STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD LAMONT DAVIS,

Defendant-Appellant.

UNPUBLISHED
August 7, 1998

No. 198842
Ingham Circuit Court
LC No. 96-070573 FC

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

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated 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 sentenced to consecutive terms of two years' imprisonment for the felony-firearm conviction and life in prison without parole for the murder conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion in admitting a witness' testimony that the victim told the witness that defendant

> [b]roke into Stitty [the victim's] house and robbed his son and the baby-sitter. Put a pistol up to his son head and told the baby-sitter 'you better give me your money or I'm going to kill this little baby.'

Defendant claims that reversal is required because the witness' testimony simply constituted inadmissible hearsay.[1] However, this incident was crucial to defendant's theory of self defense and was mentioned by almost every witness that took the stand without objection by defendant. In fact, defense counsel referred to the incident in his opening and closing statements. Accordingly, even assuming that the hearsay evidence was erroneously admitted, we conclude that in light of strength and weight of the untainted evidence in this case the effect of the error on the factfinder was negligible. *People v Mateo*, 453 Mich 203, 221; 551 NW2d 891 (1996). Accordingly, reversal on this ground is not required.

Next, defendant argues that the trial court abused its discretion when it excluded evidence that the victim had a packet of cocaine on his person at the time of his death. We note that at trial, defendant's theory was that the victim was after defendant because of defendant's alleged assault and robbery of the victim's son and babysitter, that on the day of the shooting the victim was the aggressor, and that defendant shot the victim in self defense. Defendant supported his theory, in part, with the testimony of Alonzo Jones, who testified that the day before the shooting the victim told Jones that he (the victim) had been looking for a person named "Drama" (defendant), who had allegedly put a gun to the head of the victim's child. Jones testified that the victim, while appearing upset and hostile, stated that he (the victim) had been looking for defendant and that when he saw defendant he was "goin' to do him. He was goin' to handle business. He told me that he was goin' to blast him . . ." and make sure that defendant "was taken out." Jones testified that the victim offered Jones an "eighthie" (a quantity of cocaine worth approximately $3200) to go with the victim to Ruthie's house. Jones testified that he declined the victim's offer. The following day the victim went to Ruthie's house with two other men and the shooting happened shortly thereafter outside this house.

Defendant now argues that the trial court erred in excluding the relevant evidence that the victim had a packet of cocaine on his person at the time of the shooting. The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material *People v Brooks*, 453 Mich 511, 520; 557 NW2d 106 (1996). In this case, the excluded evidence was material to a fact of consequence at trial, i.e., whether defendant acted in self defense. *Id*. at 517-518. The excluded evidence was also somewhat probative of this defense because the excluded evidence had a tendency to make it more probable that the victim had a plan to trade drugs for assistance in "blasting" defendant. *Id*. at 518. Thus, we agree with defendant that the excluded evidence was relevant.

However, eyewitness testimony was presented at trial that just before the shooting the victim either pulled up his shirt and reached for what appeared to be a gun or was jogging toward defendant with a gun in his hand. Despite this material and highly probative evidence that the victim was the initial aggressor, the jury rejected defendant's justification that he killed the victim in self defense. In light of the strength and weight of the untainted evidence rejected by the jury, we conclude that the effect of the error on the jury (not allowing the jury to also consider that victim possessed a packet of cocaine) was negligible. *Mateo, supra*. Accordingly, reversal on this ground is not warranted.

Last, defendant raises an issue related to the jury instructions and defense counsel's closing argument. The instruction at issue is CJI2d 7.23. This instruction provides:

> [Specific Acts]
>
> (1) There has been evidence that the [complainant/decedent] may have committed violent acts in the past and that the defendants knew about these acts. You may consider this evidence when you decide whether the defendant honestly and reasonably feared for [his/her] safety.
>
> [General Reputation]

(2) There has been evidence that the [complainant/decedent] may have had a reputation for cruelty or violence. You may consider this evidence when you decide whether it was likely that the [complainant/decedent] threatened to hurt the defendant physically, and whether the defendant honestly and reasonably feared for [his/her] safety.

* * *

Commentary

Prior threats or conduct of a victim may be considered by the trier of fact in determining whether the defendant acted in self-defense. . . . However, a decedent's prior threats against the defendant are admissible on the question of who the aggressor was only if those threats were communicated to the defendant. . . . [CJI2d 7.23 (citations omitted).]

At trial, the court stated that based on the testimony of Alonzo Jones, among others, it would give CJI2d 7.23(2). The court also stated that it would give CJI2d 7.23(1), but that in light of the commentary to CJI2d 7.23 "I will limit it to the testimony of Eddie Birdsong because the testimony of Alonzo Jones was not communicated to the Defendant . . . ." The trial court instructed defense counsel that "I will not permit you to argue that Alonzo Jones heard that [the victim's threats with respect to defendant] because it wasn't communicated to the Defendant and therefore is irrelevant."

On appeal, defendant argues that the commentary to CJI2d 7.23 is in error and that a victim's threats need not be communicated to a defendant. Defendant contends that the court's ruling damaged defense counsel's ability to argue that the victim "intended to 'blast' defendant at the next available opportunity," which in turn would have made it "more probable that [the victim] had a gun and more probable that he pulled the gun when he chased Defendant."

However, despite the court's ruling, defense counsel was fully able to argue defendant's theory of the case to the jury. Specifically, defense counsel utilized an argument that parroted Jones' testimony even though counsel did not attribute the argument to Jones testimony:

We have a series of threats that support the terror that was going on that day. I think it's lasted from that day. I think you see evidence of it during the last two weeks. That terror went on even during the trial, talking about words such as kill, blast, take care of business regarding the person who had put a gun to the baby's head.

* * *

There's no indication from anyone during this trial that my client threatened [the victim], or that he was looking for him to do him; to kill him, to blast him, to take care of business. Folks, it was the other way around.

Moreover, the jury was not instructed that it could not consider Jones' testimony in reaching a verdict. Accordingly, even assuming that the commentary with respect to CJI2d 7.23 is erroneous, which in turn caused the trial court to erroneously rule that defense counsel could not argue Jones' testimony with respect to CJI2d 7.23(1), we nevertheless find that the error did not prejudice defendant in this case. *Mateo, supra* at 215.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Michael R. Smolenski

[1] Actually, the witness' testimony constituted double hearsay. MRE 805. Defendant's own statement would, of course, be admissible as the statement of a party-opponent. MRE 801(d)(2). However, the question in this case is the admissibility of the witness' testimony concerning what the victim purportedly stated. MRE 805.