

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 8, 2012

v

LEANDER ELMORE,

No. 302408
Washtenaw Circuit Court
LC No. 10-000828-FC

Defendant-Appellant.

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; and first-degree home invasion, MCL 750.110a(2). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 15 to 30 years' imprisonment for armed robbery, and 15 to 30 years' imprisonment for first-degree home invasion. Defendant appeals as of right. We affirm.

Defendant's sole argument on appeal is that the trial court improperly admitted a portion of a statement he made to a police detective at the conclusion of an interview. Defendant told the police detective, after having given a statement ostensibly providing an innocent explanation that he was in the wrong place at the wrong time, that "I'd like to tell you the truth but I can't because they'll send me back to prison." Defendant specifically claims that the trial court erred in admitting into evidence the portion of his statement indicating that he would be sent back to prison. We disagree.

The trial court's decision whether to admit evidence is reviewed for an abuse of discretion, but preliminary legal determinations of admissibility are reviewed de novo; it is necessarily an abuse of discretion to admit legally inadmissible evidence. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). Conversely, a trial court generally cannot be said to have abused its discretion if the evidentiary question was a close one. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). "In cases involving preserved, nonconstitutional errors, the defendant must establish that it is more probable than not that the error undermined reliability in the verdict." *People v Cornell*, 466 Mich 335, 363 n 16; 646 NW2d 127 (2002).

Defendant does not, in any serious way, challenge the fact that his statement was relevant. MRE 401 defines relevant evidence as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In this case, defendant was accused of armed robbery

and first-degree home invasion based on the victims' allegations that defendant had broken into their home and threatened them. After his arrest, defendant gave an exculpatory statement to the police, claiming that he did not break into the victims' house or threaten anyone. Defendant's statement to the police formed the basis of his theory of defense at trial. This theory was advanced by defense counsel's arguments and questioning of witnesses at trial. Thus, while defendant did not testify at trial, defendant's credibility, as it related to his theory of defense and his statement to the police, was at issue in this case. Credibility is a material issue. See *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005).

Again, defendant contends only that the trial court should have excised his proffered reason for *why* he would like to be honest but could not be. The phrase "I'd like to tell you the truth but I can't," was relevant, even without the remainder of the statement, because it supported that defendant's exculpatory statement to police was not truthful. However, the phrase "because they'll send me back to prison" was also relevant where it provided a powerful explanation of why defendant did not tell the police the truth. Accordingly, the phrase "because they'll send me back to prison" was relevant under MRE 401, and therefore admissible under MRE 402, because it made the fact that defendant lied to the police more probable. Presuming for the sake of argument, without deciding, that it was indeed error for the trial court to admit the entirety of the statement, we find it highly unlikely that doing so undermined the reliability of the verdict.

First, the trial court explicitly instructed the jury that "as to the alleged statement that the defendant would tell what happened but they would send him back to prison, you may only consider that in deciding whether the defendant's other statements to the officer were true." Juries are presumed to follow their instructions. *People v Armstrong*, 490 Mich 281, 294; 806 NW2d 676 (2011). Furthermore, "instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 256, 279; 662 NW2d 836 (2003). We do not believe the single reference to going back to prison would be so inflammatory that it raises the specter of the jury disregarding its instructions, nor do we perceive any indication in the record that the jury did in fact disregard its instructions.

Second, the aspect of defendant's statement most damaging to his defense was simply communicating that he had not been honest with the police detective. In other words, his innocent explanation for how he came to be in the wrong place at the wrong time and thus entirely unconnected with the home invasion was a fabrication. As a practical matter, it was the portion of the statement to which defendant does not object that truly undermined his theory of the case. Whether he was less than honest because he would be sent back to prison, merely sent to prison at all, for any other reason, or for no reason at all was relevant enough to admit under MRE 401 and 402, but not substantively much more prejudicial under MRE 403 when considered in context.

Considering the overwhelming evidence admitted in this case, including the defendant being caught by the victim while breaking-in to the victim's home, the admission of defendant's statement that "they'll send me back to prison" did not undermine the reliability of the verdict. Consequently, defendant is not entitled to reversal or a new trial on that basis.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause