STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2013
v DEVON RAYMON MATTHEWS, Defendant-Appellant.	No. 308369 Wayne Circuit Court LC No. 11-008423-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DARIUS REECE THERIOT, Defendant-Appellant.	No. 308640 Wayne Circuit Court LC No. 11-008423-FC

Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

This matter involves a consolidated criminal appeal from the circuit court. In Docket No. 308369, defendant Devon Matthews appeals as of right from his bench trial convictions of one count of second-degree murder, MCL 750.317, three counts of assault with intent to do great bodily harm less than murder, MCL 750.84(1)(a), one count of felon in possession of a firearm (felon in possession), MCL 750.224f, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent prison terms of 30 to 35 years for the second-degree-murder conviction, 5 to 10 years for each of the assault-with-intent-to-do-great-bodily-harm convictions, and 2 to 5 years for the felon-in-possession conviction, and to a consecutive prison term of 2 years for the felony-firearm conviction. We conclude that on this record there is no error to review.

In Docket No. 308640, defendant Darius Theriot appeals as of right from his jury trial convictions of one count of second-degree murder, MCL 750.317, three counts of assault with intent to commit murder, MCL 750.83, one count of assault of a pregnant individual causing

death to fetus, MCL 750.90b(a), and one count of felony-firearm, MCL 750.227b. He was sentenced as a second-offense habitual offender to concurrent prison terms of 45 to 80 years for the second-degree-murder conviction and each of the assault-with-intent-to-murder-convictions, and 10 to 15 years for the assault-causing-death-to-fetus conviction, and to a consecutive prison term of 2 years for the felony-firearm conviction. We affirm defendant Theriot's convictions, but we vacate his sentence and remand for resentencing.

This case arises from a drive by shooting. Defendant Theriot drove the vehicle from which defendant Matthews shot an AK-47, killing a pregnant woman and injuring three others.

I. DOCKET NO. 308369

Defendant Matthews argues that the information in the presentence investigation report (PSIR) did not support a score of 15 points for OV 5 because there was no evidence that "[s]erious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a). However, defendant Matthews did not comply with this Court's request for the PSIR. As the appellant, defendant Matthews has "the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated." *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). On this record, there is no error to review. Accordingly, this Court cannot conclude that the trial court clearly erred in determining that the victim's mother suffered serious psychological injury.

II. DOCKET NO. 308640

A. NONASSERTIVE CONDUCT

First, defendant Theriot argues that the trial court abused its discretion by prohibiting defendant Theriot from asking any of the witnesses about his demeanor immediately after the shooting. We agree, but because the error was harmless, we find that defendant is not entitled to relief.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). However, to the extent defendant Theriot argues that the trial court's ruling violated his constitutional right to present a defense, that argument is unpreserved, as an objection based on the rules of evidence does not preserve the issue of whether the exclusion violated a constitutional right, and thus, we review it for plain error affecting substantial rights. See *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003)

Defendant Theriot argues that any testimony regarding his nonverbal behavior and demeanor was admissible as nonassertive conduct. Defendant Theriot argues that his reaction to the shooting, whether by his sudden silence, erratic driving, or body language, was not a statement for hearsay purposes.[1] Defendant Theriot also argues that his statement "what the hell

[1] Defendant Theriot asserts that he was prohibited from cross-examining a witness about whether defendant Theriot exhibited anger with defendant Matthews after the shooting, as opposed to

was that?" made immediately after the shooting was not hearsay because it was not assertive or offered for the truth of the matter asserted, and thus was admissible. At trial, the trial court prohibited defendant Theriot from admitting into evidence any witnesses' observations of his reaction to the shooting. The trial court determined that evidence of defendant Theriot's reaction to the shooting contained an implied assertion, making it hearsay.

MRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a). Quoting 2 McCormick on Evidence (4th ed), § 250, pp 110-111, this Court explained the rationale for excluding nonassertive conduct from the definition of hearsay:

> People do not, prior to raising their umbrellas, say to themselves in soliloquy form, "It is raining," nor does the motorist go forward on the green light only after making an inward assertion, "The light is green." The conduct offered in the one instance to prove it was raining and in the other that the light was green, involves no intent to communicate the act sought to be proved, and it was recognized long ago that purposeful deception is less likely in the absence of intent to communicate. [*People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 214; 579 NW2d 82, mod in part on other grounds 458 Mich 862 (1998).]

The key determination is whether an assertion was intended. *People v Watts*, 145 Mich App 760, 762; 378 NW2d 787 (1985). Behavior that is "so patently involuntary" such as the "spontaneous act of crying" cannot be treated as an assertion. *People v Davis*, 139 Mich App 811, 813; 363 NW2d 35 (1984).

Reactions to a shooting are likely spontaneous outbursts, and thus, "so patently involuntary" that they could not be intended assertions. Defendant Theriot's display of surprise, anger, silence, and erratic driving were likely involuntary reactions to the shooting, and they do not indicate that he had an "intent to communicate the act sought to be proved." Thus, defendant Theriot should have been permitted to ask questions regarding his demeanor following the shooting, so long as the conduct involved was involuntary and spontaneous, and not intended as an assertion. Accordingly, the trial court erred in this regard.

Likewise, defendant Theriot's question "what the hell was that?" made after the shooting was not hearsay. As stated, to qualify as hearsay, the "statement" must be an "assertion". Defendant Theriot's question is incapable of being true or false, and thus, is not an assertion.

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nonchalance. However, in his argument section, defendant Theriot fails to specifically address how the trial court erred in this regard. Thus, to the extent that defendant Theriot argues that the trial court erred by prohibiting him from cross-examining the witness about defendant Theriot's anger, this issue is abandoned. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.").

Jones (On Rehearing After Remand), 228 Mich App at 204-205; see also *United States v Thomas*, 451 F3d 543, 548 (CA 8, 2006) (stating that "[q]uestions and commands generally are not intended assertions, and therefore cannot constitute hearsay"). Even if the question could qualify as an assertion, the question was not offered to prove the matter asserted, i.e., what something was. Rather, the question was offered to show that defendant Theriot was surprised the shooting occurred. Although, as the trial court suggested, there may be an implied assertion that defendant Theriot is innocent of being an aider and abettor because he did not know there was going to be a shooting, this Court has stated that implied assertions are not hearsay. *Jones (On Rehearing After Remand)*, 228 Mich App at 225-226. Thus, the trial court erred in excluding this evidence.[2]

However, although the trial court erred, in light of the overwhelming evidence against defendant Theriot, the error was harmless, and thus, he is not entitled to relief. MCR 2.613(A). Defendant Theriot admitted to getting the gun, which he illegally owned, of his own free will. One witness testified that defendant Theriot made the decisions on where to go that night, and he intentionally drove his truck to the house and slowed down when he drove by it. Defendant Theriot was quoted as saying, "don't worry about it, we'll get them later, we'll take care of it in our own time," after four men associated with the victims had confronted defendant Theriot and his friends. After the shooting, defendant Theriot wiped the gun clean of prints, and he was the last person seen with the gun. He also urged witnesses not to snitch and to lie for him. Further, given that the jury heard testimony that defendant Theriot was scared after the shooting, particularly because he stepped on the gas and jerked the truck, it is unlikely that hearing he was surprised would have changed the verdict.

Additionally, defendant Theriot argues the trial court's rulings denied him his right to present a defense. "[A] criminal defendant has a state and federal constitutional right to present a defense," but this right is not absolute. *People v Hayes*, 421 Mich 271, 278-279; 364 NW2d 635 (1984). The Sixth Amendment only grants criminal defendants "'a *meaningful* opportunity to present a complete defense." *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (quotation marks and citation omitted) (emphasis added). As noted, the trial court's evidentiary error was harmless, and as such, it did not rise to the level of a constitutional deprivation. Defendant Theriot was not precluded from presenting a complete defense because there was testimony showing that he was scared after the shooting based on how he sped off and jerked the truck. Defendant Theriot was also able to ask the witnesses whether anyone encouraged defendant Theriot to get the gun and drive by the house, and whether defendant

[2] Plaintiff argues that defendant Theriot may not offer his own exculpatory statement because it is self-serving. See e.g., *People v Taylor*, 98 Mich App 685, 690; 296 NW2d 631 (1980) ("An exculpatory statement by a defendant made after his arrest is properly excluded at trial as self-serving."). The self-serving line of cases is distinguishable because they concern a defendant offering his or her own statements, and not another witness testifying about defendant's conduct. They are also distinguishable because in the present case the conduct occurred before the arrest, as opposed to after the defendant was arrested and Mirandized.

Theriot ordered or encouraged defendant Matthews to shoot. Accordingly, defendant Theriot had a meaningful opportunity to present a defense.

Further, any perceived constitutional error would be harmless beyond a reasonable doubt, given that the evidence against defendant Theriot was strong. See *People v Carines*, 460 Mich 774, 763; 597 NW2d 130 (1999) (stating that to require reversal, the nonstructural constitutional error must be harmless beyond a reasonable doubt). Defendant Theriot provided the transportation, weapon, and opportunity, and his actions after the shooting are very indicative of a consciousness of guilt.[3]

B. RULE OF COMPLETENESS

Next, defendant Theriot argues that the trial court erred by denying his request to admit additional excerpts of recorded jail phone conversations between him and his friend and mother. We disagree. As stated, a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Herndon*, 246 Mich App at 406. However, to the extent that defendant Theriot argues that the exclusion of the additional excerpts violated his constitutional right to present a defense, that issue is unpreserved, and thus, we review for plain error. *Coy*, 258 Mich App at 12.

The common law "rule of completeness" was codified in MRE 106, which provides, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." "The premise of the rule is that a thought or act cannot be accurately understood without considering the entire context and content in which the thought was expressed." *People v McReavy*, 436 Mich 197, 214-215; 462 NW2d 1 (1990). Our Supreme Court has stated that "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996),).

The trial court did not err by refusing to play the additional excerpts. Defendant Theriot stipulated to the admission of the recorded jail calls, and he did not move to have the additional excerpts played at the time the prosecution played the other portions of the tapes. Instead, defendant Theriot waited until the last day of trial to request the admission of the additional excerpts. MRE 106 clearly states that "the adverse party may require the introduction *at that time* of any other part . . . which ought in fairness to be considered *contemporaneously* with it." Contrary to what the rules requires, defendant Theriot failed to move for the introduction of the other parts of the recorded statements at the time the prosecution introduced them, so they could be played at the same time. Playing the additional excerpts, some of which were only seconds long, apart from the original statements, would likely cause confusion, as the trial court correctly determined.

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[3] Defendant Theriot states that he also enjoys a right to confront the witnesses against him, but makes no argument on how he was denied this right. Thus, it is considered abandoned. See *Harris*, 261 Mich App at 50.

Further, the trial court allowed defense counsel to inquire about the context of the statements on direct examination, where defendant Theriot was able to explain why he said what he said. This Court has noted that allowing a defendant to explain his statements rather than playing a recording that was not relevant except for the portion that the jury heard, has "the potential to be more compelling evidence in favor of the defense than the tape itself." *Herndon*, 246 Mich App at 409. Defendant Theriot has failed to explain how the additional excerpts were relevant, i.e., how they would offer context for the other statements. Defendant Theriot sought to admit his own statements, not to offer context or to make the statements complete, but to rebut any implication of guilt by providing alternative explanations for the statements. And, as discussed, defendant Theriot was able to do this during his direct examination, which still provided the jury with an "intelligible presentation of the full context in which disputed events took place." *Sholl*, 453 Mich at 741. Accordingly, given that MRE 106 is a discretionary rule, *People v Fackelman*, 489 Mich 515, 545 n 22; 802 NW2d 552 (2011), we find no evidentiary error.

Additionally, defendant Theriot asserts that the trial court's ruling violated his right to present a defense. As discussed in Issue II, the Sixth Amendment only grants criminal defendants "a *meaningful* opportunity to present a complete defense." *Holmes*, 547 US at 324 (quotation marks and citation omitted) (emphasis added). "It is well settled that the right to assert a defense may permissibly be limited by 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038, 35 L Ed 2d 297 (1973). "The Michigan Rules of Evidence do not infringe on a defendant's constitutional right to present a defense unless they are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *People v King*, 297 Mich App 465, 474; 824 NW2d 258 (2012), quoting *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998) (opinion by Thomas, J.).

As discussed, pursuant to MRE 106, the trial court properly excluded the additional excerpts, and thus defendant Theriot was not denied his constitutional right to present a defense. See *Hayes*, 421 Mich at 278. Moreover, defendant Theriot had a meaningful opportunity to present a complete defense, as he was able to provide an explanation about his statements during his direct examination, which had the potential to be more compelling than listening to a few seconds of a recording. Finally, defendant Theriot fails to argue that MRE 106 is arbitrary or disproportionate to the purpose it was designed to serve; thus, in this respect, this issue is abandoned. See *King*, 297 Mich App at 474. Accordingly, we find no constitutional error.

C. HABITUAL OFFENDER SENTENCE

Next, defendant Theriot argues, and the prosecutor agrees, that the trial court erred in sentencing him as a second-offense habitual offender. We agree. A trial court's decision to enhance a defendant's sentence under the habitual offender statutes is reviewed for an abuse of discretion. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Defendant Theriot argues that he cannot be sentenced as a second-offense habitual offender because the prosecutor failed to provide him with a notice of intent to seek an enhanced sentence. If a prosecutor wishes to seek an enhanced sentence, the prosecutor must file a written

notice of intent within 21 days of the defendant's arraignment, or if the arraignment is waived, within 21 days of the filing of the information. MCL 769.13(1); MCR 6.112(F). Here, the prosecutor concedes that defendant Theriot was not provided with a notice of intent to seek an enhanced sentence. Thus, defendant Theriot should not have been sentenced as a second-offense habitual offender.

Additionally, defendant Theriot argues that he cannot be sentenced as a second-offense habitual offender because he did not have a prior felony conviction for purposes of habitual offender sentencing. The second-offense-habitual-offender statute, MCL 769.10(1), provides:

> If a person has been convicted of a felony or an attempt to commit a felony . . . and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony . . . .

Thus, the statute requires the defendant to have been convicted of an offense before the commission of the sentencing offense. "An assignment to youthful trainee status does not constitute a conviction of a crime unless the court revokes the defendant's status as a youthful trainee." *People v Dipiazza*, 286 Mich App 137, 141-142; 778 NW2d 264 (2009), citing MCL 762.12. Here, the parties concede that defendant Theriot's HYTA status was revoked after the jury convicted him in this case, so at the time defendant Theriot committed the sentencing offense, he did not have a prior felony conviction for purposes of habitual offender sentencing. Thus, defendant Theriot should not have been sentenced as a second-offense habitual offender. Accordingly, we remand for resentencing.

D. JUDICIAL BIAS

Finally, defendant Theriot argues that he should be resentenced before a new trial judge. We disagree. To determine whether a different trial judge should resentence a defendant, this Court applies the following test:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (quotation marks and citations omitted).

Here, the trial judge did not make any comments on the record indicating that he was biased. The trial judge may have vigorously expressed his views, but only out of frustration with defendant Theriot's actions in that he attempted to coach witnesses, frequently interrupted the proceedings, and tried to run the trial over his attorney. Additionally, even though some of the trial court's rulings were erroneous, this is not enough to demonstrate bias. See *Bayati v Bayati*, 264 Mich App 595, 603; 691 NW2d 812 (2004) ("Repeated rulings against a party, no matter how erroneous, or vigorously or consistently expressed, are not disqualifying."). Given the length of the trial and the amount of testimony heard, reassigning this matter to a different judge,

who knows nothing about the case, would entail waste, particularly when there is no indication that the trial judge would not be able to resentence defendant Theriot fairly.

III. CONCLUSION

In Docket No. 308369, we conclude that on this record there is no error to review. In Docket No. 308640, we affirm defendant Theriot's convictions, but vacate his sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra