S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 26, 2005
v RAYMOND WILBUR DUVALL, JR., Defendant-Appellant.	No. 252487 Oscoda Circuit Court LC No. 03-000773-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DONALD DEAN DUVALL, Defendant-Appellant.	No. 252720 Oscoda Circuit Court LC No. 03-000772-FC

Before: Murray, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

Defendants Raymond Duvall, Jr., and Donald Duvall were each convicted, at a joint jury trial, of two counts of first-degree murder, MCL 750.316(1)(a). Both defendants were sentenced to two concurrent terms of life imprisonment. They both appeal as of right. We affirm.

Defendants' convictions arise from the disappearance and suspected killing of two hunters who never returned from a weekend hunting trip in November 1985, in the Mio area of northern Michigan. The two men, David Tyll and Brian Ognjan, had planned to travel to Tyll's family cabin in White Cloud and visit a friend, Dennis Gallop, in Mio, but they never arrived at either location. According to the prosecutor's theory of the case, defendants, along with other unidentified individuals, beat the victims to death after they became involved in an argument. The victims' bodies were never found, nor were their car or other personal effects ever located. The prosecutor's case principally relied on the testimony of a local resident, Barbara Boudro, who claimed to have witnessed the killings, and on various statements allegedly made by defendants admitting to their participation in the killings.

I. Admission of Evidence

Both defendants first challenge the testimony of Michigan State Police Detective Sergeant Robert Lesneski concerning his contacts with Barbara Boudro. In a 1999 interview at her home, Boudro provided details about the crime but initially refused to reveal that she witnessed the killings. She instead claimed that a deceased friend had witnessed the crime. She continued to deny being an eyewitness during part of a later interview conducted pursuant to an investigative subpoena. However, after a recess in the investigative subpoena proceeding where she had a further conversation with Lesneski, Boudro admitted having observed the killings. During trial, Boudro testified about what she witnessed, and also about her initial reluctance to testify and come forward with information. Over objection, the prosecutor presented Lesneski's testimony about Boudro's lack of composure during the initial and later interview, her statements that she was afraid to testify about what she had seen, and her admission to Lesneski during the investigative subpoena proceeding recess that she had witnessed the killings. Defendants challenge the trial court's decision to admit this testimony.

A trial court's ruling admitting evidence is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995). In overruling defendants' objections, the trial court based its decision in part on its determination that Boudro's earlier statements were admissible under the excited utterance exception to the hearsay rule, MRE 803(2). We agree that the trial court erred to the extent that it concluded that Lesneski's testimony was admissible under this exception. MRE 803(2) provides an exception to the general prohibition against hearsay, MRE 802, for statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Although the victims' killings certainly qualifies as a startling event, and while it is evident from Lesneski's testimony that Boudro was under stress when he confronted her in 1999, we cannot conclude that Boudro's stress in 1999 was caused by the 1985 killings. Rather, it is apparent that Boudro's stress and excitement arose from Lesneski's unexpected arrival and subsequent questioning. Furthermore, during the intervening years, Boudro had ample time for reflection about what she allegedly saw, especially since she admitted making a conscious decision to lie to Lesneski about whether she personally witnessed the killings. Therefore, Boudro's statements do not fall within the excited utterance exception to the hearsay rule. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

However, this Court will affirm a trial court's decision if the court reached the correct result, albeit for the wrong reason. *People v Chapman*, 425 Mich 245, 254; 387 NW2d 835 (1986). Here, the challenged testimony was admissible on alternative grounds.

First, Lesneski's testimony concerning Boudro's behavior and demeanor was properly admissible. This testimony did not concern statements made by Boudro, but Lesneski's observations of her. Boudro's demeanor was non-assertive conduct and thus not a statement for hearsay purposes. MRE 801(a); *People v Davis*, 139 Mich App 811, 813; 363 NW2d 35 (1984).

Likewise, Lesneski's testimony concerning Boudro's statements of her fear was also admissible. It was not offered for the truth of the matter asserted, but to explain how and why Boudro changed her testimony during the investigative subpoena proceeding, a nonhearsay purpose. MRE 801. "Where a witness testifies that a statement was made, rather than about the truth of the statement itself, the testimony is not hearsay." *People v Harris*, 201 Mich App 147,

151; 505 NW2d 889 (1993); see also *People v Fisher*, 220 Mich App 133, 152-154; 559 NW2d 318 (1996). Additionally, to the extent that these statements could have been used to prove the truth of the matter asserted, they fall within the state-of-mind exception to the hearsay rule, MRE 803(3).

Lastly, these statements, as well as Boudro's initial statements admitting that she had observed the killings, were admissible under MRE 801(d)(1)(B), as a prior consistent statement. To be admissible in this context, the prior consistent statement must meet the following requirements:

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. [*People v Jones*, 240 Mich App 704, 706-707; 613 NW2d 411 (2000), quoting *United States v Bao*, 189 F3d 860, 864 (CA 9, 1999).]

Here, during Boudro's cross-examination, counsel for Raymond Duval suggested that Boudro had changed her testimony during the investigative subpoena proceeding because Lesneski threatened her after he turned off a recorder. He further questioned her about a reward offered for assistance in finding the victims' killers, and how it had grown over the years and asked if she would be receiving the reward. Lesneski's testimony served to rebut these charges of improper motive and recent fabrication. The prior statements were consistent with Boudro's trial testimony. They assisted the prosecutor in showing that Boudro's long silence and initial reluctance to come forward were due to fear, not threats from Lesneski or a decision to claim the reward. Further, they were made before the alleged threats, i.e., before the time Lesneski allegedly threatened Boudro to change her story. Therefore, they were admissible under MRE 801(d)(1)(B).

Thus, although the trial court may have erroneously concluded that the statements in question were admissible as an excited utterance, defendants have failed to show that the challenged statements were inadmissible hearsay.

II. Other Acts Evidence

Defendant Raymond Duvall next argues that he was denied a fair trial by the introduction of other bad acts evidence, contrary to MRE 404(b). Defendant did not object to any of the challenged evidence at trial. Indeed, it was defense counsel who elicited much of the evidence that defendant now challenges. Because defendant did not object to this evidence, he must demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We disagree with defendant's assertion that the challenged evidence was irrelevant or more prejudicial than probative. Most of the challenged evidence concern admissions made by one or both defendants in the context of discussing their involvement in the charged killings in the course of threatening various family members and other witnesses. Although the fact that

these admissions included references to other improper or illegal activity was prejudicial to defendant, the evidence was probative of defendant's identity as the perpetrator of the charged crimes and was also relevant to explain the long silence by the many witnesses involved. The probative value of the evidence was not substantially outweighed by its prejudicial effect. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, modified 450 Mich 1212 (1995); People *v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Likewise, a witness' testimony that he moved out of the state because of threats was relevant as evidence of defendants' consciousness of guilt, despite the fact that the threats came from persons in defendants' family rather than defendants themselves. See *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996); *People v Salsbury*, 134 Mich 537, 569-570; 96 NW 936 (1903). Evidence of defendants' involvement with disposing stolen automobiles and car parts was also relevant to explain how defendants could have disposed of the victims' vehicle without being detected.

Moreover, much of the challenged testimony was elicited by defense counsel. Defendant may not now use this testimony as a ground for obtaining reversal on appeal. See *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

For these reasons, defendant has failed to demonstrate plain error with respect to the admission of the challenged other acts evidence.

Defendant also argues that defense counsel was ineffective for failing to object to the introduction of the other acts evidence. As previously discussed, however, the evidence was both relevant and sufficiently probative to justify its admission. Defense counsel was not required to advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

III. Prosecutorial Misconduct

Defendant Raymond Duvall further argues that misconduct by the prosecutor denied him a fair trial. We disagree.

Defendant first complains that the prosecutor improperly introduced the other acts evidence discussed in part II of this opinion. As previously discussed, however, defendant's substantive challenges to the introduction of this evidence are without merit. Moreover, a prosecutor's "good-faith effort to admit evidence does not constitute misconduct." *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Here, defendant has not presented anything to support his claim of an improper motive by the prosecutor.

Defendant also argues that the prosecutor improperly vouched for Barbara Boudro's testimony during closing arguments. We disagree. The prosecutor never suggested that she had some special knowledge, unknown to the jury, that Boudro was testifying truthfully, nor did the prosecutor use the prestige of her office to vouch for Boudro's credibility. Rather, she discussed Boudro's testimony and argued why it should be believed. The prosecutor's arguments in this regard were not improper. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996); *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992).

Defendant next argues that the prosecutor improperly engaged in impermissible character assassination of the defendants and dramatic theatrics at the expense of the evidence to sway the jury. In particular, defendant complains that the prosecutor improperly characterized the crime as horrific and used inflammatory statements to describe defendants' intimidation of witnesses. We disagree. The prosecutor's comments were supported by the evidence. From Boudro's account, the killings were horrific. During trial, the prosecutor presented substantial evidence that defendants engaged in both an elaborate cover up of the killings and a system of intimidation of witnesses and relatives. The prosecutor was free to argue the evidence and all reasonable inferences arising from it as they related to her theory of the case, and she was not required to state her inferences and conclusions in the blandest possible terms. *Bahoda*, *supra* at 282; *Launsburry*, *supra* at 361. Defendant has failed to show that the prosecutor's remarks were improper.

Defendant also maintains that defense counsel was ineffective for failing to object to the prosecutor's conduct. We disagree. Because defendant has not shown that the prosecutor's conduct was improper, he has also failed to show that defense counsel was ineffective for failing to object. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991); *Snider*, *supra* at 423.

IV. Failure to Request a Limiting Instruction

Defendant Donald Duvall does not challenge the introduction of the other acts evidence discussed in part II of this opinion. But in a related claim, he contends that defense counsel was ineffective for failing to request a cautionary instruction, such as CJI2d 4.11. This issue is not preserved for appeal because Donald Duvall did not raise it in a motion for a new trial or a *Ginther*[1] hearing. *Armendarez*, *supra* at 73-74. Therefore, our review is limited to mistakes apparent from the record. *Snider*, *supra* at 423.

Defendant has not overcome the presumption that counsel's failure to request a cautionary instruction was a matter of trial strategy. See *Toma*, *supra* at 302. Much of the other acts evidence was presented in the context of admissions by defendant concerning the charged offense. A number of defendant's threats to other witnesses involved embedded confessions. Any instruction would have highlighted theses admissions. Indeed, to properly caution the jury, the trial court would likely have had to deal with each statement in turn. Defense counsel may have chosen not to draw unnecessary attention to this evidence.

Instead, it appears from the record that defense counsel decided to acknowledge the other acts evidence and attempt to place it in a light more favorable to defendant. Counsel's chosen method of dealing with the other acts evidence was to exaggerate and dismiss it as a type of unbelievable folklore developed over the years by less than solid citizens of the community. Counsel's closing arguments suggest that he wanted the jury to agree with his condemnation of the ridiculousness of the prosecutor's attempt to portray the defendants as "the most dangerous guys in town . . . since Jesse James and his gang rode." We cannot conclude that counsel's

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

decision not to request a cautionary instruction was based on a mistake rather than a conscious decision. The fact that a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). We therefore reject this claim of error.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Pat M. Donofrio