

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK REX PIZANO,

Defendant-Appellant.

UNPUBLISHED

January 28, 2003

No. 232663

Jackson Circuit Court

LC No. 00-004061-FC

Before: O’Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

After a joint trial before separate juries with his brother and codefendant, Ben Pizano, defendant was convicted on three counts of felony murder, MCL 750.316(1)(b), as well as the predicate felony of arson of a dwelling house, MCL 750.72. Defendant was sentenced to three concurrent mandatory life prison terms and appeals by claim of right. We affirm.

The three victims in this case are Mr. Emilio Ortiz, Mrs. Magdalena Ortiz and their granddaughter, Sandra Ortiz. Defendant Jack Pizano married Diana, the former wife of Mrs. Ortiz’ son, Trinidad Ramon, by whom Diana had several children, including Benny Ramon. The prosecutor theorized that defendant Jack Pizano, assisted by his brother Ben, set the fire two days after an argument between Mrs. Ortiz and Diana, joined by Jack, that was precipitated when fourteen-year-old Benny Ramon was apprehended for shoplifting and Mrs. Ortiz expressed her intent to obtain custody of Diana’s children, Mrs. Ortiz’ grandchildren. The prosecutor further theorized that the seriousness of this argument, minimized by Pizano witnesses, was shown by statements Mrs. Ortiz made to others in the two days between the argument and the fire, repeating her intent to remove her grandchildren from Diana’s custody and expressing fear of Jack to the point of predicting “if anything happens to me, Jack did it.”

Defendant first argues that the trial court abused its discretion by ordering discovery of a letter written to defense counsel by a prospective witness. We disagree. The trial court’s rulings on discovery are reviewed for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). However, whether material is privileged under the work-product doctrine, as claimed here, is a question of law subject to de novo review. *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997).

In the case at bar, the trial court was informed that the letter by the prospective witness concerned the pending action and what the witness “saw, heard, smell[ed], touched and taste[d],” and therefore, it fell within the definition of a discoverable statement set forth in MCR 2.302(B)(3)(c)(i), *People v Holtzman*, 234 Mich App 166, 176; 593 NW2d 617 (1999). This conclusion is also consistent with this Court’s decision in *People v Johnson*, 168 Mich App 581, 584-585; 425 NW2d 187 (1988), where we held, before the adoption of MCR 6.201, that the trial court did not abuse its discretion by ordering discovery of a letter written by a witness to defense counsel.

Moreover, defendant makes no claim, and none can be made, that the reliability of the verdict was undermined by granting discovery. Thus, even if the trial court abused its discretion because the witness did not testify and the letter was not admitted into evidence, any error by the trial court in granting discovery was harmless. MCL 769.26; *People v Elston*, 462 Mich 751, 765-766; 614 NW2d 595 (2000); *Johnson, supra* at 585.

Next, defendant contends he was denied a fair trial when the trial court granted the prosecutor’s motion to preclude impeachment of a testifying police officer with an unrelated charge of assault and battery pending at the time of trial. Defendant did not object to the prosecutor’s motion below and on appeal advances the speculation of counsel for Ben Pizano it was relevant to bias in that the officer might by his testimony attempt to curry favor with his superiors. His claim is therefore unpreserved. *People v Poindexter*, 138 Mich App 322, 331; 361 NW2d 346 (1984). The trial court’s decision to admit or exclude evidence is reviewed for an abuse of discretion, *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001), which “by definition” generally cannot occur on a close evidentiary question, *id.* Here, no abuse of discretion occurred and thus plain error did not affect defendant’s substantial rights, *People v Carines*, 460 Mich 750, 763, 774; 597 NW 2d 130 (1999).

In the case at bar, defendant never sought to impeach the officer with his pending assault and battery charge. Further, defendant neither objected to the trial court’s granting of the prosecutor’s motion in limine nor presented an offer of proof, MRE 103(a)(2), and he did not advance a theory of logical relevance between the pending charge of assault and battery and bias of the witness. Absent invocation of the trial court’s discretion, there can be no abuse. *People v Rice (On Remand)*, 235 Mich App 429, 438-439; 597 NW2d 843 (1999). Moreover, review of the available record does not establish that plain error affected defendant’s substantial rights. *Carines, supra* at 763, 774.

Defendant argues next that he was denied a fair and impartial trial by the seating of and dismissal of an alternate juror mid-trial. Defendant contends that the trial court should have sua sponte declared a mistrial when the juror revealed he realized that he worked in the same area of the Southern Michigan Correctional Facility (Jackson prison) where defendant was incarcerated at the time of the trial. We again disagree.

Defendant failed to preserve his claim by objecting or moving for a mistrial in the trial court. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *People v Schmitz*, 231 Mich App 521, 526; 586 NW2d 766 (1998). Defendant’s claim that he was denied a fair and impartial jury raises a constitutional issue subject to de novo review. *People v Manser*, 250 Mich App 21, 24; 645 NW2d 65 (2002); *Schmitz, supra* at 528. However, because the alleged error was not

preserved, appellate review is for plain error affecting defendant's substantial rights. *Carines, supra* at 763, 774; *People v Milstead*, 250 Mich App 391, 402; 648 NW2d 648 (2002).

In the present case, the trial court excused the juror in question before deliberations commenced when he revealed that he knew defendant was incarcerated in prison. The trial court properly acted to eliminate this potential obstacle to an impartial jury pursuant to MCL 768.18, which provides, in part: "Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12." Our Supreme Court has held MCL 768.18 is intended to avoid mistrials in situations similar to the case at bar where a juror disqualification or disability arises or comes to light during the course of trial. *People v Van Camp*, 356 Mich 593, 605-606; 97 NW2d 726 (1959). The trial court did not abuse its discretion because a factual justification existed for its decision to excuse the juror and the jury was not reduced below the constitutional twelve members. *Id.* at 605; *People v Bradford*, 13 Mich App 150, 152; 163 NW2d 640 (1968).

Defendant's argument that potential prejudice from the seating of the juror in question required the trial court to order a mistrial has no merit. Alleged juror impropriety without a showing of actual impairment of defendant's right to a fair trial does not justify the trial court sua sponte declaring a mistrial. *People v Rutherford*, 208 Mich App 198, 203; 526 NW2d 620 (1994); *People v Williams*, 85 Mich App 258, 263-264; 271 NW2d 191 (1978). Moreover, even if error occurred it is not plain, clear, or obvious, and defendant has failed to establish actual prejudice to his substantial rights, which is required for relief from unpreserved plain error. *United States v Olano*, 507 US 725, 737-739; 113 S Ct 1770; 123 L Ed 2d 508 (1993); *Milstead, supra* at 403.

Last, defendant argues the trial court erred by admitting hearsay statements of the victims that defendant threatened them and they were afraid of defendant. Defendant contends that the admission of this hearsay not only violated the rules of evidence but also violated defendant's Confrontation Clause rights. We disagree.

Because the grounds for objection at trial and the grounds raised on appeal must be the same, defendant has preserved his argument based on the rules of evidence but not an objection based on the Confrontation Clause. MRE 103(a)(1); *People v Kilbourn*, 454 Mich 677, 684-685; 563 NW2d 669 (1997); *People v Ortiz*, 249 Mich App 297, 310; 642 NW2d 417 (2001).

Prior to trial, the prosecutor filed a motion in limine seeking a ruling admitting certain hearsay statements made by two of the victims, Mrs. Ortiz, and to a lesser extent, Mr. Ortiz. The hearsay statements of Mrs. Ortiz covered three areas: (1) a description of an argument she had with Jack Pizano's wife, Diana Pizano, during which Jack Pizano was alleged to have made threats; (2) statements that Mrs. Ortiz told the Pizanos during the argument that she intended to obtain custody of Diana's children, Mrs. Ortiz' grandchildren; and (3) statements by Mrs. Ortiz concerning her fear and that if anything happened to her Jack Pizano would be responsible.

The trial court did not clearly abuse its discretion by admitting the hearsay statements in question. *Layher, supra*. Generally, all relevant evidence is admissible and irrelevant evidence is not. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). To be relevant,

evidence must have “any tendency to make the existence of any fact that is of consequence . . . more probable or less probable.” MRE 401; *People v Sabin (After Remand)*, 463 Mich 43, 56-57; 614 NW2d 888 (2000). In the present case, the trial court found that the evidence was relevant to a motive for murder, and motive is always relevant in a murder case. *Id.* at 68; *Rice (On Remand)*, *supra* at 440. The trial court relied on three alternative exceptions to the rule against hearsay and only one need be applicable for the evidence to be properly admitted. See, e.g., *Sabin (After Remand)*, *supra* at 56 (theory of multiple admissibility), and *Starr*, *supra* at 501 (only one theory need be proper).

One exception relied on by the trial court was MRE 803(2), which permits “hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the ‘sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.’” *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), quoting 5 Weinstein, Evidence (2d ed), § 803.04(1) 803-19. There are two requirements for the admission of an excited utterance: (1) that a startling event occurs, and (2) that the resulting statement is made while under the excitement caused by the event. *Smith, supra*; *Layher, supra* at 582. Although the length of time between the startling event and the statements is an important factor to consider in determining admissibility, it is not controlling. Rather, the key question is whether the declarant is still under the stress of the event, and the trial court is accorded wide discretion in making that preliminary factual determination. *Smith, supra* at 551-552; *Layher, supra* at 582.

In the present case, the startling event was the argument between Mrs. Ortiz and Diana Pizano, participated in by defendant Jack Pizano, on the Tuesday evening before the fire, which occurred around 4:00 a.m. Friday morning. The testimony of Robert Parker established that Mrs. Ortiz was so upset she fell to the ground and was sobbing for almost two hours when she returned home after the argument. The next day, Wednesday, Mrs. Ortiz made the statements at issue to her daughter, Mary Jane Ramon, and her granddaughter, Sandra Conner. Conner, the first witness to speak to Mrs. Ortiz on Wednesday, testified that her grandmother was upset and crying but eventually was able to tell her about the argument. Mrs. Ortiz repeated her statements when Mary Jane Ramon, Sandra’s mother, arrived. Thus, the record clearly supports a finding of the two criteria for admission of Mrs. Ortiz’ hearsay statements to Ramon and Conner under MRE 803(2). The trial court did not abuse its discretion.

Mrs. Ortiz’ statements to Amy Nelson on Thursday, about forty-eight hours after the argument, present a closer question of admissibility under MRE 803(2). By that time, Mrs. Ortiz added a fabrication to her statements, which was that she had reported the argument to the police, in the hope that Nelson would later tell her mother and stepfather, Diana and Jack Pizano. The fabrication itself was not hearsay admitted to prove the truth of the matter asserted, that the incident was reported to the police, but rather as further evidence of Mrs. Ortiz’ fear. Thus, Mrs. Ortiz’ statements to Nelson clearly relate to the major stressor she was still experiencing from the argument – her fear of Jack Pizano. The trial court’s decision on close evidentiary questions ordinarily cannot be an abuse of discretion. *Layher, supra* at 761; *Smith, supra* at 550.

The trial court also found the hearsay at issue was admissible under MRE 803(3), which provides “[a] statement of the declarant's then existing state of mind, emotion, sensation, or

physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . .” is not excluded by the hearsay rule. We agree with the trial court that Mrs. Ortiz’ statements of future intent to obtain custody of Diana Pizano’s children, and her fear of Jack Pizano, clearly fall within this “state of mind” exception to the hearsay rule. *People v Fisher*, 449 Mich 441, 449-451; 537 NW2d 577 (1995); *Ortiz, supra* at 310.

Our Supreme Court has made clear that evidence that “demonstrates an individual’s state of mind will not be precluded by the hearsay rule,” *Fisher, supra* at 449, citing MRE 803(3), and further, that statements of murder victims as to plans or feelings are admissible where relevant to material issues, including motive, *id.* at 450. Here, the trial court did not abuse its discretion finding that Mrs. Ortiz’ state of mind, her intent to obtain custody of her grandchildren, and her expressed fear of Jack Pizano, were relevant and material to a motive for murder. *Id.* Likewise, this Court has held that a murder victim’s statements concerning her fears are properly admitted under MRE 803(3) to establish a motive without the victim’s state of mind being “at issue,” *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996), and include evidence of the defendant’s statements that caused the fear, *Ortiz, supra* at 310.

The trial court, however, may exclude relevant, admissible evidence when its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Fisher, supra* at 451. Unfair prejudice means evidence that has a high risk to sway the jury based on extraneous matters such as bias, prejudice, or sympathy. *Id.* at 452. Here, the trial court did not abuse its discretion by finding that the evidence of motive was highly probative and not substantially outweighed by the danger of unfair prejudice, *Fisher, supra* at 453.

Because the trial court did not abuse its discretion admitting the hearsay at issue under either MRE 803(2) or MRE 803(3), defendant’s unpreserved claim that his Confrontation Clause rights were violated must fail. In *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980), the Supreme Court noted that the “hearsay rules and the Confrontation Clause are generally designed to protect similar values,” quoting *California v Green*, 399 US 149, 155; 90 S Ct 1930; 26 L Ed 2d 489 (1970), and “stem from the same roots,” quoting *Dutton v Evans*, 400 US 74, 86; 91 S Ct 210; 27 L Ed 2d 213 (1970), and thus,

when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. [*Ohio v Roberts, supra* 448 US at 66.]

In the present case, both MRE 803(2), *White v Illinois*, 502 US 346, 355-356, n 8; 112 S Ct 736; 116 L Ed 2d 848 (1992), and MRE 803(3), *Ortiz, supra* at 310, are “firmly rooted” hearsay exceptions, and therefore statements that satisfy either rule carry sufficient indicia of reliability to satisfy the Confrontation Clause “without more.” *Roberts, supra* at 448 US 66; *Ortiz, supra* at 311. Thus, plain error affecting defendant’s substantial rights did not occur. *Carines, supra* at 763, 774.

Finally, the non-hearsay evidence presented a very strong circumstantial case against defendant, including two witnesses identifying him at a gas station with the suspect pickup shortly before the fire, several witness whose testimony together placed the suspect pickup in front of the victim's house at the time of the fire, and witness testimony and physical evidence establishing he was the passenger in the suspect pickup holding a gas can shortly after the fire. This evidence, together with testimony of confessions to two fellow inmates, overwhelmingly established defendant's guilt. Thus, even if preserved trial error or unpreserved constitutional error occurred, reversal is not warranted because it is not reasonably probable that the error was outcome determinative, *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), or that the alleged error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, *Carines, supra* at 774.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Jane E. Markey