinned" for her death.

Extrinsic evidence of a prior inconsistent statement is admissible to impeach a witness. MRE 613(b). "The general rule is that evidence of a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends directly to inculcate the defendant." *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). However, a prosecutor may not introduce evidence of a statement that directly inculcates the defendant under the guise of impeachment if the substance of the statement is relevant to the central issue of the case and there is no other testimony from the witness for which her credibility was relevant to the case. *Id.* at 682-683; *People v Stanaway*, 446 Mich 643, 692-693; 521 NW2d 557 (1994). Here, the substance of Bibbins's statements to McCready and Despins were relevant to the central issue of the case, the identity of Dubay's killer. Bibbins's telephone conversation with defendant occurred before the police had found Dubay's body, and, therefore, defendant's statement to her that Dubay was dead inculpated him as the killer. In addition, there was no other testimony from Bibbins for which her credibility was relevant. Accordingly, the trial court abused its discretion in allowing the prosecutor to admit extrinsic evidence of Bibbins's prior inconsistent statements. *Lukity, supra*.

III. Prosecutorial Misconduct

Defendant next asserts the prosecutor engaged in misconduct by arguing facts not in evidence and in arguing Bibbins's prior inconsistent statement as substantive evidence during closing arguments. We disagree that facts not in evidence were argued, but agree that evidence admitted for impeachment was improperly argued as substantive evidence.

Defendant asserts that the prosecution committed misconduct by arguing facts not in evidence when it argued that there was no sign of a struggle at either Dubay's apartment or on Cornell Road where Dubay's body was found. An unpreserved claim of prosecutorial

misconduct is reviewed for plain error affecting the defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

While a prosecutor may not argue facts not in evidence, *Stanaway*, *supra* at 686, a prosecutor may argue the evidence and all reasonable inferences the evidence creates, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). No evidence indicated a struggle between Dubay and her killer. Therefore, it was not inappropriate for the prosecutor to argue that there was no sign of a struggle. Regardless, even if the argument was improper, any prejudice to defendant was alleviated by the trial court's instructions to the jury that it was to decide the case based on the evidence presented and that the lawyers' statements were not evidence. A jury is presumed to follow its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that the trial court's error in admitting Bibbins's prior inconsistent statements was compounded when the prosecutor improperly argued the statements as substantive evidence of defendant's guilt. A prior inconsistent statement is not substantive evidence; it may only be used for impeachment purposes. *Barnett v Hidalgo*, 478 Mich 151, 164; 732 NW2d 472 (2007); *People v Jenkins*, 450 Mich 249, 261; 537 NW2d 828 (1995).

The record establishes that the prosecution clearly understood that Bibbins's prior inconsistent statements could not be used as substantive evidence of defendant's guilt. After overruling defendant's objection to the prosecution's offer of proof regarding McCready's testimony, the trial court stated it should give a cautionary instruction that a prior inconsistent statement is not substantive evidence. The prosecution stated the trial court was "absolutely correct" and that it would "ask the [trial court to] give those instructions regarding how the jury is to view prior inconsistent statements." In addition, after the trial court clarified that the prosecution's request to play the video recording of Despina's interview with Bibbins was for impeachment purposes, the prosecution replied, "That's true your honor. And . . . then the proper instruction would be that it is not substantive. It is only for impeachment." Further, after the video recording of Despina's interview with Bibbins was played for the jury, the trial court read a cautionary instruction drafted by the prosecution, which stated that "the testimony and video evidence you previously heard from Officer Despina is only being used to impeach the testimony of Louella Bibbins regarding a portion of her conversation with the Defendant. It is not to be used as substantive evidence."

Yet, despite this clear evidence establishing that the prosecution knew of the limited use Bibbins's prior inconsistent statements, the prosecution repeatedly argued the inconsistent statements as substantive evidence of defendant's guilt. In its closing statement, the prosecution made the following comments:

. . . And, Paul Gibbs told Louella Bibbins, Tammie is dead, and they're going to pin it on me; six hours, five hours before her body was found. . . .

* * *

. . . No one else knew she was dead before her body was found. . . .

* * *

At about 1:00 o'clock eastern time the cellphone he's using hits a cell tower in South Bend, Indiana [with the call to Louella Bibbins]; 6:35, 6:40 p.m. that same day, Mr. Moseng and Ms. Stornello call the police [to report finding a body]. He knew she was dead before she was found. It's that important. It's important enough that he calls Louella Bibbins to lie about it. That's how important it is.

* * *

Another quick example, the East Lansing interview with Louella and Donald Gibbs, when she was explaining the details of that call to Officer Despina, he made a note it's on the tape. This was just prior to 5:55 p.m., a full 40 to 45 minutes before Mr. Moseng and Ms. Stornello had even called the police yet. So, at the time she was talking, she didn't know how important it was, so she told the truth.

In its rebuttal closing argument, the prosecution again stated that defendant "knew she was dead before she was found."

Plaintiff claims that no error occurred because defendant's alleged prior knowledge of Dubay's death was established substantively through the testimony of defendant's parole officer, Noah Nagy. Nagy testified that, when he spoke with defendant on July 19, 2004, defendant confirmed that he had called Bibbins over the telephone on July 14, 2004, and that when he called Bibbins he knew Dubay was dead because Dubay's murder was all over the news. When Nagy advised defendant that his telephone conversation with Bibbins occurred before Dubay's body was discovered, defendant changed his story and said that he just had a "bad feeling."

While defendant's changing story is persuasive substantive evidence of his guilt, see *infra*, the prosecution's closing argument relied exclusively on the extrinsic evidence introduced to impeach Bibbins. Nagy's testimony was never mentioned. Because the prosecution only cited the extrinsic evidence of Bibbins's prior inconsistent statements to support its theory that defendant spoke with knowledge known only to Dubay's killer, the prosecution's argument as presented to the jury was improper.

IV. Harmless Error

Having concluded the trial court abused its discretion in admitting Bibbins's prior inconsistent statements, an error which was severely compounded by the prosecution's misconduct of arguing the statements as substantive evidence of defendant's guilt, and in admitting Dubay's out-of-court statements regarding past events, we must determine whether the errors require reversal of defendant's conviction. A trial court's nonconstitutional error in admitting evidence is not grounds for reversal unless after an examination of the entire cause, it shall affirmatively appear more probable than not that the error was outcome determinative. *Lukity, supra* at 495-496. An error is deemed to be outcome determinative if it undermines the reliability of the verdict. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). In making this determination, we must focus on the nature of the error in light of the weight and strength of the untainted evidence. *Id.*

We acknowledge that resolution of whether the errors in this case are harmless is a close question. The admission of Dubay's past statement of fact that defendant had attempted to kill her offers undeniable support to the theory that, in the early morning hours of July 14, 2004, defendant did kill her. Even more persuasive of defendant's guilt was the extrinsic evidence of Bibbins's prior inconsistent statements, especially in light of the prosecution's improper use of the evidence as substantive evidence of defendant's guilt. In watching the video recording of Despina's interview of Bibbins, the jury clearly heard Bibbins say that defendant told her Dubay was dead. Revealing to another person knowledge that, at the time, is only known to the killer is tantamount to a confession, and the prosecution repeatedly returned to this point in its closing argument. Thus, the errors in this case can only be categorized as extremely significant. The erroneously admitted evidence directly addressed the only contested issue in the case, the identity of Dubay's killer, and was prominently featured by the prosecution in making its case to the jury.

Nonetheless, after a careful review of the untainted evidence, we conclude that the errors in this case were harmless because it does not affirmatively appear more probable than not that the errors were outcome determinative. *Lukity, supra*. In the days immediately preceding her death, Dubay informed others that she was afraid of defendant. Defendant was seen by Crystal carrying Dubay out of the apartment and into his pickup truck, and a surveillance camera captured defendant in the parking lot of the apartment complex in which Dubay lived in the early morning hours of July 14, 2004. While the camera captured numerous vehicles entering and leaving the parking lot, defendant was the only person seen walking toward Dubay's apartment. Later that morning, defendant returned to Dubay's apartment wearing a coat, gloves, and a hat, which, according to Margaret, were inappropriate for the weather. Defendant, during his conversation with Margaret regarding Dubay's whereabouts, was "edgy" and "wanting to leave real fast." He told Margaret that he would get Dubay from the residence of an unknown friend, but he instead left the state.

In addition, forensic evidence established that, although 99.16 percent of the Caucasian population could be excluded as the donor of DNA found on the cord wrapped around Dubay's neck, defendant could not be excluded as the donor of the DNA. Also, paint chips, which consisted of three layers of paint, were taken from defendant's pickup truck and each layer matched paint chips found in the blanket that covered Dubay's body. Because the three-layered paint chips were "so unusual," it was the opinion of the prosecution's forensic expert that the paint chips found in the blanket originated from defendant's pick-up truck. Further, in the parking lot of Haslett Community Church, the location where the police believe Dubay was killed,² a police officer located a pack of red Pall Mall cigarettes and a Virginia Slims cigarette butt. Defendant smoked both Paul Mall and Virginia Slims cigarettes. Moreover, defendant,

² Dubay's body was found near Haslett Community Church. The police did not believe Dubay was killed where she was found on Cornell Road because of the manner in which she was killed and the amount of traffic on the road, nor did they believe Dubay was killed at her apartment because of Crystal's statement. The police believed Dubay was killed in the parking lot of the church because it was the only "real secluded area" between where Dubay's body was found on Cornell Road and Dubay's apartment.

when questioned by Nagy, admitted that he called Bibbins on the afternoon of July 14, 2004, and that he had mentioned to her that Dubay was dead. He changed his explanation for his knowledge of Dubay's death from it being all over to news to him just having a "bad feeling" when Nagy informed him that the telephone conversation occurred before the police found Dubay's body.

Finally, Robert Jacobson and Thomas Russell, two men with whom defendant was incarcerated, testified that defendant had told them, on separate occasions, that he had strangled his girlfriend. Margaret Lumbert, a corrections officer, overheard part of the conversation between Russell and defendant. When Russell asked defendant if he had really done it, defendant replied yes. Lumbert interpreted defendant's answer to mean that he had killed his girlfriend.

Based on the persuasive value of this untainted evidence, we conclude that the evidentiary errors and the prosecutorial misconduct do not warrant reversal because it does not affirmatively appear more probable than not that the errors were outcome determinative. *Lukity*. Given the quantity and strength of the untainted evidence, the evidentiary errors and the prosecutorial misconduct do not undermine the reliability of the jury's verdict. *Whittaker, supra*.

V. Remaining Issues

Defendant claims the trial court improperly admitted twelve gruesome photographs of Dubay's body because the photographs were more prejudicial than probative. A trial court's decision to admit photographs into evidence is reviewed for an abuse of discretion. *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998).

While gruesome photographs should not be admitted solely to garner sympathy from the jury, a photograph that is otherwise admissible for some proper purpose is not rendered inadmissible because of its gruesome details. *Id.* at 188. The photographs were admitted into evidence during the testimony of the forensic pathologist who examined Dubay's body. They are accurate reflections of the injuries to Dubay, and the photographs are gruesome only because Dubay's manner of death, strangulation, was gruesome. "Gruesomeness alone need not cause exclusion." *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). Moreover, "[t]he prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate any of the elements." *Id.* at 69-70. Thus, while defendant did not contest Dubay's cause of death or that her killer acted with premeditation or deliberation, the prosecution was not relieved of its duty to prove all the elements of first-degree murder. "The claim that evidence that goes to an undisputed point is inadmissible has also been rejected in criminal cases." *Id.* at 71. Accordingly, the trial court did not abuse its discretion in admitting the photographs into evidence.³

³ We note, however, that the photographs were not admissible merely because they evidenced the facts on which the forensic pathologist based her opinion regarding the cause of death. "The [2003] modification of MRE 703 corrects a common misreading of the rule by allowing an expert's opinion only if that opinion is based exclusively on evidence that has been introduced (continued...)"

Defendant next claims that he was denied the effective assistance of counsel by (1) counsel's failure to object to the prosecution's misuse of Bibbins's prior inconsistent statements in its closing argument and counsel's failure to request a curative instruction, (2) counsel's failure to request an instruction regarding the proper use of Dubay's out-of-court statements, and (3) counsel's failure to object to the prosecution's misconduct of arguing facts not in evidence.

To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687-688, 691-692; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994).

As already established, the prosecution did not engage in any misconduct, i.e., argue facts not in evidence, when it argued there was no sign of a struggle. Accordingly, any objection by counsel would have been futile. Counsel is not required to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

It is unnecessary to address whether counsel's performance fell below an objective standard of reasonableness when he failed to object to the prosecution's misuse of Bibbins's prior inconsistent statements, failed to request a curative instruction, and failed to request a limiting instruction regarding the proper use of Dubay's out-of-court statements. We have already determined the trial court's errors in admitting Dubay's out-of-court statements and Bibbins's prior inconsistent statements were harmless. Accordingly, there is no probability that, but for counsel's failure to object to the improper use of Bibbins's prior inconsistent statements and to request curative or limiting instructions, the result of defendant's trial would have been different. *Pickens, supra*. Defendant was not denied the effective assistance of counsel.

Finally, defendant argues that the trial court improperly ordered him to contribute \$500 to the costs of his court-appointed attorney without engaging in any inquiry as to his present or future ability to pay. We agree. A trial court may not require an indigent defendant to reimburse the county for the costs of his court-appointed attorney without first assessing his ability to pay now and in the future. *People v Dunbar*, 264 Mich App 240, 251-255; 690 NW2d 476 (2004). The trial court failed to conduct such an assessment. Accordingly, we vacate the portion of the judgment of sentencing requiring defendant to pay \$500 in attorney fees and remand for consideration of defendant's ability to pay.

(...continued)

into evidence in some way other than through the expert's hearsay testimony." MRE 703, staff comment to 2003 amendment

Even if the trial court abused its discretion in admitting some, because of duplicity among the photographs, or all of the photographs, the error does not require reversal. The properly admitted evidence establishing defendant's guilt summarized earlier in this opinion renders the error harmless.

Defendant's conviction is affirmed, but we vacate the portion of the judgment of sentencing requiring defendant to pay \$500 in attorney fees and remand for consideration of defendant's ability to pay. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ E. Thomas Fitzgerald

/s/ Joel P. Hoekstra