STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 29, 2001
v	No. 217631 Oakland Circuit Court
DEBRA L. SMITH, Defendant-Appellant.	LC No. 97-152970-FC

Before: Sawyer, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of murder in the first degree, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. She was sentenced to the mandatory terms of life without parole on the murder conviction and two years on the felony-firearm conviction. She now appeals and we affirm.

Defendant first argues that the trial court erred in admitting testimony by the victim's mother regarding statements the victim made to her shortly before the murder regarding the victim's intent to discontinue her relationship with defendant and to plan for some funerals and procure more insurance "in case something happens." The Supreme Court has held that statements by murder victims regarding their plans and feelings are admissible. *People v Fisher*, 449 Mich 441; 537 NW2d 577 (1995).

Next, defendant argues that the trial court erred in admitting evidence of past arguments between the victim and defendant and that the victim desired to end their relationship. We disagree. The Supreme Court, in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994), adopted an approach to other-acts evidence that employs the evidentiary safeguards already present in the rules of evidence. First, the prosecutor must offer the evidence for a proper purpose under MRE 404(b); in other words, the evidence must be offered to prove something other than the defendant's propensity to commit the charged crime. *VanderVliet, supra* at 74. Second, the evidence must be relevant to a fact at issue in the case, in order to be admissible under MRE 402. *VanderVliet, supra.* Third, under MRE 403, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *VanderVliet, supra* at 74-75.

The challenged evidence that defendant had acted violently toward the victim in the past, that defendant had exhibited jealousy of the victim, and that the victim was afraid of defendant and wanted to get away from defendant was relevant for a proper purpose—to show defendant's motive for killing the victim. See also *Fisher, supra* at 543. Evidence that defendant threatened the victim in the past is highly probative of motive, such that its probative value outweighs any prejudicial effect of admitting the evidence. *People v Armentero*, 148 Mich App 120, 133; 384 NW2d 98 (1986). Additionally, evidence that defendant owned and was familiar with a handgun was relevant to show defendant's opportunity to commit the crime and to show absence of mistake or accident in the firing of the gun. In short, we are not persuaded that the trial court abused its discretion by admitting the challenged evidence.

Defendant next argues that there was insufficient evidence that defendant intentionally killed the victim with premeditation and deliberation. We disagree. In reviewing a sufficiency of the evidence issue, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992).

Defendant argues that the evidence showed that defendant and the victim fought about whether to steal a car, that both defendant and the victim were intoxicated, and that the shooting occurred during the fight. However, the evidence does not compel the conclusion that this was a killing in hot blood or in rage. While the police officers did smell alcohol on defendant's breath, they testified that defendant was not intoxicated. Further, the only evidence of the fight itself was defendant's own statements. In any event, we do not view the evidence in the light most favorable to defendant, but in the light most favorable to the prosecution. The prosecution presented evidence that the victim and defendant were involved in a romantic relationship and that defendant was jealous and had exhibited violence towards the victim on prior occasions. Further, the victim had expressed fear of defendant and indicated a desire to end the relationship. Further, a neighbor testified that she heard silence for about three minutes after the shooting and before defendant knocked on her door crying hysterically; there was evidence to suggest that defendant used that time to wash blood from her hands before summoning help.

The nature of the shooting itself supported a conclusion of premeditation and deliberation. There were multiple gunshot wounds to the head, one of which was a contact would (i.e., the gun was held against the back of the victim's head and the trigger was pulled). Further, a neighbor testified that she heard three shots, followed by a silence, then three more shots. The time lapse between the volleys can support an inference of premeditation. *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979). Finally, the medical examiner testified that the victim suffered a gunshot wound to her forearm that was defensive in nature and that that wound was likely inflicted before any of the gunshots to the victim's head were fired. Defensive wounds can be evidence of premeditation. *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999).

For the above reasons, we are satisfied that there was sufficient evidence to support the jury's verdict.

Defendant's next argument is that the trial court should have granted her motion to quash the information, which charged open murder, because the prosecutor had presented insufficient evidence of premeditation and deliberation, nor of malice, at the preliminary examination. We disagree. First, the prosecutor is not required to present evidence of premeditation and deliberation during the preliminary examination to support a bindover on a charge of open murder. *People v Baugh*, 243 Mich App 1, 7; 620 NW2d 653 (2000), lv held in abeyance 624 NW2d 187 (2001). Second, malice may be inferred from the use of a deadly weapon. *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995). Finally, any error would be harmless because the prosecutor presented sufficient evidence at trial to convict defendant of the charged offense. *People v Parker*, 230 Mich App 677, 688-689; 584 NW2d 753 (1998).

Next, defendant argues that the trial court erred in admitting statements made by defendant to Officer Rene Willick at the crime scene and later at the police station. We disagree. Two statements are at issue. First, at the crime scene, Officer Willick asked defendant what had happened. Willick testified that, at that point, she was unsure whether defendant was a witness, a victim, or a suspect. Defendant told Willick that her boyfriend had killed the victim by accident with a gun belonging to defendant. Defendant thereafter agreed to come to the police station, where she was questioned by Officers Ron Halcrow and Terrence Kiernan. She made various statements during that interrogation. During this interrogation, defendant twice asked to use the restroom. She was escorted to the restroom by Willick, who had not participated in the questioning. On the second trip, defendant told Willick, "All right, I did it, but she wanted to die anyway" and that Willick should handcuff her and take her away. Willick testified that defendant made these statements spontaneously and not in response to any questions. Officers Halcrow and Kiernan then visited the crime scene and Kiernan returned to interview defendant again. Only then was defendant advised of her rights. Defendant waived her rights and gave conflicting accounts of the incident. Again, defendant only challenges the admissibility of her statements to Officer Willick. She has not challenged the statements made to Officers Halcrow and Kiernan before she was read her rights.

An advice of rights is required only where the suspect is subjected to custodial interrogation. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). *Miranda* warnings are not required before general on-the-scene questioning regarding the facts surrounding a crime. *Id.* at 477-478; see also *People v Ridley*, 396 Mich 603; 242 NW2d 402 (1976). The simple fact of the matter is that defendant was not yet in custody.

The statement made to Willick at the station house, however, is not so easily disposed of. The trial court found that defendant was in custody at the police station. The trial court, however, further found that defendant's statement to Willick was volunteered and not made in response to any questioning. Volunteered statements made while in custody are admissible even in the absence of *Miranda* warnings. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). The evidence here established that Officer Willick did not participate in the questioning

of defendant at the police station and specifically had not asked defendant any questions during the trip to the restroom which prompted defendant to make her statement. Therefore, we cannot say that the trial court erred in concluding that defendant's statement to Willick during the restroom trip was volunteered and, therefore, admissible.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell