

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JULIA M. CATLETT,

Defendant-Appellant.

UNPUBLISHED

December 23, 2003

No. 242787

Oakland Circuit Court

LC No. 2001-179973-FC

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

PER CURIAM.

Defendant appeals as of right from a jury conviction of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224F, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. She was sentenced as an habitual offender, MCL 769.10, to concurrent terms of 35 to 60 years' imprisonment for the murder conviction, and 1 to 7 ½ years' imprisonment for the felon in possession conviction, to be served consecutively with 2 years' imprisonment for the felony-firearm convictions. We affirm.

Defendant first argues that the trial court committed error requiring reversal by excluding relevant testimony. We disagree.

A trial court's exclusion of evidence is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). See also *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999); MCL 769.26 and MCR 2.613(A). MRE 402 states in pertinent part, "All relevant evidence is admissible, except as otherwise provided by . . . these rules, or other rules adopted by the Supreme Court." MRE 402. The trial court excluded evidence in three of the challenged instances on hearsay grounds. Hearsay is defined as "a statement, other than the one made by the declarant while testifying . . . offered to prove the truth of the matter asserted." *McCallum v Dept of Corrections*, 197 Mich App 589, 603; 496 NW2d 361 (1992), citing MRE 801(c). Pursuant to MRE 802, hearsay is inadmissible unless otherwise provided by the Michigan Rules of Evidence. MRE 802.

Hearsay may be admissible when critical to a defense and where its exclusion would deny a defendant a fair trial. *People v Herndon*, 246 Mich App 371, 411; 633 NW2d 376 (2001). However, a defendant is not denied a fair trial when able to present a theory of defense to the jury despite the excluded evidence. *Id.*

In the present case, a detective was not permitted to testify regarding the contents of an earlier report. However, the detective was allowed to testify that the report pertained to a domestic violence complaint involving an assault and battery, and that defendant was the victim and her boyfriend was the aggressor. Although a second witness was not permitted to testify regarding statements she overheard, she was allowed to testify that she recognized the victim's voice, overheard fighting and blows, and heard defendant crying and screaming. She also testified that when she saw defendant the next day, three braids were ripped from defendant's scalp. A third witness's testimony, that defendant told her she was scared and asked the witness to accompany her, was likewise precluded by the trial court. However, this witness did testify that she accompanied defendant to the porch, the victim snatched open the door and grabbed defendant's arm to pull her in the house, and defendant grabbed the witness's arm. Because defendant was able to present her theory of self-defense to the jury in all three instances despite the excluded statements we conclude that she was not denied a fair trial. *Herndon, supra* at 411.

The court also excluded the testimony of defendant's daughter regarding whether her mother was afraid because it called for speculation. A witness may only testify regarding matters of which the witness has personal knowledge, MRE 602; however, a witness may give an opinion formed after direct observation pursuant to MRE 701. *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997). Nonetheless, a party may not claim error regarding exclusion of evidence unless a substantial right is affected and the party objects, stating the specific ground for the objection. *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). In the instant case, although defense counsel argued that defendant's daughter knew her mother and could tell when she was scared, counsel did not argue that the testimony was admissible under MRE 701. Moreover, where the jury could have inferred that defendant was scared from testimony that she was crying, no substantial right was affected.

Defendant next claims that the trial court should have instructed the jury on the lesser charge of intentionally aiming a weapon resulting in death, MCL 750.329. We disagree.

"This Court reviews de novo claims of instructional error." *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Because defendant did not request the instruction on the lesser charge, we review for plain error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Under a plain error analysis, an error must have occurred, the error must have been plain or obvious, and the defendant must demonstrate that the error affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Assuming arguendo that an error occurred, defendant has not established that the error affected her substantial rights. Although the trial court did not give an instruction for intentionally aiming a weapon resulting in death, MCL 760.329, it did give an instruction on the lesser offense of voluntary manslaughter. Where an instruction is given for an intermediate lesser included offense, and the jury returns a guilty verdict for the greater offense, failure to instruct on another lesser offense may be harmless. *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990). Here, the jury found defendant guilty of the greater offense of second-degree murder when it could have found defendant guilty of voluntary manslaughter. Thus, the trial court's failure to instruct regarding intentionally aiming a weapon resulting in death, MCL 760.329, was not outcome determinative and was harmless error. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). Because reversal regarding forfeited error is only warranted

when an actually innocent defendant was convicted or when the “fairness, integrity or public reputation of judicial proceedings” were seriously affected, *Carines, supra* at 763, citing *Olano, supra* at 736-737, the trial court’s failure to give the instruction on the lesser charge does not require reversal.

Defendant next argues that the court erred by limiting its jury instruction regarding impeachment of credibility by inconsistent statements to defendant’s testimony, when her children’s testimony was also impeached by inconsistent statements. We disagree.

Jury instructions are reviewed in their entirety rather than extracted piecemeal to determine whether error has occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

In the present case, no limiting instruction was requested and no prejudice demonstrated. Neither the trial court nor the prosecution suggested that the prior inconsistent statement could be used as substantive evidence and, thus, failure to give the instruction does not require reversal. *People v Paul Mathis*, 55 Mich App 694, 697; 223 NW2d 310 (1974). Moreover, omission of an instruction does not result in an error requiring reversal where the instructions in their entirety cover the substance of the instruction omitted. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997). Because the trial court instructed the jury that statements made outside the trial could not be considered as evidence and informed the jury that it could believe or disbelieve any of the testimony presented, the instructions as a whole covered the substance of the omitted instruction. Error requiring reversal did not occur.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Jessica R. Cooper