

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ELOFE KUSTER,

Defendant-Appellant.

UNPUBLISHED

July 17, 2001

No. 218266

Marquette Circuit Court

LC No. 97-034194-FC

Before: Sawyer, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right his conviction in a bench trial of first-degree murder, MCL 750.316, following the shooting death of his wife. Defendant was sentenced to life imprisonment without possibility of parole. We affirm.

Defendant asserts that his Sixth Amendment constitutional right to counsel at his trial was violated by the judge's view of the crime scene in the absence of defendant's counsel where defendant did not affirmatively waive his right to have counsel present at the view. Defendant further asserts that this denial of counsel at a critical stage in the proceeding was structural error requiring reversal. We disagree.

The judge's viewing of the crime scene was at the request of both the prosecutor and defense counsel.¹ There was discussion between counsel and the judge over any differences at the scene from the time of the crime, as well as from what positions the judge should view the scene. There was not, however, any discussion of defendant or counsel being present during the viewing, nor any such request by defendant or counsel. The judge viewed the scene by himself during a lunch break and reported on the record what he observed. The judge also made references to the scene during his findings of fact.

We do not take issue with defendant's assertion that he had a right to be present during the viewing and to have his attorney present. However, in the absence of a request to be present,

¹ The initial request came from the prosecutor. Defense counsel, however, indicated that he was going to make a similar request himself.

or an objection to being excluded, defendant has forfeited this issue.² See *People v Bryant*, 43 Mich App 659, 662; 204 NW2d 746 (1972) (issue not preserved where the trial judge discussed with counsel his intent to view the scene and no objection was made); see also *People v King*, 210 Mich App 425, 432-433; 534 NW2d 534 (1995) (defendant did not request to be present at jury view of the scene and did not demonstrate any prejudice); *People v Broadnax*, 57 Mich App 621, 622-623; 226 NW2d 589 (1975) (defendant could not raise issue for first time on appeal where defense counsel participated in the judge's viewing of the scene, no testimony was taken at the scene, and no objection to the procedure was made); *People v Dykes*, 37 Mich App 555, 558; 195 NW2d 14 (1972) (defendant did not request to be present at jury view); *People v Gauthier*, 28 Mich App 318, 324; 184 NW2d 488 (1970) (defendant waived his presence). Further, defendant has not demonstrated prejudice sufficient to merit reversing his conviction under the plain error standard. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Next, defendant argues that the trial court erred in admitting various alleged hearsay statements of the victim. The trial court set out an extensive analysis of this issue in a memorandum dated March 16, 1998. The trial court primarily relied upon the decision in *People v Fisher*, 449 Mich 441; 537 NW2d 577 (1995). The Supreme Court made the following observations on this issue:

Specifically, statements by murder victims regarding their plans and feelings, have been admitted as hearsay exceptions in a number of jurisdictions. In *United States v Donley*, 878 F2d 735, 737-739 (CA 3, 1989), cert den 494 US 1058 (1990), a statement by the victim's wife that she intended to move out of the apartment and separate from the defendant-husband was found admissible to show marital discord and motive. Likewise, in *Whitmire v State*, 789 SW2d 366 (Tex App 1990), statements of the decedent-husband that he wanted to end the marriage with the defendant-wife were found admissible. See also *United States v Hartmann*, 958 F2d 774, 782 (CA 7, 1992), in which statements made by the victim-husband about the "dismal state of his marriage" to the defendant-wife, his removal of her as beneficiary from his life insurance policy, and statements of his fear of being killed by the defendant-wife and her codefendant lover all were found admissible under a state of mind exception to the hearsay rule.

In the case at hand, martial discord, motive, and premeditation are all at issue. Thus, the statements of the victim-wife are admissible to show the effect they had on the defendant-husband. This testimony will not offend the hearsay rule because it does not constitute hearsay.

The victim-wife's statements that were not known to the defendant about her plans to visit Germany to be with her lover and her plans to divorce the defendant upon her return are hearsay. They are admissible, however, because they satisfy the exception to the hearsay rule for "statement[s] of the declarant's

² Defendant first raised an objection to the trial court's viewing of the scene in his motion for new trial following conviction.

then existing . . . intent, plan . . . [or] mental feeling” MRE 803(3). [*Fisher*,
supra at 450.]

We are satisfied that the trial court correctly concluded that this case is controlled by *Fisher* and that the statements in the case at bar are admissible just as the statements in *Fisher* were admissible. Accordingly, we affirm the trial court’s decision for the reasons set forth in the trial court’s well-reasoned memorandum.

Affirmed.

/s/ David H. Sawyer

/s/ Michael R. Smolenski

/s/ William C. Whitbeck