STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 14, 2013
v	No. 311870 Midland Circuit Court
RACHEL MARIE MOORE, Defendant-Appellant.	LC No. 11-004983-FC

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction of first-degree premeditated murder, MCL 750.316(1)(a). Because the evidence was sufficient to support her conviction, the prosecutor's argument that defendant was not worthy of belief based on the evidence presented did not infringe on defendant's constitutional or statutory rights, and defendant has failed to establish a real and substantial possibility that a juror's independent investigation could have affected the jury's verdict, we affirm.

Defendant's conviction stems from the shooting death of Brian Reichow, a married man with whom defendant had an on-again-off-again volatile relationship. Defendant first argues that the evidence was insufficient to support her conviction because it failed to show that she premeditated the shooting. We review de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *Id.* at 196. "The scope of review is the same whether the evidence is direct or circumstantial." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Id.* (quotation marks and citation omitted).

"To establish first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and the act of killing was deliberate and premeditated." *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). "The elements of premeditation and

deliberation may be inferred from all the facts and circumstances surrounding the incident, including the parties' prior relationship, the actions of the accused both before and after the crime, and the circumstances of the killing itself[.]" *Haywood*, 209 Mich App at 229 (internal citations omitted).

The evidence was sufficient for a rational juror to conclude that defendant premeditated Reichow's murder. Defendant and Reichow had a volatile relationship that involved physical violence. On one occasion, defendant broke Reichow's jaw when they were arguing and, on another occasion, she went to his home, damaged approximately $10,000 worth of property, and engaged in a physical altercation with him that prompted him to call 911. Reichow later filed an ex parte petition for a personal protection order against defendant in which he stated that defendant was stalking him, that she had entered his home without permission on more than one occasion, and that he was afraid for his life because she always attacked him from behind when he did not expect it. Defendant also sent Reichow e-mails expressing her hatred for him, stating that she could not wait for him to die, and exclaiming "DIE, DIE, DIE!"

Defendant testified that, on the day of the shooting, she left work early because she was "floored" after reading Reichow's 2:20 p.m. e-mail, in which he stated that he wanted to end their relationship. Reichow sent the e-mail only hours after they had spent the morning looking for a place to live together because Reichow purportedly wanted to divorce his wife. Defendant arrived home from work at approximately 3:30 p.m., grabbed a vase of flowers that Reichow had given her, and retrieved a gun. She then went to Reichow's apartment, smashed the vase of flowers and emptied his trash on his front porch. Thereafter, she attempted to call Reichow several times. Although there was a Burger King restaurant close to Reichow's apartment, defendant traveled to another Burger King restaurant that was close to a home that Reichow was remodeling. Defendant saw Reichow pull into the Burger King parking lot in his truck and she followed him into the parking lot.

Defendant got out of her vehicle and into Reichow's truck. Defendant maintained that she shot Reichow in self-defense after he pulled a gun out of the glove box and pointed it at her. She claimed that she grabbed the gun and then shot Reichow four times. Defendant's testimony was refuted by evidence showing that she brought the gun with her. Reichow was shot with a .38-caliber revolver, and defendant admitted that she owned a .38-caliber revolver. After the shooting, an empty gun case for a .38-caliber revolver was found in defendant's home, along with a box of .38-caliber bullets with some bullets missing. As previously indicated, defendant testified that she grabbed her gun when she went home after work and before she went to Reichow's apartment. After testifying as such, she immediately recanted her statement that she had grabbed her gun.

Defendant admitted that she shot Reichow four times at close range. One witness testified that defendant admitted that she shot Reichow "numerously" because he kept promising to leave his wife but instead wrote her "Dear John" letters. A second witness testified that defendant claimed that she shot Reichow because he gave her a gun and told her to shoot him. A third witness testified that defendant claimed that she shot Reichow after he handed her a gun, and that she looked up, saw people looking at her, and then shot him three more times in the chest. Finally, a fourth witness testified that defendant admitted that she shot Reichow because he was "playing head games with her" and she "couldn't take it anymore." That witness further

testified that defendant stated that after the initial shot "she looked around and she just kept shooting."

After the shooting, defendant fled the scene, did not call 911, and threw the gun, Reichow's car keys, and her cell phone in a lake. She then went to her son's father's house, cut her hair, had intimate relations with her son's father, and gave the fathers of her two children money to take care of them. Defendant also left two messages on Reichow's home phone. Reichow's wife described defendant as "hysterical" on the messages. In one message, defendant stated that she was "sick to [her] stomach." Further, over time, defendant discussed the shooting with seven people and had 120 phone conversations with her son's father, but she did not tell any of them that she had shot Reichow in self-defense. One witness testified that on the day of Reichow's funeral, defendant remarked that "the bastard was burning in hell" and laughed about it. Another witness testified that defendant was nonchalant in describing how she shot Reichow, as if it were a joke. A third witness testified that after discussing Reichow's death, defendant stated that she did not regret it "[b]ecause some people deserve what they get." Accordingly, the evidence was sufficient for a rational juror to conclude that defendant premeditated Reichow's murder.

Defendant next argues that she was denied her Fifth, Sixth, and Fourteenth Amendment rights, as well as her constitutional and statutory rights to be present at her own trial, when the prosecutor was permitted to argue that defendant lied under oath for no other reason than she did not want to be convicted of murder. Because defendant did not preserve this issue by objecting below, our review is limited to plain error affecting her substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"A defendant's right to testify in his own defense arises from the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution." *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). A defendant also has a constitutional and statutory right to be present during trial. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.3; *People v Mallory*, 421 Mich 229, 246 n 10; 365 NW2d 673 (1984). Defendant relies on *People v Buckey*, 424 Mich 1, 15-16; 378 NW2d 432 (1985), for the proposition that it is improper for a prosecutor to argue that a defendant lied merely because she was present at trial and could tailor her testimony to account for the other evidence. In *Buckey*, however, the Court noted that it is permissible for a prosecutor to comment on a defendant's testimony in relation to the testimony of other witnesses. *Id.* at 15. The Court further stated that "the prosecutor may comment upon the testimony and draw inferences from it and may argue that a witness, including the defendant, is not worthy of belief." *Id*. at 14-15. See also *Portuondo v Agard*, 529 US 61, 73; 120 S Ct 1119; 146 L Ed 2d 47 (2000) ("Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth.").

Contrary to defendant's argument, the prosecutor did not make a blanket statement that defendant lied merely because she sat through trial and heard the evidence against her. Rather, the prosecutor argued that defendant lied based on the evidence presented during trial after defense counsel's argument to the contrary. Because defendant was the only witness to the shooting, her credibility was essential to her claim that she shot Reichow in self-defense. The

prosecutor argued that defendant lied because she did not tell anyone that she shot Reichow in self-defense until the day of the trial. The prosecutor pointed out that defendant shot Reichow four times and that Reichow was wearing his seatbelt and looking straight ahead when he was first shot. After the shooting, defendant threw the gun and Reichow's keys in a lake and did not call 911. The prosecutor also challenged the veracity of defendant's testimony that she drove to the Burger King restaurant where she shot Reichow because her son wanted Burger King for dinner. The prosecutor noted that it should have taken defendant only 10 to 15 minutes to drive from Reichow's apartment to the restaurant, but that she did not call her son until almost 6:30 p.m., giving her 1-½ hours to search for Reichow in an area where she suspected she might find him. Accordingly, the prosecutor's arguments were proper and did not infringe on defendant's constitutional or statutory rights.

Finally, defendant argues that the trial court should have granted her motion for a new trial because she was denied her Sixth Amendment rights of confrontation, cross-examination, and assistance of counsel as a result of the jury's exposure to an extraneous influence during deliberations. Before the jury reached a verdict, the trial court denied its request to inspect the type of truck in which Reichow was killed. After indications that a juror had conducted an independent investigation of a similar truck and discussed the investigation with other jurors during deliberations, each juror was questioned. The juror in question acknowledged that, on the night before deliberations began, she sat in the driver's seat of a large truck and reached across the passenger seat to determine if she could reach the glove box. She claimed that her investigation did not change the way that she decided the case. Ten other jurors testified that the independent investigation was discussed during deliberations. Two stated that the investigating juror said that she could reach the glove box, four claimed that the investigating juror reported that she could not reach the glove box or that it would be difficult, three said that they could not remember the result of the juror's independent investigation, and the remaining juror was not asked if she remembered the results. Each of the ten jurors maintained that the independent investigation did not influence his or her decision. One juror stated that he did not recall discussing the investigation during deliberations, but stated that it would not have impacted his decision. The trial court opined that there was a real possibility that the juror's independent investigation could have affected the jury's verdict, but ultimately concluded that the error was harmless beyond a reasonable doubt.

We review for an abuse of discretion a trial court's ruling on a motion for a new trial. *People v Johnson*, 245 Mich App 243, 250; 631 NW2d 1 (2001). An abuse of discretion occurs when the trial court's decision falls outside the principled range of outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). "Underlying questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear error[.]" *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010) (citations omitted). We also review de novo questions of constitutional law. *People v Le Blanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

In order to warrant a new trial on the basis of an extrinsic influence, "the defendant must prove that the jury was exposed to extraneous influences" and "must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict." *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997). "Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is

substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id.* at 89. "If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt." *Id.* This can be established "by proving that either the extraneous influence was duplicative of evidence produced at trial or the evidence of guilt was overwhelming." *Id*. at 89-90.

The prosecutor argues that defendant failed to establish a real and substantial possibility that the juror's independent investigation could have affected the jury's verdict because all 11 jurors who were aware of it stated that it did not affect their decision, and one juror who did not recall discussing the matter said it would not have affected his decision. The prosecutor's argument is misplaced because it focuses on the jurors' subjective beliefs as opposed to the objective inquiry required under *Budzyn*. See *Budzyn*, 456 Mich at 89 n 10 ("The inquiry whether the extrinsic influences could have affected the jury's verdict is an objective inquiry.") Looking at the issue objectively, defendant cannot establish a real and substantial possibility that the independent investigation could have affected the jury's verdict. Whether it was feasible for Reichow to reach the glove box from the driver's seat speaks to defendant's credibility in general, but it says little about whether defendant shot Reichow in self-defense. Even if Reichow could have and did reach into the glove box and retrieve a gun, the question is whether he then pointed the gun at defendant or gave it to her. Four witnesses testified that defendant stated that Reichow handed her the gun. Two of those witnesses testified that defendant stated that she shot Reichow after he asked her to shoot him. Thus, whether Reichow was able to reach into the glove box from the driver's seat was not determinative of the ultimate issue in the case. Accordingly, defendant has failed to establish a real and substantial possibility that the independent investigation could have affected the jury's verdict.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra