STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24 2001
v	No. 218586 Roscommon Circuit Court
JAMES EDWARD BANE, Defendant-Appellant.	LC No. 98-003630-FC

Before: Cavanagh, P.J., and Markey and Collins, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549,[1] arson of personal property over $50.00, MCL 750.74; MSA 28.269, and mutilation of a dead body, MCL 750.160; MSA 28.357. He was sentenced to concurrent terms of life imprisonment for the second-degree murder conviction, two to four years for the arson conviction, and five to ten years for the mutilation conviction. He appeals as of right. We affirm defendant's convictions but remand for correction of the presentence report.

I

Defendant argues that the evidence was insufficient to justify submitting the charge of first-degree murder to the jury, or to support his conviction of second-degree murder. We disagree.

Defendant was convicted of killing his live-in companion and mother of his two children. It was the prosecutor's theory of the case that a breakup between defendant and the decedent was imminent, and that defendant murdered the decedent out of jealousy or anger and then staged an automobile accident in the decedent's truck in order to collect on the decedent's life insurance benefits, which were doubled in a situation involving an accidental death. The prosecutor also maintained that defendant intentionally set fire to the decedent's pickup truck following the "accident" to cover up evidence of the crime and then fled the state to avoid prosecution.

[1] Defendant was convicted of second-degree murder as a lesser offense to the charged offense of first-degree premeditated murder, MCL 750.316; MSA 28.548.

Defendant maintained that he and the decedent were happy together and that the decedent's death was, in fact, accidental. Although claiming he remembered little about the accident itself due to injuries he sustained during the alleged accident, he testified that he recalled arguing with the decedent while she was driving. He claimed that he slid over on the seat to comfort her, whereupon she took her hands off the wheel and pushed him away, causing the vehicle to swerve off the road and crash into a stand of trees.

Due to the highly burned condition of the decedent's body, the medical examiner could not determine the exact cause of death, but did opine that the decedent did not die as a result of injuries sustained in a vehicle crash or as a result of the subsequent fire. On appeal, defendant maintains that, because of the lack of evidence concerning the exact cause of the decedent's death, the evidence was insufficient to support the charge of first-degree premeditated murder or his conviction for second-degree murder.

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 478 (1992), amended 441 Mich 1201 (1992); *People v Randolph*, 242 Mich App 417, 419; 619 NW2d 168 (2000). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *Id*. However, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra* at 514; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime charged. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

The elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v Dykhouse*, 418 Mich 488, 508-509; 345 NW2d 150 (1984).

In order to convict a defendant of first-degree murder, the prosecution must prove the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id*. The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993), citing *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). Premeditation may be established through evidence of the following factors: (1) 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. *Anderson, supra* at 537.

According to the medical examiner, the condition of the decedent's body made it clear that the decedent did not die as a result of injuries sustained in a vehicular crash. She testified specifically that, based upon the damage to decedent's skull, the decedent did not die as a result of a crash impact, but could have been knocked out by whatever caused the skull fracture and then suffocated. The medical examiner ruled out defendant's theory that decedent may have been knocked out as the result of the crash and then suffocated herself by blocking her own airway. She agreed with defense counsel that it was possible that portions of the brain that control breathing could be damaged from an open or closed head injury, but stated that they are located in the lower, protected portion of the brain, which was not damaged in the crash. Further, the medical examiner testified that, because there was no soot in the decedent's trachea and airways, and because there was no evidence of any burning in those areas such as would be found in someone who had been alive during a fire, she was confident that the decedent did not die of injuries sustained in the fire. In addition, there was a low carbon monoxide level in the decedent's blood and the decedent's organs were not a "bright cherry pink color" as they would have been if the decedent was alive during the fire. In light of all the evidence, it was the opinion of the medical examiner that the decedent was killed and then the body was burned to hide the evidence. Viewed most favorably to the prosecution, the medical examiner's testimony, if believed, was sufficient to enable the jury to conclude that the decedent did not die as a result of a vehicular crash or from injuries sustained in a fire, but rather, died as the result of a homicide.

Apart from the testimony of the medical examiner, the prosecutor also presented testimony from arson investigators regarding the cause and origin of the fire in the truck and the presence of accelerants that were allegedly used to start the fire. Each of the prosecutor's "cause and origin" experts opined that the fire was deliberately set. In addition, a laboratory technician who examined samples from the floor of the vehicle testified that the samples tested positive for gasoline and that the test results were not consistent with what would have been found had someone inadvertently spilled gasoline in the truck after the accident.

The prosecutor also presented evidence probative of defendant's intent and motive to kill the decedent. One witness testified that defendant offered him $900 to kill the decedent for him. Another witness testified that defendant told him on a number of occasions that defendant was going to kill the decedent. Additionally, a former cell mate testified that defendant told him the decedent died when defendant pushed her head against "the windshield or something on the driver's side of the car" and that defendant then started the fire because he was "covering his butt." The prosecution also presented evidence that defendant and the decedent were having problems with their relationship, that decedent was planning to leave defendant, and that defendant was expecting to receive the decedent's life insurance proceeds, which were doubled in the event of an accidental death.

Viewed most favorably to the prosecution, the foregoing evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant, without justification, excuse, or mitigation, caused the decedent's death, either intentionally or by an act intended to cause great bodily harm or create a very high risk of death, and with the knowledge that the act probably

would cause death or great bodily harm. Additionally, in light of the evidence of the tumultuous prior relationship between defendant and the decedent, the evidence that defendant had threatened to kill the decedent in the past and offered one person $900 to kill the decedent, as well as the evidence suggesting defendant's conduct in staging an accident and intentionally setting fire to the decedent's vehicle as a cover-up, we conclude that there was sufficient evidence of premeditation and deliberation to submit the charge of first-degree murder to the jury.

II

Defendant argues that he was denied a fair trial because of the erroneous admission of expert testimony and other evidence suggesting that the vehicle fire was caused by arson. In particular, defendant challenges the admissibility of expert testimony regarding "alerts" by a K-9 arson dog that examined the scene of the accident, gas chromatograph results of the testing of samples obtained from the vehicle, and "burn pattern" analysis of the fire by the prosecutor's cause and origin experts. Because defendant did not object at trial to the trial court's decision to qualify the prosecutor's arson witnesses and the K-9 dog handler as experts under MRE 702, or challenge the admissibility of the other scientific evidence that defendant now challenges on appeal, this issue is not preserved. See *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994). Therefore, appellate relief is precluded unless defendant demonstrates plain error (i.e., error that is clear or obvious) that affected his substantial rights (i.e., affected the outcome of the proceedings). *Carines*, *supra* at 763-764. Defendant bears the burden of persuasion with respect to prejudice. *Id*., citing *United States v Olano*, 507 US 725, 734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Moreover, even if defendant is successful in demonstrating outcome-determinative plain error, reversal is warranted only if the plain error resulted in conviction of an innocent defendant or the error "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id*. at 763.

In the instant case, we conclude that plain error has not been shown. As a corollary to MRE 702, the *Davis-Frye* rule, adopted from *Frye v US*, 293 Fed 1013; 54 US App DC 46 (1923) and *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955), now codified in MCL 600.2955(2); MSA 27A.2955(2), requires that novel scientific evidence be shown to have gained general acceptance in the scientific community to which it belongs in order to be admissible at trial. *People v McMillan*, 213 Mich App 134, 136; 539 NW2d 553 (1995). The rule's purpose "is to prevent the jury from relying on unproven and ultimately unsound scientific methods." *People v Gonzales*, 415 Mich 615, 623; 329 NW2d 743 (1982). The party offering the evidence has the burden of demonstrating its acceptance in the scientific community. *People v Adams*, 195 Mich App 267, 269; 489 NW2d 192 (1992), modified on other grounds 441 Mich 916 (1993).

The *Davis-Frye* test applies only to new scientific principles or techniques, and a party need not show the general acceptance of an established test. *People v Haywood*, 209 Mich App 217, 221; 530 NW2d 497 (1995). Because this Court has held that gas chromatography is a generally accepted laboratory procedure which no longer falls under this category, even when it is used in a "novel" application, *People v Davis*, 199 Mich App 502, 512-513; 503 NW2d 457

(1993), we hold that defendant has failed to show that the admission of this evidence was plain error.

Additionally, this Court has approved the use of burn pattern (or "pour pattern") analysis by arson investigators as a basis for determining whether accelerants were used in the intentional setting of a fire. See *People v Simon*, 174 Mich App 649, 653-654; 436 NW2d 695 (1989); *Gibson v Group Ins Co*, 142 Mich App 271, 274; 369 NW2d 484 (1985). Therefore, we likewise conclude that the admission of such evidence at trial did not constitute plain error. Indeed, the fact that defendant presented his own arson "cause and origin" expert, who used the same burn pattern analysis to opine that the fire started underneath the vehicle, further undermines his claim that the prosecution's presentation of such evidence constituted error.

Finally, we hold that no plain error has been shown with respect to the testimony of the K-9 dog handler concerning his observations when the dog was used to examine the burned vehicle. Contrary to defendant's assertion, this testimony was not used in a vacuum as substantive evidence to establish defendant's guilt. Rather, the samples taken as a result of the arson dog's "alerts" were subsequently tested along with other samples recovered from the scene and the results of those tests were admitted at trial.

In sum, because defendant has not shown that the introduction of the challenged arson evidence was plain error, he is not entitled to appellate relief on the basis of this unpreserved issue.

III

Defendant also challenges the trial court's decision to allow the prosecutor to present evidence of defendant's prior physical abuse of the decedent, including the fact that defendant was arrested for domestic violence following an altercation in September 1996.

Use of evidence of prior bad acts as evidence of character is prohibited by MRE 404(b) to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998), quoting *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982). To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, i.e., one other than establishing the defendant's character to show his propensity to commit the offense; (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). The admissibility of other acts evidence is within the trial court's discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

The list of exceptions in MRE 404(b) is nonexclusive. *People v Engelman*, 434 Mich 204, 212; 453 NW2d 656 (1990). In *Starr*, *supra* at 496, the Supreme Court, quoting *VanderVliet*, *supra* at 63, held that MRE 404(b) prohibits admission of bad acts evidence "'[i]f the proponent's only theory of relevance is that the other act shows defendant's inclination to

wrongdoing in general to prove that the defendant committed the conduct in question.'" However, the Court further held that the admissibility of other acts evidence is permitted "whenever it is relevant to a noncharacter theory such as, but not limited to, those reasons specifically listed in the rule." *Starr*, *supra* at 496-497.

In this case, as discussed above, defendant claimed that he and the decedent had been arguing and that he put his arm around her and touched her face "to calm her down," whereupon she took her arms off the steering wheel to push defendant away, causing her to lose control of the vehicle. The challenged evidence was offered to rebut defendant's claim that the decedent's death was accidental and also as evidence of defendant's intent.

We conclude that, under the circumstances, the trial court did not abuse its discretion in admitting the evidence. Much of defendant's theory of innocence revolved around his claim that he and decedent were happy together and had a 12-year relationship that provided no motive for him to act violently toward the decedent. Defendant himself testified about the extent of the couple's long relationship, that they were to be married, had a child, and that they were closer than ever following his counseling for domestic abuse. The evidence of the couple's previous history of fights and defendant's abusive conduct was relevant to rebut defendant's evidence. See *People v Biggs*, 202 Mich App 450, 452; 509 NW2d 803 (1993). Additionally, because defendant's intent was a crucial issue in the case, we conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403.

Defendant also argues that, even if the prior bad acts evidence was properly admitted, reversal is required because the prosecutor misstated the evidence during closing argument. Specifically, defendant complains that the prosecutor erroneously stated that one of the acts of domestic violence occurred in September 1997, when it actually occurred in September 1996. However, because defendant did not object to this apparent misstatement, the issue is not preserved. A curative instruction, upon timely request, could have cured any error in this regard. Indeed, defense counsel subsequently brought the apparent mistake to the jury's attention during his closing argument. Therefore, this apparent misstatement does not warrant appellate relief. See *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000).

IV

Defendant also argues that the trial court erred by failing to provide additional requested jury instructions on reasonable doubt and by denying a request to rehear certain testimony. We find no merit to this issue. First, the trial court's instructions on reasonable doubt, when viewed in their entirety, were more than adequate. See *People v Bartlett*, 231 Mich App 139, 155; 585 NW2d 341 (1998). Further, contrary to defendant's assertion, the trial court instructed the jury on reasonable doubt when discussing the revisions to the jury form and revisiting the elements of the applicable offenses. Second, defendant did not object to the trial court's instruction directing the jury to use their collective memories, and the trial court's instruction did not specifically foreclose the jury from rehearing testimony later. Accordingly, we find no error requiring reversal with respect to this issue. See MCR 6.414(H); *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000).

V

Defendant next argues that the prosecutor's repeated objections during defendant's testimony deprived him of a fair trial. We disagree.

Although defendant frames his argument in terms of prosecutor misconduct, an examination of defendant's trial testimony reveals that the prosecutor, somewhat aggravated by defendant's inconsistent statements regarding his "failing memory" about events surrounding the accident, objected often, and relatively vigorously, challenging whether defendant had the requisite personal knowledge of the events described to provide competent testimony. Defendant's real argument appears to be that his right to testify on his own behalf trumps the rules of evidence normally governing witness testimony, specifically MRE 602, which provides:

> 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.

Although a criminal defendant does have the right to testify on his own behalf, it is well-established that this right is not absolute. See *Rock v Arkansas*, 483 US 44, 51-52; 107 S Ct 2704; 97 L Ed 2d 37 (1987); *Nix v Whiteside*, 475 US 157, 175; 106 S Ct 988; 89 L Ed 2d 123 (1986); *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973); *People v LaVearn*, 448 Mich 207, 217; 528 NW2d 721 (1995); *People v Moore*, 164 Mich App 378, 384; 417 NW2d 508 (1988). As the United States Supreme Court has stated, the right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers*, *supra* at 295. These interests include the interests served by state procedural and evidentiary rules controlling the presentation of evidence. *Rock*, *supra* at 56 n 11; see also *Chambers*, *supra* at 302 (an accused, while having the right to testify, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence). The limitation placed upon the use of these restrictions is that they "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock*, *supra* at 55-56.

We hold that the requirement of MRE 602, providing that a witness, including a criminal defendant, have personal knowledge of the events about which they are testifying, serves this purpose to the extent necessary to support limiting defendant's right to testify under *Rock*, *supra*. We note that MRE 102 provides:

> These rules are intended to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

This requirement is necessary to provide the jury with reliable evidence so they can determine the truth. Therefore, we conclude that the prosecution's objections, and the trial court's actions in sustaining some of these objections, although disruptive to the flow of defendant's testimony, did not improperly interfere with defendant's right to testify on his own behalf.

VI

Next, defendant argues that trial counsel was ineffective in several respects, including failing to challenge the introduction of the arson evidence discussed above, and failing to obtain childhood medical records of the decedent to show that an injury sustained as the result of a childhood accident was similar to the injury that the medical examiner opined occurred shortly before death.

To establish a claim of ineffective assistance of counsel, defendant must show that his attorney's representation fell below an objective standard of reasonableness and resulted in prejudice such that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To establish deficient performance, a defendant must overcome the strong presumption that counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). A showing of prejudice requires that the defendant demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 167.

In the instant case, for the reasons discussed previously, defendant has not shown that the challenged arson evidence was improperly admitted and, therefore, has not shown that defense counsel erred by failing to object to this evidence. Counsel instead chose to challenge the accuracy and reliability of the evidence through his cross-examination of the prosecution's witnesses, and by presenting similar testimony by his own experts. He also attempted to show that the accelerant residue found at the scene was the result of contamination by other sources. Defendant has failed to show that counsel's decision to undermine the prosecution's evidence in the manner that he did was objectively unreasonable. See *Mitchell*, *supra* at 163. Therefore, we do not find counsel's performance deficient with respect to this issue.

Nor is it apparent from the record that counsel was deficient for failing to obtain the decedent's childhood medical records. Counsel presented the issue of the decedent's earlier injury through cross-examination of the medical examiner and the testimony of the decedent's mother and defendant. The manner in which this evidence was presented to the jury was a matter of trial strategy and defendant has not shown that counsel's strategy was unsound.

VII

Defendant argues that the cumulative effect of several errors deprived him of a fair trial. While the cumulative effect of a number of minor errors may sometimes require reversal, we conclude in this case that defendant was not deprived of a fair trial by the cumulative effect of multiple errors. See *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).

VIII

Defendant argues that the presentence report inaccurately states that a prior episode of abuse occurred in 1997, when it actually occurred in 1996. Because it is apparent that the trial court did not rely on this challenged information as a basis for the sentences imposed, defendant is not entitled to resentencing, but we agree that the information must be corrected or stricken

from the report. MCL 771.14(6); MSA 28.1144(6); MCR 6.425(D)(3)(a). We therefore remand for this limited purpose.

Affirmed but remanded for correction of the presentence report consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Jeffrey G. Collins