STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 4, 2002
v	No. 228527 Saginaw Circuit Court
LIONEL VILLARREAL, Defendant-Appellant.	LC No. 99-018046-FC

Before: Saad, P.J., and Owens and Cooper, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316, for killing Nicole Sanchez by shooting her in the pelvis. A jury subsequently convicted him of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the murder conviction and an additional two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. Expert Testimony

Defendant initially argues that the trial court erroneously permitted Lt. David Menzie to testify as an expert witness in the area of crime scene behavioral analysis. We disagree. "[T]he determination regarding the qualification of an expert and the admissibility of expert testimony is within the trial court's discretion." *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). A trial court's decision concerning expert witness testimony will not be reversed on appeal absent an abuse of discretion. *Id*. An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, finds no justification for its decision. *Id*.

MRE 702 governs the admission of expert testimony and provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

> experience, training or education, may testify thereto in the form of an opinion or otherwise.

For testimony to be admissible under MRE 702, it must meet the following criteria: (1) the witness is an expert; (2) the facts in evidence are subject to analysis by a competent expert; and (3) the knowledge in that particular field belongs more to an expert than to the common man. *People v Beckley*, 161 Mich App 120, 125; 409 NW2d 759 (1987).

Defendant argues that Lt. Menzie was not qualified as a crime scene behavioral analyst because he lacked expertise in behavioral analysis and psychology. However, the trial court is given broad discretion under MRE 702 in determining whether an expert is qualified by "knowledge, skill, experience, training, or education." *People v Moye*, 194 Mich App 373, 378; 487 NW2d 777, rev'd on other grounds 441 Mich 864 (1992); see also *Mulholland v DEC Int'l Corp*, 432 Mich 395, 403-405; 443 NW2d 340 (1989). In this instance, Lt. Menzie had twenty-two years experience as a police officer, had worked on thousands of homicides, sexual assault and domestic violence cases, and was trained in anthropology, sociology, and psychology, and their use in investigating violent crimes. Furthermore, Lt. Menzie was qualified in over twenty other cases as an expert in crime scene behavioral analysis. See *People v Lewis*, 160 Mich App 20, 28; 408 NW2d 94 (1987). Therefore, we find that the trial court did not abuse its discretion in declaring Lt. Menzie qualified as an expert witness in crime scene behavioral analysis.

Defendant also contends that Lt. Menzie's testimony concerning defendant's relationship with the victim, as well as the fact that defendant had lied to and attempted to manipulate the police, was purely speculative and outside his range of expertise. However, Lt. Menzie testified that he took the known facts of similar cases, which included approximately twenty cases of relationships resulting in gunshot wounds to the genital area, and used them to help him explain the unknown in this case. Furthermore, although Lt. Menzie referred to defendant's statements to the police as inconsistent and manipulative, uncontested evidence in the record indicates that defendant provided the police with at least three conflicting versions of the crime. Expert testimony that the jury may use to assess a defendant's credibility along with the other evidence presented is admissible. *People v Hamilton*, 163 Mich App 661, 668-669; 415 NW2d 653 (1987). Consequently, the trial court did not abuse its discretion in admitting Lt. Menzie's expert testimony.

II. Admission of Evidence

Defendant next asserts that the trial court erred when it concluded that Melissa Mata's statements to Detective Robert Ruth were inadmissible as hearsay. Specifically, defendant claims that Detective Ruth was improperly prevented from recounting that Mata, who was unavailable to testify at trial, reported hearing defendant say "don't leave me, baby girl" after the shooting. We disagree. This Court reviews a trial court's decision to exclude evidence for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001).

Initially, we find that defendant's statement itself was not hearsay because it was a command rather than an assertive statement. See *People v Jones*, 228 Mich App 191, 204-205; 579 NW2d 82 (1998). Nevertheless, Detective Ruth's account of what Mata told him about the

statement would have been hearsay because Mata was the declarant and the statement was being offered to prove that defendant allegedly made a statement of concern. MRE 801(c); *People v Bartlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998). Hearsay is inadmissible as substantive evidence except as provided by the Michigan Rules of Evidence. MRE 802; *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Thus, Detective Ruth's proposed testimony concerning Mata's statements would only be admissible if it fell within an exception to the hearsay rule.

Defendant claims that the statement fell under MRE 803(3) because it related to defendant's then-existing state of mind. However, Mata is the declarant in this case as Detective Ruth would be testifying about statements that she made to him during a police interview. Therefore, MRE 803(3) is inapplicable because Mata's statement was not reflective of her then existing state of mind. Furthermore, defendant's failure to notify the prosecution before trial that he planned to offer this statement under MRE 804(b)(7), is fatal to its admission under this exception. Because the statement does not fit within any exception to the hearsay rule, we find that the trial court properly excluded the testimony.

III. Prosecutorial Misconduct

Defendant further maintains that the prosecutor's comments during closing arguments amounted to prosecutorial misconduct. We disagree. Because defendant did not object to these comments at trial, we review them for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant claims that the prosecutor improperly told jurors that the gun was in defendant's car on the night of the shooting. While this fact may not have been in evidence, the prosecutor is permitted to argue all reasonable inferences arising from the evidence as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Furthermore, the circumstances surrounding the location of the gun were not outcome determinative in light of the defense position that defendant accidentally fired the gun. We also note that whether the statement caused an unfair suggestion of premeditation is irrelevant because defendant was not convicted of premeditated murder.

Defendant also purports that the prosecutor's assertion that defendant disposed of bullets while standing on the porch lacked factual support. A careful review of the prosecutor's comments in context reveals that he did not assert this as a fact. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Rather, it appears that the prosecutor was challenging defendant's claim that he pulled the chamber of the gun while standing on the porch, causing bullets to come "flying out," although no bullets were found on the porch. See *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996) (prosecutor may argue from the facts in evidence that the defendant is untrustworthy).

Defendant also asserts that there is no record evidence to support the prosecutor's statement that defendant told Detective Ruth he had chambered the gun. However, Detective Ruth testified that in a statement at the police station defendant claimed he pulled the chamber on the gun. Given this testimony, we find no evidence of prosecutorial misconduct.

IV. Offense Variable Scoring

Defendant further challenges the scoring of offense variable six, MCL 777.36 (intent to kill or injure another individual; offense variable seven, MCL 777.37 (aggravated physical abuse); and offense variable ten, MCL 777.40 (exploitation of a vulnerable victim). This Court upholds a sentencing court's scoring decision if there is any supporting evidence in the record. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Defendant first argues that offense variable six should have been scored at twenty-five, for unpremeditated intent to kill, rather than fifty. We disagree. A fifty-point score is appropriate where the killing was committed during an attempted act of first or third-degree criminal sexual conduct (CSC). The sentencing judge cited forensic evidence indicating that the victim's body was in a defensive kicking posture at the time of the shooting, and the fact that the victim told relatives she had planned to break off her relationship with defendant and not have sex with him again. Based on this evidence, we uphold the scoring of offense variable six.

Next, defendant challenges the fifty-point scoring of offense variable seven on the grounds that the mere use of a gun is insufficient to warrant terrorism. Terrorism is defined as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." MCL 777.37(2)(a). In light of evidence indicating that the victim was in a defensive position when defendant placed the gun directly on her vagina and pulled the trigger, we find support for this score.

Defendant also claims that the five-point scoring of offense variable ten was unwarranted because there was no evidence that he exploited the victim's vulnerability during the murder. We disagree. According to MCL 777.40(1)(c), five points is appropriate if "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." The evidence supports a five-point score because the victim was sleeping shortly before she was shot, and because defendant, at 5'9" and 180 pounds, was much larger than the 5'1", 120 pound victim. MCL 777.40(1)(c). Therefore, scoring of this variable was not erroneous.

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Jessica R. Cooper