# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 12, 2010 |
| v | No. 287383<br>Oakland Circuit Court |
| CAMERON TERRELL HOLBROOK,<br><br>Defendant-Appellant. | LC No. 2007-218017-FC |

Before: Wilder, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a third habitual offender, MCL 769.11, to life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

## I. MRE 804(b)(2) – DYING DECLARATION

Defendant contends on appeal that the trial court erred by admitting the dying declaration of the victim, Gary Nelson, Jr., as a violation of his right to confrontation because it was not established that the declaration was based on personal knowledge. We disagree.

"To preserve an evidentiary issue for review, the 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). Although defendant objected at trial to the admission of the statement, the objection was not based on a lack of personal knowledge, but rather the lack of a foundation establishing that the declarant was aware of his impending death. Since the objection at trial did not encompass the same error as alleged on appeal, the issue is unpreserved. Further, because dying declarations are recognized as an historical exception to the Confrontation Clause, defendant's constitutional argument is misplaced. *People v Geracer Taylor*, 275 Mich App 177, 183; 737 NW2d 790 (2007) (citing *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004)). As a result, we review only for plain error affecting substantial rights. *People v Plumaj*, 284 Mich App 645, 650; 773 NW2d 763 (2009).

Defendant claims that the declarant of a dying declaration under MRE 804(b)(2) must also meet the personal knowledge requirement of MRE 602.[1] Specifically, defendant asserts that the prosecution failed to prove that Nelson's statements were not merely speculation, as opposed to being based on personal knowledge.

Michigan's Rules of Evidence, which were implemented in 1978, were based on the Federal Rules of Evidence. *People v Barrett*, 480 Mich 125, 130; 747 NW2d 797 (2008). MRE 804 deals with exceptions to hearsay where the declarant is unavailable to testify at trial. MRE 804(b)(2) was adopted verbatim from the Federal Rules:

> (b) The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> > (2) In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

Before Michigan's Rules of Evidence were implemented, it was established that in order for a dying declaration to be admissible, the statement must have been based on personal knowledge. *People v Christmas*, 181 Mich 634, 647; 148 NW 369 (1914); *People v Wilborn*, 57 Mich App 277, 287-288; 225 NW2d 727 (1975).

While not dealing exclusively with MRE 804(b)(2), this Court in *People v Lee*, 243 Mich App 163; 622 NW2d 71 (2000), addressed factors to be evaluated or reviewed to establish the indicia of reliability required for the catch-all exceptions for hearsay, including the necessity of personal knowledge. Specifically, this Court stated, in relevant part:

> When determining whether a statement has adequate "indicia of reliability," the totality of the circumstances surrounding the making of the statement must be considered. Factors to be considered include (1) the spontaneity of the statements; (2) the consistency of the statements; (3) lack of motive to fabricate or lack of bias; (4) the reason the declarant cannot testify; (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence; (6) *personal knowledge of the declarant about the matter on which he spoke;* (7) to whom the statements were made, e.g., a police officer who was likely to investigate further; and (8) the time frame within which the statements were made. The court may not consider whether evidence produced at trial corroborates the statement. [*Id.* at 178 (internal citations omitted, emphasis added.).]

[1] MRE 602: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony . . . ." This rule is identical to the FRE 602 provision.

As further guidance, we note that the Advisory Committee's Note under FRE 803 states, "In a hearsay situation, the declarant is, of course, a witness, and neither [FRE 803] or [FRE 804] dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. See [FRE 602.]" Additionally, federal courts examining the federal rule counterparts, FRE 602 and FRE 804, have found that personal knowledge is needed for these types of statements to be admissible. See *Alexander v CareSource*, 576 F3d 551, 562-563 (CA 6, 2009) (for statements against interest declarant needed personal knowledge).

We conclude that the plain language of MRE 804 does not preclude the application of MRE 602. Therefore, in order for a dying declaration to be admissible, the declarant must possess personal knowledge related to the statement. However, personal knowledge can be presumed as long as there was evidence to show that the declarant "was in a position to know the fact stated." *Wilborn*, *supra* at 287 (citation omitted). Consequently, if it was "manifestly impossible" for a declarant to have known such facts, then the statement is mere opinion and not admissible. *Id.* (citation omitted).

Nelson was shot seven times. Most of the entry wounds were located in the front of his body. This would support an inference that Nelson was facing his attacker and had an opportunity to observe him. In addition, Nelson was also shot in his right hand, which is indicative of a defensive posture. A reasonable inference is that Nelson *saw* his attacker during the shooting and raised his hand to ward off the attacker. Furthermore, there existed additional evidence that Nelson's statement was not a mere opinion. Nelson was very specific regarding the details of his shooter. He told the police that the shooter was "Kimmy," who was in a green Cadillac with another black man. The fact that Nelson was able to speak in such specific terms regarding the vehicle used and how many others were with defendant that night supports an inference that Nelson's statements were based on his personal knowledge and direct observation. Consequently, the necessity of meeting any requirements mandated by MRE 602 are satisfied since there was sufficient evidence to support a finding that Nelson had personal knowledge of his shooter. Therefore, the trial court did not err in admitting the statement.

## II. MRE 803(3) – STATE OF MIND EXCEPTION

Defendant also argues that Nelson's statement to his girlfriend, that he was going out to meet "Kimmy," was inadmissible. We disagree.

Defendant contends that the statement was inadmissible because defendant's right to confrontation was violated because the statement lacked any indicia of reliability. While there used to be an "indicia of reliability" requirement for a hearsay statement to satisfy the Confrontation Clause, that requirement no longer exists. *Crawford*, *supra* at 62-69; *People v Eric Taylor*, 482 Mich 368, 377; 759 NW2d 361 (2008). The Confrontation Clause applies, not only to in-court testimony, but also to out-of-court statements introduced at trial. *Crawford*, *supra* at 50-51. However, only out-of court statements that are testimonial implicate the Confrontation Clause, while nontestimonial, out-of-court statements are merely subject to the normal rules of hearsay evidence. *Id.* at 50-52, 61, 68; *Eric Taylor*, *supra* at 374, 377. Statements are testimonial when made under circumstances that would lead an objective declarant reasonably to believe that the statement would be available for use at a later trial. *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006); *Eric Taylor*, *supra* at 377-378.

After receiving several phone calls late at night, Nelson told his girlfriend that he was leaving the apartment to meet with "Kimmy" for a few drinks. A reasonable person in Nelson's position would not have thought that the statement would be used later at a trial. It was merely a routine conversational exchange between two people who lived together. As a result, Nelson's statement to his girlfriend was nontestimonial, and the Confrontation Clause is not implicated. Therefore, any portion of defendant's argument that relies on a Confrontation Clause violation is meritless.

Since the Confrontation Clause is not implicated, the only question remaining is whether the statement was properly admitted under Michigan's hearsay rules. The state-of-mind exception to hearsay is codified in MRE 803(3):

> A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation identification, or terms of declarant's will.

MRE 803(3) is consistent with the long-standing policy of admitting a homicide victim's declarations of where the victim intended to go and with whom. *People v Furman*, 158 Mich App 302, 315-316; 404 NW2d 246 (1987). Nelson's statement of leaving to meet "Kimmy" was a statement expressing Nelson's state of mind, specifically, an intent or plan to meet "Kimmy." Thus, it is admissible as a hearsay exception under MRE 803(3).

Defendant also argues that even if Nelson's statement to his girlfriend was admissible under MRE 803(3), it should have been precluded under MRE 403 because it was "more prejudicial than probative." MRE 403, states, in pertinent part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Defendant's assertion that the evidence was extremely prejudicial is insufficient to preclude its admissibility. All evidence is prejudicial or damaging to one side or the other at trial. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod by 450 Mich 1212 (1995). This aspect of MRE 403 covers only unfairly prejudicial evidence. *Id.* "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001) (citation omitted). The statement indicated that Nelson had plans to meet defendant that night. This is probative because, if the plan came to fruition, it places defendant and Nelson together. However, defendant has failed to demonstrate that this evidence was given undue or preemptive weight by the jury. Thus, defendant's unpreserved claim fails.

## III. SUFFICIENCY OF THE EVIDENCE

Defendant asserts that insufficient evidence was presented to support his first-degree murder conviction. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine "if any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). "All conflicts with regard to the evidence must be

resolved in favor of the prosecution. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005) (internal citations omitted).

"To establish first-degree premeditated murder, the prosecutor must prove that the defendant intentionally killed the victim with premeditation and deliberation." *Geracer Taylor*, *supra* at 179. Defendant first contends there was insufficient evidence that he shot Nelson. However, the trial court admitted Nelson's statement, which identified defendant as the shooter through his nickname, "Kimmy." In addition to this direct evidence of defendant's guilt, there was significant circumstantial evidence. First, Nelson stated he was going to meet defendant immediately before the shooting. Second, Nelson's statement that defendant was in a green Cadillac with another black man the night of the shooting was corroborated by the testimony of Brandy Whitbread, who said someone named "Cam" stole her green Cadillac. Third, there was evidence that two black men abandoned the Cadillac immediately after the shooting. Fourth, defendant was seen walking the neighborhood streets in close proximity to the location where the Cadillac was abandoned. Fifth, there was evidence that defendant called his girlfriend to have her drive over and pick him up. Sixth, defendant fled the state and gave a false name to police on two different occasions following the shooting.[2] Viewing the direct and circumstantial evidence in a light most favorable to the prosecution, there was sufficient evidence to sustain defendant's conviction.

Defendant also argues that there was insufficient evidence to prove that the killing was the result of premeditation and deliberation. Premeditation and deliberation require sufficient time to permit the defendant to reconsider his actions or to "take a second look." *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Factors relevant to the establishment of premeditation and deliberation include: (1) evidence of "the prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the homicide." *Id.* "Circumstantial evidence and reasonable inferences from the evidence can be sufficient to prove the elements." *Id.*

There was sufficient circumstantial evidence to support a finding that defendant premeditated and deliberated the killing. First, one of the seven gunshot wounds that Nelson suffered was a defensive wound to his right hand. "Defensive wounds . . . can be evidence of premeditation." *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999). Additionally, there was evidence that Nelson and someone using Michael Pepper's phone talked several times leading up to the murder. The calls took place at 10:09 p.m., 10:17 p.m., and 10:34 p.m. Since Nelson immediately told his girlfriend after these phone calls that he was heading out to meet "Kimmy," a jury could reasonably infer that defendant was using Pepper's phone during this time to set up the meeting. This evidence is circumstantial evidence of premeditation. Finally, "evidence that a victim sustained multiple violent blows may support an inference of

[2] "A jury may infer consciousness of guilt from evidence of lying or deception." *People v Unger*, 278 Mich App 210, 227; 749 NW2d 272 (2008). Additionally, evidence of flight is circumstantial evidence of "consciousness of guilt and accordingly, the fact of guilt itself." *People v Smelley*, 285 Mich App 314, 333; ___ NW2d ___ (2009).

premeditation and deliberation," *People v Unger*, 278 Mich App 210, 231; 749 NW2d 272 (2008), especially when multiple volleys of gunshots are involved, *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979). The existence of multiple blows or multiple volleys establishes a time lapse between the initial and subsequent attacks. *Id.* This time lapse, which can be as little as a second, can be sufficient to allow the attacker to "take a second look." *Id.* Nelson was shot seven times. As noted in the autopsy report, three shots entered Nelson's mid-to-right abdomen area and had a right-to-left, front-to-back, and downward trajectory through the body. It is reasonable to infer that, because of the proximity of these entry wounds and their similar trajectory, these shots happened at nearly the same time or came from the same volley. However, three other shots that struck Nelson's body had vastly different trajectories and entry points at the back of the victim's right rear shoulder, the front lower mid-abdomen, and the lower right back. Thus, a jury could have reasonably inferred that some time elapsed between the first group of three shots and the remaining shots, which was sufficient for defendant to have taken a second look.

Additionally, although there is no requirement mandating the establishment of a motive for the killing, *People v Herndon*, 246 Mich App 371, 416; 633 NW2d 376 (2001), the prosecutor did proffer a theory, which supported a finding of premeditation and deliberation. The prosecution introduced evidence that Nelson's cousin, Clarence Cowen, was a "big time" drug dealer, who demonstrated an animosity regarding Nelson. There was an eyewitness who testified that a few weeks before the shooting, Cowen was involved in a violent fight with Nelson, after which Cowen attempted to run Nelson over with a car. The prosecution supplied circumstantial evidence that defendant talked several times to Cowen immediately before the murder and again shortly after the murder. The prosecution also produced phone records that showed that after defendant was arrested, there were numerous attempts by someone at the Oakland County Jail attempting to contact Cowen. During the relevant time that defendant was in the Oakland County Jail, these calls were initiated from the same cells that housed defendant. Being placed from the jail, all of the phone calls were placed collect. Cowen did not accept any of these calls. The prosecution maintained that, after the murder, Cowen had no further use for defendant and that is why defendant's calls were refused following his arrest. When viewed alone, the evidence of the contacts between defendant and Cowen arguably is insufficient to establish beyond a reasonable doubt that an agreement between defendant and Cowen existed to murder Nelson. See *People v Fisher*, 193 Mich App 284, 289; 483 NW2d 452 (1992) (inferences may not be based on evidence that raises merely a conjecture or possibility). However, when viewing all of the circumstantial evidence in a light most favorable to the prosecution, a jury could infer that defendant's killing of Nelson was premeditated and deliberate.

## IV. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, Defendant argues he was denied the effective assistance of counsel. We disagree.

"Whether a defendant has been deprived of the effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "The [court] must first find the facts, and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are

reviewed de novo. *Id.*

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008).

Defendant first contends that his trial counsel was ineffective by not objecting to the admission of defendant's prior act of selling crack cocaine. We disagree.

MRE 404(b) addresses evidence of other "bad" acts. MRE 404(b)(1) specifically states that "other crimes, wrongs, or acts [are] not admissible to prove the character of a person in order to show action in conformity therewith." However, MRE 404(b)(1) allows these other acts to be admissible "for other purposes," such as proof of motive, opportunity, intent, preparation, scheme, or plan. "When relevance to an issue other than mere propensity is found, MRE 404(b) is not violated." *People v VanderVliet*, 444 Mich 52, 84; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

The prosecution offered evidence that defendant sold crack cocaine to Whitbread. This evidence was not admitted for the purpose of showing that defendant had a "bad" character and acted in conformity. Rather, it was offered to show how defendant came into possession of Whitbread's green Cadillac. While the fact that defendant gained possession of the car through the means of an illegal drug deal was not an essential element of any of the charged offenses, it comprised necessary information for the jury to obtain the full story of how defendant procured the vehicle. A jury is entitled to hear the "complete story" of the matter in issue. *Aldrich*, *supra* at 115 (citation omitted). Thus, the evidence of defendant being a drug dealer was admissible under MRE 404(b) since it was relevant and offered for a proper purpose. Because it was admissible, defense counsel was not ineffective by failing to make a futile objection. *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008).

Next, defendant argues that counsel was ineffective by failing to object to repeated references regarding defendant being in custody or having a prior felony record. This argument is also without merit.

Defendant claims that his trial counsel should have objected to the repeated instances of the prosecution eliciting the fact that defendant was in custody at some point. Defendant relies on *People v Wallen*, 47 Mich App 612; 209 NW2d 608 (1973), which stands for the proposition that "when there are deliberate and repeated efforts by the prosecutor to impress upon the jury that defendant has committed other crimes, reversible prejudice results and a new trial must be ordered." *Id.* at 613. However, these instances of being in custody related to defendant being in custody for the offense he was on trial for and not other offenses. Specifically, the prosecution purposefully elicited testimony that defendant was housed in the Oakland County Jail, cell R9, from October 1, 2007, until October 8, 2007, and in cell B5A from October 8, 2007, until March

