# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IVAN W. SMITH,

Defendant-Appellant.

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UNPUBLISHED
July 2, 2002

No. 232234
Wayne Circuit Court
LC No. 00-006617

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316(a). The trial court sentenced him to life imprisonment. He appeals as of right. We affirm.

## I. Basic Facts

Deborah Dahl dated the victim for over ten years. Although they terminated their romantic relationship, they nevertheless remained friends. At the time of the incident giving rise to defendant's prosecution, Dahl was dating defendant and had been for approximately one month. On the day of the incident, Dahl was at the victim's house. Defendant picked her up and drove her home. Dahl testified that although she was drinking that night, defendant was not. When she and defendant reached her home, the victim called and defendant answered the phone. Dahl did not hear the conversation. Later, according to the statement that Dahl gave to the police, she heard the victim knocking on the door to her front porch and asking to speak with her.

Dahl told the police that defendant went into the kitchen and said that he had enough. Dahl testified at the preliminary examination that she saw defendant go through her knife drawer. Thereafter, defendant went to the door and let the victim in. According to her police statement, Dahl looked out the front window into the porch. Defendant grabbed the victim from behind, stabbed him in the abdomen, and beat him up. Defendant repeatedly stabbed and slashed the victim. Dahl said that "[defendant] just grabbed [the victim] and killed him, cold-blooded killing." When she approached the body, she noted that "[defendant]'s in the corner smug as can be." At trial, she stated that although the victim was unarmed, had not threatened anyone and was generally "easy going," defendant acted in self defense because "[the victim] was where he shouldn't have been." Dahl characterized her statement to the police as being the result of shock and upset.

At the close of the prosecution's case, defendant moved for a directed verdict, which the trial court denied. Although defendant chose not to testify, two statements that he made to the police were read into the record. Defendant essentially claimed self-defense. After deliberation, the jury found defendant guilty of first-degree murder.

## II. Evidentiary Errors

Defendant first argues that the trial court made several evidentiary errors, when considered either individually or together require reversal. We review the admission of evidence by a trial court for an abuse of discretion. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). An abuse of discretion exists where a neutral person, with the same facts that the trial court had, would find no justification or excuse for the ruling. *Id*. To merit reversal, an evidentiary error must have been outcome determinative. *People v Cain*, 238 Mich App 95, 123; 605 NW2d 28 (1999).

### A. Evidence of Racial Antipathy

Defendant first contends that the trial court prevented him from presenting evidence of the victim's animosity toward him and that this prevented him from presenting a full and meaningful defense, particularly on the issue of self-defense. We disagree.

The proffered evidence related solely to the victim's prior alleged use of racial epithets when referring to defendant. A defendant's state of mind is relevant where self-defense is asserted in response to a murder charge. *People v Harris*, 458 Mich 310, 316; 583 NW2d 680 (1998). Similarly, animosity between a defendant and the victim is relevant. See *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994). The evidence was, therefore, minimally relevant to defendant's state of mind within the context of his claim of self-defense. MRE 401.

However, relevant evidence should be excluded when the probative value of the evidence is substantially outweighed by the possibility of unfair prejudice. MRE 403. Unfair prejudice includes evidence that suggests an improper, often emotional, basis to convict. *People v Meadows*, 175 Mich App 355, 361; 437 NW2d 405 (1989). Here, the trial court ruled that the minimal probative value of the evidence was substantially outweighed by the potential for undue prejudice. MRE 403.

Reviewing courts should generally defer to a trial court's contemporaneous judgment of probative value and potential prejudice under MRE 403. *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995). It cannot be said that a neutral person, with the same facts that the trial court had, would find no justification or excuse for the ruling. *Taylor, supra* at 60. Thus, the trial court properly excluded the evidence under MRE 403. Even if error occurred, nothing in the record suggests that it was outcome determinative, *Cain, supra* at 123, especially where the probative value of the proffered testimony was minimal.

B. Prior Statement

Defendant next contends that the trial court improperly admitted Dahl's prior statement to the police into evidence because the prosecution failed to lay a proper foundation. We disagree.

Hearsay testimony may be admitted as evidence if it falls within an exception to the hearsay rule. *People v Kubasiak*, 98 Mich App 529, 536; 296 NW2d 298 (1980). MRE 803(5) provides an exception for recorded recollections where the following foundational requirements are satisfied:

> (1) The document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his memory. [*Id.* at 536-537.]

Upon careful review of the record, we find that the foundational elements were clearly established and that the trial court thus properly admitted the statement into evidence.

C. Lay Opinion By Police Officer

Next, defendant argues that the trial court improperly allowed a police officer to give his opinion on defendant's self-defense claim. Non-experts may give opinion testimony, but are limited to testimony that is (1) rationally based on their perception, and (2) helpful to either a clear understanding of a fact in issue or the witness' testimony. MRE 701. The testimony may also take the form of an opinion or inference regarding an ultimate issue to be decided by the trier of fact. MRE 704. Opinion testimony in the form of a legal conclusion may be permissible. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994).

Here, we find that the witness testified based on his perceptions concerning what defendant told him and the statement was read into evidence. Thus, the testimony was admissible. *Id.* At best, this was a close evidentiary question, and therefore could not have constituted an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

III. Jury Instructions

Defendant also claims that the trial court's jury instructions were deficient. We disagree.

Trial courts must instruct juries on the law applicable to the case at hand and fairly present the case to the jury in an understandable way. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). The trial court must properly instruct the jury so that it may intelligently reach a verdict, *People v Clark*, 453 Mich 572, 583; 556 NW2d 820 (1996), and because defendants have a right to a properly instructed jury. *People v Mills*, 450 Mich 61, 80-81; 537

NW2d 909, mod on other grounds 450 Mich 1212 (1995). Even if imperfect, this Court will not find error if the instructions "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Henry, supra* at 151. We review unpreserved claims of erroneous jury instructions for constitutional plain error. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). Defendant must demonstrate plain error that was outcome determinative. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant first argues that the trial court should have sua sponte instructed the jury regarding the proper use of Dahl's prior inconsistent statements introduced from her statement to the police. For the first time on appeal, he argues that the trial court should have instructed the jury:

> the law allows [the jury] to discount her [Dahl's] testimony due to the numerous prior inconsistent statements or that these prior inconsistent statements could not be used as substantive evidence of guilt . . . .

This argument lacks merit because statements introduced under MRE 803(5) may be used substantively. *Daniel, supra* at 669. Thus, it would have been error to instruct the jury otherwise.

Moreover, Dahl testified under oath, subject to the penalty of perjury, at the preliminary examination. Under MRE 801(d)(1)(A), her preliminary examination testimony did not constitute hearsay. *People v Shipp*, 175 Mich App 332, 337; 437 NW2d 385 (1989). The Supreme Court recognizes that evidence admitted under MRE 801(d)(1)(A) is admissible substantively. *People v Malone*, 445 Mich 369, 381-382; 518 NW2d 418 (1994) (quoting 2 McCormick Evidence ($4^{th}$ ed) § 251, p. 120.) Because the testimony was admissible substantively, no error could have resulted from the trial court's failure to give an instruction regarding the proper use of prior inconsistent statements.

Defendant argues that the following instruction constituted error because it shifted the burden of proof:

> You must think about all of the evidence in deciding what the defendant's state of mind was at the time of the alleged killing. The defendant's state of mind may be inferred from the kind of weapon used, the type of wounds inflicted, the acts and words of the defendant and any other circumstances surrounding the alleged killing.
>
> You may infer that the defendant intended to kill if he used a dangerous weapon in a way that was likely to cause death. Likewise, you may infer that the defendant intended the usual results that follow from the use of a dangerous weapon. And a dangerous weapon is any instrument that is used in a way that is likely to cause severe physical injury or death.

Defendant maintains that this instruction regarding the interpretation of defendant's actions unconstitutionally shifted the burden of proof to the defendant because the trial court did not inform the jury that the same actions could be interpreted as self-defense.

The trial court used the word "may" rather than the word "presumes." Because the term "may" indicates that something is permissive rather than mandatory, See *Oakland Co v Michigan*, 456 Mich 144, 154 n 10; 566 NW2d 616 (1997), the instruction did not present the danger that the jury would treat it as conclusive. Hence, this aspect of defendant's claim has no merit.

Defendant also claims that the trial court should have instructed the jury that the same evidence that could be used to infer premeditation could also "lead to the inference that Appellant acted only in self-defense." This claim has no merit because the trial court *did* instruct the jury on self-defense a mere two paragraphs after the instructions to which defendant assigns error. Moreover, reading the instructions as a whole, the trial court not only gave instructions on defendant's theory of the case, it also "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Henry*, *supra* at 151.

IV. Sufficiency of Evidence

Finally, defendant claims that the prosecution presented insufficient evidence of premeditation or deliberation to allow the jury to find defendant guilty of first degree murder, MCL 750.316(a), beyond a reasonable doubt. A reviewing court must uphold a conviction where there is sufficient evidence to justify a rational trier of fact in finding a defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, mod on other grounds 441 Mich 1201 (1992). The standard of review is highly deferential, and the reviewing court must draw all reasonable inferences and make all credibility choices in support the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Evaluating the credibility of witnesses is the task of the jury, *People v Velasquez*, 189 Mich App 14, 17; 472 NW2d 289 (1991), and the testimony of the victim alone may be sufficient to establish all the elements of an offense beyond a reasonable doubt. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

First-degree murder, MCL 750.316(a), requires that the prosecution prove beyond a reasonable doubt that (1) the defendant killed the victim (2) deliberately or with premeditation. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). The second element exists where the defendant had sufficient time to "take a second look," and may be inferred from the circumstances surrounding the killing. *Id*.

Upon review of the record, we find that the prosecution presented ample, indeed overwhelming, evidence that defendant killed the victim with premeditation and deliberation.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray