

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBIN EMANUEL HAMMOCK,

Defendant-Appellant.

UNPUBLISHED

September 23, 2008

No. 277672

Wayne Circuit Court

LC No. 06-014450-01

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, possession of a firearm during the commission of a felony, MCL 750.227b(1), and felon in possession of a firearm, MCL 750.224f(1). He was sentenced as a second-felony habitual offender, MCL 769.10, to concurrent prison terms of 35 to 70 years for the murder conviction, 20 to 60 years for the assault conviction, and time served (154 days) for the felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals by right. We affirm.

I. Admissibility of Victim's Recorded Statement

Defendant first argues that the trial court erred in admitting an audio recording of the surviving victim's interview with the police.

A trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). In this case, however, defendant did not object to the admission of the audio recording, or challenge its authenticity. Therefore, the issue is unpreserved and is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant argues that the admissibility of the audio recording must be evaluated according to the seven-part test adopted in *People v Taylor*, 18 Mich App 381, 383-384; 171 NW2d 219 (1969). But in *People v Berkey*, 437 Mich 40, 48-50, 52; 467 NW2d 6 (1991), our Supreme Court observed that since *Taylor* was decided, Michigan adopted the rules of evidence,

including MRE 901, which allows the foundation for proffered evidence to be established by “evidence sufficient to support a finding that the matter in question is what its proponent claims.” MRE 901(b)(5) allows a voice recording to be authenticated “by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.” The concerns addressed in the seven-part test affect only the weight, rather than the admissibility, of the evidence and “are matters that should ordinarily be addressed to the finder of fact.” *Berkey, supra* at 50-52.

In the present case, the witness’s testimony—identifying his own voice on the audio recording—was sufficient to authenticate the evidence under MRE 901(5). Accordingly, there was no plain error in receiving this evidence. The lack of clarity of the recording affects only its weight, not its admissibility.

II. Admissibility of Expert Testimony

Next, defendant argues that the trial court erred in allowing expert testimony concerning cellular telephones. On appeal, he challenges this testimony on two grounds: (1) the witness was not endorsed as an expert before trial; and (2) whether the witness was qualified as an expert and his testimony reliable. The question whether the witness was qualified to testify as an expert was raised below and decided by the trial court. Therefore, that issue is preserved. But, defendant did not argue below that the witness should not be permitted to testify as an expert because he was not endorsed as such. Therefore, that issue is unpreserved. We review unpreserved issues for plain error affecting substantial rights. *Carines, supra* at 763.

A. MCR 2.401(I)

Although MCR 2.401(I)(1)(b) requires that a witness list indicate whether a listed witness is an expert, and the witness here was not designated as such, MCR 2.401(I)(2) allows a court to permit a nonendorsed witness to testify for good cause shown. In this case, the prosecutor reasonably could have expected that the witness’s location testimony would be permitted as his personal knowledge of his employer’s transmission system and equipment, rather than being considered expert testimony. Because the record provides a basis for finding good cause for the prosecution’s not endorsing the witness as an expert, there was no plain error in allowing the witness to be so qualified despite the failure to endorse him as such.

B. MRE 702

In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780 n 46; 685 NW2d 391 (2004), the Supreme Court adopted the requirements of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), concerning the reliability of expert testimony. MRE 702 was then amended to provide:

If the court determines that 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 if (1) the testimony is based on sufficient facts or data, (2) the testimony is the

product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under *Daubert* and MRE 702, the trial court's role is to determine "whether the opinion is rationally derived from a sound foundation," not whether it is ultimately correct or indisputable. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008), quoting *Chapin v A & L Parts, Inc*, 274 Mich App 122, 139; 732 NW2d 578 (2007) (Davis, J.). "An expert's opinion is admissible if it is based on the 'methods and procedures of science' rather than 'subjective belief or unsupported speculation.'" *Unger, supra* at 218, quoting *Daubert, supra* at 590.

In this case, defendant argued that the witness's proposed testimony concerning the location of a caller with respect to a particular cellular telephone tower was unreliable. The trial court determined that the testimony was not "junk science" and allowed the witness to testify as an expert. It is evident that the witness's testimony was helpful in understanding the cellular telephone records the prosecutor introduced. In particular, the witness testified that the caller had to be within a five-mile radius of any cellular telephone tower that carried his signal at a particular moment. The witness's testimony was based on his education and experience concerning the capabilities and properties of his employer's equipment. The record does not disclose any reason to believe that the testimony was not based on reliable principles and methods or that those principles and methods were not reliably applied in this case. Thus, the trial court did not abuse its discretion in allowing the witness to testify as an expert under MRE 702.

III. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence of malice to support his second-degree murder conviction. We disagree.

This Court evaluates the sufficiency of the evidence by reviewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The resolution of credibility disputes is within the exclusive province of the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). The trier of fact may also draw reasonable inferences from the evidence. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

To convict a defendant of second-degree murder, the prosecution must show beyond a reasonable doubt that there was a death, caused by an act of the defendant, who acted with malice, and without justification, excuse, or mitigation. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice is defined as the intent to kill, the intent to cause great bodily harm, or to do an act in the wilful and wanton disregard of the likelihood that the natural tendency of one's actions will be to cause death or great bodily harm. *Id.*

"Malice . . . may be inferred from the facts and circumstances" of a crime, *People v Spearman*, 195 Mich App 434, 438; 491 NW2d 606 (1992), overruled in part on other grounds in *People v Veling*, 443 Mich 23, 42; 504 NW2d 456 (1993), including the use of a deadly weapon, *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995), overruled in part on other

grounds in *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). A defendant's intent can also be inferred from the nature and location of a victim's wounds. *Unger, supra* at 231.

Here, the surviving victim testified that he heard a gunshot and then saw defendant fire a second shot into the decedent. The medical examiner testified that the decedent was shot in the back, and on the right side of the back of the head, and that the shots were the cause of his death. The decedent also had stippling marks on his face, indicating that he was shot at close range, but that bullet did not hit him.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant acted with the requisite malice to support a conviction for second-degree murder. Additionally, while there was some evidence that various items had been or were being stolen from the house where the shooting occurred, there was no evidence concerning when the items were taken, whether the items belonged to defendant or his companion, or whether the deceased and the surviving victim may have been responsible for taking the items. Thus, a rational trier of fact could conclude that defendant acted without justification, excuse, or mitigation.

We affirm.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot