STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 5, 2004
v	No. 248784 Jackson Circuit Court
BRIDGETT LORRAINE NORRIS, Defendant-Appellant.	LC No. 02-006733-FC

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from her conviction by a jury of first-degree premeditated murder, MCL 750.316(1), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court imposed consecutive sentences of two years in prison for the felony-firearm conviction and life without eligibility for parole for the first-degree murder conviction. We affirm.

The instant case stems from allegations that defendant shot and killed her former lover as she walked along the street near her apartment. Defendant contends that the prosecution presented insufficient evidence to sustain her first-degree murder conviction. We review de novo a defendant's claim that the evidence presented at trial was insufficient to support a conviction as a matter of law. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). The prosecution must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The court must examine this evidence in the light most favorable to the prosecution. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and the reasonable inferences arising from it may constitute sufficient evidence of the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

In order to prove that a defendant committed first-degree murder, the prosecution must present evidence establishing that "the defendant intentionally killed the victim and that the killing was premeditated and deliberate." *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). However, defendant does not contend that there was insufficient evidence of her intent to kill or of premeditation or deliberation. She contends that there was insufficient evidence that she was the shooter. Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976).

In the instant case, the prosecution offered a significant amount of circumstantial evidence tending to show that defendant killed the decedent. It presented a recording of a 9-1-1 call, received a few minutes before the decedent's death, in which she complained that defendant had just assaulted her. And it called two witnesses who placed defendant near the scene of the crime at the time the shooting occurred.

Additionally, Officer Robert Noppe of the Jackson Police Department testified that, just after the shooting, he saw defendant attempting to leave the area. When he ordered her to stop, she fled. Officer Noppe further testified that he observed defendant reaching towards her waist as she ran as if trying to get something out. After capturing her, he discovered a pistol along the path defendant took when she fled.

Furthermore, the medical examiner testified that a pair of gunshot wounds caused the decedent's death and that both bullets were recovered from the body. A detective from the Jackson Police Department testified that ballistics tests were conducted on these bullets and it was determined that they were fired from the gun discovered by Officer Noppe.

Based on the evidence presented, a rational jury could infer that it was defendant who shot the decedent.

Defendant next asserts that the trial court erred in admitting testimony concerning hearsay statements made by the decedent regarding her fear of defendant. Decisions on whether to admit evidence are reviewed for abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). But preliminary questions of law, such as whether a rule of evidence precludes admissibility, are reviewed de novo. *Id.* A trial court abuses its discretion if it admits evidence that is inadmissible as a matter of law. *Id.*

MRE 801(c) defines hearsay as a declarant's out of court statement offered to prove the truth of the matter asserted. *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Hearsay is inadmissible as substantive evidence unless one of the exceptions in the rules of evidence applies. *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993). Under MRE 803(3), a statement of a declarant's "then existing state of mind, emotion, sensation, or physical condition" is not excluded by the hearsay rule. *People v Coy*, 258 Mich App 1, 14; 669 NW2d 831 (2003). But MRE 803(3) does not apply to "a statement of memory or belief to prove the fact remembered or believed." *Id.*

In the instant case, defendant argues that the statements the decedent made concerned her memory of past fears of the defendant and were thus inadmissible under MRE 803(3) and violated her rights under the Confrontation Clause. But defendant failed to object in the trial court on the basis of the Confrontation Clause. Accordingly, the issue is unpreserved and our review is limited to plain error under *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant has failed to meet her burden under the plain error rule.

First, defendant must show that there is a clear or obvious error. *Id.* at 763. In light of the United States Supreme Court's recent decision in *Crawford v Washington*, 541 US ___; 124 S Ct 1354; 158 L Ed 2d 177 (2004), it is no longer clear that non-testimonial hearsay, such as in the case at bar, offends the Confrontation Clause. The Court concluded that its opinion casts doubt on its prior decision in *White v Illinois*, 502 US 346; 112 S Ct 736; 116 L Ed 2d 848

(1992), which held that it did. *Crawford,* 158 L Ed 2d at 198-199. Therefore, if error is present in this case, it is not clear or obvious.

Second, defendant must demonstrate prejudice, which requires defendant to show that the error affected the outcome of the trial. *Carines, supra* at 763. Given the volume of evidence against defendant, we are not persuaded that defendant was prejudiced by any error under this issue.

Third, even if defendant establishes plain error, we may reverse only if the error resulted in the conviction of an actually innocent defendant or that it seriously affected the integrity, fairness or public reputation of the judicial proceedings. *Id.* We are not persuaded that that is the case here.

Accordingly, we reject defendant's claim of error under the Confrontation Clause.

Next, defendant argues that the trial court erred in admitting evidence under MRE 404(b) that showed she threatened and assaulted the decedent on several occasions before the shooting. She argues that, rather than being offered for a proper purpose, this evidence showed that she possesses bad character and that its probative value was outweighed by the potential for unfair prejudice.

MRE 404(b) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994), our Supreme Court stated that before a trial court may admit evidence of other bad acts, it must determine:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

In the instant case, the prosecution sought to introduce the evidence of threats against and violent behavior towards the decedent as evidence of defendant's motive and intent to kill her. When a defendant enters a plea of not guilty, all elements of a criminal offense are placed in issue and the prosecution bears the burden of proving each of them beyond a reasonable doubt. *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995), modified and remanded 450 Mich 1212; 539 NW2d 504 (1995), citations omitted. And as noted above, intent is one of the elements of first-degree murder. *Marsack, supra* at 370. Consequently, the evidence that

defendant intended to harm or kill the decedent did more than indicate that defendant possesses bad character. Rather, it was relevant to the prosecution's prima facie case and was properly presented for this purpose.

Additionally, the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice. In *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995), our Supreme Court found evidence of marital discord "highly relevant" to the issue of motive in a murder and as "circumstantial evidence of premeditation and deliberation." Because of this, it held that such evidence was more probative than prejudicial. *Id.* In the instant case, the probative value of the evidence that defendant threatened and assaulted the decedent after their relationship ended similarly outweighs any negative inferences the jury might have drawn concerning defendant's character. Furthermore, the trial court twice instructed the jury that it could only consider such evidence as it related to motive, intent, opportunity, or lack of mistake. And it specifically stated that the jury could not use the evidence as proof of defendant's bad character. Based on the standard from *Starr*, the trial court did not err in admitting evidence of defendant's other bad acts and we affirm her convictions.

Defendant also contends that the trial court erred in refusing to give her proposed instruction regarding hearsay. We review de novo a defendant's claims of instructional error. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). But the determination of whether a jury instruction is applicable to the facts of a particular case "lies within the sound discretion of the trial court." *Id.*

Rather than give the proposed instruction, the trial court stated that CJI2d 4.11, regarding other acts evidence, was "more to the point and more relevant." As noted above, the reading of this instruction properly explained the extent to which the jury could use the evidence of defendant's prior bad acts. Additionally, defendant's proposed instruction mischaracterized the testimony and misstated the law regarding hearsay. Much of the testimony addressed in the proposed instruction referred to defendant's own statements. These constituted admissions by a party under MRE 801(d)(2) and were therefore not hearsay. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). To the extent that the testimony mentioned did contain hearsay, the trial court admitted it under MRE 803(3). Where one of the exceptions in the rules of evidence applies, hearsay is admissible as substantive evidence. *Poole*, *supra* at 159. Thus, no special instruction regarding the use of hearsay evidence was required and the trial court did not abuse its discretion in refusing to give the proposed instruction.

Finally, defendant asserts that the trial court erred in denying her request for a jury instruction regarding voluntary manslaughter. In *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003), our Supreme Court stated that in order to establish voluntary manslaughter

> one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions.

The Court further stated that, rather than being an element of voluntary manslaughter, provocation constitutes a circumstance that negates the presence of malice. *Id.* Because of this, the Court held that the elements of voluntary manslaughter "are included in the elements of murder" and it constitutes a necessarily included lesser offense of murder. *Id.* at 541.

Consequently, an instruction on voluntary manslaughter must be given when a defendant is charged with murder if the instruction is supported by a rational view of the evidence. *Id.*

In the instant case, defendant argues that a manslaughter instruction was supported by a rational view of the evidence in that the testimony presented by the prosecution showed that an altercation took place between defendant and the decedent a few minutes before the shooting. Although several witnesses testified that this confrontation occurred, no evidence exists to show that the decedent did anything to provoke defendant. Even if she had provoked defendant, the evidence shows that a significant amount of time lapsed between the confrontation and the shooting. Based on the definition of the offense provided in *Mendoza, supra* at 535, a rational view of the evidence does not support a finding of voluntary manslaughter. Although the trial court erroneously stated that manslaughter is not a necessarily included lesser offense of murder, it held that even if it was, the evidence presented did not support the requested instruction. Thus, the trial court did not abuse its discretion in denying defendant's request for a manslaughter instruction and we affirm defendant's conviction.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Henry William Saad