

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MARCELLO LAMONT LEWIS,

Defendant-Appellant.

UNPUBLISHED
December 28, 2010

No. 293485
Genesee Circuit Court
LC No. 08-023773-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

TANIKA NICOLE LOVE,

Defendant-Appellant.

No. 293810
Genesee Circuit Court
LC No. 08-023774-FC

Before: DONOFRIO, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Defendants Marcello Lewis and Tanika Love were tried jointly, before separate juries, on charges stemming from the shooting death of Latonya Larry. Defendant Lewis was convicted of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, carjacking, MCL 750.529a, felon in possession of a firearm, MCL 750.224f, illegal use of a financial transaction device, MCL 750.157q, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant Love was convicted of first-degree felony murder, armed robbery, carjacking, and illegal use of a financial transaction device. Defendant Lewis appeals as of right in Docket No. 293485, and defendant Love appeals as of right in Docket No. 293810. We consolidated the appeals and because the record does not establish the assignments of error by either defendant, we affirm in both appeals.

DOCKET NO. 293485 - DEFENDANT LEWIS

I. OTHER ACTS EVIDENCE

Lewis first argues that he was denied his due process right to a fair trial when the trial court admitted prejudicial evidence of other crimes and bad acts, contrary to MRE 404(b)(1). Error may not be predicated on the admission of evidence unless a substantial right is affected and a timely objection or motion to strike is made, stating the specific ground for objection if it is not apparent from the context. MRE 103(a)(1). Further, the grounds for objection at trial and the basis for the challenge on appeal must be the same. *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005). During trial, Lewis either failed to object to the admission of the challenged evidence altogether or failed to object on the basis of MRE 404(b). Thus, his arguments are not preserved for this Court's review.

This Court reviews unpreserved issues for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Reversal is warranted only if the error resulted in conviction despite the defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

MRE 404(b)(1) governs the admission of prior acts evidence. Whether other acts evidence is admissible under MRE 404(b)(1) depends on four factors. First, the evidence must be offered for a permissible purpose, i.e., one other than showing character or a propensity to commit the charged crime. *Knox*, 469 Mich at 509. Second, the evidence must be relevant under MRE 402. *Id.* Third, unfair prejudice must not substantially outweigh the probative value of the evidence under MRE 403. *Id.* Fourth, the trial court, if requested, may provide a limiting instruction to the jury under MRE 105. *Id.*

Lewis first challenges Love's testimony that Sergeant Michael Angus had told her that Lewis was a suspect in a different homicide. Lewis argues that this testimony was not admissible for a proper purpose under MRE 404(b)(1) and was offered for the sole purpose of showing that he is a bad person and acted in conformity with his character. The prosecutor's theory was that Love and Lewis conspired to kill Latonya Larry and remove her belongings from her house. Love's defense was that she was unaware of any such plan and was merely present to help Lewis move his belongings from the home in exchange for \$100 because he was breaking up with Larry. Love's testimony that she was unaware that Lewis was a suspect in another homicide tended to support her theory that she did not know of Lewis's intent to kill Larry and had no reason to suspect such an intent. Further, the testimony buttressed her claim that she did not believe that Lewis was serious when he said, in reference to Larry, "the bitch gonna make me kill her." Love testified that Lewis was angry when he made the statement and was merely venting. Accordingly, Love's testimony was admissible under MRE 404(b) to show her motive, intent, and knowledge on the night of the killing.

Lewis also challenges Love's direct examination testimony regarding her knowledge, at the time of the offense, whether Lewis had ever threatened the mother of his children. Lewis objected to the question on the basis of relevance and Love's counsel responded that the question was relevant to Love's state of mind. As discussed previously, testimony establishing Love's state of mind was admissible under MRE 404(b) to show her motive, intent, and knowledge on the night in question. In any event, although Love testified that she heard that Lewis had threatened the mother of his children, she admitted that she did not actually hear Lewis make any

threats. The trial court instructed the jury that Love's testimony regarding statements attributable to third persons other than Lewis was not evidence and could not be considered as evidence.

Lewis next challenges Love's testimony that Larry was not the only person who Lewis had threatened to kill. During Love's direct examination, counsel questioned her regarding Lewis's statement, "The bitch gonna make me kill her." Love testified that Larry was not the only person about whom Lewis had made such a statement and that the statement had no bearing on whether she believed that Lewis actually intended to kill Larry. Again, the testimony was admissible to show Love's motive, knowledge, and intent on the night of the offense. The testimony supported Love's theory that although Lewis had made the statement, she did not believe that he was serious and did not interpret the statement as evidencing an intent to kill.

Lewis also challenges Love's testimony that she had never seen Lewis without a gun and that he owned more than one gun. This testimony also supported Love's theory that she was unaware of Lewis's intent to kill Larry. Love claimed that she did not think anything of the fact that Lewis carried a gun "because where we live every—a lot of people carry guns[.]" She further testified that "where we hang at everybody—everybody in the hood—well, in the neighborhood we hang with; all the dudes over there carry guns." Thus, the testimony was not offered to show that Lewis was a bad person, but rather to show Love's knowledge and intent on the night of the killing, including her lack of knowledge regarding Lewis's intent. Thus, the testimony was admissible under MRE 404(b).

Finally, Lewis challenges the admissibility of Love's testimony that he did not have a job but always had money. Lewis misstates the record. Although Love initially testified that Lewis did not have a job, after Lewis's attorney objected, she admitted that she was unaware whether he had a job. Accordingly, the record does not support Lewis's claim of error.

II. RIGHT TO PRESENT A DEFENSE

Lewis next argues that the trial court denied him his right to present a defense when it excluded a recording of Larry's 911 call to the police 18 days before the charged offense. We review for an abuse of discretion a trial court's decision whether to admit evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

"A defendant has a constitutionally guaranteed right to present a defense[.]" *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). This right is not absolute, however, and the defendant must still comply with established rules of procedure and evidence. *Id.* Generally, all relevant evidence is admissible, and irrelevant evidence is inadmissible. MRE 402; *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

The trial court correctly determined that the 911 tape was not relevant to the proceeding. Lewis argued that only circumstantial evidence connected him to Larry's death and that he was entitled to offer an alternative theory to explain the events that occurred that night. Lewis

averred that Larry identified Earthly Knight as the shooter on the 911 tape. As the trial court determined, the shooting incident involving Knight occurred 18 days before Larry's death and was not relevant to the proceeding without some evidence connecting Knight to the events that occurred on the night of the charged offense. Absent some linkage, the theory that Knight was responsible for Larry's death was based on mere speculation.

In any event, Lewis was able to present the defense without the 911 tape. Defense counsel questioned witnesses about Knight during trial and elicited testimony that Knight was Larry's former boyfriend. Counsel's questioning also revealed that Knight and Lewis "was beefing in the streets" and "got into it[.]" Sergeant Angus showed Larry's brother, Carantis Lane, a photographic lineup containing Knight's photo and Lane identified Knight. Police officers were informed that Larry had filed a police report against Knight and that Knight had previously fired gunshots in front of her house. As a result of hearing Knight's name at the scene, Angus attempted to locate Knight, but was unable to do so. After collecting evidence and conducting interviews, Angus determined that it was not necessary to locate Knight. Thus, Lewis was not denied an opportunity to present his alternative theory to the jury.

In any case, the theory that Knight was responsible for Larry's death conflicted with Lewis's own trial testimony that Love admitted committing the offense. Lewis testified that Love told him that she went back to Larry's house and killed her after forcing her to open a safe and discovering no money inside. Thus, notwithstanding that Lewis was able to present the alternative theory to the jury without the 911 tape, it conflicted with his own testimony.

III. LATE ENDORSEMENT OF WITNESS

Lewis next argues that he was denied a fair trial and his right to confrontation when the prosecution was permitted to call Susan Young as a witness and failed to establish good cause for its late endorsement of Young. We review for an abuse of discretion a trial court's decision whether to allow a late endorsement. *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992).

MCL 767.40a provides, in relevant part:

(1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.

(2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.

(3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.

(4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

Lewis complains that the prosecutor failed to disclose Young as a witness at least 30 days before trial, and contends that she failed to present good cause for such failure.

As MCL 767.40a(1) indicates, a prosecutor is required to provide notice of only known witnesses. See also *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). The record shows that the prosecutor was unaware of Young until counsel for Lewis reviewed Sergeant Angus's file on the eve of trial and discovered Young's November 25, 2008, statement to Angus. The prosecutor's late discovery of Young was sufficient to establish good cause for her late endorsement. See *Burwick*, 450 Mich at 289 (belated discovery of witness constituted good cause); *Canter*, 197 Mich App at 563 (witness unidentified until middle of trial constituted good cause). As a result of the late discovery, the trial court adjourned trial for one week to allow the attorneys to prepare for Young's testimony. During that time, the court held a hearing at which counsel for Lewis had an opportunity to cross-examine Young and Angus. Moreover, Young did not testify until June 18, 2009, the fifth day of trial, and the record fails to indicate that counsel for Lewis was unprepared for her testimony. Thus, the trial court did not abuse its discretion by allowing the prosecutor's late endorsement of Young.

IV. FAILURE TO DISCLOSE YOUNG'S PRESENTENCE REPORT

Lewis next argues that the trial court denied him his right of confrontation and to impeach Young's testimony by prohibiting him from reviewing Young's presentence investigation report (PSIR). "A trial court's decision regarding discovery is reviewed for an abuse of discretion." *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003).

MCL 791.229 provides:

All records and reports of investigations made by a probation officer, and all case histories of probationers shall be privileged or confidential communications not open to public inspection. Judges and probation officers shall have access to the records, reports, and case histories. The probation officer, the assistant director of probation, or the assistant director's representative shall permit the attorney general, the auditor general, and law enforcement agencies to have access to the records, reports, and case histories and shall permit designated representatives of a private vendor that operates a youth correctional facility under section 20g to have access to the records, reports, and case histories pertaining to prisoners assigned to the youth correctional facility. The relation of confidence between the probation officer and probationer or defendant under investigation shall remain inviolate.

This Court has recognized that the language of this provision is absolute and bars discovery of a PSIR. *Peters v Bay Fresh Start, Inc*, 161 Mich App 491, 496, 498; 411 NW2d 463 (1987). This Court has also recognized, however, that "preserving the confidentiality of presentence reports, may directly conflict with the equally protected rights of confrontation and impeachment through

prior inconsistent statements.” *People v Rohn*, 98 Mich App 593, 599; 296 NW2d 315 (1980), overruled in part on other grounds *People v Perry*, 460 Mich 55, 64; 594 NW2d 477 (1999). Where such a conflict exists, “confidentiality must give way to other stronger interests.” *Id.* Although impeachment purposes outweigh the need for confidentiality of a PSIR, this rule does not allow a defendant wholesale access to another’s PSIR. *Id.* at 600. Rather,

when records of prior inconsistent statements of witnesses are necessary for effective cross-examination, they should be made available to the defendant. An in camera inspection procedure should be utilized by the court to limit disclosure to those statements materially inconsistent with the witness’s testimony. [*Id.*]

Lewis contends that review of Young’s PSIR was necessary to effectively cross-examine her and the impeachment of her testimony was crucial to his defense. He does not indicate the information purportedly contained in the PSIR that would have permitted him to impeach Young. Lewis argued below that review was necessary to obtain information regarding a possible sentence agreement or benefit in exchange for Young’s testimony.

MCR 6.201(C) provides, in relevant part:

(1) Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant’s right against self-incrimination, except as provided in subrule (2).

(2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.

Here, despite that Lewis failed to demonstrate a good-faith belief, grounded in articulable fact, that there existed a reasonable probability that the PSIR would contain material information, the trial court conducted an in camera review of the PSIR. Thereafter, the trial court stated:

There’s nothing in this report that’s suggests [sic] a conversation between Ms. Young and the prosecutor. What this pre-sentence report is, it’s a basically a document that contains the background history of Mrs. [sic] Young for purposes of the Judge in a sentencing proceeding. So it has the basic information. There’s nothing in here that would describe conversations with the prosecutor. It may, sometimes it [sic] will have in here whether or not there was any offer of sentence agreement that was entered into between either the Judge or a—or a—or [sic] a charge agreement that might be between the prosecutor and the defendant. But outside of that, it generally does not provide any other information other than that. And when I read this report, it is consistent with all the reports that I’ve read. There is just nothing in here that I see that addresses any private discussions between Mrs. Young and the prosecutor, any indication of any agreements by the prosecutor to do anything in particular for Mrs. Young. None of that is in here. You know, it does lay out her bond history, it does make reference that she is on

parole. Things of that nature are contained in the report but they are all factual information [sic] that has nothing to do with any agreements or any persuasion or anything the prosecution may have applies, [sic] for Mrs. Young's testimony. It's just not here.

Thus, the record shows that the PSIR did not contain the information that Lewis sought. The trial court did not abuse its discretion by denying Lewis's request to review Young's PSIR.

DOCKET NO. 293810 - DEFENDANT LOVE

I. GREAT WEIGHT OF THE EVIDENCE

In Docket No. 293810, Love first argues that the verdict is against the great weight of the evidence because of a trial irregularity based on Sergeant Angus's misrepresentation of evidence. Love preserved her argument for this Court's review by moving for a new trial on this basis in the trial court. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). We review the trial court's decision on the motion for an abuse of discretion. *Id.*

A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Questions of witness credibility and conflicting testimony are generally insufficient to grant a new trial, and, absent exceptional circumstances, such issues should be left to the trier of fact. *Unger*, 278 Mich App at 232.

Love argues that the verdict is against the great weight of the evidence because Sergeant Angus misrepresented that she made an admission during her statement to him. During trial, Angus maintained that Love admitted in her videotaped statement that she went outside at Lewis's direction to determine whether she could hear more gunshots. Although Angus was certain that Love made the admission, he was unable to find the location of the purported admission on the videotape. Love contends that Angus's testimony was the only evidence showing that she aided and abetted the killing and that, without such testimony, the prosecutor would have been unable to show that she knew of Lewis's intent and performed some act or encouraged him to commit the crime.

A transcript of Love's statement to Angus discloses that several portions of the statement were "inaudible." Nowhere in the transcript does Love state that she went outside at Lewis's direction to listen for gunshots. Although Love admitted several times that she went outside and heard a gunshot, she did not state that she went outside at Lewis's direction to listen for a gunshot. In addition, a review of the DVD containing Love's statement to Angus reveals that many portions of the statement are indecipherable. In any event, despite the DVD's lack of clarity, the verdict is not against the great weight of the evidence such that a miscarriage of justice would result if it is allowed to stand. *Musser*, 259 Mich App at 218-219.

As defense counsel stated during trial, whether Love made the admission on the video recording was a matter for the jury to determine. The video was admitted as evidence and the jury was permitted to view the video during its deliberations. Thus, the jury was able to

determine for itself whether Love made the admission. Although many portions of the video are indecipherable, this issue was a question of fact for the jury to determine.

Moreover, contrary to Love's argument, Angus's testimony was not the only evidence showing that Love aided and abetted Larry's death. Young testified that she heard Love admit that she was in the basement during the killing. In a letter that Young wrote to Angus, Young maintained that both Love and Lewis planned the killing and that Lewis did not plan it on his own as Love had led the police to believe. Young claimed that Love was not an innocent bystander. Young's credibility was a question for the jury. *Unger*, 278 Mich App at 232. In addition, Love told Angus three different versions of events. Love's changed stories in light of the evidence connecting her to the crime bore on her credibility as well, which was for the jury to determine. The evidence does not preponderate so heavily against the verdict that a miscarriage of justice would result if the verdict stands. *Musser*, 259 Mich App at 218-219.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Love next argues that she was denied the effective assistance of counsel when defense counsel failed to take steps to show that her videotaped statement did not contain the purported admission to Sergeant Angus. Love preserved this issue for our review by moving for a new trial on this basis in the trial court. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's factual findings for clear error and questions of constitutional law de novo. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived her of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorner*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorner*, 262 Mich App at 75-76.

Love argues that counsel was ineffective for failing to take measures to refute Angus's testimony that Love admitted going outside Larry's home at Lewis's direction to determine if she could hear gunshots. Love contends that counsel should have resolved this dispute at the preliminary examination, should have further challenged Angus during trial to identify the location of the admission on the videotape, and should have had the videotaped statement transcribed to prove to the jury that Love did not make the admission.

Although trial counsel has submitted an affidavit conceding his purported ineffectiveness, the videotape was admitted as evidence and the jurors were permitted to review the recording during their deliberations. Thus, they were able to determine firsthand whether Love made the admission. Further, when Love was afforded the opportunity at the preliminary examination to explore in depth the challenged statement with Sergeant Angus, she declined, preferring to explore the issue in the circuit court. More importantly, Love is unable to show prejudice

resulting from counsel's alleged errors. As previously discussed, other evidence established Love's involvement in the plan to kill Larry and the circumstantial evidence showed that she willingly participated in the plan rather than participated only because she feared for her life. Thus, Love has not demonstrated a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *Toma*, 462 Mich at 302-303; *Moorer*, 262 Mich App at 75-76.

III. SANCTION FOR DISCOVERY VIOLATIONS

Love next argues that she was denied a fair trial when the trial court refused to exclude Young's and Lewis's testimony as a sanction for discovery violations. We review for an abuse of discretion a trial court's decision whether to admit evidence during trial. *Katt*, 468 Mich at 278. We also review for an abuse of discretion a trial court's determination regarding the appropriate remedy for a discovery violation. MCR 6.201(J); *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002).

"There is no general constitutional right to discovery in a criminal case." *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). "When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance." *Banks*, 249 Mich App at 252. MCR 6.201(J) allows a trial court to grant a continuance or prohibit the introduction of the undisclosed evidence, among other remedies. The exclusion of evidence is a severe sanction and should be imposed only in egregious circumstances. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 455 n 10; 722 NW2d 254 (2006).

The trial court properly exercised its discretion and granted a one-week continuance as a result of the late notice regarding Young and Lewis. The record shows that the prosecutor was unaware of Young until counsel for Lewis reviewed Sergeant Angus's file on the eve of trial and discovered Young's November 25, 2008, statement to Angus. The prosecutor was also unaware of Lewis's second statement to Angus until the Friday preceding Monday, June 1, 2009, which was the day before trial. During the one-week continuance, the trial court conducted a hearing regarding the admissibility of Young's testimony at which counsel for Love cross-examined Young and Angus. Further, as a result of the prosecutor's intent to introduce Young's testimony, the trial court granted defendants' request to admit Latonya Kelly's contrary testimony. Young did not testify until June 18, 2009, the fifth day of trial, and Lewis did not testify until June 25, 2009, the ninth day of trial. Thus, Love had ample time to prepare for their testimony. Although Love argues that a one-week continuance was insufficient to cure the prejudice of the late notices, she fails to indicate what she would have done differently had she been granted a longer continuance. Accordingly, the trial court did not abuse its discretion by granting a continuance rather than excluding Young's and Lewis's testimony.

IV. SEPARATE TRIALS

Love next argues that the trial court abused its discretion by denying her motion for separate trials. We review for an abuse of discretion a trial court's decision regarding severing the trials of multiple defendants. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994).

MCR 6.121(C) provides:

On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.

"Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Hana*, 447 Mich at 346. Absent such a showing or an indication that the requisite prejudice actually occurred at trial, this Court will affirm a trial court's decision denying a motion for severance. *Id.* at 346-347. The use of separate juries is a partial form of severance that allays the risk of prejudice. *Id.* at 351. We scrutinize the dual-jury procedure under the same standard employed in reviewing a decision on a motion for severance, i.e., we must determine whether the procedure prejudiced the defendant's substantial rights. *Id.* at 351-352. "The precise issue is whether there was prejudice to substantial rights after the dual-jury system was employed." *Id.* at 352.

The trial court properly determined that this case is on all fours with *Hana*. The trial procedure utilized in *People v Gallina* and *People v Rode*, companion cases to *Hana*, was identical in all respects to that utilized in the instant case. In *Gallina* and *Rode*, the defendants were tried jointly with separate juries. They were together with friends in a Chevrolet Camaro drag racing with another car. At least one occupant of the Camaro fired gunshots at the other car, killing an occupant of that vehicle. At trial, each defendant denied firing the fatal shot and claimed that the other defendant had fired over the roof of the car, resulting in the victim's death. *Hana*, 447 Mich at 334-336. Both defendants were convicted of second-degree murder. *Id.* at 337.

While the *Hana* Court recognized that a joint trial involving codefendants with antagonistic defenses may have serious negative implications for an accused, it nevertheless held that the standard for severance is not lessened in such a situation. *Hana*, 447 Mich at 347. Quoting *Zafiro v United States*, 506 US 534, 540; 113 S Ct 933; 122 L Ed 2d 317, 326 (1993), the Court stated:

[I]t is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials. . . . While "[a]n important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence," . . . a fair trial does not include the right to exclude relevant and competent evidence. A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant. [*Hana*, 447 Mich at 350.]

In *Rode* and *Gallina*, the defendants testified after the prosecution rested. When *Rode* was called to testify, the trial court granted the prosecutor's request to reopen his proofs in the *Gallina* case to allow the *Gallina* jury to hear *Rode*'s testimony. *Hana*, 447 Mich at 357. The

same procedure was followed with respect to Gallina's testimony. *Id.* at 358. Our Supreme Court stated that "severance should be granted 'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" *Id.* at 359-360, quoting *Zafiro*, 122 L Ed 2d at 325. The Court held that the defendants failed to identify which trial rights were violated or how the juries' determinations were unreliable. *Id.* at 360. The Court observed, "[t]here is no indication that either defendant was restricted in his presentation of a defense, nor was either jury exposed to evidence that would have been barred from their considerations in separate trials." *Id.*

Love attempts to distinguish this case from *Gallina* and *Rode* by arguing that her jury was exposed to evidence that, in practical terms, would have been barred had she and Lewis been tried separately because each defendant would have asserted his or her Fifth Amendment right to silence at the other's trial. Our Supreme Court rejected this argument, stating that it could not employ "'what if' speculation as the basis for a severance rule." *Hana*, 447 Mich at 361. The Court noted that if it were to do so, prejudice would always be imagined. *Id.* The Court further stated:

[W]hen each defendant testified before his own jury, he thereby waived his Fifth Amendment rights regarding the events in question. Thereafter, it became permissible for the prosecution to call that defendant as a witness in the trial of the codefendant. [*Id.*]

Thus, the Court recognized that all of the evidence admitted at the dual trial would have been available for use at both of the defendants' separate trials. *Id.* at 362. Finally, the Court stated that "'a fair trial does not include the right to exclude relevant and competent evidence.'" *Id.*, quoting *Zafiro*, 122 L Ed 2d at 326.

The procedure utilized in this case is identical to that used in the *Gallina* and *Rode* trial and mandates the same result. Contrary to Love's argument, evidence was not presented to her jury that would have been excluded if she were tried separately.¹ Love's theory that both she and Lewis would have exercised their Fifth Amendment rights if called to testify at the other's trial is mere speculation and insufficient to require severance. *Hana*, 447 Mich at 361. Further, Love fails to indicate the specific trial right that was allegedly violated and there is no indication that she was restricted in her presentation of a defense. See *id.* at 360. Accordingly, the trial court properly denied her motion for separate trials.

CONCLUSION

¹ Evidence involving Lewis's second statement to Sergeant Angus, implicating Love, was not presented before Love's jury. The same procedure was utilized in *Rode* and *Gallina*. *Hana*, 447 Mich at 358.

Defendant Lewis has not established error requiring reversal. Love's testimony was admissible under MRE 404(b) and Lewis misstated Love's testimony regarding his employment. The trial court did not abuse its discretion by excluding the 911 tape and Lewis was not denied his right to present a defense. Because the prosecutor was unaware of Young until the eve of trial and the trial court granted a one-week adjournment to allow the parties to prepare for her testimony, the court did not abuse its discretion by allowing the late endorsement of Young. Finally, the trial court did not abuse its discretion by denying Lewis's request to review Young's PSIR. Lewis failed to demonstrate a good-faith belief, grounded in articulable fact, that there existed a reasonable probability that the PSIR was likely to contain material information. Regardless, the trial court conducted an in camera review and reported that the PSIR did not contain the information sought.

Defendant Love has not established error requiring reversal. The verdict is not against the great weight of the evidence. Whether Love admitted that she went outside for the purpose of listening for a gunshot was a jury question and the jury was able to review Love's videotaped statement. In any event, other evidence showed that Love aided and abetted Larry's Murder. Defense counsel did not render ineffective assistance at trial, and, in any event, Love has failed to establish prejudice resulting from counsel's alleged errors. The trial court did not abuse its discretion by granting a continuance rather than excluding Young's and Lewis's testimony as a discovery sanction. Finally, the trial court did not abuse its discretion by denying Love's motion for separate trials.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald