

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST LAMAR THOMAS,

Defendant-Appellant.

UNPUBLISHED

May 13, 2004

No. 246796

Wayne Circuit Court

LC No. 02-007765

Before: Saad, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

The victim was shot in a crowded nightclub where various rap artists were performing. The principal witnesses to the shooting were related to or acquainted with the victim. These witnesses gave conflicting accounts of the events that occurred on the evening of the shooting. The prosecutor was able to elicit fear, a threat, and a bribe as a basis for the disparity between the trial testimony and prior accounts by the witnesses. However, the witnesses did not provide specifics regarding any threat or bribe. The defense challenged the credibility of the witnesses, focusing on the different accounts and the relationship to the victim. Furthermore, the defense tried to expand on an altercation the victim had in the nightclub in which the victim threw his drink on another man before the shooting. The defense also elicited testimony that there was a commotion involving groups from two different projects in the nightclub where it appeared that the groups were about to engage in a fight. The defense tried to get witnesses to admit that any arm gesture observed by defendant could be explained as participation in the rap concert. Despite this strategy and attempt to undermine the credibility of the witnesses, defendant was convicted as charged.

Defendant first alleges that a new trial is required because admission of the testimony regarding threats and bribes was improperly admitted where there was no evidence to link

defendant to the threats or bribes. We disagree.¹ Defendant did not object to the prosecutor's questioning of the witnesses on this basis in the trial court and therefore, we review this issue for plain error. Defendant has the burden of establishing that "(1) error occurred, (2), the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

A defendant's threat against a witness is generally admissible because it can demonstrate consciousness of guilt. *People v Scholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). However, before the evidence may be considered, it must be connected to the defendant. That is, the prosecutor must establish that the attempt to suppress evidence was "made at the instigation of the defendant, or with his consent or approval, or at least knowledge or expectation that it had been or would be made." *People v Salsbury*, 134 Mich 537, 569-570; 96 NW 936 (1903).

In the present case, there was no objection to and no attempt to link any alleged threat or bribe to defendant. However, the testimony was not admitted to establish that defendant attempted to threaten or bribe witnesses. Indeed, specific information of any threat or bribe was not admitted at trial. Rather, the evidence was admitted to explain why the witnesses gave prior inconsistent statements. Prior inconsistent statements are generally relevant to impeach a witness' credibility, and inquiry into why the witness made the prior statement is an appropriate means of testing credibility. See *Scholl*, *supra* at 735-376. The probative value of this testimony was not outweighed by the danger of unfair prejudice, MRE 403, where the information was used to explain the disparity in the witnesses' testimony. Moreover, defense counsel also questioned the witnesses regarding any threat or bribe and alleged that specifics could not be provided because the threat or bribe never occurred. Defendant has failed to establish plain error arising from the admission of this testimony. *Jones*, *supra*.

Defendant next argues that the prosecutor improperly introduced hearsay testimony to establish that he threatened the victim with a gun approximately one year before the charged offense. Because defendant did not object to this testimony at trial, we review this issue for plain error affecting defendant's substantial rights. *Jones*, *supra*. Defendant has failed to establish that the challenged testimony was plain error.

It is not apparent that the prosecutor sought to introduce hearsay evidence in order to establish that defendant had previously threatened the victim. Rather, the prosecutor elicited testimony from a witness that, shortly before the shooting, the victim said, "I should whip his ass because he pulled a gun on me." The victim made this statement while looking angrily at defendant, and defendant looked back at the victim. A victim's statement regarding his or her state of mind may be relevant and admissible without offending the rules against hearsay. See MRE 803(3), *People v White*, 401 Mich 482, 503-504; 257 NW2d 912 (1977), and *People v Ortiz*, 249 Mich App 297, 307-310; 642 NW2d 417 (2001). Because the testimony about the victim's statement shed light on the victim's state of mind, and was part of the circumstances surrounding the shooting incident itself, we reject defendant's claim that its admission

¹ To the extent that defendant alleges evidentiary error based on testimony elicited by defense counsel, the issue is waived. *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003).

constituted error, plain or otherwise. Under the rule of completeness, a jury is entitled to hear the complete story of what occurred. *Scholl, supra* at 742.²

At best, the record raises an issue concerning whether defense counsel should have requested a limiting instruction so as to preclude the jury from considering the evidence about the victim's statement for the truth of the underlying facts, namely, that defendant had pulled a gun on the victim. *White, supra* at 505. We note, however, that defense counsel, on cross-examination of Williams, elicited that the gun incident occurred approximately a year before the charged offense. To the extent that defendant suggests that the testimony elicited by defense counsel requires reversal, we deem this issue waived. See *Jones, supra*.

We have nonetheless considered defendant's claim that the prosecutor erroneously used the evidence elicited by defense counsel as substantive evidence of the matter asserted, namely, that there was a prior situation in which defendant pulled a gun on the victim. "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Examined as whole, the prosecutor's closing remarks did not ask the jury to draw any inference from Williams' testimony other than that defendant and the victim had a "beef" and that the victim was upset about it on the night of the shooting. Other evidence was presented establishing that defendant and the victim had a "beef" of some sort. Regardless of whether the reason for the dispute between defendant and the victim was motivated by an earlier gun incident or originated over a woman, as indicated in defense counsel's closing argument, or was caused by some other source of disagreement, the witnesses' testimony about defendant shooting the victim on the dance floor after their eye-to-eye contact in the bar area, if believed, provided substantial evidence that defendant shot the victim with premeditation and deliberation. Because defendant has not established that the prosecutor committed an outcome-determinative error when commenting on the testimony, this issue does not afford a basis for relief. *Jones, supra*.

Finally, defendant alleges that defense counsel's failure to object to the testimony elicited by the prosecutor about the threats and bribery attempts, and defense counsel's own active undertaking to elicit some of this testimony, constituted ineffective assistance of counsel. We disagree and also reject defendant's claim that this case should be remanded for a *Ginther*³ hearing regarding this issue. Defendant has not established that further elucidation of facts might advance his position that he was denied the effective assistance of counsel. *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995).

Considering defendant's ineffective assistance of counsel claim in the context of the testimony underlying defendant's first two issues, including the testimony elicited by defense counsel, we find no basis for concluding that defense counsel was ineffective. In each instance,

² Additionally, proof of motive in a prosecution for murder, although not essential, is always relevant, and evidence of other acts to prove motive is admissible under MRE 404(b)(1). *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999).

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

defendant has failed to show either the requisite deficient performance by defense counsel or the requisite prejudice to succeed on a claim of ineffective assistance of counsel. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant has not shown any actual errors, singularly or cumulatively, that warrant relief. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002).

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Karen M. Fort Hood