STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ORLANDO R. FLOWERS,

Defendant-Appellant.

UNPUBLISHED
February 27, 2001

No. 218593
Wayne Circuit Court
Criminal Division
LC No. 98-001357

Before: Talbot, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), two counts of armed robbery, MCL 750.529; MSA 28.797, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to life imprisonment without the possibility of parole for the murder conviction, along with concurrent prison sentences of fifteen to thirty years for each of the armed robbery convictions, and six to ten years for each of the assault convictions. Additionally, the court imposed a consecutive term of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the court improperly admitted the hearsay testimony of defendant's accomplice. Hearsay consists of an out-of-court statement offered into evidence to prove the truth of the matter asserted. MRE 801(c). Hearsay is generally inadmissible, however the rules of evidence provide certain exceptions. MRE 802. We review the trial court's ultimate decision to admit or exclude evidence for an abuse of discretion, while bearing in mind that the scope of the rules of evidence is a question of law that we address de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The first challenged statement occurred outside of defendant's presence when, according to the testimony of a surviving victim, codefendant Eric Woods essentially stated that he intended to shoot the witness in the head. The trial court admitted this statement as nonhearsay to show that the threat was made and that it put the witness in fear. A threat, "being an act done with words . . . is admissible as nonhearsay." *People v Jones (On Rehearing After Remand)*, 228

Mich App 191, 205; 579 NW2d 82 (1998), modified in part on other grounds 458 Mich 862 (1998). Moreover, the threat was probative of the accomplice's intent,[1] and fell squarely within the exception to the hearsay rule described in MRE 803(3).[2] *People v Brownridge (On Remand)*, 237 Mich App 210, 217; 602 NW2d 584 (1999). We do not disturb the trial court's ruling in this regard.

The second statement was part of an exchange between the accomplice and defendant. The accomplice's question was not hearsay because it contained no assertion capable of being true or false, and was offered only to give meaning to defendant's response. See *Jones, supra* at 205-206. The trial court allowed the admission of defendant's response, "I don't give a fuck," for the limited purpose of showing its impact on the hearer, and so it was not hearsay. We therefore find no error.

Defendant also asserts that the prosecutor's closing argument cited the accomplice's statements for purposes beyond those for which they were admitted. We conclude that any error was harmless. Even if the prosecutor disregarded the limitations that the court placed on the use of the evidence, the statement was admissible under MRE 803(3). Defendant's statement that he did not "give a fuck" was admissible as evidence of his "state of mind" or "mental feeling." MRE 803(3). Further, our review of the record indicates that the prosecutor sought to draw fair inferences from the evidence adduced at trial. The prosecutor's argument, therefore, did not deny defendant a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Finally, defendant contends that the trial court granted his motion to quash the information and was, therefore, without jurisdiction to try him. In light of the explicit record, we view the June 16, 1998, order disposing of defendant's motion to quash the information to contain a mere clerical error. This clerical error did not have the legal effect of granting defendant's motion. MCR 6.435(A). Should it so choose, the trial court may take appropriate

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[1] The prosecution had advanced a theory of accomplice liability. Under the circumstances of this case, the prosecution was obliged to prove: (1) that defendant's accomplice had the intent to kill; and (2) that defendant was aware that his accomplice had this intent. See *People v Carines*, 460 Mich 750, 758-760; 597 NW2d 130 (1999) (accomplice liability for felony murder requires malice and something, such as knowledge of intent, to demonstrate that the killing was not outside the scope of the criminal enterprise); *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995) ("aiders and abettors can be liable for specific intent crimes if they possess the specific intent required of the principal or if they know the principal has that intent").

[2] MRE 803(3) provides that the following is not excluded by the hearsay rule:

> (3) Then Existing Mental, Emotional, or Physical Condition. A statement 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) . . . .

steps to correct the face of the order, but this opinion shall suffice to settle the substance of that order.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper