STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSIE LEE AGNEW,

Defendant-Appellant.

UNPUBLISHED
December 6, 1996

No. 166587
LC No. 92-010859

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH MCINTOSH,

Defendant-Appellant.

No. 169875
LC No. 92-010859

Before: White, P.J., and Smolenski and R.R. Lamb,* JJ.

PER CURIAM.

Defendants were originally tried together before separate juries. Defendant Agnew was convicted of felony murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). He was sentenced to two years' imprisonment for the felony-firearm conviction, with such sentence to be followed consecutively by concurrent terms of life in prison without parole for the felony murder conviction and twenty to fifty years' imprisonment for the assault conviction. Defendant Agnew appeals as of right in Docket No. 166587.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant McIntosh was acquitted by the first jury of felony murder. The jury was unable to reach a verdict on the remaining counts. After a second trial, defendant McIntosh was convicted of assault with intent to murder and felony-firearm. Defendant McIntosh was sentenced to consecutive terms of two years' imprisonment for the felony-firearm conviction and eleven to twenty-five years' imprisonment for the assault conviction. Defendant McIntosh appeals as of right in Docket No. 169875.

Defendants' convictions arise out of events occurring on September 9, 1992, when three men entered a house at approximately 9 p.m. armed with guns and demanded money from the occupants. Linda Hollingsworth was living in the house with her boyfriend, Sam Mack. Hollingsworth was an admitted heroin user who also distributed drugs. Hollingsworth later identified the three men as defendant Agnew, defendant McIntosh and Andre Manley, although she was initially reluctant to, or could not, name the men. While the men were inside the house, they searched for money. Hollingsworth was forced to lead two of the men around the house after she was told to remove her clothing. All three men were eventually in the basement with Hollingsworth and Mack when they again demanded money. Defendant Agnew shot Hollingsworth in the head, neck, arm and hand while Manley apparently shot Mack before all three men left with money that Mack had given them. Hollingsworth survived the attack but Mack, who also suffered multiple gunshot wounds, died from his injuries.

I

Defendant Agnew contends that the trial court erred in failing to grant his motion for a mistrial where several references were made before his jury to a statement defendant McIntosh made to the police. The grant or denial of a mistrial is within the sound discretion of the trial court. A mistrial should be granted only for an irregularity that is prejudicial to the defendant's rights and impairs his ability to get a fair trial. *People Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Introduction of a nontestifying codefendant's powerfully incriminating statement violates a defendant's right to confrontation.[1] See US Const, Am VI; Const 1963, art 1, 20; *People v Frazier (After Remand)*, 446 Mich 539, 542, 567 (Brickley, J., with Griffin and Mallett, JJ., concurring), 568 (Riley, J., with Boyle, J., concurring); 521 NW2d 291 (1994); *People v Banks*, 438 Mich 408; 475 NW2d 769 (1991).

In this case, while references to defendant McIntosh's statement to the police were made before defendant Agnew's jury, the actual substance of defendant McIntosh's statement was never brought out before this jury. At most, defendant Agnew's jury could infer that the police learned of defendant Agnew's identity through defendant McIntosh,[2] not that defendant McIntosh implicated defendant Agnew in this crime. Because there was other evidence that defendant McIntosh knew defendant Agnew, we conclude that this inference did not powerfully incriminate defendant Agnew. Therefore, defendant Agnew was not denied his right of confrontation. *Frazier*, *supra* at 541-452 (Brickley, J.,

with Griffin and Mallett, JJ., concurring), 568 (Riley, J., with Boyle, J., concurring). Nor was this the type of antagonistic evidence that required separate trials. *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994). The trial court did not abuse its discretion in denying defendant Agnew's motion for a mistrial.

II

Defendant Agnew next cites error with the court's use of the same venire in picking both juries. Having reviewed the record, we do not believe that the trial court's procedures prejudiced defendant Agnew's substantial rights for several reasons. *Hana, supra* at 351-352. First, defendant Agnew failed to raise an objection to the court's use of the same venire when picking both juries. Second, defendant Agnew's claim of error is premised upon statements made during voir dire on March 15, 1993, about McIntosh's confession. However, according to the lower court record, none of the venire members who were present on that day were involved in jury selection for defendant Agnew's case because an entire new panel of venire members was required on March 16, 1993, to conclude jury selection for defendant McIntosh and to begin picking a jury for defendant Agnew. On March 16, 1993, there were no references made to defendant McIntosh's statement in the voir dire for either defendant. Accordingly, there is no evidence in the record that defendant Agnew was prejudiced by the use of the same venire for jury selection for both defendants. *Id*. at 362.

III

Defendant Agnew next argues that the trial court erred when it did not give the jury a supplemental instruction on aiding and abetting second-degree murder after the jury asked to be reinstructed on the crimes of felony murder and second-degree murder. After the court reread the instructions on the crimes, one juror questioned whether "Second Degree Murder is he actually killed him?" When the court asked for clarification of this question, the juror just asked the court to again explain the crime of second-degree murder, which the court did. Defendant Agnew did not object to the court's handling of the matter. However, the prosecutor later voiced an objection that the court should have instructed on aiding and abetting for second-degree murder because that was what the juror was really asking about.

Because defendant Agnew did not object below, the issue is waived unless manifest injustice would result. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Manifest injustice has not been shown. The trial court properly exercised its discretion in responding to the jury's questions when it was not clear what the jury wanted to know. The jury did not ask for reinstruction on aiding and abetting. The jury was given a general instruction on aiding and abetting in the court's final instructions. Had defendant Agnew objected to the court not reinstructing on aiding and abetting, the court might have been swayed to so instruct. It appears that defendant Agnew did not object due to trial strategy. Therefore, manifest injustice has not been shown.

IV

Defendant Agnew argues that the trial court abused its discretion in its handling of the jury's request to have the testimony of the prosecution's key witness, Linda Hollingsworth, read back. The trial court did not abuse its discretion.

When a jury requests that testimony be read back to it both the reading and the extent of the reading is a matter within the trial court's sound discretion. This Court reviews the trial court's decision for an abuse of discretion. MCR 6.414(H); *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974).

In this case, the jury asked for all of Hollingsworth's testimony. The court reporter read back the first day of her testimony. However, because the court reporter apparently did not have the remaining portion of Hollingsworth's cross-examination readily available to read to the jury, the court instructed the jury that it should resume deliberations in the meantime while the court reporter tried to locate her records. If the jury still needed to hear the remaining testimony, the court would have the rest of the testimony read back to the jury. The jury returned its verdict without a request for the remainder of Hollingsworth's testimony.

Under the circumstances, the trial court did not abuse its discretion. When the transcript was not readily available, it was reasonable for the court to ask the jury to resume its deliberations. Because the trial court did not foreclose the possibility of rereading the rest of Hollingsworth's testimony in the near future if needed, error has not been shown. *People v Austin*, 209 Mich App 564, 569; 531 NW2d 811 (1995), lv gtd in part on other grounds ___ Mich ___; 1996 Mich LEXIS 2842 (decided 11/13/96, Docket No. 103521). See also *People v Terry Williams*, 134 Mich App 639, 642-643; 351 NW2d 878 (1985).

V

Defendant McIntosh contends that the trial court erred in allowing in evidence of other crimes, contrary to MRE 404(b). The trial court did not abuse its discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995).

Evidence of other crimes committed as part of this incident was properly admitted by the trial court under the res gestae exception for evidence of bad acts. Because the evidence was admissible under the res gestae exception, this Court need not decide if the evidence was also admissible under MRE 404(b). *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995).

Defendant McIntosh did not object to the admission of the evidence that he was a drug dealer. Therefore, this issue is not preserved. *People v Mooney*, 216 Mich App 367, 378; 549 NW2d 65 (1996). In any event, we find no error. The evidence of defendant McIntosh's drug dealing was

relevant to motive where the prosecution's theory was that both Hollingsworth and defendant McIntosh were dealing drugs and that defendant McIntosh therefore knew that Hollingsworth might have money in her house. MRE 404(b). Moreover, defendant McIntosh stated during his direct examination that he was a drug dealer. To the extent that the prosecutor questioned defendant McIntosh concerning the source of his drug supply, we note that the court sustained defense counsel's objection.

VI

Defendant McIntosh argues that the trial court abused its discretion in denying his motions for a mistrial and a new trial. Specifically, defendant McIntosh contends that the prosecutor erroneously impeached him with a prior drug conviction and the length and details of the resulting sentence. A trial court's decision on a motion for a mistrial or new trial is reviewed for an abuse of discretion. *People v Cunningham*, 215 Mich App 652, 645; 546 NW2d 715 (1996); *People v Legrone*, 205 Mich App 77, 83; 517 NW2d 270 (1994).

When a defendant testifies in his own defense, his credibility may be impeached like that of any other witness. *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995). However, for the purpose of attacking the credibility of a witness, only prior convictions containing an element of dishonesty, false statement or theft are admissible. MRE 609(a). All other convictions are inadmissible for impeachment. *People v Frey*, 168 Mich App 310, 318; 424 NW2d 43 (1988).

Moreover, evidence of a witness's pending charges or arrests not resulting in conviction generally may not be used for impeachment purposes. *People v Rappuhn*, 390 Mich 266, 270-271; 212 NW2d 205 (1973). However, an exception to this general rule exists where the evidence is being offered to show that pending charges give the witness a motive to testify falsely. *People v Yarbrough*, 183 Mich App 163; 454 NW2d 419 (199); *People v Hall*, 174 Mich App 686, 690-691; 436 NW2d 446 (1989). Cross-examination is a proper means to attempt to illicit the existence of a possible interest. *Hall, supra* at 691.

In addition, it is generally error to cross-examine a defendant about the duration and details of prior prison sentences to test his credibility. *Rappuhn, supra at* 270-274; *People v Coffey*, 153 Mich App 311, 313; 395 NW2d 250 (1986). However, an exception to this rule exists where the sentence status of a defendant gives the defendant a motive for testifying falsely. *People v Clements*, 91 Mich App 103; 284 NW2d 132 (1979). Sentence time yet unserved has just as direct an impact on witness motivation and credibility as does a promise of leniency to an accomplice. *Id.* at 108.

In this case, the prosecutor's questioning of defendant McIntosh concerning his prior arrest for selling drugs and resulting probation was not in blatant disregard of MRE 609. Rather, the prosecutor's general cross-examination of defendant McIntosh was an attempt to specifically impeach or contradict defendant McIntosh's direct examination testimony that he had only testified in court one time previously, i.e., in the previous trial of this case.[3] The prosecutor's questioning in this regard initially

went unchallenged. When finally challenged by defense counsel, a side bar ensued after which the prosecutor made no further reference to defendant McIntosh's prior drug arrest or resulting probation for the remainder of defendant McIntosh's cross-examination.

On redirect examination, defense counsel specifically elicited from defendant McIntosh that he had been charged with and pleaded guilty to selling drugs, that there was not a trial, and that he had not testified. The trial court later indicated that defense counsel, over the trial court's request to "stay away from the whole area," insisted on presenting this evidence to rebut the prosecutor's previous cross-examination of defendant McIntosh.

During the prosecutor's recross-examination of defendant McIntosh, the prosecutor attempted to establish over strenuous objection by defense counsel that a conviction in this case would result in a probation violation. The prosecutor's purpose in so questioning defendant McIntosh was to establish that the pending probation violation and possible prison sentence resulting from such violation gave defendant McIntosh a motive to lie in this case. The trial court ruled that the prosecutor could go into the fact that a conviction in this case could result in a probation violation, but that the prosecutor could not go into the particular penalty resulting from such violation. Misunderstanding the court's ruling, the prosecutor asked defendant McIntosh the following question: "If you're found guilty of another offense, then you could go to jail for up to 20 years on your drug case; isn't that true?" The court sustained defense counsel's immediate objection and no answer to the question was given. The prosecutor made no further reference to possible penalties for a probation violation.

During jury instructions, the jurors received a curative instruction concerning the evidence of defendant McIntosh's probation status as well as an instruction that the lawyers' questions did not constitute evidence.

In denying defendant McIntosh's motions for mistrial and new trial, the court balanced any error in the prosecutor's cross-examination of defendant McIntosh with the following factors: (1) that defense counsel insisted in specifically setting forth for the jury defendant McIntosh's prior drug conviction; (2) that defendant McIntosh's previous drug conviction was not a "bombshell" to the jury in light of the unchallenged evidence already in the record concerning defendant McIntosh's drug dealing; (3) that the specific penalty for a probation violation did not come into evidence; and (4) that the jury presumably followed their instructions, including the curative instruction. The court concluded that under the circumstances of this case, defendant McIntosh had not been prejudiced. In agreeing with the court's reasoning and conclusion, we further note that the complainant, who was the prosecution's primary witness, was herself an admitted heroin addict and drug dealer. Thus, in light of this record, we cannot conclude that the trial court abused its discretion in denying defendant McIntosh's motions for a mistrial or a new trial.

VII

Defendant McIntosh next challenges the propriety of the prosecutor's opening statement and closing argument. We do not believe error has been shown.

Defendant McIntosh failed to object to the prosecutor's opening statement. The issue may only be reviewed for the first time on appeal if an instruction could not have cured the prejudicial effect or if the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

The prosecutor's opening statement did not involve an improper statement regarding the jurors' civic duty. The prosecutor's comments were limited to the evidence. If there was any error here, it could have been cured with a cautionary instruction and a miscarriage of justice has not been shown. Id.

Defendant McIntosh also claims error with the prosecutor's rebuttal argument. We do not believe the argument warrants reversal. The prosecutor was responding to a defense argument that other suspects were not properly eliminated during the police department's investigation. The court sustained defendant McIntosh's objection to the argument and gave the jury a cautionary instruction. Because that instruction should have cured the error, reversal is not required. *People v Spivey*, 202 Mich App 719, 723-724; 509 NW2d 908 (1993); *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

VIII

Defendant McIntosh next argues that the trial court erred by not barring the admission of his statement to the police at his second trial pursuant to the doctrine of collateral estoppel. We disagree.

"Collateral estoppel precludes litigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined." *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990). There is no set formula for deciding whether relitigation of an issue is precluded. It is sufficient to preclude the defense of collateral estoppel if a court is unable to determine on what basis an acquitting jury reached its verdict. *Id*. at 155, 158. The doctrine will only apply where the basis of the prior judgment can be ascertained clearly, definitely and unequivocally. *Id*. at 158.

The prior jury's acquittal of defendant McIntosh on the charge of felony murder does not support the conclusion that the jury rejected the validity of defendant McIntosh's statement in total. Defendant McIntosh's statement included assertions that he was a willing participant in the robbery and the assault of Hollingsworth, but that he did not want to see anyone killed during the crime. The jury may have found defendant McIntosh not guilty of felony murder based upon the portion of his statement that he did not want anyone killed. The conflict in the content of defendant McIntosh's statement was enough reason for the trial court to refuse to apply collateral estoppel to preclude the admission of the

statement at the second trial. This Court, as well as the

trial court, is unable to determine why the first jury acquitted defendant McIntosh and if the jury completely, or only partially, rejected defendant McIntosh's statement. *Id.*

IX

Defendant McIntosh's last issue is a challenge to the great weight of the evidence. The trial court did not abuse its discretion in denying the motion for a new trial. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). While the prosecution's key witness may have had some credibility problems, her testimony was not so incredible that the jury could not believe her and find defendant McIntosh guilty. While defense witnesses offered a different version of events, their testimony was no more credible than the testimony of the prosecution's witnesses. The trial court therefore properly held that the jury's verdict was not against the great weight of the evidence.

Affirmed.

/s/ Michael R. Smolenski
/s/ Richard R. Lamb

[1] We assume for the purpose of analysis that this rule of law is applicable to this case. However, we note that it appears that defendant McIntosh was not a nontestifying codefendant where he waived his Fifth Amendment rights concerning the events in question and testified before his own jury in the first trial. Defendant Agnew has not addressed this issue and we decline to do so. But see *People v Hana*, 447 Mich 325, 361; 524 NW2d 682 (1994) (Where each defendant testified before his own jury in a dual-jury trial, it became permissible for the prosecution to call that defendant as a witness in trial of the codefendant.); *People v Lee*, 212 Mich App 228, 257; 537 NW2d 233 (1995) (The failure to call a witness does not deny a defendant the right to confrontation.).

[2] However, contrary to this supposition, we cannot help but note that the jury twice asked how the police had come to suspect defendant Agnew in this case.

[3] The attempted impeachment was not on a collateral matter, but rather went to defendant's theory of the case. Defendant's theory was that he had not been at the scene of the crime and that he was being framed by the investigating officer who took defendant's incriminating statement. Defendant testified that he had not made an incriminating statement to the officer, but rather had only told the officer the names of those persons in his neighborhood known for carrying guns. Defendant testified that he knew such persons because he was a drug dealer who made it his business to know everyone in his neighborhood who would carry a gun because drug dealing is a dangerous business. Defendant further contended that he had signed his statement only because the officer had beaten him. As part of defendant's theory of being framed, defendant sought to portray himself as inexperienced in the ways of the court system, having only testified once before in court, when compared to the more experienced investigating officer, who had testified many times.