

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DAMIEN TRICE,

Defendant-Appellant.

UNPUBLISHED

October 19, 2001

No. 223177

Saginaw Circuit Court

LC No. 99-017136-FC

Before: K. F. Kelly, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), carrying a dangerous weapon with unlawful intent, 750.226, felon in possession of a firearm, 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction and three to five years each for the carrying a dangerous weapon with unlawful intent and felon in possession convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I

Defendant first challenges the introduction of evidence regarding his affiliation with the “Sunny Side” gang, as well as gang member behavior patterns and activities, claiming that such evidence was unduly prejudicial. Defendant also challenges the use of an expert witness to discuss these issues, the qualification of the expert witness, and the basis for the expert’s testimony.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Likewise, a trial court’s assessment of the probative value and prejudicial effect of evidence will not be reversed on appeal absent an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Snider*, 239 Mich App 393, 419; 608 NW2d

502 (2000). In the instant case, the prosecutor sought to prove that the motive for the shooting stemmed directly from defendant's gang membership and the accompanying gang-related behavior of "challenging" strangers who invaded the gang's "turf" and meeting with violence anyone who showed disrespect by failing to provide a satisfactory answer. Without this evidence of motive, the shooting would appear inexplicable, considering that the evidence showed that the victim was a stranger to the area, was non-threatening, and did not carry any money or valuables. Thus, the evidence of defendant's gang membership and the underlying behavior patterns of gangs was relevant to prove motive. *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). Further, we cannot say that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. MRE 403. Likewise, because the evidence was offered for a proper purpose other than to show defendant's propensity to commit such an offense, the admission of the evidence did not violate MRE 404(b). *Starr, supra* at 498; *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

Defendant, however, further contends that there was no need for an expert witness regarding this evidence, claiming that the assistance of an expert was not needed to help the jury determine defendant's status as a gang member or to explain the members' behavior patterns, including the fact that members routinely protect their territory from outsiders and meet with violence those who challenge their authority. We disagree.

Expert testimony is permissible when the testimony will aid the jury in understanding evidence or factual issues, particularly in a field in which lay people usually do not possess the requisite knowledge. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986); see also *People v Peterson*, 450 Mich 349, 362; 537 NW2d 857 (1995). Admissibility is governed by a three-part test: (1) the witness must be an expert; (2) there must be facts in evidence which require or are subject to examination and analysis by a competent expert; and (3) there must be "knowledge in a particular area which belongs more to an expert than an ordinary person." *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991); *People v Beckley*, 161 Mich App 120, 125; 409 NW2d 759 (1987). "The critical inquiry, however, is whether such testimony will aid the factfinder in making the ultimate decision in the case." *Ray, supra* at 707. Moreover, the fact that an expert's opinion may embrace "an ultimate issue" in the case does not make it inadmissible. *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993); *Ray, supra* at 707.

In the instant case, the trial court did not err in allowing the prosecutor to present expert testimony regarding defendant's gang membership and the gang-related behavior patterns involved in this case. As mentioned previously, this evidence was directly related to defendant's alleged motive for the killing, a fact at issue in this case where the killing was otherwise inexplicable. Additionally, we are satisfied that testimony dealing with the world of gang membership, with its apparently arbitrary rules of conduct, identification of members of rival gangs and territorial behavior patterns, does not fall within the purview of the average juror. Therefore, the trial court did not abuse its discretion in concluding that specialized knowledge in this area would assist the jury in evaluating the evidence. See *Williams (After Remand), supra* at 542. Furthermore, the record discloses that the prosecutor's expert witness possessed extensive experience and expertise in the area of gang membership, both practically and academically, and we therefore conclude that the trial court did not abuse its discretion in qualifying him as an expert. MRE 702.

Defendant additionally challenges the witness' reliance on hearsay evidence from police reports and other sources as a basis for some of his conclusions. However, although hearsay evidence is generally inadmissible, MRE 802, an expert witness is permitted to base his opinion on hearsay evidence. MRE 703; *People v Dobben*, 440 Mich 679, 695; 488 NW2d 726 (1992); *People v Anderson*, 166 Mich App 455, 465; 421 NW2d 200 (1988). Thus, we find no error.

Finally, defendant challenges the trial court's decision to permit the expert witness to base his opinion that defendant was a member of the Sunny Side gang, at least partially, on a statement made by defendant to police in 1994. Defendant claims that the statement was too remote to be relevant to the question of his gang membership in 1999. However, considered in conjunction with testimony that defendant was not actively involved in gang activity during this time period due primarily to his incarceration, and testimony that members of the Sunny Side gang do not leave the gang once having joined, although they may keep a low profile following their release on probation or parole, we find no error with respect to this issue.

II

Defendant next argues that the prosecutor failed to introduce sufficient evidence to support his conviction for first-degree premeditated murder. We disagree.

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In reviewing the sufficiency of the evidence, this Court views the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that each essential element of the crime was proven beyond a reasonable doubt. *Id.* In doing so, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

A conviction of first-degree, premeditated murder requires proof "that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). The elements of first-degree murder may be inferred from the circumstances surrounding the killing. *People v Ortiz-Kehoe*, 237 Mich App 508, 520; 603 NW2d 802 (1999). Premeditation and deliberation requires a showing of a sufficient time to allow the defendant to take a "second look." *Kelly, supra* at 642. Factors that may be considered in determining whether premeditation and deliberation were established include: "(1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998); see also *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

In the instant case, the prosecutor's principal witness testified that, after he and defendant approached a house where the witness planned to sell crack cocaine, they encountered the victim who did not respond to defendant's repeated questions concerning his reasons for standing near the house. In response to this lack of a reply, and despite this witness' repeated efforts to get

defendant to leave, he saw defendant point a gun at the victim and prepare to fire. Then, as this witness ran from the scene, he heard shots from where defendant and the victim remained and was followed by defendant back to a car at a nearby church.

This testimony, coupled with the testimony of defendant's brother concerning defendant's actions in retrieving the loaded gun earlier in the evening and returning it unloaded to him later, the corroborating testimony of the owner of the house where defendant's brother was staying regarding defendant's visits to the house on the night of the shooting, and the tracing of the weapon later found in the brother's possession to the victim through ballistics evidence, viewed most favorably to the prosecution, was sufficient to enable the jury to find that it was defendant who shot the victim and that he did so without provocation and under circumstances showing premeditation and deliberation. Thus, defendant's first-degree murder conviction was supported by sufficient evidence.

III

Defendant argues in the alternative that his first-degree murder conviction was against the great weight of the evidence. Because defendant did not raise this issue in a motion for a new trial in the trial court, it is not preserved. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Accordingly, we will review the issue only for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Because the evidence reasonably supports the verdict in this case, we find no plain error warranting appellate relief. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999); *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

IV

Defendant argues that the prosecutor's misconduct deprived him of a fair trial. However, because defendant did not object to the challenged conduct at trial, appellate relief is foreclosed absent plain error affecting defendant's substantial rights. *Carines*, *supra* at 763. Viewing the challenged remarks in context, *Noble*, *supra* at 660, we find no plain error. Further, to the extent some of the remarks could be considered improper, a curative instruction could have eliminated any resulting prejudice. Therefore, defendant's substantial rights were not affected. *Carines*, *supra*; *People v Schutte*, 240 Mich App 713, 720-721; 613 NW2d 370 (2000)

V

Defendant next argues that the trial court's failure to sever the felon in possession of a firearm charge from the remaining charges constituted error. Severance of this charge was not necessary because the court provided a proper limiting instruction consistent with this Court's decision in *People v Mayfield*, 221 Mich App 656, 659-660; 562 NW2d 272 (1997).

VI

Defendant lastly argues that the trial court erred when instructing the jurors after they indicated that they could not reach a verdict. A review of the record discloses that the court's

instructions substantially complied with CJI2d 3.12. Accordingly, we find no error with respect to this issue. *People v Pollick*, 448 Mich 376, 380-385; 531 NW2d 159 (1995).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald