

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

FREDERICK FIELDS,

Defendant-Appellant.

UNPUBLISHED
November 13, 2003

No. 237176
Wayne Circuit Court
LC No. 01-000516-02

Before: Wilder, P.J., and Griffin and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316, and solicitation of murder, MCL 750.157b(2). Defendant was sentenced to natural life in prison for the first-degree premeditated murder conviction, and to thirty to sixty years' imprisonment for the solicitation of murder conviction, the two sentences to run concurrently. We affirm.

On appeal, defendant argues that the trial court erred in denying his motion to suppress his custodial statement as the fruit of an illegal arrest because the police did not have probable cause to arrest him. We disagree. This Court reviews a trial court's findings of fact regarding a motion to suppress evidence for clear error and reviews the trial court's ultimate decision on a motion to suppress de novo. MCR 2.613(C); *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000).

In *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998), this Court stated:

A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that the individual committed the felony. MCL 764.15(c).¹ In reviewing a challenged finding of

¹ MCL 764.15(1)(c) states:

(1) A peace officer, without a warrant, may arrest a person in any of the following situations:

* * *

(continued...)

probable cause, an appellate court must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony. [Citations omitted; footnote added.]

The evidence at the evidentiary hearing established that defendant was arrested on December 16, 2000, at 12:30 a.m. and taken downtown for questioning. At that time, the police did not have probable cause to arrest defendant since the only incriminating evidence the police had regarding defendant was the fact that the victim was dead. This evidence alone does not justify a fair-minded person of average intelligence in believing that defendant had committed the felony. *Kelly, supra*, 231 Mich App 631.

However, “[t]he mere fact of an illegal arrest ‘does not per se require the suppression of a subsequent confession.’ It is only when an ‘unlawful detention has been employed as a tool to directly procure *any* type of evidence from a detainee’ that the evidence is suppressed under the exclusionary rule.” *Kelly, supra*, 231 Mich App 634 (citations omitted). The police subsequently had probable cause to arrest defendant based on the statements given to the police by the victim’s neighbor at 1:00 a.m. on December 16, 2000, only one half hour after defendant was actually arrested. The neighbor’s statement indicated that defendant had destroyed the victim’s Christmas tree and ornaments, and the victim had “put defendant out of the house.” Defendant did not give his inculpatory statement until 3:00 p.m. on December 17, 2000. Therefore, any illegality in defendant’s arrest was subsequently attenuated by his “official” arrest at noon on December 16, 2000, before he made his inculpatory statement on December 17, 2000. Hence, the trial court did not err in denying defendant’s motion to suppress his statement.

Defendant next argues that the trial court violated his rights of due process and confrontation by admitting hearsay statements made by the victim under MRE 803(3) and admitting as substantive evidence against him his nontestifying codefendant’s statement against interest. We disagree. This Court reviews the trial court’s decision to admit certain evidence for an abuse of discretion. *Dep’t of Transportation v VanEslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed *de novo*. Where the issue implicates the Confrontation Clause² of the federal constitution, the issue is constitutional and is reviewed *de novo*. *People v Washington*, 251 Mich App 520, 524-525; 650 NW2d 708 (2002).

Two witnesses testified, over defendant’s objection, that the victim told them, “If anything happens to me, it’s [defendant].” One of the witnesses the victim made this statement to had been in a phone conversation with the victim several days before the victim made this statement, and had overheard a threatening verbal altercation between the victim and the defendant after the victim told the defendant she would evict him from her home. The other

(...continued)

(c) A felony in fact has been committed and the peace officer has reasonable cause to believe the person committed it.

² US Const, Am VI.

witness had been told by the victim about this altercation, and had also been told that the defendant had threatened the victim. The trial court admitted the victim's statement pursuant to MRE 803(3), and instructed the jury that the victim's statement could be used only for the limited purpose of showing the familial discord between defendant and the victim, his mother. The trial court neither erred or abused its discretion in admitting the statement.

In *People v Fisher*, 449 Mich 441; 537 NW2d 577 (1995), the Michigan Supreme Court ruled:

Evidence of marital discord is relevant to motive just as evidence of marital harmony would be relevant to show lack of motive. *Discord or lack of discord in an ongoing relationship obviously has some tendency to make the existence of a fact in controversy more or less probable--whether or not the accused ended the relationship as it is alleged he did.* Whether the marital discord is of a type that would provide a motive for murder is an issue of weight, not admissibility. [*Fisher, supra* at 454 (emphasis added).]

Applying the reasoning in *Fisher* to the facts presented here, we conclude that because the statement establishes the victim's state of mind as to the increasing familial discord shortly before she was killed, the victim's statements are admissible as relevant to defendant's motive. Furthermore, the trial court did not abuse its discretion in concluding that the statement was highly probative of the familial discord existing at the time the statement was made and that its probative value outweighed any prejudice to defendant. *Fisher, supra* at 453.

Defendant next argues that his right of confrontation was violated when the trial court permitted hearsay statements of the codefendant to be admissible against him as substantive evidence. The witness testified that he had been told by codefendant that defendant had paid codefendant \$250 to kill defendant's mother. We disagree.

Because codefendant did not testify in the trial and was not subject to cross examination by defendant, codefendant was unavailable as a witness in defendant's trial and defendant was unable to confront him about his statement. The Confrontation Clause "permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial." *People v Washington*, 251 Mich App 520, 531; 650 NW2d 708 (2002)(Zahra, concurring in part and dissenting in part), quoting *People v Petros*, 198 Mich App 401, 410; 499 NW2d 784 (1993). Where a hearsay statement falls within a firmly rooted hearsay exception, or where the statement bears an adequate indicia of reliability, admission of the hearsay statement does not violate a defendant's right to confrontation. *People v Shutte*, 240 Mich App 713, 717-718; 613 NW2d 370 (2000), citing *People v Poole*, 444 Mich 151, 162-163; 506 NW2d 505 (1993).

As a general rule, a codefendant's inculpatory hearsay statement against another codefendant is presumed unreliable and therefore inadmissible under MRE 804(b)(3). *Schutte, supra* at 717. Nevertheless, on the facts presented here we conclude that the statement at issue in this case is more than sufficiently reliable to overcome the general presumption of unreliability, and was properly deemed admissible by the trial court against defendant.

In *Schutte, supra*, this Court indicated the appropriate analysis to be undertaken in determining the reliability of a codefendant's inculpatory statement:

In evaluating whether a statement against penal interest that inculcates a person in addition to the declarant bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against the other person, courts must evaluate the circumstances surrounding the making of the statement as well as its content.

The following factors favor admission of a statement against penal interest: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family friends, colleagues, or confederates - that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.

The presence of the following would favor inadmissibility: (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.

Courts should also consider any other circumstance bearing on the reliability of the statement. The totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission although a defendant is unable to cross-examine the declarant. [*Schutte, supra*, 240 Mich App 718-719, quoting *People v Poole*, 444 Mich 151, 165; 506 NW2d 505 (1993).]

When applying the above factors to the present case, we conclude that there were sufficient indicia of reliability to support the trial court's ruling that the statement was permissibly admitted as substantive evidence against defendant. The codefendant voluntarily made the statement to the witness while they were both in lock up at the Detroit Police Station. The statement was made three days after the victim was killed and the day after the codefendant was arrested. According to the witness, codefendant asked him to make a telephone call to codefendant's cousin to tell the cousin to dispose of a gun, since the codefendant was "on restrictions" and not allowed to have visitors or make telephone calls at that time. After the witness made the telephone call for the codefendant, the codefendant made the statement at issue as an explanation for the necessity of the call. The statement was made in front of two other inmates in lock up, and there was no evidence that the witness initiated this conversation. Notably, the codefendant did not make the statement to law enforcement officials, he did not minimize his culpability in the statement, making the statement to the witness did not advantage the codefendant or otherwise curry favor with anyone in law enforcement, and the codefendant had no motive to lie. All of the factors discussed establish more than sufficient indicia of reliability of the statement.

Further, defense counsel for both defendants vigorously cross examined the witness and impeached him with evidence of previous crimes of dishonesty. Therefore, the jury had evidence from which it could determine whether to believe the witness' account of the codefendant's statement. *Poole, supra* at 164. For all of these reasons, defendant's right of

confrontation was not violated by his inability to cross-examine the codefendant regarding the alleged statement.

Defendant also argues that the trial court committed error requiring reversal by refusing the codefendant's request for a cautionary instruction regarding the testimony about the codefendant's statement. However, defense counsel stated on the record that he had no objection to the jury instructions as the trial court gave them. Counsel's agreement to the instructions constituted a waiver which extinguishes any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

Defendant next argues that the prosecutor impermissibly questioned a witness, a friend of the deceased, about the witness' religious beliefs. We disagree. Defendant did not object to the prosecutor's questions regarding the witness' religion. Generally, "[a]bsent an objection at trial to the alleged misconduct, appellate review is foreclosed unless a defendant demonstrates plain error that affected his substantial rights, i.e., error that was outcome determinative." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.*

However, as noted by defendant, MCL 600.1436 precludes the questioning of any witness "in relation to his opinions on the subject of religion." In interpreting this statute, our Supreme Court has held that where the religious beliefs and their bearing on truthfulness of a defendant or witness have been improperly injected into the proceedings by a prosecutor, reversal is required irrespective of a showing of prejudice caused by the questioning. *People v Hall*, 391, Mich 175, 180-183; 215 NW2d 166 (1974). Therefore, we must determine whether the questions asked by the prosecutor in this case improperly injected the religious beliefs of the witness, and the bearing of those beliefs on the truthfulness of the witness, into the proceedings, thus requiring automatic reversal.

After a careful review of the record, we conclude that the prosecutor's questions did not improperly inject religion into the proceedings. During direct examination the prosecutor asked the witness why she had gone to the victim's house two days before the victim was killed. The witness testified that she had gone to the house with anointing oils to give to the victim, because she (the witness) was concerned the defendant had been taken over by the devil. The witness further testified that she instructed the victim to use the anointing oils to anoint the defendant and the victim's home. Thereafter, the prosecutor asked the witness whether she was spiritual and a Christian, and whether that was why she took the anointing oils to the victim's home. These questions merely clarified the witness' testimony, and was not an attempt to bolster the witness' credibility by asking about her religious beliefs or a question about the witness' opinions on religion. Therefore, the prosecutor's questions to the witness were not plain error, and reversal is not required on this basis.

Defendant's final argument is that the trial court erred in granting the prosecutor's request to strike the victim's neighbor as an endorsed witness. We disagree. This Court reviews the deletion of a witness from the prosecution's witness list for good cause shown for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995).

The trial court granted the prosecutor's request to strike the witness after the prosecutor presented two letters from the witness' physicians stating that it would be detrimental to the health of this neighbor who was "eighty-plus-years-old" to testify at trial. According to her doctors' letters, the witness has a history of breast cancer, diabetes, and hypertensive cardiovascular disease, must eat frequent small meals due to the diabetes, and must avoid stress that would cause fluctuations in her blood pressure and heart rate. The trial court did not abuse its discretion in following the advice of the physicians and permitting the prosecutor to strike the neighbor as a witness.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Hilda R. Gage