STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 24, 2004
v	No. 247039 Wayne Circuit Court
RICHARD PERRY BRYANT, Defendant-Appellant.	LC No. 02-005508

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of second degree murder, MCL 750.317, felony firearm, MCL 750.227b, and felon in possession, MCL 750.224f, arising from the shooting death of Anthony Covington. We affirm.

On April 29, 2001, Covington was shot in the chest and, when he was found by police, he said "I was shot. Rick shot me." He also gave a physical description of Rick and said that he had a conversation with Rick through the back door of a yellow house on the corner of Laura and Pennsylvania, during the course of which he heard a gunshot and as he turned to leave, he was struck by a second bullet that was fired through the door. Although he did not see Rick, he knew Rick was the person who shot him because he recognized his voice. Covington died a few hours later from his injuries.

Police went directly to the house described by Covington and found two bullet holes in the rear door, a bullet, blood on the back porch, and Covington's wallet. They also found a piece of mail addressed to defendant in the trash but neither a gun nor defendant were present. Defendant's girlfriend and defendant's three children were at the house and his girlfriend indicated that defendant had been there that evening. She testified at trial that she never saw defendant again after that night although they had lived together at that house for about eight months. When the police went to that house about a week later, it appeared to be vacant. Covington's brother, Paul Mitchell, testified that he and his brother lived down the street from defendant, who was only known as "Rick," and that defendant sold drugs from his back door. Covington was one of defendant's customers and had been for about three years. Mitchell also testified that he knew his brother was going to defendant's house the night he was killed to retrieve an expensive coat he had traded to defendant for drugs. Defendant was eventually apprehended in California and extradited to Michigan where he was charged with first-degree murder, possession of a firearm by a felon, and felony firearm with regard to Covington's death.

On appeal, defendant argues that the admission as excited utterances of Covington's statements to police before he died of the gunshot wounds denied him his Sixth Amendment right to confrontation, US Const, Am VI, since he did not have the opportunity to cross examine Covington. Because defendant raises this issue for first time on appeal, our review is for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant relies on the recent case of *Crawford v Washington*, 541 US ____; 124 S Ct 1354; 158 L Ed 2d 177 (2004), which held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had the prior opportunity to cross examine the witness. *Id*. at 1374. However, Covington's statements were not "testimonial" in nature since they were not the result of police interrogation. See *id*. at 1364-1365. The police officers who responded to the shooting found Covington laying on the ground, bleeding from the chest and stomach areas. He was moaning, in obvious physical pain, winded, and had a difficult time speaking. They asked him what happened and Covington responded that he had been shot by Rick at Rick's house, through the door, and he gave the location of Rick's house and a physical description of Rick. Covington was taken from the scene by ambulance and died at the hospital. The one question asked by the police – "what happened?" – does not constitute an interrogation and there is no evidence of interrogation. Further, the statements were not any type of "*ex parte* in-court testimony or its functional equivalent." See *Crawford*, *supra* at 1364. Accordingly, defendant has not established plain error warranting relief.

Next, defendant argues that his motion for directed verdict should have been granted because there was insufficient evidence to establish either that defendant perpetrated the murder or that he did so with premeditation. We disagree. This Court reviews a trial court's decision regarding a motion for a directed verdict de novo and considers the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

To establish first-degree premeditated murder, the prosecutor must prove that the defendant killed the victim and that the killing was willful, deliberate, and premeditated. MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). First, defendant claims that the prosecutor did not establish that he killed Covington because the only evidence that defendant was the perpetrator was Covington's voice identification of him prior to his death. Defendant claims that it was not sufficient to identify him as the killer.

Voice identification is competent evidence if it is "reasonably positive and certain," and is based on sufficient knowledge by the witness about the voice. *People v Hayes*, 126 Mich App 721, 725; 337 NW2d 905 (1983), quoting *People v Bozzi*, 36 Mich App 15, 19; 193 NW2d 373 (1971). Such identification evidence is sufficient if it is corroborated by other testimony. *People v Palmer*, 392 Mich 370, 377; 220 NW2d 393 (1974). Here, the evidence included that (1) Covington knew defendant, (2) defendant was only known as "Rick," (3) immediately before being shot, Covington had a conversation with defendant through the back door of defendant's house, (4) for about three years Covington had purchased drugs sold by defendant at the back door of the house defendant lived in, (5) Covington was going to defendant's house the night he was shot, (6) there were bullet holes in the back door at defendant's house, as well as blood and

Covington's wallet, and (7) the bullet found in Covington had markings on it consistent with being shot through a door. Considered in the light most favorable to the prosecution, we conclude that the evidence was sufficient for a rational trier of fact to find that defendant was the killer.

Second, defendant claims that the prosecutor did not establish that the killing was premeditated. "Premeditation and deliberation may be established by evidence of '(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.'" *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999), quoting *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). Circumstantial evidence and reasonable inferences arising from that evidence may establish elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Here, the evidence included that (1) defendant was selling drugs from the back door of his house, (2) Covington had been a customer for about three years, (3) on the night of the killing, Covington went to defendant's house to retrieve a coat he had traded to defendant for drugs, (4) Covington and defendant had a conversation through defendant's closed back door and then defendant fired two gunshots, at least one chest high, at Covington through the door, (5) there was no evidence that Covington was armed or that the shooting was provoked, (6) defendant immediately fled the scene, with the gun, leaving his children and girlfriend behind, and (7) defendant never returned to the house he had lived in for years but instead fled to California where he resided until he was extradited to Michigan. We conclude that the evidence was sufficient for a reasonable jury to find that defendant killed Covington with premeditation. See *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003).

Finally, defendant argues that the trial court committed reversible error when it denied his request, pursuant to MRE 804(b)(1), to admit the prior testimony given by his son in response to an investigative subpoena because he was unavailable to testify at trial. We disagree. We review a trial court's interpretation of a rule of evidence de novo, and its decision regarding the admission of the evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

MRE 804(b)(1) is an exception to the rule that hearsay is inadmissible evidence. It provides that "[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination[,]" is admissible if the declarant is unavailable as a witness. A witness is deemed "unavailable" if "absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5).

Here, defendant's eleven-year-old son gave a recorded sworn statement during the investigation of this homicide pursuant to a subpoena. Defendant sought to introduce this statement when his son did not appear at trial. However, this statement would only be admissible under MRE 804(b)(1) if the witness was unavailable, i.e., defendant, after diligent good-faith efforts were made, was unable to procure his son's attendance by process or other reasonable means. See *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998); *People v Cummings*, 171 Mich App 577, 585-586; 430 NW2d 790 (1988).

On the first day of trial, defense counsel requested assistance from the prosecution in locating defendant's son but when the court was going to grant that assistance, defendant personally assured the court that he could make a telephone call and have his son in court the next day. The court then noted that "according to your client he doesn't need the assistance of the prosecutor," to which defense counsel replied "Very well, your Honor." Apparently, on the afternoon of the next day, defense counsel renewed his request for assistance from the prosecution; a subpoena was issued and its execution attempted that same evening, as well as the next morning, without success. On the third day of trial, defendant then moved for admission of the contested testimony which the court denied on the ground that defendant had not met his due diligence obligation since he merely requested assistance the previous day. In light of defendant's tardy and incomplete efforts to secure the testimony of his son, we will not reverse the trial court's decision. See *Bean*, *supra*; *People v Dye*, 431 Mich 58, 73-78; 427 NW2d 501 (1988).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad