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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 27, 2007
v	No. 267822 Saginaw Circuit Court
CORIELLE DEMONT JOHNSON, Defendant-Appellant.	LC No. 05-025719-FC

Before: Donofrio, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a), larceny of a firearm, MCL 750.357b, felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant was convicted of killing Devon Stinson, who was shot in the head while sitting in his vehicle during the early morning hours of December 26, 2004. There were no witnesses to the shooting. The prosecution's theory was that defendant shot Stinson with a handgun that he stole from his girlfriend, Tamara Darby, intending to shoot another man who he argued with earlier that night.

On appeal defendant raises several claims of ineffective assistance of counsel. After reviewing the trial court's findings of fact for clear error and the questions of law de novo, we conclude that defendant's claims do not merit relief. See *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

First, defendant argues that counsel was ineffective for failing to offer evidence of a recorded telephone conversation between defendant and his mother in which defendant's mother

commented that the police had not recovered the gun that was used in the shooting. The trial court concluded that counsel was not ineffective for failing to offer this evidence because the evidence was inadmissible hearsay. We agree. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally not admissible unless an exception applies. MRE 801(c); *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997).

Defendant claims that he only learned about the missing gun from what his mother told him. The purpose of the evidence was to show that defendant's mother told defendant that the police had not recovered a gun. Because defendant sought to offer the statement for its truth, the statement is hearsay. Furthermore, the evidence was not admissible under MRE 801(d)(2) as a party admission because defendant's mother is not a party and any statement by defendant was self-serving and was not being offered against him. See *People v Jensen*, 222 Mich App 575, 581; 564 NW2d 192 (1997), vacated in part on other grounds 456 Mich 935 (1998). And, although the prosecutor introduced evidence of conversations between defendant and Tamara Darby, the conversation between defendant and his mother was not admissible under MRE 106. The conversation did not relate to the former conversations and, therefore, was not necessary to a fair consideration of the conversations between defendant and Darby. In summary, because the conversation between defendant and his mother was not admissible, defense counsel was not ineffective for failing to offer it into evidence at trial.

Second, defendant argues that his counsel was ineffective for not attempting to establish through Antaurean Jones, who was present at the time of the shooting, that an automatic gun was used in the shooting and that the gunman drove a Dodge Stratus. Defendant argues that such evidence was important because the prosecution's theory was that he used Darby's gun, which was a revolver, and that he was driving a Chrysler 300 or 300M at the time of the shooting.

Jones could not be located for trial, so his preliminary examination testimony was read at trial. Although defendant argues that counsel was ineffective for failing to question Jones at the preliminary examination regarding the type of weapon used and the vehicle driven by the shooter, counsel was not obligated to explore all possible details at the preliminary examination stage on the assumption that Jones would not be available for trial. Furthermore, defense counsel explained that he did not ask Jones about a weapon because Jones said that he did not see the shooting. Counsel also explained that he spoke to Jones and Jones denied making the police statement that was attributed to him, and further, based on his conversation with Jones, counsel did not intend to have Jones testify at trial because he would not have helped defendant's case. It is apparent that counsel's questioning of Jones was a matter of trial strategy and defendant has not overcome the presumption of sound strategy. See *Tommolino*, *supra*.

Third, defendant argues that counsel should have offered evidence of additional recorded telephone conversations between defendant and Darby after the prosecution offered two such recorded conversations between them. We agree with the trial court that the proffered evidence was not admissible. The recorded conversation that defendant argues should have been offered was a distinct conversation between defendant and Darby and was not necessary to the jury's understanding of the two conversations that were admitted. Accordingly, it was not admissible under MRE 106. Moreover, it would not have been admissible under MRE 801(d)(2)(A) if offered by defendant. See *Jensen*, *supra* at 581.

Fourth, defendant argues that counsel was ineffective for failing to object to evidence of other bad acts under MRE 404(b). We disagree. Defendant was not prejudiced by counsel's failure to object to testimony that defendant met a witness at a parole office, considering that the jury was already aware that defendant had at least one prior felony conviction based on the felon in possession of a firearm charge. Furthermore, defense counsel did not object to defendant's reference to another pending assault case in defendant's statement as a matter of trial strategy. Defendant has neither overcome the presumption of sound strategy, nor has he demonstrated a reasonable probability that the result of the trial would have been different but for the brief reference to the other pending case. See *Johnson*, *supra*.

Finally, defendant argues that his attorney was ineffective for not attempting to impeach Darby with her testimony from the preliminary examination. Decisions regarding the questioning of witnesses involve matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, counsel's decision not to impeach Darby with evidence that she initially claimed that her police statement was false was clearly a matter of trial strategy. Had counsel tried to impeach Darby with this evidence, it would have opened the door for the prosecutor to introduce her subsequent preliminary examination testimony under MRE 106. In the latter testimony, Darby claimed that defendant admitted taking Darby's gun and firing it, and Darby also claimed that defendant did not return to Darby's home until after the shooting occurred, points which Darby equivocated on at trial. Defendant has not overcome the presumption of sound strategy with regard to the impeachment of Darby's trial testimony.

Next, defendant argues that the trial court erred by allowing the jury to view Darby's prior videotaped police statement in its entirety. The trial court admitted the statement for impeachment purposes because it was inconsistent with Darby's trial testimony and instructed the jury on the limited purpose of the evidence at the time it was introduced. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. Any preliminary questions of law are reviewed de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

Under MRE 607, the prosecutor was permitted to impeach Darby even though she was a prosecution witness. Further, MRE 613(b) permits extrinsic evidence of a witness' prior inconsistent statement:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Under this rule, Darby's prior statement was admissible to impeach her credibility and it was not hearsay because it was not being offered as substantive evidence to prove the truth of the statement. See *Merrow v Bofferding*, 458 Mich 617, 631; 581 NW2d 696 (1998).

Relying on MRE 403 and *People v Jenkins*, 450 Mich 249; 537 NW2d 828 (1995), however, defendant argues that the videotaped statement should not have been admitted because it contained prejudicial comments by Darby and the two detectives who were interviewing her. We disagree. The comments at issue were not as objectionable as those in *Jenkins*.

Furthermore, unlike in *Jenkins*, the trial court instructed the jury on the limited purpose of the prior statement at the time it was introduced. Under the circumstances, the court's contemporaneous instruction was sufficient to protect against the potential of unfair prejudice. The trial court did not abuse its discretion in allowing the statement.

Defendant next argues that the trial court erred in admitting both Lyndon Sampson's prior police statement and his preliminary examination testimony. We disagree.

The trial court admitted Sampson's recorded police statement under MRE 803(5), which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> * * *
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> **(5) Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

MRE 803(5) requires that

> "[d]ocuments admitted pursuant to this rule must meet three requisites: (1) The document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters are fresh in his memory." [*People v Daniels*, 192 Mich App 658, 667-668; 482 NW2d 176 (1991), quoting *People v J D Williams*, 117 Mich App 505, 508-509; 324 NW2d 70 (1982).]

If an adequate foundation is established to admit a statement under this rule, the statement is not rendered inadmissible because other evidence contradicts the accuracy of the statement. *Daniels*, *supra* at 669. The weight of the statement is for the jury to decide. *Id*.

Before Sampson's recorded police statement was admitted, Sampson admitted making the statement, but denied being able to recall its details. Further, there is no dispute that Sampson had a better recall of the events at the time he gave the prior statement than when he was called to testify at trial. Thus, there was an adequate foundation for admitting the prior statement under MRE 803(5).

We note that after the trial court admitted the recorded statement, Sampson testified that some of the information in the prior statement was not true. Previously, however, Sampson

testified that he was not able to recall the details of his prior statement and refused to testify, and the record does not indicate which portions of the prior statement Sampson later was claiming were lies. Because a sufficient foundation for admitting the recorded statement was established at the time the statement was received, the trial court did not abuse its discretion in allowing the statement. Sampson's later testimony affected only the weight of the prior statement, not its admissibility.

Defendant also argues that Sampson's preliminary examination testimony was improperly admitted. The trial court admitted Sampson's preliminary examination testimony under MRE 804(b)(1), which provides:

> **(b) Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> (1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

MRE 804(a) provides as follows:

> **(a) Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant --
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> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
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> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
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> (3) has a lack of memory of the subject matter of the declarant's statement; or
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> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
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> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.
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> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

To the extent that the trial court relied on MRE 804(a)(2) to find that Sampson was unavailable, we agree that the requirements of this subrule were not satisfied because the trial

court did not first order Sampson to testify. It is clear, however, that Sampson was refusing to testify. Furthermore, the record establishes that Sampson was also claiming a lack of memory of the events in question. Thus, even if the trial court failed to comply with MRE 804(a)(2), the record establishes an independent basis for a finding of unavailability under MRE 804(a)(3). Indeed, defendant conceded below that Sampson's preliminary examination testimony was admissible due to his refusal to testify. Therefore, reversal is not required on this basis.

Defendant next argues that the trial court erred in denying his request for a mistrial after Sampson twice referred to a polygraph examination while testifying. A trial court's decision to grant or deny a motion for a mistrial is reviewed for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 512-514; 603 NW2d 802 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. at 514.

On cross-examination by defense counsel, Sampson twice referred to a polygraph examination. A reference to a polygraph examination is generally considered plain error, but does not always require reversal. *People v Nash*, 244 Mich App 93, 97-98; 625 NW2d 87 (2000). The following factors should be considered in determining whether reversal is required:

> "(1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted." [*Id*., quoting *People v Kiczenski*, 118 Mich App 341, 346-347; 324 NW2d 614 (1982) and *People v Rocha*, 110 Mich App 1, 9; 312 NW2d 657 (1981).]

Although Sampson twice referred to a polygraph examination, neither reference was solicited. Defense counsel did not object to the first reference, but waited until the second reference to raise the matter before the trial court. Further, Sampson never disclosed the results of any examination, and we disagree with defendant that it could be implied from his comments that he had passed a polygraph examination. Sampson's brief comments did not reveal sufficient information to allow the jury to draw any conclusions about the results. Under the circumstances, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. As defense counsel noted above when he declined a special instruction, because Sampson did not reveal any results, any prejudicial impact arising from the references was minimal.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Mark J. Cavanagh