STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 28, 2001
v	No. 218919 Wayne Circuit Court
MICHAEL F. JONES, Defendant-Appellant.	LC No. 97-005381

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b, for shooting his former girlfriend. The trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that insufficient evidence identified him as the shooter or proved his premeditation and deliberation. When reviewing a sufficiency of the evidence claim, this Court views the evidence in the light most favorable to the prosecution to determine if a rational jury could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). With respect to identity, the victim's mother specifically identified defendant as the man fleeing her home immediately after the shooting occurred. Furthermore, testimony by the victim's son and sister and evidence of a January 1997 personal protection order that the victim obtained against defendant showed that defendant repeatedly had threatened to kill or hurt the victim. We conclude that this evidence and the reasonable inferences arising from it supported the jury's finding beyond any reasonable doubt that defendant shot the victim. To the extent that defendant challenges the believability of the victim's mother's identification, we note that issues of witness credibility and the weight of evidence belong to the jury, and we will not second guess the jury's determinations. *People v Avant*, 235 Mich App 499, 505-506; 597 NW2d 864 (1999).

Regarding premeditation and deliberation, these elements may be established by evidence of the prior relationship of the parties, the defendant's actions before the killing, the circumstances surrounding the killing itself, and the defendant's conduct after the murder. Circumstantial evidence and the reasonable inferences arising therefrom may suffice to establish

a defendant's premeditation and deliberation. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). In this case, defendant and the victim had engaged in a romantic relationship that ended acrimoniously shortly before the victim's murder. During the months preceding the murder defendant threatened to kill the victim. The victim's death, which occurred during the early hours of the morning, resulted from several close range gunshots to her face and head. *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993). Within twelve hours of the murder, defendant's sister observed a gun in defendant's waistband. The shooter gained entry to the victim's home through locked doors without damaging them. Furthermore, on learning that the police were looking for him, defendant left his sister's home for a friend's residence, where shortly thereafter police apprehended him. We conclude that this evidence amply supported the jury's determination beyond any reasonable doubt that defendant premeditated and deliberated the victim's murder.

Defendant next argues that the trial court erred in admitting evidence of his past bad acts contained within the personal protection order and the victim's sister's testimony. We review the trial court's admission of evidence for a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Evidence of past acts is admissible if relevant to any fact at issue outside of the defendant's criminal propensity, as long as the risk of unfair prejudice does not substantially outweigh its probative value. *People v VanderVliet*, 444 Mich 52, 55, 64; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). The prosecutor offered the other acts evidence to prove defendant's intent and motive to kill the victim. The evidence of defendant's prior threats to the victim, contained in both the personal protection order and the victim's sister's testimony, plainly tended to establish defendant's motive for killing the victim and prove his intent to kill the victim, both proper purposes. *People v Fisher*, 449 Mich 441, 452-453; 537 NW2d 577 (1995) (noting that evidence of discord within a romantic relationship is relevant to motive and premeditation); *People v Teague*, 411 Mich 562, 565; 309 NW2d 530 (1981) (observing that recent past threats are relevant to prove the defendant's motive and intent). Furthermore, in light of the significant probative value of this evidence shedding light on defendant's relationship with the victim, any risk of unfair prejudice did not substantially outweigh the evidence's probative value. MRE 403. Accordingly, the evidence was admissible.

Defendant further suggests that the protection order was inadmissible in light of the prosecutor's failure to timely notify defendant of his intent to introduce the order, and that the trial court erred in refusing defendant's request for a limiting instruction regarding the other acts evidence. While defendant correctly observes that a prosecutor intending to introduce evidence of past acts must provide the defendant reasonable notice, MRE 404(b)(2), and that the court must read a requested limiting instruction that delineates the jury's proper consideration of prior acts, *Starr*, *supra* at 498, we find that neither the prosecutor's failure to properly notify defendant nor the trial court's refusal to read defendant's requested limiting instruction affected the outcome of defendant's trial. Given the facts that (1) defendant knew almost two years before his trial that the prosecutor introduced the protection order during defendant's preliminary examination, (2) the other acts evidence was admissible, and (3) the transcripts reflect that defendant had several opportunities at trial to challenge the admissibility of the evidence, we cannot conclude more probably than not that the asserted lack of notice resulted in a miscarriage

of justice. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999); *People v Hawkins*, 245 Mich App 439, 453-456; 628 NW2d 105 (2001). Furthermore, in light of the substantial evidence of defendant's guilt and the cumulative nature of the evidence of threats contained in the protection order and the victim's sister's testimony, we likewise are not convinced that the instructional error resulted in a miscarriage of justice. *Lukity*, *supra*.

Defendant also asserts that the reading into evidence of defendant's sister's and nephew's February 11, 1997 written statements to the police constituted the impermissible admission of hearsay evidence. The statements were hearsay because they were not made at the trial and were offered into evidence "to prove the truth of the matter asserted," i.e., as substantive evidence.[1] MRE 801(c), *People v Harris*, 201 Mich App 147, 150-151; 505 NW2d 889 (1993). A court may not admit hearsay evidence unless an exception applies. MRE 802. Therefore, the prosecutor could introduce the statements as substantive evidence only after he laid the proper foundation for their admission as past recollections recorded, MRE 803(5), a hearsay exception. *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995).

The following elements must be met to establish a past recollection recorded: (1) the witness once had knowledge of the matter, (2) the witness now has an insufficient recollection of the matter to permit him to testify fully and accurately, and (3) the document either was written by the witness, or was examined by the witness and accurately reflects the witness' knowledge when the matter remained fresh in the witness' memory. *People v Hoffman*, 205 Mich App 1, 16; 518 NW2d 817 (1994); *People v Missias*, 106 Mich App 549, 554; 308 NW2d 278 (1981).

Defendant's sister testified repeatedly that she could not remember various events involving defendant that occurred the day before the victim's death. Furthermore, she agreed that when she signed her statement to the police on the day after the victim's murder the events remained fresher in her mind. Because the sister's testimony established the necessary foundational elements for the admission of her earlier statement as a past recollection recorded, we conclude that the trial court did not abuse its discretion by permitting the prosecutor to request that the sister read excerpts of her statement into the record. MRE 803(5); *Starr*, *supra* at 494.

The prosecutor failed to establish, however, that defendant's nephew's previous statement to the police qualified as a past recollection recorded. The prosecutor showed neither that the nephew lacked sufficient recollection of the matter to permit his full and accurate testimony nor that the nephew's statement accurately reflected his knowledge when the events were fresh in his mind. The nephew specifically rejected that the statement accurately reflected his knowledge of events occurring the day before the victim's murder. The nephew explained that although he had signed the statement, he never reviewed it. Notwithstanding the nephew's attempts to respond from memory to the prosecutor's questions and his denial of the statement's accuracy, the prosecutor requested and the trial court ordered, both improperly, that the nephew simply read his

[1] The sister's and nephew's statements did not qualify as nonhearsay under MRE 801(d)(1)(A) because neither the sister nor nephew made the prior statements under oath.

prior statements into the record. The trial court clearly abused its discretion when it sanctioned this tactic.[2] MRE 803(5); *Starr, supra*.

The prosecutor's and the trial court's mishandling of the nephew's prior statements led to the introduction of several statements prejudicial to defendant, including that (1) on the day before the murder defendant asked his nephew to drive him to the victim's house; (2) when the nephew declined to provide defendant transportation defendant drew his gun and threatened to shoot his nephew; (3) defendant stated to his nephew that "he was tired of that girlfriend playing with him;" and (4) "[a]fter [defendant] killed [the victim], he came back to the [nephew's] house to find out if the police is [sic] looking for him." As indicated above, however, MCL 769.26 "places the burden on the defendant to demonstrate that 'after an examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice." *Lukity*, *supra* at 495. After carefully scrutinizing the effect of the instant error in the context of the untainted evidence presented at trial, including the properly admitted evidence of (a) the victim's and defendant's failed romantic relationship; (b) defendant's repeated threats during the weeks and months before the murder to kill the victim, and the protection order obtained by the victim; (c) the victim's mother's identification of defendant running away from her home immediately following the shooting; (d) defendant's sister's sighting of a gun in defendant's waistband on the day before the murder; (e) defendant's apparent flight from his sister's home on notification that the police were searching for him; (f) the facts that defendant had visited the home where the shooting occurred many times before the murder, and that the crime scene did not reflect a break in; and (g) the facts that the victim's mother testified that the man fleeing the scene of the shooting wore "light" clothes, and that a police officer testified that he discovered defendant in his boxer shorts next to a pile of clothes that included a pair of tan pants, we are not convinced that "it is more probable than not that a different outcome would have resulted without the error." *Lukity*, *supra*.

Defendant further claims that the circuit court's method of selecting jurors violated MCR 2.511(F), which requires that each dismissed potential juror be replaced before a party is required to exercise peremptory challenges, and denied him due process. Defendant failed to preserve this issue for review because his counsel exercised just one peremptory challenge, failed to object to the jury selection method, and expressly indicated his satisfaction with the jury. *People v Jendrzejewski*, 455 Mich 495, 514-515, n 19; 566 NW2d 530 (1997).[3]

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[2] While the prosecutor might properly have inquired of the nephew regarding his prior inconsistent statements for impeachment purposes, the prosecutor plainly violated the rules of evidence by demanding that the nephew read his prior statements into the record. We further note the trial court's failure to instruct the jury that they could consider evidence of the nephew's prior statements for impeachment purposes only. *Jenkins*, *supra* at 260-264.

[3] We note that *People v Hubbard (After Remand)*, 217 Mich App 459; 552 NW2d 493 (1996), on which defendant relies, is distinguishable from the instant case. In *Hubbard*, this Court concluded that the defendant's failure to exercise all his peremptory challenges did not forfeit his fair cross section challenge to the jury venire because the "[d]efendant could not have cured any defect in the juror allocation process through the use of additional peremptory challenges." *Id*. at 468. In this case, the trial court only once failed to seat a new juror immediately before

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Defendant lastly contends that his life sentence without parole qualifies as a determinate sentence violative of Const 1963, art 4, § 45, and that the sentence constitutes cruel or unusual punishment. Const 1963, art 1, § 16. Both arguments entirely lack merit. The Legislature has the authority to establish determinate sentences, including life sentences without parole. *People v Snider*, 239 Mich App 393, 426-428; 608 NW2d 502 (2000). Furthermore, in light of the gravity of the offense, a sentence of life with no possibility of parole for a first-degree murder conviction does not constitute a cruel or unusual punishment. *People v Launsburry*, 217 Mich App 358, 363-364; 551 NW2d 460 (1996).

Affirmed.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

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requesting that defendant exercise peremptory challenges. Defendant, who utilized only one peremptory challenge, could have cured this procedural defect by exercising further peremptory challenges.