STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 1, 2010
v	No. 291040 Allegan Circuit Court
DEREK LANCE WOODLEY, Defendant-Appellant.	LC No. 08-015757-FC

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant appeals as of right his convictions, following a jury trial, of first-degree murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, and two counts of felony-firearm, MCL 750.227b.[1] Defendant was sentenced to life imprisonment for his murder conviction, 25 to 50 years' imprisonment for his assault conviction, and to two years' imprisonment each for his felony-firearm convictions. We affirm.

Defendant first argues that there was insufficient evidence of premeditation and deliberation to sustain his conviction for first-degree premeditated murder. We disagree. We review sufficiency of the evidence claims de novo, viewing the evidence in the light most favorable to the prosecution to determine if the evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

"To prove first-degree premeditated murder, the prosecution must establish that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000). "Premeditation and deliberation may be inferred from the circumstances, including the defendant's behavior before and after the crime." *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). Premeditation may be established through evidence of such factors as "(1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after

[1] The jury acquitted defendant of felony murder, MCL 750.316(1)(b), an additional count of assault with intent to murder, MCL 750.83, unlawful imprisonment, MCL 750.349b, and three additional counts of felony-firearm, MCL 750.227b.

the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Moreover, there must be "[s]ome time span between the initial homicidal intent and the ultimate killing," for a second look, to establish premeditation and deliberation. *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008). The "second look" required for premeditation and deliberation depends on the totality of the circumstances surrounding the killing. *People v Meier*, 47 Mich App 179, 183; 209 NW2d 311 (1973).

In this case, viewed in a light most favorable to the prosecution, there was ample evidence of premeditation and deliberation. Defendant's and the victim's relationship was tumultuous, including physical, emotional, and verbal abuse of the victim by defendant, which may be circumstantial evidence of premeditation and deliberation. See *Unger*, 278 Mich App at 231 ("Evidence showing marital discord is admissible as circumstantial evidence of premeditation and deliberation."). Defendant threatened to kill the victim. He thereafter drove off with the victim as she attempted to remove their son from the car. Over the course of the following 1-1/2 days, he limited the victim's communication with her family, refused to return the victim to her mother's residence, repeatedly misled the victim's mother about doing so, and shortly before the victim's death, sent their son to his sister's residence. The victim died during the later evening hours of December 10, 2007, or the early morning hours of December 11, 2007. The record demonstrates that defendant was with the victim during this period. It was undisputed that the victim was shot with a shotgun at close range. Defendant never told law enforcement officers, with whom he was in communication for much of a 6-1/2 hour stand-off, that he accidentally shot the victim or that she needed medical assistance. "[D]efendant's attempt to conceal the killing can be used as evidence of premeditation." *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). See also *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995) (a defendant's lack of remorse after the victim's killing would be relevant to determine whether there was premeditation and deliberation). On the record, based on the previous relationship between the defendant and the victim, defendant's actions before and after the crime; and the circumstances of the killing itself, we find that there was ample circumstantial evidence of premeditation and deliberation. *Plummer*, 229 Mich App at 300. Further, the record establishes that there was time for defendant to take the requisite second look, *Meier*, 47 Mich App at 191-192, as he had the victim in his control for 1-1/2 days before the murder.

Additionally, there was substantial evidence of defendant's consciousness of guilt in this case. Defendant repeatedly failed to comply with the police officers' orders to open the door, and he fired at Trooper Paul Gonyeau when the trooper kicked down the door. Such evidence demonstrates defendant's consciousness of guilt. See generally *People v Solmonson*, 261 Mich App 657, 666-667; 683 NW2d 761 (2004) (a defendant's nonresponsive conduct may be properly viewed as evidence of his consciousness of guilt); *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996) (a threat by a defendant against a witness is generally admissible to demonstrate consciousness of guilt). Further, defendant testified that he contemplated suicide throughout the stand-off, and his suicidal ideation may be used as circumstantial evidence of consciousness of guilt. See, *United States v Cody*, 498 F3d 582, 591-592 (CA 6, 2007).

While defendant testified that he accidentally shot the victim, the jury rejected that story, and we defer to their credibility assessment. *People v Harrison*, 283 Mich App 374, 378; 766 NW2d 98 (2008). Viewing the evidence in a light most favorable to the prosecution, there was

sufficient evidence presented to permit a rational trier of fact to conclude that the essential elements of first-degree premeditated murder were proven beyond a reasonable doubt. *McGhee*, 268 Mich App at 622; *Mette*, 243 Mich App at 330.

Likewise, defendant's assertion that there was insufficient evidence to sustain his assault with intent to murder conviction related to his shooting of a Michigan State trooper also lacks merit. The elements of the offense of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). Intent to kill may be proved by reasonable inferences from the victim's testimony. *People v Davis*, 216 Mich App 47, 52-53; 549 NW2d 1 (1996). Notably, minimal circumstantial evidence is sufficient to prove defendant's intent. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). "The use of a lethal weapon is the kind of evidence which will support an inference of an intent to kill." *People v Turner*, 62 Mich App 467, 470; 233 NW2d 617 (1975).

The testimony viewed in the light most favorable to the prosecutor was sufficient to permit a rational trier of fact to conclude that all of the elements of assault with intent to murder were proven beyond a reasonable doubt, where defendant fired a shotgun at close range at the trooper's torso. Defendant's claim that he was merely attempting to repel an intruder is self-serving and not in keeping with the requirement that the evidence be viewed in a light most favorable to the prosecution. The evidence established that police made repeated announcements and knocks on the door before entering. Defendant fired the shotgun, at a height of a person's mid-section, in the direction of the door after police forced it open. If defendant had hit and killed the trooper, this would have been a murder. *People v Goecke*, 457 Mich 442, 463; 579 NW2d 868 (1998). Therefore, viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence presented to permit a rational trier of fact to conclude that the essential elements of assault with to murder were proved beyond a reasonable doubt. *McGhee*, 268 Mich App at 622; *Brown*, 267 Mich App at 147-148.

Defendant next contends that his murder and assault convictions are against the great weight of the evidence. This issue is unpreserved, because defendant failed to raise this issue below in a motion for new trial, and therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998) (citations omitted).

As discussed previously, the evidence adduced at trial and reasonable inferences derived therefrom support defendant's murder conviction. On appeal, defendant argues that his expert witness' testimony supported his theory that the victim was killed when the gun defendant was loading accidentally discharged. Nevertheless, it was for the jury to assess the credibility of the expert witnesses, and to decide which expert to believe. *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008). Moreover, a jury is not bound to accept the opinion of an expert witness. *People v Clark*, 172 Mich App 1, 9; 432 NW2d 173 (1988). We find that the defense

expert's testimony did not impeach the proofs supporting defendant's murder conviction such that a new trial is warranted. Certainly, the expert's testimony supported defendant's version of the victim's killing. However, the jury, as trier of fact, rejected that version. The testimony supporting the murder conviction was not impeached to the extent that it was deprived of all probative value or that a jury could not believe it. *Lemmon*, 456 Mich at 645-646. Further, defendant's arguments do not relate to indisputable physical facts, but rather, to alternate theories as to how the killing occurred. See *Musser*, 259 Mich App at 219.

Defendant also claims that he had no motive to kill the victim and that they were voluntarily engaging in normal everyday activities in the days leading up to the murder. The prosecution, nonetheless, did not have to prove motive as an element of first-degree premeditated murder. *People v Yost*, 468 Mich 122, 133 n 13; 659 NW2d 604 (2003); *Unger*, 278 Mich App 223; *Mette*, 243 Mich App at 330. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial" under the great weight of the evidence standard. *Lemmon*, 456 Mich at 647. In this case, defendant presented testimonial evidence challenging the credibility of the prosecution witnesses' testimony, as well as attempting to establish an alternate version of the killing. Nevertheless, we conclude that the testimony supporting the murder conviction was not deprived of all probative value or that the jury could not have believed it, or that the testimony contradicted indisputable physical facts or defied physical realties. *Id.* at 645-646. Defendant ultimately failed to establish plain error affecting his substantial rights regarding his claim that his murder conviction was against the great weight of the evidence. *Musser*, 259 Mich App at 218.

With respect to his assault conviction, defendant asserts that the jury's guilty verdict regarding the charge involving one trooper cannot be reconciled with its acquittal of a similar charge involving another trooper. Even though the jury acquitted defendant on the latter assault charge, this does not mean that his assault conviction on the former charge was against the great weight of the evidence. A jury in a criminal case may reach an inconsistent verdict as part of its power of leniency. See *People v Torres*, 452 Mich 43, 75; 549 NW2d 540 (1996); *People v Lewis*, 415 Mich 443, 449-452; 330 NW2d 16 (1982). The testimony supporting the assault conviction was not impeached such that it was deprived of all probative value or that the jury could not have believed it, nor did the testimony contradict indisputable physical facts or defy physical realties. *Lemon*, 456 Mich at 645-646. Defendant has failed to establish plain error affecting his substantial rights regarding his allegation that his assault conviction was against the great weight of the evidence. *Musser*, 259 Mich App at 218.

Defendant next complains that the trial court erroneously admitted evidence of his past instances of domestic violence against the victim. We disagree. We review evidentiary rulings for an abuse of discretion, *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). "[An]" 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). MCL 768.27b(1) provides in pertinent part that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403."

In the instant case, there was ample testimony that defendant threatened the victim in the past, and that he subjected the victim to verbal, emotional, and physical abuse. On appeal, defendant challenges testimony by the victim's mother that defendant threatened the victim by stating that, if she did not do what he wanted her to do, he was going to rape her younger sister. This threat was made to the victim, as a threat to her, to force her to comply with defendant's wishes. The challenged testimony was properly admitted pursuant to MCL 768.27b. The instant case involved domestic violence, because defendant caused or attempted to cause mental harm to the victim, a household member, and also engaged in activity toward the victim that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 768.27b(5)(a)(i) and (iv). The victim was a household member, because she was an individual with whom defendant formerly resided and an individual with whom defendant has or has had a dating relationship. MCL 768.27b(5)(b)(ii) and (iv).

The challenged testimony, as well as the other evidence of previous acts of domestic violence, was also relevant to the determination whether defendant intended to kill the victim, and whether defendant acted with premeditation and deliberation in killing her. Both elements were necessary to prove the offense of first-degree premeditated murder. *Mette*, 243 Mich App at 330. Additionally, the challenged evidence was relevant in determining defendant's motive for killing the victim, and in determining defendant's credibility regarding his defense of accidental discharge. Motive is always relevant, even though it is not an essential element of murder. *People v Rice*, 235 Mich App 429, 440; 597 NW2d 843 (1999).

Finally, with respect to MRE 403 (exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time), the victim's mother's testimony regarding the threat was limited, and it was clear that defendant threatened the victim by stating that he was going to rape her sister. Defendant bears a high burden to show that a trial court abused its discretion by declining to exclude relevant evidence under MRE 403. *People v Albers*, 258 Mich App 578, 588-589; 672 NW2d 336 (2003). He has not met this burden here. On the record presented, we find that there was no danger that marginally probative evidence would be given undue weight by the jury or that the jury was confused or misled. The evidence did not cause undue delay, nor was it a waste of time. In sum, MRE 403 did not require the denial of the admission of evidence. Ultimately, the trial court did not abuse its discretion in allowing the victim's mother's testimony regarding defendant's threat against the victim under MCL 768.27b. *Washington*, 468 Mich at 670.[2]

Defendant also argues that the trial court improperly excluded evidence regarding allegations that the victim's mother and stepfather committed child abuse against the victim in 2001 or 2002. Under MRE 402, "[a]ll relevant evidence is admissible." Relevant evidence has

[2] In reaching our conclusion, we note that both parties discuss the applicability of MRE 404(b) (other-acts evidence is generally inadmissible to prove the character of a person to prove conformity therewith) to this allegation of error. As discussed previously, the evidence was properly admitted under MCL 768.27b, therefore, the admissibility of that evidence under MRE 404(b) is not material. See *People v Pattison*, 276 Mich App 613, 615-616; 741 NW2d 558 (2007).

"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. Defendant faced charges of open murder and unlawful imprisonment of the victim, among other charges. The question whether the victim sought to end her relationship with defendant was an underlying issue in this case, because defendant claimed that the victim was staying at her parents' residence out of necessity and not by choice and that the victim had no intention of ending their relationship. Therefore, evidence of prior abuse of the victim by her mother and stepfather would have been relevant to undermine credibility of the victim's mother, where she claimed that she was providing a safe haven for the victim. See *McGhee*, 268 Mich App at 637 (a witness' credibility is always relevant).

However, relevant evidence may be excluded by operation of MRE 403, "[i]f 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." It is undisputed that the allegations of child abuse occurred six or seven years before the instant trial. How the victim may have viewed her parents' residence years before may have differed greatly from how she viewed it as a 19-year-old mother of two small children looking for a residence other than with an abusive ex-boyfriend. Without the victim to provide an explanation, the jury would have been left to speculate on the importance of this evidence. The trial court appropriately concluded that there was a real concern of confusing the issues or misleading the jury with respect to speculative evidence involving allegations of abuse that were several years old. As our Supreme Court has noted, the MRE 403 determination is "'best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony . . . '" *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995), quoting *VanderVliet*, 444 Mich 81; People v Magyar, 250 Mich App 408, 416; 648 NW2d 215 (2002). "Close questions arising from the trial court's exercise of discretion on an evidentiary issue should not be reversed simply because the reviewing court would have ruled differently," and "[t]he trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). We conclude on this record that the trial court did not abuse its discretion in this close evidentiary ruling, where it excluded the past allegations of child abuse of the victim by her mother and stepfather.

Defendant also claims that the exclusion of the proffered evidence amounted to a Confrontation Clause violation. This unpreserved allegation of error lacks merit. The Confrontation Clause does not confer on a defendant an unlimited right to cross-examine a witness on any subject. *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). Trial courts possess wide latitude with respect to the Confrontation Clause "to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986). Such is the case here, where, as discussed previously, the challenged evidence was properly excluded by operation of MRE 403. Not only were the allegations of child abuse properly excluded, but defense counsel had other avenues to discredit the testimony of the victim's mother. The Confrontation Clause was not offended in this case. *Id.* Defendant has failed to establish plain error affecting his substantial rights regarding his Confrontation Clause violation. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant next asserts that he was denied his right to allocution at sentencing. This unpreserved assertion of error is reviewed for plain error affecting substantial rights. *Carines*, 460 Mich 763-764. MCR 6.425(E)(1)(c) provides in pertinent part: "At sentencing, the court, must, on the record . . . give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence." "Accordingly, this court rule means that the trial court must make it possible for a defendant who wishes to allocute to be able to do so before the sentence is imposed." *People v Petit*, 466 Mich 624, 628; 648 NW2d 193 (2002). In this case, the trial court afforded defendant an opportunity "to advise the court of any circumstances [he] believe[d] the court should consider in imposing sentence." MCR 6.425(E)(1)(c). The court rule does not afford defendant an opportunity to address the victim's family, which was what defendant attempted to do at sentencing. After the trial court advised him that his remarks to the victim's family were improper, defendant indicated he had nothing additional to say regarding any circumstances that the trial court should consider in imposing sentence. On appeal, defendant merely asserts that the trial court deprived him of his opportunity to present his side of the story. The trial court was present at trial, and defendant testified. The trial court was fully aware of defendant's version of events. Even on appeal, defendant does not state any other circumstances in which he believe the trial court should have considered in imposing sentence. Defendant was afforded an opportunity to address the trial court at sentencing. *Id.* There was no plain error.

Finally, in his standard 4 supplemental brief, defendant alleges that the prosecutor's use of defendant's pre-arrest, post-*Miranda*[3] silence during closing argument violated his privilege against self-incrimination. While not expressly stating so, defendant has raised an allegation of prosecutorial misconduct. Because defendant failed to object to the prosecutor's closing argument, this allegation of error is unpreserved and subject to plain error analysis. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *Unger*, 278 Mich App at 235. Our review of the record reveals that defendant has misstated the record. The record demonstrates that the prosecutor did not elicit defendant's pre-arrest, post-*Miranda* silence during the proofs and did not reference such silence during closing argument. With respect to the challenged argument, we find that the prosecutor properly argued that defendant's actions before and after the murder were proof of premeditation and deliberation. See *People v Walker*, 265 Mich App 530, 542; 697 NW2d 159 (2005), vacated in part on other grounds 477 Mich 856 (2006). There was no plain error.

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).