

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW BLOUNT,

Defendant-Appellant.

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UNPUBLISHED

April 9, 1999

No. 203872

Kent Circuit Court

LC No. 96-011359 FC

Before: Markey, P.J., and Saad and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.242(2). The court sentenced defendant to life without parole on the felony murder conviction, to be served consecutive to the mandatory two years' imprisonment on the felony-firearm conviction. Defendant appeals as of right. We affirm.

These offenses arose from a robbery of a 7-Eleven store that occurred on August 10, 1996, during which the store manager was shot and killed. Two witnesses testified that they were with defendant on August 10 when they drove to the 7-Eleven at defendant's request. One witness, Alonzo Armstrong, followed defendant into the store, while the other, Elven Morgan, remained outside. Once inside, Armstrong saw defendant pointing a gun at the victim; defendant told Armstrong to leave. After he left the store, Armstrong heard two or three shots. Morgan, who was around the back of the store, heard three shots as well. Defendant then emerged from the store and got into the automobile. Both Armstrong and Morgan testified that after they left the store, defendant threatened them if they said anything about what happened. Four different witnesses testified that they had heard defendant admit to committing the offense. Defendant's theory of the case was that another person, Rodney Tillman, had committed the murder in order to cover up a robbery he allegedly had committed at the store five days earlier.

Defendant first argues on appeal that the trial court abused its discretion in admitting a statement made by one witness, Jennifer Figures, to a detective, Mark Armstrong, about what she had been told by another witness, Lottie Sanders, who was defendant's girlfriend. We review a trial court's decision

to admit evidence for abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). An abuse of discretion will be found only when an unprejudiced person, considering the facts upon which the trial court made its decision, would find there was no justification or excuse for the ruling. *Id.* Hearsay is defined as an out-of-court statement, other than one made by the declarant while testifying, offered to establish the truth of the matter asserted. MRE 801(c); *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Hearsay is not admissible at trial, unless it falls within an exception under the Rules of Evidence. MRE 802; *Tanner, supra*.

On cross-examination, defendant elicited testimony from Detective Armstrong that Figures told him that Tillman told her that defendant, along with Robert Kellogg, an employee at the 7-Eleven, and another person, had “set-up” the August 5 robbery at the 7-Eleven. On re-direct examination, the prosecutor made reference to that earlier questioning by defendant, and then asked if Armstrong had received any other information from any other source to the same effect. Over the objection of defendant, the prosecutor then elicited testimony from Armstrong that Figures had been informed by Sanders that Robert Kellogg was involved in the August 5 robbery. The prosecutor acknowledged that the statement was hearsay, but also stated that he was not offering the statement for the truth of the matter asserted, “that Kellogg and [defendant] were involved in the 8-5 robbery,” but only to establish that Tillman had made statements to Figures. Defendant contends that the court erred in allowing Armstrong to testify to the substance of a statement made by Figures concerning a statement made by Sanders implicating defendant and Kellogg in the August 5 robbery.<sup>1</sup> We agree.

Although the prosecution contends that the testimony was not offered to prove that defendant was involved in the August 5 robbery, we find that the statement was not relevant for any other purpose than to show that defendant participated in the earlier robbery. We note that the statement contested by defendant as hearsay is not the same statement elicited by defendant from Armstrong. Rather, in the statement elicited by the prosecutor, Armstrong related that Figures told him *defendant’s girlfriend* provided information that may have implicated defendant. Armstrong’s earlier statement was that Figures told him Tillman, who was a potential suspect, told her that defendant was involved. Thus, we find the prosecution’s argument that defendant may not appeal evidence that he has used to his advantage to be without merit. The testimony in question is hearsay that does not fall within any recognized exception. Therefore, we find that the trial court abused its discretion in admitting it.

However, the erroneous admission of evidence is harmless if it is highly probable that, in light of the strength and weight of the untainted evidence, the tainted evidence did not contribute to the verdict. *People v Mitchell (On Remand)*, 231 Mich App 335, 339; 586 NW2d 119 (1998). Given the testimony of Alonzo Armstrong and Morgan concerning the events of August 10 at the 7-Eleven and the testimony of several others that they heard defendant admit to committing the murder, and given the ambiguous nature of Detective Armstrong’s testimony, we find it highly probable that the tainted evidence did not contribute to the verdict in this case. Therefore, we find that the erroneous admission of the hearsay evidence was harmless.

Defendant next argues that he was denied a fair trial because evidence that prosecution witnesses had received threats was admitted without a showing that those threats were connected to defendant. Because defendant failed to object to the testimony concerning threats, he has waived

review in the absence of manifest injustice.<sup>2</sup> *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Manifest injustice exists when the unpreserved error could have been outcome determinative. *People v Durham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). Evidence of threats to witnesses may be used to demonstrate consciousness of guilt if there is evidence connecting defendant to the threats. *People v Walker*, 150 Mich App 597, 603; 389 NW2d 704 (1985). Evidence of threats by third parties may be admissible, regardless of whether the threats are connected to defendant, to explain why a witness has given inconsistent statements. *People v Clark*, 124 Mich App 410, 412-413; 335 NW2d 53 (1983).

At both the beginning of his testimony and when he was recalled to the stand, Elroy Sanders testified that he was threatened and warned not to testify against defendant. During closing arguments, the prosecutor referred to Sanders' testimony about threats as showing defendant had attempted to manipulate testimony. We find that these threats were never sufficiently connected to defendant to be admissible to show consciousness of guilt. However, even though the evidence of threats to Sanders was inadmissible for this purpose, we find that it was not determinative of the outcome. The threats were part of the larger issue of defendant's attempts to influence witnesses generally; the other testimony on that point to which the prosecutor referred was supported by evidence, consisting, in part, of letters that were admitted at trial and read during closing argument. Defendant also complains of the evidence of threats to Tiffany Olejnczik and Jennifer and John Figures. We find that in the case of Olejnczik, the evidence was admissible to explain a prior inconsistent statement about what occurred around the time of the offense. In the case of the Figureses, the context of the testimony suggests that the evidence was introduced to explain their lack of cooperation with police. Because that evidence was not presented or argued as probative of defendant's consciousness of guilt, and given the strength and weight of the other evidence discussed above, we do not believe the testimony was outcome determinative. Therefore, we find no manifest injustice.

Defendant's third claim on appeal is that the trial court erred in failing to inform the jury, when it requested a transcript of the testimony of two witnesses, that it could have the testimony read to it immediately from the court reporter's notes. Defendant did not object to the trial court's instruction, but expressly acquiesced to the court's response to the jury's request. See *People v Fetterley*, 229 Mich App 511, 519-520; 583 NW2d 199 (1998). Because defendant did not object, appellate review is precluded absent manifest injustice. *People v Weatherford*, 193 Mich App 115, 121; 483 NW2d 924 (1992).

The reading and extent of the reading of testimony rest within the sound discretion of the trial judge. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). A court does not abuse its discretion when it does not foreclose the possibility of rereading the testimony in light of a later request. *People v Sullivan*, 167 Mich App 39, 49; 421 NW2d 551 (1988). The trial court in this case noted that the testimony of the two witnesses took approximately five hours and that it would take approximately fifteen hours to transcribe the testimony. The court then sent the jury back to rely on its collective memory, but offered to have the transcripts prepared if the jury decided it still wanted them. Although the court did not inform the jury that they could have the requested testimony immediately reread to them from the court reporter's notes, because the court did not foreclose the jury from

rehearing the testimony, we find no manifest injustice. With regard to defendant's assertion that he was denied effective assistance of counsel because counsel failed to object to the court's response to the jury request, we note that this claim was not included in defendant's statement of questions presented and so is not properly presented for review. *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995).

Defendant's last argument on appeal is that the trial court erred in giving an instruction to the jury on its use of prior convictions in deciding the credibility of two witnesses, while not including three other witnesses who also admitted to having prior convictions. Because defendant failed to object to the instruction as given, we will not review the claim in the absence of manifest injustice. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). In reviewing jury instructions, this Court examines the instructions as a whole; even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

In this case, the jury was instructed on the use of prior convictions in assessing the credibility of two witnesses, Armstrong and Kellogg. See CJI2d 5.1. Both men had prior convictions admissible under MRE 609(a). However, the instruction did not require that the jury consider prior convictions, nor did it preclude the jury from considering the prior convictions of the three witnesses who were not named in the instruction. While the instruction was not perfect, it sufficiently protected defendant's rights by presenting the issues to be tried. Therefore, we find no manifest injustice. Again, although defendant claims that he was denied effective assistance of counsel because counsel failed to object, because he did not include this claim in his statement of questions presented, the issue is not presented for review. *Price, supra* at 548.

Affirmed.

/s/ Jane E. Markey  
/s/ Henry William Saad  
/s/ Jeffrey G. Collins

<sup>1</sup> We note that it is not clear from the context of the testimony that Sanders actually implicated defendant in the August 5 robbery. However, because the testimony was ambiguous, it is possible that the jury may have inferred that she did.

<sup>2</sup> While defendant claims that he objected to some of the testimony at issue, the record shows that he did so on the basis of hearsay and speculation, not on the basis that the threats were not connected to defendant. An objection not properly raised at trial is not preserved for appeal. *People v Welch*, 226 Mich App 461, 464; 574 NW2d 682 (1997).