STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2004
V	No. 245088 Wayne Circuit Court
ARNETT LIONEL ROMANS, Defendant-Appellant.	LC No. 01-013459

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction, twenty-two to thirty-five years' imprisonment for the assault with intent to commit murder conviction, two to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

In defendant's first claim of error, he raises several issues regarding the trial court's decision to (1) declare a prosecution witness, Cheryl Alexander, unavailable, (2) allow the prosecution to submit her prior testimony from defendant's first trial[1] into evidence, and (3) deny defendant's motion for a continuance. This Court reviews for clear error the circuit court's findings of fact, including whether a witness qualifies as unavailable. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). Generally, a trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Coy*, 258 Mich App 1, 3; 669 NW2d 831 (2003). However, this Court reviews de novo constitutional issues, including whether the admission of the evidence was sufficiently reliable to protect a defendant's constitutional right of confrontation. *People v Haynes*, 256 Mich App 341, 345; 664 NW2d 225 (2003); *People v Smith*, 243 Mich App 657, 681-682; 625 NW2d 46 (2000). A trial court's decision whether to

[1] Defendant's first trial ended in a mistrial after a juror had to be excused for medical reasons.

grant a continuance is reviewed for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002).

First, defendant asserts that Alexander should not have been deemed "unavailable" because it was not certain that she could not have testified at a later date, and she was a critical witness because she was the only person who could identify defendant as the shooter. We disagree. Generally, if the prosecution endorses a witness, it is required to use due diligence to produce the witness at trial, regardless whether the endorsement was required. *People v Wolford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991). However, when a witness is unavailable due to mental or physical illness under MRE 804(a)(4),[2] a showing of due diligence in attempting to produce the witness is not required. *People v Gross*, 123 Mich App 467, 470; 332 NW2d 576 (1983). Under the plain language of MRE 804(a)(4), a witness may be declared unavailable because of a *then existing* physical infirmity. Thus, we conclude that the rule does not require that the prosecution must first establish that a witness' health will not improve before a witness may be declared unavailable. Here, the prosecution established that Alexander had a physical infirmity at the time of trial. The prosecution presented communications from Alexander's surgeon to the trial court indicating that Alexander would not be available to testify until after the trial was scheduled to end. As such, Alexander's condition met the requirements of MRE 804(a)(4). Consequently, because MRE 804(a)(4) examines a witness' present and not future infirmity at the time of trial, we conclude that the trial court properly declared Alexander unavailable to testify because of a physical infirmity. *Gross*, *supra* at 470.

Next, defendant asserts that the trial court erred in admitting Alexander's prior testimony. We disagree. Where a declarant is unavailable as a witness, the hearsay rule does not exclude "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 . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect." MRE 804(b)(1). See also *People v Adams*, 233 Mich App 652, 656; 592 NW2d 794 (1999). While defendant emphasizes that the jury was denied the opportunity to judge Alexander's demeanor, MRE 804(b)(1) only requires that there was an opportunity for cross-examination under a similar motive.

Here, the record establishes that in thirty-two pages of cross-examination and recross-examination transcript, defendant had the opportunity to cross-examine Alexander with a similar motive at the first trial as he would have had at the second trial. Defendant step-by-step went over each statement that Alexander made during her direct and redirect testimony as a means to

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[2] MRE 804(a)(4) provides, in pertinent part:

> (A) "Unavailability as a witness" includes situations in which the declarant-
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> * * *
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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 . . . . [Emphasis added.]

attack Alexander's credibility by finding inconsistencies in her testimony with the goal of discrediting her as a witness. Therefore, in light of defendant's opportunity to cross-examine Alexander at the first trial under a similar motive that he would have had at the second trial, we find that Alexander's testimony from the first trial was properly admitted. MRE 804(b)(1); *Adams, supra* at 656.

Next, defendant asserts that his constitutional right of confrontation was violated when Alexander's testimony from the first trial was introduced as evidence. We disagree. Even when evidence of an unavailable witness is admissible under the Michigan Rules of Evidence, it is still necessary to determine whether the use of the testimony would violate a defendant's constitutional right to confront prosecutorial witnesses. US Const, Am VI; Const 1963, art 1, § 20; *Adams, supra* at 659. The Confrontation Clause allows the prior testimony of an unavailable witness to be used at trial under MRE 804(b)(1) only on a showing that the testimony bears satisfactory indicia of reliability. *People v Meredith*, 459 Mich 62, 68; 586 NW2d 538 (1998). "This reliability requirement is satisfied 'without more' if the proposed testimony falls within a firmly rooted exception to the hearsay rule." *Id*.; *Adams, supra* at 659-660. Accordingly, we conclude Alexander's testimony from the first trial was properly admitted pursuant to MRE 804(b)(1). *Meredith, supra* at 65-66. Lastly, because MRE 804(b)(1) is a firmly rooted exception to the hearsay rule, Alexander's testimony had sufficient indicia of reliability to satisfy defendant's right of confrontation. *Id*.

Next, defendant asserts that the trial court erred in failing to grant his request for a two-week continuance; however, the record establishes that defendant's continuance request was not limited to a specific period of time. Specifically, at the special prehearing, defense counsel stated:

> [Alexander] is unavailable ironically the exact time the trial is to proceed, and to just delay it, you know, a matter of weeks or months or whatever the Court . . . would be in the best interest of the trier of fact . . .

MCR 2.503(C) is the rule that "governs the granting of adjournment on the basis of the unavailability of a witness or evidence." *Jackson, supra* at 276. MCR 2.503(C) provides:

> (1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.
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> (2) An adjournment[3] may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.

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[3] "A continuance and an adjournment are essentially the same procedural mechanism." *People v Grace*, 258 Mich App 274, 277 n 1; 671 NW2d 554 (2003), citing MCR 2.503, staff comment (the term "continuance" was uniformly replaced by the term "adjournment"); Black's Law Dictionary (7th ed) (the definitions of adjournment and continuance are almost identical).

> (3) If the testimony or the evidence would be admissible in the proceeding, and the adverse party stipulates in writing or on the record that it is to be considered as actually given in the proceeding, there may be no adjournment unless the court deems an adjournment necessary. [Footnote added.]

In light of our conclusion that Alexander's testimony was admissible under MRE 804(a)(4), coupled with defendant's vague request for a continuance, we conclude that the trial did not abuse its discretion in deciding not to grant a continuance. *Jackson, supra* at 276. We note that defendant raises additional constitutional rights violations: (1) the right to present a defense, (2) the right to have a fair trial, (3) the right to counsel, and (4) the right to due process, all of which are based on the proposition that after the trial court denied the motion for a continuance, defense counsel was unable to prepare an effective defense because he had less than twenty-four hours to examine Alexander's testimony from the first trial and thus lacked adequate preparation time. However, we find no merit in defendant's argument because he had the benefit of the same defense counsel at both trials, and thus, he had the benefit of familiarity with Alexander's previous testimony had she testified at the second trial.

Next, defendant asserts that the jury's verdict was against the great weight of the evidence and the evidence was insufficient to sustain his convictions. We disagree. On appeal, this Court reviews a trial court's grant or denial of a motion for a new trial for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). An abuse of discretion exists when the trial court's denial of the motion was manifestly against the clear weight of the evidence. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence**.** MCR 2.611(A)(1)(e). Such a motion should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result by allowing the verdict to stand. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

This Court reviews a claim of insufficient evidence by viewing the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could find that each element of the offense was proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To sustain a conviction for first-degree murder, the prosecutor had to prove that the killing was intentional and that the act of killing was premeditated and deliberate. MCL 750.316(1)(a); *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001). Premeditation and deliberation can be inferred from the surrounding circumstances, but the inferences cannot be merely speculative and must have support in the record. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). Factors evidencing premeditation are (1) the prior relationship between the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing, including the weapon used and the location of the wounds, and (4) the defendant's conduct after the victim's death. *Id*. at 300.

To sustain a conviction for assault with intent to murder, the prosecution had to establish (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing

murder. MCL 750.83; *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). To sustain a conviction for felon in possession of a firearm conviction, the prosecution had to establish that, in either of two separate periods, it was unlawful for defendant as a convicted felon to carry a firearm by establishing either: (1) he was convicted of an unspecified "felony" and he could not possess a firearm in Michigan until the expiration of three years after serving any term of imprisonment, parole or probation, or (2) that he was convicted of a "specified felony," as defined by the statute, and was subject to a five-year period during which it was unlawful for him to possess a firearm in the state. MCL 750.224f; *People v Parker*, 230 Mich App 677, 686; 584 NW2d 753 (1998).

To sustain a conviction for felony-firearm, the prosecution had to establish that defendant carried or possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b; *People v Williams*, 212 Mich App 607, 608; 538 NW2d 89 (1995), rev'd on other grounds 461 Mich 431 (2000). Possession may be actual or constructive and may be proven by circumstantial evidence. *Id.* at 609.

Defendant's argument is in reliance on a hospital surveillance tape that purportedly established that he could not have committed the crime because it occurred around 2:00 p.m. and the hospital videotape showed a person matching defendant's description entering the hospital with his girlfriend and their baby at 1:46 p.m., and a person matching defendant's description leaving the hospital at 2:17 p.m. Additionally, evidence was presented that the hospital videotape showed a wall clock that was one hour behind the master tape. Defendant's theory at trial was that the wall clock was accurate because it had been changed to reflect daylight savings time whereas the master tape had not been adjusted, and the hospital tape showed him wearing different clothing than that described by Alexander.

In our review of the record, we conclude that with respect to the first-degree murder charge and the assault with intent to murder charge, there was ample evidence to establish that defendant's act of killing complainant was intentional and premeditated, and defendant assaulted Alexander with an intent to kill. Specifically, defendant fired multiple times at complainant, who had thirteen gunshot wounds. Alexander had at least four gunshot wounds and she testified that if she had not played dead, she believed that she would be dead. Defendant went away and came back to fire a second round of seven or eight gunshots. During the second pass, defendant leaned over the driver of the "getaway" car to shoot at complainant and Alexander. Evidence was presented that the slugs found at the scene came from a semi-automatic weapon, which required that the trigger be squeezed each time a gunshot was fired. Defendant fled the scene and attempted to have three witnesses, Niesha Smith, Jacqueline Davis, and Doris Banks establish an alibi for him.

Although defendant relies extensively on the hospital tape as evidence that the jury improperly rejected his alibi defense, we disagree. Generally, "if an alibi defense is accepted by the jury, a defendant cannot be convicted." *People v Erb*, 48 Mich App 622; 629; 211 NW2d 51 (1973). "It is the duty of the prosecution to show beyond a reasonable doubt that the defendant did not commit the crime and that, therefore, the defendant was at the scene of the crime at the time it was committed. *Id*. at 629-630.

Here, the jury could reasonably reject defendant's alibi defense that he was with his girlfriend at the hospital at the time of the shooting because the prosecution attacked his alibi

defense on several levels. First, and perhaps the most damaging, the prosecution was able to elicit testimony from the surveillance tape technician that, despite images on the videotape that showed the wall clock in the cashier's office being one hour behind the time stamp on the master videotape, the master tape could have actually indicated the correct time showing defendant at the hospital between 2:46 p.m. and 3:17 p.m., one hour after the crime occurred. Second, the prosecution presented evidence that defendant was seen one hour before the shooting by Jamal Reno at a gas station, despite defendant's claim and Kellita Scott's testimony that he arrived at her house to pick up his girlfriend at 1:00 p.m. This evidence supported the prosecution's theory that defendant could not be at two places at the same time.

Third, the prosecution presented evidence that defendant was seen in the area of the crime near the time of the shooting. Fourth, evidence was presented that defendant was seen wearing a dark "hoody" as Alexander indicated, contrary to his claims that he wearing a light jacket, particularly where testimony was presented that he changed clothes on the afternoon of the crime. Fifth, evidence was presented that the drive to the hospital from the scene of the crime took approximately six to nine minutes. Therefore, it was possible, consistent with the prosecution's theory, that defendant committed the crime, went to Jacqueline Davis' house almost immediately thereafter, changed clothes and drove to the hospital afterwards, if at all.

Sixth, we are cognizant that the jury was allowed to view the hospital tape and defendant at trial and as such, was in a better position to determine if the videotape showed defendant entering the hospital. Seventh, the prosecution questioned Kellita Scott's delay in coming forward with evidence that defendant arrived at her house at 1:00 p.m. "The credibility of a witness may be attacked by showing that she failed to speak or act when it would have been natural to do so, if the facts were in accordance with her testimony." *People v Martinez*, 190 Mich App 442, 446; 476 NW2d 641 (1991). "The timeliness of an alibi account may be highly probative of its truthfulness." *Id.*

Eighth, the prosecution was able to suggest that defendant, after seeing a still photograph of the hospital entrance, purchased clothing similar to the clothing that was worn by the unidentified person on the videotape in an attempt to establish an alibi. Lastly, evidence was presented that the hospital staff had no recollection that defendant was indeed at the hospital with his girlfriend at the time of her appointment. Moreover, the jury heard testimony that his girlfriend was willing to pay someone at the hospital to provide an alibi for defendant, and Doris Banks' testimony that defendant returned to the clinic in an attempt to get her to state that he was at the clinic with his girlfriend.

Consequently, there was conflicting evidence regarding defendant's whereabouts between 1:00 p.m. and the time of the shooting and the clothing he was wearing that afternoon, thereby raising questions of credibility that this Court generally leaves to the factfinder. *Lemmon*, *supra* at 642-643. This Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *Id.*

Similarly, there was ample evidence to establish that defendant, as a previous felon, was prohibited from possessing a weapon in light of the parties' stipulation that he had been convicted of a previous felony and had not completed the terms of probation or paid the required fines, and that defendant was guilty of the felony-firearm charge in light of Alexander's

description that she was shot at least four times by defendant and Reno's testimony that he observed defendant with the gun.

In sum, after reviewing the evidence, we are confident that the verdict was not manifestly against the clear weight of the evidence, and allowing the verdict to stand will not result in a miscarriage of justice. *Id.* at 642. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Daoust, supra* at 16. Moreover, we are not persuaded that the evidence was insufficient to sustain defendant's convictions when viewed in a light most favorable to the prosecution. *Nowack, supra* at 400; *Lee, supra* at 167-168.

In defendant's last claim of error, he asserts that the trial court erred when it excluded his motion for leave to add a witness, Stoney Harris, who sent him a letter on or around the third day of trial. Defendant asserted that Harris' letter indicated that another person, Miguel Kimber, confessed to the crime. The trial court excluded the letter on the ground that Harris' letter lacked circumstances to indicate it was trustworthy.

The determination whether circumstances sufficiently establish the trustworthiness of a statement against penal interest depends, in part, on the trial court's findings of fact and, in part, on its application of the legal standard to those facts. *People v Barrera*, 451 Mich 261, 268-269; 547 NW2d 280 (1996). Generally, this Court uses a clearly erroneous standard in reviewing the trial court's findings of fact and an abuse of discretion standard in reviewing the trial court's decision to exclude the statement. *Id*. However, defendant did not specifically or timely object to the trial court's decision to exclude Kimber's statement via Harris' testimony. Therefore, the trial court's evidentiary decision to exclude the statement is unpreserved. Unpreserved issues are reviewed for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

"A declarant's hearsay statement against penal interest that also implicates another person may be admissible as substantive evidence against the other person (1) if the statement is admissible as a matter of the law of evidence, MRE 804(b)(3),[4] and, (2) its admission would not violate the defendant's right of confrontation." *People v Poole*, 444 Mich 151, 162; 506 NW2d 505 (1993). In *Poole*, our Supreme Court stated:

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[4] MRE 804(b)(3) is an exception to the hearsay exclusionary rule and provides, in pertinent part:

> (3) A statement which was at the time of its making so far contrary to the declarant's pecuniary . . . interest, or so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates--that is, to someone whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
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> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.
>
> Courts should also consider any other circumstance bearing on the reliability of the statement at issue. While the foregoing factors are not exclusive, and the presence or absence of a particular factor is not decisive, the totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant. [*Poole, supra* at 165 (citation omitted).]

Here, defendant asserts that Harris' proposed testimony regarding Kimber's confession that he was the shooter was supported by corroborating circumstances because Kimber "apparently made the statement spontaneously to Harris without any apparent inducement for doing so and was supported by sworn testimony at Harris' preliminary examination." We disagree. Defendant failed to provide *any* information regarding the circumstances of the statement. First, the letter from Harris is undated and unsigned. As such, the letter could have actually been written by anyone. At best, defendant only established that the statement, if actually made by Kimber, was made on October 30, 2001. No facts were provided to indicate the nature of Kimber's and Harris' relationship or that Kimber's statement was (1) voluntarily given, (2) made contemporaneously with the shooting, (3) made to Harris as a person whom Kimber would likely speak the truth, or (4) uttered spontaneously at Kimber's initiation without prompting or inquiry by Harris.

Additionally, although defendant asserts on appeal that "the information provided by Harris was substantiated by transcripts from Harris' preliminary examination." the record establishes that trial counsel was reluctant and unwilling to guess the exact nature of Harris' proposed testimony without having read Harris' preliminary examination transcript. The record does not indicate that the trial court was ever presented with Harris' preliminary examination transcript and the lower court record does not contain any testimony from Harris' preliminary examination to substantiate Harris' letter. As such, defendant has failed to establish plain error. *Carines*, *supra* at 764-765; *Barrera*, *supra* at 261.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borello