9, 2008. The test to admit such evidence is relevance. See *People v DeBlauwe*, 60 Mich App 103, 105; 230 NW2d 328 (1975). In this instance, where defendant was housed was extremely relevant. The prosecution offered evidence that someone from those particular jail cells accessed the phone and attempted to call Cowen. This evidence was consistent with the prosecution's theory regarding the motive for the killing. The prosecution attempted to prove this connection by showing numerous contacts between defendant and Cowen leading up to the murder, immediately after the murder, and following defendant's incarceration. The prosecution relied on the fact that Cowen did not accept any of the collect calls from the jail as evidence that Cowen was now no longer interested in defendant once the murder was completed. Therefore, the references to defendant being jailed were permissible because they were unrelated to other crimes committed by defendant and were relevant in connecting defendant to Cowen in support the prosecution's motive theory.

Similarly, defendant claims that defense counsel was ineffective by failing to object to the reference regarding his probation officer and fingerprint cards. However, "an isolated or inadvertent reference to a defendant's prior criminal history will not result in reversible prejudice." *Wallen*, *supra* at 613. The reference to the witness, Geoffrey Kaplan, being a probation officer was an isolated reference. In fact, the reference was a short response, "I'm a probation officer," to a question posed by the trial judge, not the prosecutor. Moreover, Kaplan did not testify regarding any of defendant's prior criminal acts, convictions, or sentences. Rather, the sole purpose was to establish that defendant admitted to Kaplan that he was born in Connecticut. This was important to establish because Ralph McMorris testified that defendant said he had family in Connecticut. Thus, Kaplan's testimony corroborated McMorris's testimony such that it allowed a jury to reasonably infer that McMorris truly was talking with defendant that night. Moreover, even though the trial judge elicited the fact that Kaplan was a probation officer, it was not stated that he was defendant's probation officer. Thus, this vague reference to defendant's criminal history falls short of the type of "deliberate and repeated efforts" that are impermissible. *Wallen*, *supra* at 613. Furthermore, to the extent that defense counsel chose to not object to the trial judge's question, it could be considered trial strategy. See *Unger*, *supra* at 242. Objecting could have brought undue attention to the entire matter before the jury. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant also claims that trial counsel should have objected to the introduction of the fact that he had a fingerprint card. Defendant argues that having a fingerprint card was indistinguishable from stating that defendant had a prior felony conviction. We disagree. The reference that defendant claims should have been objected to was as follows:

> *Q.* And can you tell the jury the purpose of having contact with [defendant]?
>
> *A.* The fingerprint cards that I had listed the person [sic], they weren't of good quality. So I went to the Oakland County Jail to [finger]print the individual myself.

The assertion that the reference to defendant having fingerprint cards was analogous to defendant having a prior felony is too tenuous. There is nothing in the record stating that the card was a result of a prior conviction. The statement could have just as likely referred to the fingerprint card that defendant provided upon being arrested for this offense was of poor quality. Therefore,

given the fact that the statement did not explicitly implicate a prior conviction, trial counsel reasonably did not object.

Defendant next argues that he was deprived the effective assistance of trial counsel when his trial counsel failed to request certain jury instructions. We disagree.

Defendant contends that trial counsel should have requested a jury instruction concerning the credibility of an addict-informer, with regard to the testimony of Whitbread. Instructions concerning the "special scrutiny of the testimony of addict-informants should be given upon request, where the testimony of the informant is the only evidence linking the defendant to the offense." *People v Griffin*, 235 Mich App 27, 40; 597 NW2d 176 (1999) (citing *People v Atkins*, 397 Mich 163, 170; 243 NW2d 292 (1976)), overruled on other grounds *People v Thompson*, 477 Mich 146 (2007). Defendant fails to show how not requesting the instruction fell below an objective standard of reasonableness. The instruction would not have been appropriate since Whitbread's testimony was not the "only evidence" linking defendant to the murder. The primary evidence linking defendant to the murder was Nelson's statement. Accordingly, defense counsel was not ineffective for failing to make a baseless request. See *Horn*, *supra* at 39-40.

Defendant next claims that trial counsel was ineffective by failing to request the witness-credibility jury instruction, CJI 2d 3.6. However, this claim is without merit because the trial judge gave this instruction.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot