

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH COLVIN JR.,

Defendant-Appellant.

UNPUBLISHED

April 11, 1997

No. 188176

Kent Circuit Court

LC No. 94-002732

Before: Reilly, P.J. and MacKenzie, and B.K. Zahra*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), three counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, robbery armed, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced on July 12, 1995, to life imprisonment without parole for the murder convictions, life for the assault and the robbery convictions, and a consecutive prison term of two years for the felony-firearm conviction. He appeals as of right. We reverse in part and affirm in part.

First, defendant asserts that the trial court committed error requiring reversal in admitting the redacted confession of his accomplice-brother, Kelley Colvin, on the ground that it was hearsay.¹ We disagree.

MRE 804(b)(3) provides an exception to the hearsay rule for a statement which “at the time of its making . . . so far tended to subject the declarant to criminal liability . . . that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.” Where the declarant’s statement contains portions which inculcate himself and the defendant who is on trial, the portions that are against the declarant’s own penal interest are admissible. *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993); *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994). However, the “carry over” portion of the statement that inculcates an individual other than the

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

declarant is admissible only where the circumstances under which the statement was made attest to its reliability. *Poole, supra*, at 162; *Spinks, supra*.

In the present case, the trial court admitted only a redacted version of Kelley Colvin's statement, which included no reference to defendant. We find that this statement in which the declarant confessed the two killings and the robbery, clearly was against Kelley Colvin's penal interest when made. Therefore, admission of the statement was proper under MRE 804(b)(3). We also do not agree with defendant's assertion that the probative value was substantially outweighed by the danger of unfair prejudice. MRE 403.

Next, defendant asserts that the trial court committed error requiring reversal in admitting evidence of defendant's sibling relationship to Kelley Colvin. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v McMillan*, 213 Mich App 134, 137; 539 NW2d 553 (1995). Generally, all relevant evidence is admissible and all irrelevant evidence is inadmissible. MRE 402; *People v VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993). Evidence is relevant if it tends to make the existence of a fact in issue more or less probable than it would be without the evidence. *Id.* at 60. This broad definition allows the admission of all evidence that is helpful in throwing light on any material point. *People v Kozlow*, 38 Mich App 517, 524-525; 196 NW2d 792 (1972). However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Pickens*, 446 Mich 298, 335-336; 521 NW2d 797 (1994).

We find that Kelley Colvin's identity and relationship to defendant were relevant. First, the relationship established that defendant and Kelley Colvin knew each other, as opposed to being strangers, which tends to make it more likely that defendant would be Kelley Colvin's accomplice. Furthermore, the identity of Kelley Colvin was relevant due to defendant's police statement wherein he specifically referred to being with Kelley Colvin at a family outing at the time the incident occurred. Additionally, there is no reason to conclude that Kelley Colvin's identity or the relationship was unduly prejudicial and defendant has presented no persuasive authority in that regard. Therefore, we conclude that the trial court did not abuse its discretion in admitting this evidence.

Defendant's third claim of error is that the trial court erred in admitting evidence of his failure to appear for a requested police line-up. Defendant failed to object to this evidence, and therefore, it has not been preserved for appellate review. *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). Contrary to defendant's contention, there is no authority for the proposition that comment on defendant's decision not to appear for a police line-up implicates a constitutionally protected right. The evidence was relevant to defendant's challenge of the identifications by the eyewitnesses. Our failure to further review this issue would not result in manifest injustice.

Next, defendant argues, and the prosecutor concedes, that defendant's convictions for felony murder and the underlying, or predicate, felony of armed robbery violates double jeopardy. We agree. *People v Passeno*, 195 Mich App 91, 96; 489 NW2d 576 (1995). The proper remedy is to vacate the conviction and sentence for the underlying felony. *Id.* at 97.

Defendant next asserts that he was denied a fair trial due to the admission of false testimony by the prosecution. We disagree. Defendant failed to object to the testimony. Therefore, this issue has not been preserved for appellate review unless failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Due process is offended when a prosecutor allows false testimony to stand uncorrected when it appears, even where the false testimony was not solicited. *People v Wiese*, 425 Mich 448, 453-454; 389 NW2d 866 (1986); *People v Canter*, 197 Mich App 550, 568; 496 NW2d 336 (1992). This is true even when the testimony only goes to a witness' credibility. *Wiese, supra*, at 454. Failure to correct the testimony requires reversal where the false testimony has any reasonable likelihood of having affected the judgment of the jury. *Id.*; *Canter, supra*.

The contradictions in the testimony of witness Gary Crum at the pretrial motion hearing and the trial indicate that he was testifying falsely. Unlike the defense counsel, the prosecutor was present at both proceedings where Crum testified concerning the taking of Kelley Colvin's statement. However, the testimony Crum gave at trial appears less damaging to defendant because it indicates a greater likelihood that the police coached Kelley Colvin with respect to the content of the statement. Furthermore, that portion of Crum's statement dealt solely with an issue that was, at best, collateral to the primary issues at trial. Moreover, there was overwhelming evidence of defendant's guilt from three eyewitnesses who positively identified defendant as the man who shot them during the perpetration of the crime. Therefore, although the prosecutor's failure to bring the inconsistent testimony to the attention of the court was improper, we conclude that that testimony had no reasonable likelihood of affecting the outcome of the trial.

Defendant also asserts that the trial court erred in denying his request for the court recorder's tape recording of his preliminary examination proceedings. We disagree. The court rules provide that a defendant is entitled to a transcript of all proceedings. MCR 8.108(E) and 6.433(A). In the present case, defendant received the required transcript and has provided no authority to establish a right to a recording of the proceedings.²

Finally, defendant argues that the trial court's admission of the identification evidence was improper on due process grounds. We disagree. The admission of identification evidence by a trial court will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). To sustain a due process challenge to identification evidence, a defendant must show that the identification procedure was so suggestive in light of the totality of the circumstances that there was a substantial likelihood of misidentification. *Id.* Defendant offers no evidence to support his allegations that the eyewitnesses' identifications were tainted by the police showing the witnesses a picture of defendant. Further, defendant presents no evidence to support his assertion that the police changed their notes concerning the perpetrator's description to conform to defendant's appearance. Therefore, we conclude that the trial court did not clearly err in admitting the identification evidence.

Defendant's conviction and sentence for armed robbery are vacated, but in all other respects defendant's convictions and sentences are affirmed.

/s/ Maureen Pulte Reilly
/s/ Barbara B. MacKenzie
/s/ Brian K. Zahra

¹ Although defendant, in his statement of questions presented, refers to an alleged violation of his right to confrontation, that issue is not argued in his brief. Accordingly, we deem the issue abandoned. *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995).

² Defendant's reliance on the freedom of information act, MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.*, is misplaced since the judiciary is specifically excluded from the provisions of that act. MCL 15.232(b)(v); MSA 4.1801(2)(b)(v). If defendant believed that the transcript did not accurately reflect the proceedings at the preliminary examination, he should have requested that he be permitted to listen to the tape recording and compare it to the transcript in the presence of a court employee or the reporter.