STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2008
v	No. 274508 Wayne Circuit Court
REGINALD LENOIR LEWIS, Defendant-Appellant.	LC No. 06-006502-01

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree murder, MCL 750.316. The trial court sentenced him to natural life in prison. We affirm.

Defendant's convictions arise from the death of his longtime girlfriend, Tomeka Cook. After a dispute with defendant over money, Cook was found dead with multiple stab wounds.

Defendant's first argument on appeal is that the admission of an autopsy report prepared by two nontestifying medical examiners through the testimony of a third medical examiner from the same laboratory, Dr. Carl Schmidt, violated his Sixth Amendment rights under the confrontation clause and was contrary to the Michigan Rules of Evidence. We disagree.

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); MRE 103(a)(1). "Because the grounds for objection at trial and the grounds raised on appeal must be the same, an objection based on the rules of evidence will not necessarily preserve for appeal a confrontation clause objection." *People v Bauder*, 269 Mich App 174, 178-179; 712 NW2d 506 (2005). Because defendant did not object to the admission of the autopsy report or the testimony of Dr. Schmidt on any grounds, this issue is unpreserved.

In the case of a preserved claim of constitutional error, "a new trial must be ordered unless it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Bauder*, *supra* at 179. However, because defendant failed to object to the admission of the autopsy report and Dr. Schmidt's testimony on Sixth Amendment grounds, we review his claim for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999); *Bauder*, *supra* at 180. "Thus, to avoid forfeiture of the issue, defendant must

demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings." *Aldrich, supra* at 110. "We will reverse only if we determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, regardless of his innocence." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

"When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes the admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Otherwise, we review a trial court's decision to admit evidence for an abuse of discretion. *Id*. at 670. As noted, *supra*, however, defendant also failed to preserve his claim that admission of this evidence violated the Michigan Rules of Evidence, so appellate review is limited to plain error affecting defendant's substantial rights.

When addressing a constitutional question, we first consider the constitutional text. *National Pride at Work, Inc v Governor of Michigan*, 274 Mich App 147, 157; 732 NW2d 139 (2007) ("This Court typically discerns the common understanding of constitutional text by applying each term's plain meaning"). The confrontation clause provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. Our state constitution also guarantees the same right. Const 1963, art 1, § 20. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant was unavailable at trial and there was a prior opportunity for cross-examination of the declarant. *Crawford v Washington*, 541 US 36; 124 S Ct 1074; 13 L Ed 2d 177 (2004); *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). In other words, the confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination," regardless of their admissibility under the rules of evidence. *Crawford*. at 50-51, 53-54.[1]

Statements are testimonial where the "primary purpose" of the statements or the questioning that elicits them "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v Washington*, 547 US 813, ____; 126 S Ct 2266, 2274; 165 L Ed 2d 244 (2006). Even if the nontestifying medical examiners were unavailable to testify,[2] defendant did not have a prior opportunity to cross-examine them. Accordingly, Dr. Schmidt's testimony regarding the contents of the autopsy report was barred by the confrontation clause if the evidence is "testimonial," under *Crawford* and *Davis*.

In support of his argument that the disputed evidence was testimonial, defendant cites *People v Lonsby*, 268 Mich App 375; 707 NW2d 610 (2005).[3] In that case, the victim claimed

[1] Where the hearsay is nontestimonial, the confrontation clause does not restrict state law in its determination of whether the hearsay is admissible. *Crawford, supra* at 68.

[2] Dr. Schmidt testified that one of the medical examiners who prepared the report was retired and the other was ill and not working.

[3] Judge Saad authored the Court's opinion; Judges Talbot and Whitbeck concurred in result only.

that the defendant sexually assaulted her, and the defendant denied it. The only physical evidence was a stain on the defendant's swim trunks, which the victim alleged was semen, and the defendant claimed was urine. Melinda Jackson, the crime lab serologist who tested the stain and recorded her observations and conclusions in laboratory notes and a laboratory report, did not appear as a witness at the defendant's trial. Instead, David Woodford, another serologist from the same laboratory, testified about the contents of Jackson's written statements. *Id*. at 377-378. Although he testified that he did not learn anything about the case until the morning of the trial, he "testified about what Jackson found, how she conducted certain tests, and why she opted not to conduct other tests." *Id*. at 380. The defendant moved for a new trial, arguing that Woodford's testimony was inadmissible hearsay and violated his rights under the confrontation clause. Ignoring defendant's hearsay and constitutional arguments, the trial court found that the defendant had waived any objection to the disputed testimony for reasons of trial strategy. This Court found that the trial court abused its discretion in denying the defendant's motion on that basis. *Id*. at 381-383.

This Court went on to consider the defendant's confrontation clause argument, and found that Woodford's testimony was barred by the Clause. Citing *Crawford*, *supra* at 51, it concluded that "Jackson's writings clearly qualify as statements that Jackson would reasonably expect would be used in a *prosecutorial* manner and at trial." It reasoned that "the State Police crime lab is an arm of law enforcement," as a scientist employed by the lab, the "ultimate goal" of Jackson's laboratory analysis was to "uncover[] evidence for use in a criminal prosecution," and "the scientists' written analyses are regularly prepared for and introduced in court." *Lonsby*, *supra*, at 391. The Court also reasoned that, because "the evidence at issue was based on Jackson's subjective observations" and analysis, about which Woodford lacked first hand knowledge, the defendant was unable "to challenge the objectivity of Jackson and the accuracy of her observations and methodology." *Id*. at 392. Thus, the Court concluded that the admission of Jackson's lab report and notes through Woodford's testimony violated the defendant's rights under the confrontation clause.

The Court also found that the error warranted a new trial under either the harmless error standard or under *Carines*, *supra* at 750. It reasoned that although "Jackson did not, and scientifically could not, conclude that the spot on the defendant's swim trunks was semen," "Woodford testified about the results of Jackson's preliminary semen test, he 'guessed' the reasons Jackson could not confirm her initial finding, and the prosecutor relied very heavily on this evidence to persuade the jury to convict [the] defendant." *Id*. at 393-394, 396-397.

In *People v Jambor*, 273 Mich App 477; 729 NW2d 569 (2007), by contrast, this Court concluded that fingerprint cards, which "were prepared with the ultimate goal of identifying a suspect in the break-in, but were not prepared specifically in anticipation of litigation against [the] defendant," and at a time when "[n]o adversarial relationship existed between defendant and law enforcement," were admissible under the business records exception to the rule against hearsay, MRE 803(6). *Id*. at 483-484.[4] Thus, based on the observation of *Crawford* that

[4] The Court also concluded that the fingerprint cards were admissible under the public records exception to the hearsay rule, MRE 803(8), because they were prepared during a routine police investigation, "the mere lifting of a latent print from an object is, in and of itself, 'ministerial,
(continued…)

business records are not testimonial, *Crawford*, *supra* at 56, it concluded that the fingerprint cards were admissible under the business records exception to the hearsay rule and were therefore not testimonial.[5] *Jambor*, *supra* at 487. However, it also concluded that, even if the fingerprint cards were not admissible as business records or public records, *Crawford* did not preclude their admission, because, unlike the report in *Lonsby*, *supra* at 375, the fingerprint cards "contained no subjective statements," and the technician who prepared them did not compare the fingerprints taken at the scene to other fingerprints on file. Therefore, "[a]ny testimony to the effect that a print lifted by [the technician who prepared the report] matched a print belonging to [the] defendant would come from another source and presumably would be subject to cross-examination." *Id*. at 488.

The autopsy report in this case was nontestimonial and its admission through the testimony of Dr. Schmidt did not violate defendant's Sixth Amendment rights under *Crawford*, *supra*, and *Davis*, *supra*, as interpreted by Michigan courts. The report was "not prepared in anticipation of litigation against defendant," *Jambor*, *supra* at 483-484, but pursuant to a "duty imposed by law," MRE 803(8).

MCL 52.202 provides, in part:

> (1) A county medical examiner or deputy county medical examiner shall investigate the cause of and manner of death of an individual under each of the following circumstances:
>
> (a) The individual dies by violence.
>
> (b) The individual's death is unexpected.
>
> (c) The individual dies without medical attendance by a physician, or the individual dies while under home hospice care without medical attendance by a physician or a registered nurse, during the 48 hours immediately preceding the time of death, unless the attending physician, if any, is able to determine accurately the cause of death.
>
> (d) The individual dies as the result of an abortion, whether self-induced or otherwise.

In addition, MCL 52.207 requires a medical examiner to conduct an autopsy upon the order of a prosecuting attorney. Thus, while it was conceivable that the autopsy report would become part of criminal prosecution, investigations by medical examiners are required by Michigan statute under certain circumstances regardless of whether criminal prosecution is contemplated. As one New York court noted when addressing an issue similar to the one before this Court:

(…continued)

objective, and nonevaluative,' and, as defendant was not yet a suspect, were prepared "in a setting that was not adversarial to [the] defendant.'" *Jambor*, *supra* at 485-486 (citation omitted).

[5] The Court also noted Chief Justice Rehnquist's assertion, in his concurring opinion, that public records are also nontestimonial. *Jambor*, *supra* at 487 n 4, citing *Crawford*, *supra* at 76.

> The autopsy report in this case was not manufactured for the benefit of the prosecution. Indeed, an autopsy is often conducted before a suspect is identified or even before a homicide is suspected. That it may be presented as evidence in a homicide trial does not mean that it was composed for that accusatory purpose or that its use by a prosecutor is the inevitable consequence of its composition. [*People v Durio*, 7 Misc 3d 729, 736; 794 NYS2d 863 (2005).]

Also, unlike the serologist's report in *Lonsby*, *supra* at 375, the report contained sufficient detail for Dr. Schmidt to form his own conclusions about which he could be cross-examined. Dr. Schmidt testified that the autopsy report showed that Tomeka had sustained several stab wounds, and six wounds on the backs of her hands, which the report described as "defensive wounds." He testified that the one of the medical examiners who performed the autopsy had concluded that the cause of death was multiple stab wounds and the manner of death was homicide. After reviewing the report and sketch upon which the nontestifying medical examiner based her opinion, Dr. Schmidt agreed with her conclusions about cause and manner of death, and with her description of the wounds on the backs of the hands as defensive. Dr. Schmidt testified that, in his opinion, Tomeka could have been killed on February 2, 2003, or February 3, 2003, but not on February 4, 2003, because that is when the body was found and rigor mortis was waning. Thus, the autopsy report contained enough "objective" information and statements upon which Dr. Schmidt could form an independent opinion about which he could be cross-examined.

Moreover, even if this evidence was testimonial and its admission therefore violated defendant's right of confrontation, defendant has not shown, under *Carines*, *supra* at 764, that the error affected his substantial rights. In contrast to *Lonsby*, *supra*, where the disputed evidence was outcome determinative in that it was the only evidence that could resolve the conflict between the testimony of the defendant and the victim, the admission of Dr. Schmidt's testimony was not outcome determinative. There is no dispute that a crime was committed, and the autopsy did not aid in establishing the identity of the perpetrator, which was the central issue in this case.

Defendant also argues that the report was inadmissible hearsay under MRE 802.[6] However, the report was admissible pursuant to the public records hearsay exception. MRE 803(8) provides that the following are not excluded by the hearsay rule:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers

[6] Defendant does not argue that it was improper under the Michigan Rules of Evidence for Dr. Schmidt to testify about the contents of the autopsy report. Indeed, "[i]t is well-settled that an expert witness may rely on hearsay evidence when the witness formulates an opinion." *Lonsby*, *supra* at 382-383.

> and other law enforcement personnel, and subject to the limitations of MCL 257.624.[7] [Footnote added.]

As noted, *supra*, autopsy reports are performed pursuant to duty imposed by MCL 52.202 and MCL 52.207, and thus fall within the public records exception to the rule against hearsay evidence. Admission of the report did not therefore violate the Michigan Rules of Evidence as defendant claims.

Defendant's second argument on appeal is that he received ineffective assistance of trial counsel because his attorney failed to object to evidence allegedly introduced in violation of the confrontation clause and the Michigan Rules of Evidence, object to evidence of his prior imprisonment, call alibi witnesses, and file a motion to dismiss based on excessive prearrest delay. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's findings of fact for clear error, and questions of constitutional law de novo. *Id*.

"Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id*.

First, defendant claims that counsel was ineffective for failing to object to the admission of the autopsy evidence in violation of the Confrontation clause and the Michigan Rules of Evidence. As discussed, *supra*, however, this evidence was admissible under the public records, MRE 803(8), or business records, MRE 803(6), exception to the hearsay rule, and did not violate defendant's right to confront the witnesses against him. Because counsel was not ineffective for failing to raise a futile objection, defendant was not denied the effective assistance of counsel. *People v Chambers*, 277 Mich App 1, 5; 742 NW2d 610 (2007).

Second, defendant argues that counsel was ineffective for allowing the jury to hear evidence that defendant was incarcerated prior to Tomeka's death. The prosecutor and defense counsel stipulated that defendant was incarcerated from September 6, 2001, to January 22, 2003, the prosecutor and defense counsel both mentioned defendant's incarceration during opening statements, the prosecutor mentioned it during closing arguments, and it was mentioned repeatedly during the witnesses' testimony. The trial court gave a limiting instruction:

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[7] MCL 257.624 sets forth several types of reports that are not admissible in a court action, none of which is relevant here.

> You have heard evidence that was introduced to show that the defendant was in prison from September 6, 2001, to. . . . January 22, 2003. If you believe this evidence you must be very careful only to consider it to explain why the defendant was living away during that time period. You must not consider this evidence for any other purpose. For example, you must not decide that it shows defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct.

Because of the danger of prejudice, references to a defendant's prior incarceration are generally inadmissible. *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). In this case, however, evidence of defendant's incarceration was a key fact explaining the circumstances surrounding the crime. As the Michigan Supreme Court has recognized: "Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involved the other or explains the circumstances of the crime." *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978) (quotation omitted). Similarly, to the extent evidence of defendant's prior incarceration can be considered bad acts evidence under MRE 404(b),[8] it was not rendered inadmissible under that rule because it was not offered solely to show that, because defendant had been incarcerated, he was a bad person and therefore had a propensity to commit the crime charged. Rather, it was an important part of the circumstances surrounding the crime, in particular, the relationship between defendant and Tomeka, and was relevant to defendant's possible motive to commit the crime. This evidence was therefore admissible, and any objection would have been futile. Because counsel was not ineffective for failing to raise such an objection, defendant was not denied the effective assistance of counsel. *Chambers*, *supra* at 5.

Third, defendant argues that counsel was ineffective for failing to call two additional alibi witnesses. Kendall Davis, a longtime friend of defendant, testified that defendant was at his house from about 12:30 p.m. on Sunday, February 2, 2003, until Sunday evening when another friend picked him up. Defendant argues that counsel was ineffective for failing to call Joann Coppin and Noel Coppin, Davis's mother and stepfather, as witnesses to corroborate Davis's testimony. "However, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (citation and quotation omitted). "Furthermore, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *Id*.

Davis testified that defendant was with him from about 12:30 p.m. until about 10:00 p.m. on Sunday, they were in Davis's bedroom watching television, and did not leave at all during the

[8] MRE 404(b)(1) provides, "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, 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."

day. Based on her testimony at the evidentiary hearing, Joann Coppin, with whom Davis lived, apparently would have testified that Davis picked up defendant on Sunday, February 2, 2003, Davis and defendant watched football in Davis's room and did not leave the house, and defendant left sometime in the evening when "his girlfriend or a friend of his picked him up." Joann Coppin said she did not go into Davis's room.[9]

Defendant has not overcome the presumption of trial strategy and has not shown that the decision not to call Joann Coppin deprived him of a substantial defense. Joann Coppin's testimony would have covered the same basic subject matter as Davis's, but was less specific and would perhaps have been less valuable, since Davis testified that he was actually with defendant the entire time, while Joann Coppin said she did not go into Davis's room where defendant and Davis were watching television. Even if, as defendant suggests on appeal, the jury convicted defendant because it did not find Davis credible, counsel's decision to call only Davis, who he may reasonably have judged to be the strongest "alibi witness" for the afternoon and evening of Sunday, February 2, 2003, will presumed to be a matter of trial strategy, which this Court will not second-guess with the benefit of hindsight. *Dixon*, *supra* at 398.

Finally, defendant argues that counsel was ineffective for failing to file a pretrial motion to dismiss based on excessive prearrest delay. Whether a defendant has been denied due process by a preindictment or prearrest delay is a two-part inquiry. The defendant must initially "demonstrate, 'actual and substantial' prejudice to his right to a fair trial." *People v Adams*, 232 Mich App 128, 134; 591 NW2d 44 (1998). The defendant must show that "he was meaningfully impaired of his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected." *Id*. at 134-135. If the defendant demonstrates actual and substantial prejudice, the burden shifts to the prosecution to show that the delay was justified in light of any resulting prejudice. *Id*. at 135-136. In this case, defendant has failed to allege specific "instances of prejudice-generating occurrences," *Adams*, *supra* at 135, and has therefore not established that trial counsel's failure to file a motion to dismiss based on excessive prearrest delay was prejudicial.

Defendant's third argument on appeal is that he was denied due process when the trial court failed to order a competency hearing upon request by defense counsel. We disagree. "[T]he determination of a defendant's competence is within the trial court's discretion." *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990).

The United States Supreme Court has "repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.'" *Cooper v Oklahoma*, 517 US 348, 354; 116 S Ct 1373; 134 L Ed 2d 498 (1996) (citations omitted). Under Michigan statute, however, a defendant is presumed competent to stand trial and "shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner."

[9] It is not clear what Noel Coppin would have testified, as he did not testify at the evidentiary hearing, and defendant makes no argument with respect to Noel Coppin's potential testimony.

MCL 330.2020(1).[10] "The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during trial." *Id*. See also *People v Wright*, 431 Mich 282, 285-286; 430 NW2d 133 (1988), citing MCL 330.2020 ("When a defendant's competency to stand trial is questioned, a competency examination is given to determine his mental state at the time of trial assure that he understands the charges against him and can knowingly assist in his defense.") Where evidence of incompetence has been presented and no hearing was held, this Court may order a new trial. *People v Matheson*, 70 Mich App 172, 180; 245 NW2d 551 (1976).

In this case, defense counsel asked for "a forensic" or a mistrial on the second day of trial. He said defendant had suffered two strokes, could barely walk, and his condition had "deteriorated tremendously" during counsel's involvement in the case. Counsel also said defendant had cried and gestured to the jury. The prosecution countered that defendant appeared to have been having conversations with defense counsel, and appeared to be listening and able to follow directions. The following exchange then took place between the trial court and defendant:

> *THE COURT*: . . . Mr. Lewis, sir, do you understand we can't have the laughs and the crying, the emotions during court, sir?
>
> *MR. LEWIS*: (Nodding no)
>
> *THE COURT*: Do you understand that, sir?
>
> *MR. LEWIS*: (Nodding no)
>
> *THE COURT*: Have you, have you been talking with your attorney this morning?
>
> *MR. TALON*: Just indicating for the record he's been shaking his head--
>
> *THE COURT*: --back and forth—
>
> *THE COURT*: Is there something you want to tell me, Mr. Lewis?
>
> *MR. TALON*: --in a no fashion.
>
> *MR. LEWIS*: (No response)
>
> *THE COURT*: It looks as if there's something you want to tell me, sir. I'm all ears.
>
> *MR. BLAKE*: Do you want to tell the Judge something, Mr. Lewis?

[10] In *Medina v California*, 505 US 437; 112 S Ct 1373; 120 L Ed 2d 353 (1992), the Supreme Court "establishe[d] that a State may presume that the defendant is competent and require him to shoulder the burden of proving his incompetence by a preponderance of the evidence." *Cooper*, *supra* at 355.

MR. LEWIS: I think I'm incompetent.

THE COURT: What was that, sir? With a smile on your face what is you're trying to tell me, sir?

MR. LEWIS: I think I'm not able to continue.

MR. BLAKE: You said you're not able to continue? Do you understand what's happening?

MR. LEWIS: (Nodding no)

MR BLAKE: He's nodding his head in a no fashion.

The court observed that, while defendant did have some difficulty walking, he appeared to have been communicating with his attorney, and the court had not observed any other signs of incompetence. It continued:

> [N]ow all of a sudden he's going to not be able to speak. He's silent. And the only thing that he can get out of his mouth is barely audible, incompetent. The Court believes that nothing more than trying to create some type of record and a playing of games. He's certainly competent. He knows what's going on here. We're going to proceed accordingly.

The trial court was in the best position to observe defendant's behavior during the first part of the trial, compare it to his behavior while defense counsel was making this motion, and evaluate his competence accordingly. Based on the record, it was within the discretion of the trial court to determine that defendant was competent to stand trial.

Defendant's fourth argument on appeal is that the evidence presented by the prosecution was insufficient to establish beyond a reasonable doubt that defendant committed first-degree premeditated murder. We disagree.

We review de novo a challenge to the sufficiency of the evidence. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005). "In reviewing a challenge to the sufficiency of the evidence, this Court analyzes the evidence presented in the light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt." *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002).

"To establish first-degree premeditated murder, the prosecutor must prove that the defendant intentionally killed the victim with premeditation and deliberation." *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). "[P]remeditation and deliberation may be inferred from the circumstances," and "[m]inimal circumstantial evidence is sufficient to prove an actor's state of mind." *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001).

Viewed in the light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to find that the prosecution established the elements of first-degree murder beyond a reasonable doubt. First, defendant was tied to the crime by his blood being found on

the door. Cathy Carr, a senior forensic biologist with the Detroit Police crime laboratory, testified that the deoxyribonucleic acid (DNA) profile she obtained from a swab of blood taken from the back door was consistent with the DNA profile developed from the blood sample taken from defendant. Although Carr could not determine how long the blood had been on the door, viewing this evidence in a light most favorable to the prosecution, it ties defendant to the crime.

Next, Dr. Schmidt's testimony regarding the autopsy report provided evidence that Tomeka was killed intentionally. Dr. Schmidt testified that, according to the autopsy report, Tomeka had many stab wounds: five to the face, four to the scalp, two to the neck, one to the right chest, and one to the left upper arm. She also had six "defensive wounds" on the backs of her hands. The nontestifying medical examiner who performed the autopsy concluded that the manner of death was homicide, and the cause of death was multiple stab wounds. Based on his review of the photographs, autopsy report and sketch, Dr. Schmidt agreed.

There was also sufficient evidence of premeditation to support defendant's conviction. There was evidence that Tomeka had a gambling problem and that this was a source of contention between defendant and Tomeka. In letters he wrote from prison, defendant mentioned that Tomeka was spending his money as well as hers and urged her to stop gambling. Defendant was released from prison on January 22, 2003, and Tomeka's body was found February 4, 2003. There was testimony that Tomeka was on the telephone with arguing with defendant during a gambling party she hosted on Saturday, February 1, 2003. Tomeka's cousin testified that she spoke with Tomeka on the telephone several times on Sunday, February 2, 2003. During one of the calls, Tomeka told her cousin that defendant had taken her money from the gambling party. During another, Tomeka said that things were not going well, and she planned to move out of the house she shared with defendant. The last time the cousin spoke to Tomeka was around 3:17 p.m. When she called back around 6:00 or 6:30 p.m., defendant answered and told her Tomeka was not there.

In addition, a defendant's conduct after the homicide may establish premeditation. *People v Gonzalez*, 178 Mich App 526, 533; 444 NW2d 228 (1989). Dr. Schmidt testified that Tomeka could have been killed on February 2, 2003, or February 3, 2003. Davis testified that he picked up defendant between 1:00 and 1:15 p.m. on Sunday, February 2, 2003, and defendant stayed at his house until 9:30 or 10:00 p.m., when a friend picked him up. Another friend of defendant, Taretta Johnson, testified that she picked him up that night and he stayed with her until Wednesday morning. The jury evidently disbelieved at least one of these witnesses, and it could reasonably have inferred from this testimony that defendant was trying to construct an alibi by spending days with friends and away from both his mother's house, which was his residence of record for purposes of the parole department, and the home he had shared with Tomeka before he was incarcerated, where he may also have been staying. In addition, when shown her telephone bill at trial, Johnson testified that, from February 3, 2003, to February 5, 2003, when defendant was with her, there were about ten calls made to numbers she did not recognize and had not called. The jury could have concluded that this secretive behavior was indicative of defendant's guilt. Finally, another friend testified that although she asked defendant how he and his girlfriend were doing when she saw defendant in April 2003, "there was no discussion about it," and she did not find out Tomeka was dead until the police came to see her at work in December 2003. The jury could reasonably have interpreted this as evidence of defendant's culpability.

Finally, a victim's defensive wounds indicate a struggle, which can be evidence of premeditation. *People v Johnson*, 460 Mich 720, 700, 733; 597 NW2d 73 (1999). In this case, the autopsy revealed that there were wounds on the backs of Tomeka's hands, which both the nontestifying medical examiners who prepared the report and Dr. Schmidt concluded were defensive wounds.

Defendant's final argument on appeal is that the trial court erred in admitting a recording of two 911 calls made by Tomeka's sister upon discovering Tomeka's body behind the bathroom door of Tomeka's house. While we agree that this evidence should not have been admitted, we find that the error was harmless.

"When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes the admissibility of the evidence, the issue is reviewed de novo." *Washington*, *supra* at 670-671. Otherwise, this Court reviews a trial court's decision to admit evidence for an abuse of discretion. *Id*. at 670. "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id*. "[A] trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

In general, all relevant evidence is admissible, and evidence that is not relevant is not admissible. MRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, MRE 801(d), and is inadmissible unless it falls within one of the exceptions set forth in the Michigan Rules of Evidence. MRE 802.

One such exception exists for a "present sense impression," which is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." MRE 803(1). "The admission of hearsay evidence as a present sense impression requires satisfaction of three conditions: (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be 'substantially contemporaneous' with the event." *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998) (citations omitted).

In this case, the prosecution moved for admission of the 911 tapes, and the following exchange took place:

THE COURT: Any objection?

MR. BLAKE: Judge, I would object. I don't see the purpose, Judge. She called 911 and she has testified to that. Why do we need the tape?

THE COURT: So your objection is relevancy, best evidence rule, hearsay?

MR. BLAKE: Relevancy, Judge.

THE COURT: Okay.

MR. TALON: I think it's a present sense impression of what she saw and--

THE COURT: Overruled. Go ahead. . . .

Based on the above exchange, the trial court apparently determined that the evidence was relevant and admissible under the present sense impression exception to the rule against hearsay evidence.

The threshold question is whether this evidence was relevant. Because Tomeka's sister had already testified about the circumstances under which she found the body, the recordings of the 911 calls apparently did not add any new evidence to the prosecution's case. Still, the evidence was at least marginally relevant to the fact of where and how the body was found. Nor has defendant shown that this evidence should have been excluded because of a danger of unfair prejudice under MRE 403. While all evidence is offered for the purpose of "prejudicing" the opposing party, "unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock. *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994). Put another way, "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). In this case, the recording of the 911 calls was only marginally relevant and its admission carried a risk of injecting considerations—most likely, the jury's emotions or sympathies—extraneous to the merits of the case against defendant. Thus, the trial court erred in admitting the recording of the 911 calls. However, this was harmless error as defendant has not shown that the admission of the recording affected the outcome of the trial. See *People v Young*, 472 Mich 130, 141-142; 693 NW2d 801 (2005) ("[I]n light of MCL 769.26,[11] a defendant on appeal must demonstrate that a preserved nonconstitutional error was not harmless by persuading the reviewing court that it is more probable than not that the error affected the outcome of the proceedings." (Footnote added.)) While the recording may have triggered an emotional reaction from the jury, the recording was no more than two minutes long and was relatively insignificant when considered in the light of all the evidence. Also, it in no way implicated defendant in Tomeka's killing.

[11] "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

Under the circumstances, is highly unlikely that the recording figured significantly into the jury's decision to convict defendant.

Affirmed.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Kurtis T. Wilder