

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE C. ADAMS,

Defendant-Appellant.

UNPUBLISHED

June 18, 2002

No. 226560

Wayne Circuit Court

LC No. 99-004568

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to three months' to four years' imprisonment for the felonious assault conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant and a codefendant, his brother, stood trial together on charges of felonious assault against the brother's former girlfriend, Kimberly Brown, and her current boyfriend, Danny Simmons. Brown, Simmons and Simmons' nephew all testified that defendant pointed a rifle at them, and that defendant's brother attempted to stab Brown and Simmons. The jury found defendant guilty of felonious assault against Simmons and felony-firearm. With respect to defendant's brother, the jury could not reach a verdict regarding the felonious assault count against Simmons, and found him not guilty of assaulting Brown.

I

Defendant first contends that Brown's missing written statement to the police precluded his counsel from effectively cross examining her, and thus violated his rights to confrontation and cross examination. A defendant is entitled to have produced at trial all evidence bearing on guilt or innocence that is within the prosecutor's control. Where evidence is not produced, the proper considerations are whether (1) suppression was deliberate, (2) the evidence was requested, and (3) in retrospect, the defense could have significantly used the evidence. *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). Absent the intentional suppression of evidence or a showing of bad faith, a loss of evidence that occurs before a defense request for its production does not require reversal. *People v Johnson*, 197 Mich App 362, 364-365; 494 NW2d 873 (1992).

In this case, the record indicates that the entire police file had been lost. Neither defense counsel alleged at trial that any bad faith on the part of the police or prosecutor had been involved in the file's disappearance, and both defense counsel declined the trial court's offer to further question the investigating police officer regarding the missing file. Although defendant suggests that a remand is necessary because the record was unclear as to what was lost or missing, nothing would be gained by a remand where the record is clear that the file was lost. Moreover, as acknowledged by defendant, reversal is not required absent a showing of bad faith or deliberate destruction of the statement. In this case, absolutely no evidence showed that the file was destroyed purposely or in bad faith.

We additionally observe that there is also no evidence that the defense could have made significant use of the missing statement. While defendant argues that Brown's statement *may* have contained information that would have demonstrated her lack of credibility, i.e., if the statement, contrary to Brown's trial testimony, omitted a reference to defendant's possession of a gun, this argument is wholly speculative. Furthermore, "[t]he right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness." *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001). Defendant had the opportunity to extensively cross examine Brown, test her credibility, and have the jury observe her demeanor.

Even assuming that defendant's right to confront Brown was compromised by the missing statement, any error qualifies as harmless. "Constitutional error is not a basis for reversal if the error was harmless beyond a reasonable doubt." *Watson, supra* at 585.

A limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation. However, violations of the right to adequate cross-examination are subject to a harmless-error analysis. Whether such an error is harmless in a particular case depends on a host of factors, including the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. [*People v Kelly*, 231 Mich App 627, 644-645; 588 NW2d 480 (1998).]

See also *Watson, supra*.

Brown was cross examined extensively by counsel for defendant and his brother's attorney. The cross examinations raised issues of Brown's credibility and impeached her using her preliminary examination testimony. Despite assaults on her credibility, the testimony and evidence at trial corroborated Brown's claim that defendant had a gun during the incident. Brown's initial statements to the responding police officer, after flagging him down at a gas station, indicated the involvement of a gun.¹ At trial, Brown, Simmons and his nephew all

¹ At the preliminary examination, Simmons testified that defendant came at him with a gun. At the preliminary examination, Brown was asked questions related to defendant's brother's assault
(continued...)

testified that defendant had a gun. This evidence reflects that the prosecutor's case was based on the testimony of several witnesses to the assault, not on Brown's testimony and credibility alone. Because Brown's testimony was cumulative to that of Simmons and his nephew, we find that the lack of her statement to further test her credibility was harmless.²

II

Defendant next argues that his counsel was ineffective for failing to ensure that the trial court read to the jury an instruction with respect to the missing witness statement. Our review of this issue is limited to errors apparent on the record because no *Ginther*³ hearing was held. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To prevail on a claim of ineffective assistance, a defendant must show that his defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

After the fact of the missing statement was brought to light, defendant's brother's counsel submitted a proposed jury instruction that would have advised the jury that Brown's written statement was lost and that the jury could infer that the statement would have been unfavorable to the prosecution. After the prosecutor objected to the instruction, the trial court invited all of the attorneys to submit memoranda addressing an instruction on the missing statement. The following day, however, the prosecutor, counsel for defendant, and defendant's brother's counsel agreed that no disputes existed regarding the jury instructions and that the court should give the instructions agreed on by the attorneys. No instruction with respect to the missing statement was included.

We find that counsel was not ineffective for failing to pursue an instruction with respect to the missing witness statement. No instruction was warranted given the absence of evidence of any bad faith by the police or prosecutor. *Davis, supra* at 514-515. Because no indication existed that any bad faith conduct had led to the missing file, counsel's decision not to pursue an instruction was not objectively unreasonable. Moreover, defendant cannot demonstrate that but for the failure to pursue the instruction, the outcome of the trial would have been different. As previously discussed, Brown's testimony was not the only evidence that defendant possessed a gun during the incident. To acquit defendant, the jury would have had to disbelieve Simmons and his nephew in addition to Brown. We cannot conclude that an instruction related to Brown's statement would have affected the outcome of defendant's trial. *Stanaway, supra*.

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on her with the knife, but was not asked any questions about defendant or his actions during the incident.

² We reiterate that the argument that the written statement may have weakened Brown's credibility is entirely speculative.

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

III

Defendant further asserts that his counsel rendered ineffective assistance in failing to object to the admission of a Korg brand bag recovered by the police from defendant's brother's house, and because counsel did not move to strike inadmissible hearsay testimony regarding the Korg bag.

We reject defendant's suggestion that his counsel was ineffective for failing to object to the admission of the Korg bag because the record demonstrates that his brother's counsel objected to the bag's admission. Where a ruling obviously affects both codefendants in a case, an objection by only one defense counsel may preserve the issue for his codefendants. *People v Griffin*, 235 Mich App 27, 41 n 4; 597 NW2d 176 (1999). Furthermore, in light of defendant's brother's objection and the trial court's ruling on the admissibility of the bag, defendant's counsel was not required to make a frivolous additional objection to the admissibility of the bag. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

The alleged hearsay testimony regarding the bag was elicited while defendant's counsel cross examined Brown. Defendant's counsel inquired whether the police had retrieved a gun from defendant's brother's house. Brown answered that she did not recall the police finding a gun, but that they found a gun clip and a "bag that the gun should have probably went [sic] in." When defense counsel then attempted to discredit Brown by emphasizing, "So, you don't even know if it was a bag" for the gun, Brown responded that her son had told her "that that's the bag that daddy keeps the gun in." This testimony undeniably constituted hearsay. MRE 801(c). However, counsel's decision not to move to strike the unresponsive hearsay statement does not constitute ineffective assistance. Counsel apparently made a strategic decision to forego an objection because moving to strike the inadmissible testimony would have highlighted it, when the statement otherwise was brief and not repeated. More importantly, defendant cannot demonstrate that but for his counsel's conduct in failing to move to strike the statement, the outcome of the trial would have been different. Whether the Korg bag could have been used for a gun or a music keyboard was examined at length during the responding police officer's testimony. The officer opined that he was sure the bag was used for gun storage. Because the jury had ample evidence that the Korg bag was a gun bag, we conclude that the hearsay response of Brown did not affect the outcome of the trial.

IV

Defendant next contends that his counsel ineffectively failed to object when the responding officer testified concerning the statements Brown and Simmons made to him after they flagged down his police car. This argument has no merit. Defendant's brother objected to the statements as hearsay and the trial court ruled them admissible. Any further objection by defendant would have been frivolous. *Torres, supra*. Accordingly, counsel's conduct was not objectively unreasonable.

Furthermore, defendant suffered no prejudice from the lack of an objection because the trial court properly admitted the statements at issue as excited utterances.

MRE 803(2) permits the admission of statements "relating to a startling event or condition made while the declarant was under the stress of the

excitement caused by the event or condition.” A statement is admissible under this exception if (1) there was a startling event and (2) the resulting statement was made while the declarant was under the excitement caused by that event. While the time that passes between the event and the statement is important in determining whether the declarant was still under the stress of the excitement when the statement was made, the focus of the exception is on the declarant’s “lack of capacity to fabricate, not the lack of time to fabricate.” [*People v Layher*, 238 Mich App 573, 582-583; 607 NW2d 91 (1999), aff’d 464 Mich 756; 631 NW2d 281 (2001).]

The testimony supported that a startling event had occurred and that Brown and Simmons remained under the stress and excitement of the incident at the time they made the challenged statements to the officer. Shortly after the incident, Brown and Simmons flagged down the first police car they saw near a gas station. The officer testified that when Brown and Simmons flagged him down, they appeared excited and hyper. The officer immediately followed them to defendant’s brother’s house, and defendant’s brother testified that the police arrived at his house within five to ten minutes of the incident. Under these circumstances, we cannot conclude that the trial court abused its discretion in admitting the evidence as an excited utterance. *Layher*, *supra* at 582.

V

Defendant also argues that the trial court improperly failed to include within its felonious assault instructions to the jury the definition of a firearm within CJI2d 17.11. This issue is not preserved because defendant neither requested CJI2d 17.11 nor objected to its absence. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). We review this issue for plain error affecting defendant’s substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). We review jury instructions in their entirety to determine if error requiring reversal occurred. Even if the instructions were imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant’s rights. *Id.* at 124.

We initially note that defendant technically has abandoned this issue by failing to explain his position or citing any authority to support his argument that the trial court should have instructed the jury according to CJI2d 17.11. *Kelly*, *supra* at 640-641. Moreover, we find no plain error affecting defendant’s substantial rights. The trial court properly instructed the jury on the charge of felonious assault pursuant to CJI2d 17.09. The court’s failure to define “firearm” within the felonious assault charge was not improper because the definition of firearm was unnecessary. The jury was instructed that the weapon at issue was a rifle. Defendant defended the charge by arguing that he never possessed a rifle and that Brown and Simmons fabricated their stories. Defendant did not set forth as a defense that any weapon he may have possessed was not a “firearm.” We further note that the trial court defined firearm within the context of the felony-firearm charge. Because the instructions as a whole fairly presented the issues and protected defendant’s rights, we conclude that the trial court’s failure to define firearm within the context of the felonious assault charge did not affect the outcome of the case.

VI

Defendant next claims that the trial court failed to properly define firearm when instructing the jury on the felony-firearm charge. We review this issue, which also is unpreserved, for plain error affecting defendant's substantial rights. *Aldrich, supra*.

The trial court instructed the jury that “[a] firearm includes any weapon from which a dangerous object can be short [sic] or propelled by use of explosives, gas or air.” Defendant argues that the trial court should have included the following italicized portion of the definition of “firearm” provided within MCL 8.3t:

The word “firearm”, except as otherwise specifically defined in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, *except any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 calibre by means of spring, gas or air.* [Emphasis added.]

At trial, however, no evidence showed that defendant possessed a BB gun, and he did not defend the charge by arguing that he possessed a weapon that did not qualify as a firearm. Therefore, the trial court's failure to include the italicized language did not affect the outcome of the case. *People v Yarbrough*, 107 Mich App 332, 336-339; 309 NW2d 602 (1981). We conclude that the instructions on the felony-firearm charge, which contained all the requisite elements of the offense, and the court's definition of firearm were adequate under the circumstances.

VII

Defendant lastly argues that the prosecutor committed misconduct by prompting the responding police officer to express his opinion on Simmons' credibility. Because defendant did not object at trial to the prosecutor's alleged misconduct, we review this unpreserved allegation for plain error affecting defendant's substantial rights. *Watson, supra* at 586.

The prosecutor asked the officer what conclusion he reached after he had obtained a description of the knife from Simmons and subsequently discovered a knife near defendant's brother's house. The officer testified to his conclusion that the recovered knife “was the knife that was indeed pulled out. Basically that the information that I gathered was true.” Defendant complains that the question and answer constituted improper vouching for Simmons' credibility.

Brown, Simmons and his nephew all testified before the officer testified. Both defendant and his brother intimated and suggested through their questioning of Brown, Simmons and his nephew that they had fabricated their stories. The prosecutor's direct examination of the officer rehabilitated Simmons' credibility by offering that the information he gave with respect to the knife had proved to be true when the evidence was recovered. The prosecutor did not engage in improper vouching, which occurs when the prosecutor expresses his opinion about a witness' truthfulness or suggests that the government has some special knowledge that a witness will testify truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). The officer did not express his opinion that Simmons was truthful or that defendant was guilty, but merely

commented that after investigating he believed that he had received credible information.⁴ Furthermore, the prosecutor did not argue for a conviction on the basis of the officer's opinions. *People v Moreno*, 112 Mich App 631, 634-636; 317 NW2d 201 (1981). Accordingly, we find no plain error affecting defendant's substantial rights.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Hilda R. Gage

/s/ Patrick M. Meter

⁴ We note that the prosecutor's challenged question regarding the knife related to the charges against his brother, not defendant himself.