STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER JOHN KNOX,

Defendant-Appellant.

UNPUBLISHED
October 16, 1998

No. 186235
Recorder's Court
LC No. 94-007684

Before: Wahls, P.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced him to concurrent terms of mandatory life imprisonment for the first-degree murder conviction and twenty to sixty years' imprisonment for the assault with intent to murder conviction, all to be served consecutively to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We reverse and remand for a new trial.

This case involves the June 1994, shooting death of Inkster police officer Kenneth Woodmore. Woodmore was shot after he stopped a man on a bicycle. Inkster auxiliary police officer Willie Hadley, who had been following Woodmore in a separate patrol car, witnessed the shooting. At trial, several witnesses testified regarding the circumstances surrounding the shooting. Prior inconsistent statements of three of those witnesses were read to the jury, and copies of two of the witnesses' prior inconsistent statements were admitted as exhibits.

Defendant argues that he was denied a fair trial by the admission of witnesses' prior inconsistent statements without a limiting instruction. Defendant essentially offers three bases for reversal. First, he argues that the trial court erred in failing to instruct the jury, sua sponte, on the limited use of impeachment evidence. Second, he argues that the prosecutor erred in introducing certain prior inconsistent statements, and in arguing prior inconsistent statements as substantive evidence of guilt. Finally, he argues that he was denied the effective assistance of counsel when his attorney failed to object to the admission of those statements, failed to object to the prosecutor's use of the statements in

his closing argument, and failed to request a limiting instruction. While we do not agree with all of defendant's contentions, we do agree that reversal is required.

In general, evidence of a prior inconsistent statement made by a witness is admissible for impeachment purposes, even when the statement tends to directly inculpate the defendant. *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). However, a statement inculpating a defendant may not be used under the guise of impeachment if the statement is relevant to the central issue of the case and there is no other testimony from the particular witness for which her credibility is relevant to the case. *People v Stanaway*, 446 Mich 643, 692-693; 521 NW2d 557 (1994); *Kilbourn*, *supra* at 682-683.

In this case, defendant's strongest claim of error involves prosecution witness Virginia Payne. Payne gave little relevant testimony on direct examination. She began by giving her name and age, and then testified that: (1) on June 17, 1994, she lived at the corner of Pine and Henry streets; (2) she remembered the night that a police officer got killed on her street corner; (3) she was outside of her house that night celebrating with some friends when she heard gunshots; (4) it was dark outside that night; (5) she saw two police cars, but she did not see any lights; and (6) at some point, she saw a policeman on the ground, but she did not see what put him on the ground. The prosecutor then asked her "Did you see the police stop anybody on a bike?" and Payne answered "No." The prosecutor then began impeaching her with her prior statements to the police. As part of this impeachment, the prosecutor introduced a written copy of Payne's statement as an exhibit. The prosecutor also elicited testimony regarding the content of Payne's prior inconsistent statements from a police officer who had interviewed her. Defense counsel objected to the admission of Payne's written statement, and to the testimony of the police officer, but did not object to the initial impeachment.

The improper nature of the prosecutor's impeachment comes to light when we consider that Payne's prior inconsistent statements were not admissible as substantive evidence of guilt. In other words, the only proper purpose for those statements was to cast doubt on Payne's testimony. *People v Jenkins*, 450 Mich 249, 261; 537 NW2d 828 (1995). Here, Payne had not offered any testimony worthy of impeachment. She had neither harmed nor helped the prosecution. Clearly, the prosecutor was not concerned with impeaching Payne.[1] Instead, the prosecutor was attempting to circumvent the hearsay problems with Payne's prior statements by introducing them under the guise of impeachment. This was improper. See *Stanaway, supra* at 693.[2] Additionally, the statements introduced to impeach Payne went beyond simply contradicting her testimony. In fact, Payne's testimony denying any knowledge of the offense was rebutted with statements implicating defendant in the crime. We conclude that these statements went beyond the scope of proper impeachment. See *Jenkins, supra* at 261.[3] The prosecutor compounded these errors by arguing the prior inconsistent statements as substantive evidence of guilt.[4] As will be explained below, we conclude that the improper use of the witness' prior inconsistent statements, combined with the absence of a limiting instruction, requires reversal.

Defendant next argues that the prosecutor improperly used another witness' prior inconsistent statement as substantive evidence of guilt. The witness, Ruth Friday, testified for the prosecution. She testified that she lent defendant a bike on the day of the shooting. Later that day, she saw defendant ride by on the same bike. A few minutes later, she heard gunshots, and when she went to see what had happened, she saw an officer on the ground. On cross examination, defense counsel used her prior

statements to the police to impeach her credibility. Thus, it was defense counsel, rather than the prosecution, that introduced Friday's prior inconsistent statements. However, the prosecutor went on to argue Friday's prior statements as substantive evidence of guilt.[5] As noted above, this was an improper use of impeachment evidence. Again, defense counsel failed to object.

The third witness subject to impeachment by prior inconsistent statement was Lorenzo Lockhart. Lockhart was called as a defense witness, and defense counsel brought out the fact that Lockhart made several written statements to the police. Defense counsel also brought out the fact that Lockhart named defendant as the shooter in one of those statements. On cross examination, the prosecutor proceeded to read much of Lockhart's inculpatory statement to the jury. After Lockhart finished testifying, the prosecutor and defense counsel stipulated to the admission of Lockhart's three written statements as exhibits.[6] Once again, the prosecutor improperly argued the prior statements as substantive evidence of guilt.[7] Once again, defense counsel failed to object.

After closing arguments, the trial court instructed the jury without including a limiting instruction regarding the use of the prior inconsistent statements. In fact, the trial court's comments and instructions suggested that the jury should consider the statements the same way it considered all of the other evidence.[8] Both parties approved the instructions as given.

Despite the absence of any objection to most of the above errors, we conclude that defendant's convictions must be reversed. A trial court's failure to instruct a jury, sua sponte, regarding the proper use of prior inconsistent statements, is error. While such error may be harmless, *People v Mathis*, 55 Mich App 694, 697; 223 NW2d 310 (1974), we conclude that the error in this case was not harmless. We base this conclusion on the fact that the prosecutor argued the prior inconsistent statements as substantive evidence of guilt, *People v Kohler*, 113 Mich App 594; 318 NW2d 481 (1981), and on our conclusion that it is not only possible, but probable, that the jury in this case considered the statements as substantive evidence of guilt, *People v Durkee*, 369 Mich 618, 627; 120 NW2d 729 (1963). Finally, the evidence against defendant was less than overwhelming. Thus, we must reverse defendant's convictions.

Because we find defendant's first issue dispositive, we address his other arguments only briefly. Defendant contends that his trial counsel was ineffective for failing to object to the prosecutor's introduction of prior inconsistent statements, for failing to object to the prosecutor's use of the statements as substantive evidence of guilt, and for failing to request a limiting instruction. We agree. While the decision not to object or request a limiting instruction can sometimes be considered trial strategy, defense counsel in this case admitted at an evidentiary hearing[9] that at least some of the alleged errors in this case were not trial strategy. In any event, we cannot conclude that allowing the prosecutor to introduce and argue the prior inconsistent statements unabated was sound trial strategy. While it presents a difficult question, we also believe that there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. Thus, reversal is also warranted on this basis. *People v Pickens*, 446 Mich 298, 309-312; 521 NW2d 797 (1994).

On the other hand, we disagree with defendant's assertion that defense counsel was ineffective and engaged in unsound trial strategy when he attempted to demonstrate, through some prior inconsistent statements and a prior shooting incident involving officer Woodmore, that the witnesses

were threatened and coerced and that the police constructed a case against defendant. This was not an unsound trial strategy. While, in hindsight, the admission of the tape of one witness' interview, in which she incriminated defendant, may not have been effective trial strategy, this does not require a finding that defense counsel was ineffective. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Also, unlike *People v Dalessandro*, 165 Mich App 569, 577; 419 NW2d 609 (1988), the case relied upon by defendant, Friday's taped statement was not the only incriminating evidence against defendant. That defense counsel's trial strategy failed is not ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Therefore, we would not reverse on this basis.

Defendant next argues that the prosecution failed to establish premeditation and deliberation beyond a reasonable doubt. We disagree. Considering the evidence in a light most favorable to the prosecution, a reasonable fact-finder could find that the prosecutor proved premeditation and deliberation beyond a reasonable doubt. The prosecution presented evidence that Woodmore, after pulling his car up to the bicyclist, walked around the back of his car and began walking up the passenger side of his car to the bicyclist before any shots were fired. Another witness saw defendant reach into his pants, presumably to pull out a gun, before Woodmore opened his car door. We have no doubt that this evidence was sufficient to support an inference of premeditation and deliberation.

Next, defendant argues that he was denied a fair trial and effective assistance of counsel through the prosecution's violations of discovery orders. We disagree. We review a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie*, 225 Mich App 592, 597; 571 NW2d 229 (1997). Here, the trial court fashioned a reasonable remedy to the alleged violations of the discovery order, and we find no abuse of discretion.

Finally, defendant argues that he was denied a fair trial through the prosecution's failure to endorse and produce a res gestae witness and defense counsel's agreement to waive production of a res gestae witness. We disagree. A res gestae witness is one who witnesses an event in the continuum of the criminal transaction and whose testimony will help in developing a full disclosure of the facts of the case. *People v O'Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990). The witnesses discussed by defendant were not res gestae witnesses.

Reversed and remanded for new trial. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

[1] The Court's observation in *Jenkins* is equally accurate here: "[The witness] did not provide testimony tending in any way to exculpate [the defendant]. [The witness], rather, disappointed the prosecutor in failing to provide inculpatory testimony." *Jenkins, supra* at 261.

[2] Here, the prosecutor attempted to impeach the witness' denial that she had seen the police stop defendant. However, "a prosecutor may not use an elicited denial as a springboard for introducing

substantive evidence under the guise of rebutting the denial." *Stanaway, supra* at 693. This is precisely what the prosecutor succeeded in doing in this case.

[3] Here, as in *Jenkins*, the admission of the prior inconsistent statements "served only one purpose – to impermissibly provide inculpatory testimony to bolster [the prosecution's case]." *Jenkins, supra* at 261.

[4] The prosecutor argued that the prior inconsistent statement is where Payne "tells the truth."

[5] The prosecutor referred to her statement indirectly: "Mr. Knox fits the description, Mr. Knox is the one whose [sic] pointed out to that night by Lockhart . . . . And he's the one who also was given up by Ms. Friday some days later."

[6] While the prosecutor actually offered the statements for admission, it is clear from the record that both parties agreed to, and asked for, their admission.

[7] The prosecutor essentially argued that the inculpatory statement represented the truth: "He comes into the police station and he starts saying little bit and little bit and little bit. And you look at those statements, ultimately he does break down and tells the police what he saw."

[8] When Payne's written statement was admitted as an exhibit, the court commented in front of the jury: "The jury can decide what part they want to believe." In addition, during its final instructions, the court gave CJI2d 3.5, which reads in part: "Evidence includes only the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else that I told you to consider as evidence." CJI2d 3.5(2).

[9] After filing his appeal, defendant requested a remand for an evidentiary hearing regarding his ineffective assistance of counsel claim, which this Court granted. At the hearing, defendant's trial counsel could not explain why he had not requested a limiting instruction, or why he failed to object to the prosecutor's closing argument.