

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS LEE HARTE,

Defendant-Appellant.

UNPUBLISHED

June 30, 2000

No. 209922

Shiawassee Circuit Court

LC No. 97-000670-FC

Before: Gage, P.J., and Gribbs and Sawyer, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's conviction arises from the killing of Mark Bosom. Bosom's wife, Cindy Endres-Bosom, developed a friendship with defendant in late 1992. The relationship appears to have begun in part because defendant provided a sympathetic ear to Endres-Bosom. Bosom was an alcoholic, and this affected his relationship with Endres-Bosom. According to Endres-Bosom, defendant desired an intimate relationship, but it did not advance to that level, instead remaining platonic.

In late 1993 or early 1994, Endres-Bosom asked defendant to leave her alone. However, their relationship continued. In late 1994, Endres-Bosom moved out of her Lansing home with Bosom. After living for a few weeks with her mother, she moved to her own apartment. She did not give defendant her new telephone number or address, but defendant obtained that information and continued to contact Endres-Bosom. Endres-Bosom testified that, after Bosom spent the night with her in May 1995, she noticed defendant near her apartment. Defendant also approached Endres-Bosom at the daycare where she took her daughter. These encounters upset Endres-Bosom.

On June 4, 1995, defendant and Bosom met. Defendant testified that Bosom had called him the day before, leaving a message for defendant to contact him. Defendant claimed that he took Bosom back to his farm, where he lived with his mother. Bosom drank beer during the afternoon at the farm.

Later that day, defendant took Bosom back home. On the way, Bosom started to choke and gag after swallowing some beer. Defendant saw blood coming out of Bosom's nose and mouth. Bosom continued to cough and gag, and defendant pulled over. He helped Bosom out of the car. Defendant performed the Heimlich maneuver on Bosom, causing Bosom to vomit in the passenger's seat. Shortly afterwards, defendant continued to take Bosom home.

On their way to Bosom's home, they noticed Endres-Bosom's car near a park, where she was playing with her daughter. Endres-Bosom approached defendant's car, a maroon colored Cadillac, and they talked. Endres-Bosom testified that Bosom told her that defendant said they had been having a sexual relationship. Endres-Bosom denied this fact to Bosom. Later, Endres-Bosom and Bosom discussed the situation and agreed to get a mutual restraining order against defendant. Endres-Bosom remained with Bosom that night, but she went home the next day.

On June 6, 1995, Endres-Bosom was with Bosom until about 7:45 p.m. when she left his house. One of the neighbors was preparing to have a barbecue. Defendant claimed that he went to Bosom's at about 8:00 p.m. on June 6 and talked with Bosom, who was participating in the barbecue. Eventually, someone told Bosom that they were running low on beer. Defendant agreed to take Bosom to the store. They got into defendant's Cadillac, and Bosom was never seen alive again.

In November 1996, human skeletal remains were found near I-69 and the Shiawassee River. The remains were identified as Bosom's. Heather Milch of the Michigan State Police Crime Laboratory gathered evidence from the scene. She collected a shirt that contained some of Bosom's rib bones. The shirt was covered with mud. Milch placed it in brown paper. After a period of time during which the contents of the paper dried, the contents were examined. Among the items associated with the shirt was a squashed .22 caliber bullet, which appeared as if it had been fired into flesh without hitting bone.

Milch examined defendant's Cadillac and detected the possible presence of blood on the passenger's seat and behind the passenger's seat on the floor. The foam on the seat cushion had a large red stain on it. Testing revealed a positive human blood reaction result on the seat cushion and base of the seat back. DNA analyses of these items was performed. Human DNA was detected on the fabric that covered the bottom of the seat. A further DNA analysis of this sample was compared to blood samples from Bosom's parents. The probability of parentage was 99.99 percent. The experts could not quantify the amount of blood that was on the seat or whether the blood was mixed with some other body fluid, such as vomit or saliva.

The prosecution admitted evidence that defendant, who lived with his mother, had access to his deceased father's .22 caliber gun. In March 1996, defendant's mother visited Bath Township Police Chief Jack Phillips. According to Phillips, defendant's mother told him that the gun was missing and she was concerned that defendant might have it. A year later, after the discovery of Bosom's remains, defendant's mother told Phillips that the gun had been destroyed in February 1996. Defendant then told Phillips that the gun had been damaged and destroyed before his father died in 1994.

The jury convicted defendant of first-degree murder and felony-firearm. Defendant challenges these convictions on appeal.

First, defendant argues that the verdict is against the great weight of the evidence or based on insufficient evidence. We disagree.

The trial court's denial of defendant's motion for new trial on the basis that the verdict is against the great weight of the evidence is reviewed for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). The motion may be granted "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). The trial judge may not sit as a thirteenth juror when deciding a motion for new trial. *Id.* Furthermore, this Court may not consider credibility issues anew. *Gadomski, supra* at 28. In deciding a motion for new trial based on a claim that the verdict is against the great weight of the evidence, the trial court must remember that issues of witness credibility are for the jury. *Id.* The trial court is not permitted to "substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.'" *Lemmon, supra* at 642, quoting *Sloan v Karmer-Orloff Co*, 371 Mich 403, 411; 124 NW2d 255 (1963). Where testimony is in direct conflict and testimony that supports the verdict has been impeached, if that testimony cannot be said to have been deprived of all probative value or that the jury could not find it believable, then witness credibility is an issue for the jury. *Lemmon, supra* at 643, citing *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942). Conflicting testimony or questions of credibility do not constitute grounds for a new trial. *Lemmon, supra*. Thus, the court may not act as a thirteenth juror in considering a motion for new trial based on a claim that the verdict is against the great weight of the evidence. *Id.* at 645. However, where the testimony "contradicts indisputable physical facts or law" or is "patently incredible or is so inherently implausible that it could not be believed by a reasonable juror," the trial court may "take testimony away from the jury." *Id.* at 643, 645.

In reviewing a claim that there is insufficient evidence to support a conviction, the evidence is considered in a light most favorable to the prosecution and this Court must determine whether a rational factfinder could conclude that the essential elements of the offense were proved beyond a reasonable doubt. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). Circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of the crime. *Id.*

Defendant first focuses on the bullet. While he correctly notes that the .22 caliber bullet could have been fired from one of thousands of guns, he incorrectly suggests that the bullet's character is speculative. On the contrary, the expert identified the bullet as a .22 caliber bullet fired from a .22 long rifle. He also testified that the gun registered to defendant's father could have fired the bullet. The firearms expert did not make assumptions regarding the nature of the bullet.

The bullet was found in the shirt containing rib bones associated with Bosom's remains. Its appearance was consistent with a bullet that had been fired into flesh without striking bone. This was consistent with the fact that no forensic evidence was discovered on the bones. This evidence connects the bullet to Bosom's death.

Defendant next challenges the claims regarding the blood found in his vehicle. The expert detected the possible presence of blood on the seat of defendant's car, some of which was confirmed

to be human. There was a large reddish stain on the top foam of the seat cushion. The expert also found evidence of blood on the base of the seat. While the amount of blood could not be quantified, the jury had the opportunity to examine the seat parts and stains and determine for themselves how much blood could have caused the staining. Additionally, DNA recovered from some of the stains revealed the almost certain likelihood that Bosom's parents were the parents of the donor of the DNA. This evidence supports the jury's verdict.

Defendant argues that the fact that the skeletal remains failed to reveal the manner of death indicates no evidence of a homicide. However, the conclusion regarding the manner of death can be inferred from the entire circumstances.

Defendant argues that his conviction violates the principle that a conviction may not be based on the piling of inferences. We disagree.

A conviction may rest on circumstantial evidence and reasonable inferences drawn from the evidence. *People v Fisher*, 193 Mich App 284, 289; 483 NW2d 452 (1992). A factfinder may draw inferences from established facts, but inferences may not be built upon other inferences. *People v Atley*, 392 Mich 298, 315; 220 NW2d 465 (1974). Inferences may not be based on uncertain or speculative evidence or evidence that raises merely a conjecture or possibility. *Fisher, supra*. However, the factfinder is permitted to make more than one inference in reaching its decision. *People v McWilson*, 104 Mich App 550, 555; 305 NW2d 536 (1981). "[P]roviding each inference is independently supported by established fact, any number of inferences may be combined to decide the ultimate question." *Id.*

The inferences that must be drawn in this case to lead to defendant's conviction are independent of one another and are drawn from the evidence. Defendant had a relationship with Endres-Bosom, with which he was frustrated. He had asked her to leave Bosom. He was the last person with whom Bosom was seen alive. Two days before Bosom's disappearance, defendant told Bosom that he and Endres-Bosom had had a sexual relationship, which upset Bosom. A .22 caliber bullet was found with Bosom's remains. Defendant had access to a .22 caliber gun. Bosom's DNA was extracted from human blood on the seat of defendant's car. This evidence, although circumstantial, is sufficient upon which to convict defendant.

Defendant also argues that there is no evidence of premeditation and deliberation. We disagree.

To establish first-degree murder, the prosecution must provide evidence "that the defendant intentionally killed the victim and that the killing was premeditated and deliberate." *Marsack, supra* at 370-371. "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). The element of premeditation and deliberation may be inferred from the circumstances, including those of the defendant's behavior before and after the crime. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). Other factors that may be considered to establish premeditation include the previous relationship between the defendant and the victim and the weapon used and location of the wounds. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Another factor that

may be used to establish premeditation and deliberation is motive. *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988). However, evidence of motive in the absence of evidence of either a preconceived design or planning activity is insufficient to establish first-degree murder. *People v Sowders*, 164 Mich App 36, 42; 417 NW2d 78 (1987).

Defendant had a motive to kill Bosom. He desired to continue his relationship with Endres-Bosom and showed an interest in developing a more intimate relationship. Bosom did not turn against Endres-Bosom when defendant told Bosom that his relationship with Endres-Bosom was sexual. In addition, witnesses who knew defendant testified that he did not carry a gun with him or in his car. Defendant had access to a .22 caliber gun, and a .22 caliber bullet was found with Bosom's remains. This evidence supports the prosecution's theory that, after his encounter with Bosom on June 4, defendant returned on June 6 with a gun, waiting for an opportunity to end Bosom's life. We find sufficient evidence of premeditation and deliberation.

We conclude that the evidence does not preponderate heavily against the verdict, and the trial court did not err in denying defendant's motion for a new trial. In addition, the convictions are based on sufficient evidence.

Next, defendant argues that the trial court abused its discretion in admitting evidence regarding his father's gun. We find no abuse of discretion.

The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Where a rule of evidence or a statute precludes admissibility, the issue is a question of law, which is reviewed de novo. *Id.* Relevant evidence is generally admissible. MRE 402. "Relevant evidence" is evidence that has any tendency to make the existence of a fact that is of consequence to the determination of the matter more probable or less probable than it would be without that evidence. MRE 401. 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.

The evidence allows an inference that Bosom was killed by a gunshot wound, inflicted by a .22 caliber weapon. The weapon was never found. A .22 caliber revolver was registered in defendant's father's name. This particular model of gun was identified as one that could have fired the bullet. That gun was missing. This evidence is relevant to show that defendant had access to a .22 caliber weapon that may have been used in this crime.

Defendant claims the probative value of this evidence is substantially outweighed by the danger of unfair prejudice. While the evidence is damaging, it was not unfairly prejudicial. *People v Sabin*, 223 Mich App 530, 537; 566 NW2d 677 (1997), citing *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983). The weight the jury would have given this evidence would not have been undue or preemptive weight. *Sabin, supra*, quoting *Sclafani, supra*. The trial court did not abuse its discretion in admitting the evidence.

Next, defendant argues that the trial court abused its discretion in admitting hearsay testimony regarding his father's gun. He argues that the statements by his mother to Phillips were untrustworthy. We disagree.

Defendant's mother was declared unavailable because of a lack of memory. MRE 804(a)(3). The court admitted her statement to Phillips regarding the disappearance of the gun under MRE 804(B)(6), the "catch-all" exception to the hearsay rule. For a statement to be admissible under this rule, it must be trustworthy. There must be adequate indicia of reliability for hearsay statements to be admissible. *People v Welch*, 226 Mich App 461, 466; 574 NW2d 682 (1997), following *United States v Barrett*, 8 F3d 1296 (CA 8, 1993). This requirement is met when the hearsay statement either falls within one of the firmly rooted hearsay exceptions or occurs under circumstances upon which trustworthiness can be guaranteed. *Welch*, *supra* at 467. To determine whether a statement is trustworthy, it must be considered under the totality of the circumstances under which the statement was made and those that show the declarant is worthy of belief. *Id.*, quoting *Barrett*, *supra* at 1300. The court may consider whether the hearsay statement shares reliability factors (such as personal knowledge and lack of bias) that are common to other hearsay exceptions and whether the evidence would otherwise fall within a specific exception. *Welch*, *supra* at 468, quoting *United States v Trenkler*, 61 F3d 45, 58 (CA 1, 1995). It must be determined "whether the totality of the circumstances surrounding the statement establish its reliability sufficiently enough to justify foregoing the rigors of in-court testimony . . . that ordinarily guarantee trustworthiness." *Id.*

Defendant's mother, Mary Harte, approached Phillips at his office to speak to him about the missing gun and window peepers that had been around her home. She had a friendly relationship with Phillips and had visited him on other occasions to discuss various matters with him. When she approached Phillips, after Bosom's disappearance, but before the discovery of his remains, Phillips did not know that defendant was a suspect in Bosom's disappearance.

Phillips made only cryptic notes of his conversation immediately following his March 1996 conversation with Harte. He wrote a more detailed report nearly a year later, when he learned that defendant was a suspect in Bosom's disappearance. The report coincides with Phillips' March 1996 notes.

We find that the circumstances surrounding Harte's statements to Phillips indicate that the statements are reliable and trustworthy. Harte made the statements to Phillips, who would be in a position to investigate the missing gun. However, Harte asked him to hold off the investigation while she approached defendant about the matter. Phillips and Harte had a friendly relationship, and she had approached him with her concerns in the past. We find that the trial court properly concluded that the statements were trustworthy.

Defendant also argues that the prosecution failed to demonstrate that Harte's statements were more probative on the point for which they were offered than any other evidence the prosecution could procure through reasonable efforts, as required by MRE 804(b)(6). However, Harte was in the best position to know the location of her deceased husband's gun. The only other person living in the house

was defendant. While defendant's siblings might have been able to provide testimony regarding the gun, their testimony would not have been more probative than Harte's.

Harte's statements to Phillips were admissible under MRE 804(b)(6). The trial court did not abuse its discretion in admitting them. Moreover, we find any error in the admission of this evidence to be harmless. Error in the admission of evidence requires reversal only if, after consideration of the entire matter, it appears "that it is more probable than not that the error was outcome determinative." *Lukity, supra* at 496. This depends on the nature of the error and "its effect in light of the weight and strength of the untainted evidence." *Id.* at 495, quoting *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). The prosecution admitted evidence that there were guns in the farm house. There was evidence that defendant's father owned a registered .22 caliber gun. Although there would have been a lack of an explanation regarding the whereabouts of that gun, the absence of Harte's statements would not have caused it to be more likely than not that the jury's verdict would have been different.

Next, defendant argues that the trial court erred in refusing to reinstruct the jury on second-degree murder after it asked for definitions of "deliberate" and "premeditated." We disagree. The trial court does not abuse its discretion in failing to repeat instructions addressing areas that were not included in a jury's specific request for reinstruction. *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998).

Finally, defendant argues that the prosecutor engaged in misconduct by repeatedly mischaracterizing the evidence. We find no misconduct.

Defendant's failure to object to the prosecution's alleged mischaracterization of evidence precludes appellate review unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice. *People Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). This Court considers allegations of prosecutorial misconduct on a case by case basis and must examine the pertinent portions of the record to evaluate the prosecutor's remarks in context. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The question is whether the defendant was denied a fair trial. *Id.* The prosecutor is not permitted to make statements of fact to the jury that are unsupported by the record evidence. *Fisher, supra* at 291. However, the prosecution is permitted to argue the evidence and all reasonable inferences drawn from the evidence as it relates to its theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

A review of the evidence and the prosecution's remarks reveals that the prosecution made reasonable inferences based on the evidence to support its theory of the case. The prosecution did not mischaracterize the evidence. All of its arguments are consistent theories based on the evidence, as defendant's theories are also based on the evidence. Our failure to consider this issue would not result in a miscarriage of justice.

Affirmed.

/s/ Roman S. Gribbs

/s/ David H. Sawyer

I concur in the result only.

/s/ Hilda R. Gage