STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2006
v	No. 263626 Leelanau Circuit Court
MATTHEW PETER O'NON, Defendant-Appellant.	LC No. 04-001420-FC

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree premeditated murder, MCL 750.316(1)(a), and sentenced to two terms of life imprisonment. He appeals as of right. We affirm.

I

Defendant's convictions arise from the shooting deaths of Manuel Longoria and Raul Ramirez. It is undisputed that defendant owed Longoria and Ramirez more than $25,000 for a drug debt, and that he shot them on May 1, 2004, in the driveway of a rental cottage owned by defendant's parents. Defendant buried the bodies on the cottage grounds and fled to Arizona. The prosecutor argued that defendant ambushed the decedents by luring them to the cottage where he was lying in wait and shot them with an automatic rifle. Defendant contended that Longoria and Ramirez were threatening to kill him because he could not pay the drug debt, and that he shot them in self-defense after Longoria first fired at defendant.

II

Defendant first argues that the trial court erred in permitting the prosecutor to introduce Jorge Luis Roman's preliminary examination testimony into evidence at defendant's trial after Roman exercised his Fifth Amendment right not to testify.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). The trial court admitted Roman's preliminary examination testimony under MRE 804(b)(1), which provides that an unavailable declarant's prior testimony is not excluded by the hearsay rule "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." Hearsay testimony may not be admitted under MRE 804(b)(1) if it would violate the defendant's constitutional right to confront witnesses.[1]

In *People v Meredith*, 459 Mich 62, 66, 67-71; 586 NW2d 538 (1998), our Supreme Court held that MRE 804(b)(1) is a firmly rooted hearsay exception and, therefore, the Confrontation Clause is satisfied when prior testimony is properly admitted under this rule. See also *People v Adams*, 233 Mich App 652, 659-660; 592 NW2d 794 (1999). Recently, the United States Supreme Court clarified these principles in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Court held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69. The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61.

In this case, defendant argues that he did not have the opportunity to adequately cross-examine Roman because he was not able to examine telephone records before the preliminary examination. Defendant maintains that the telephone records would have revealed that Roman was a friend of the Longoria family and heavily involved in drug trafficking with them.

Defendant does not explicitly explain why the telephone records and information about Roman's contacts with the Longoria family were essential to an effective cross-examination. He presumably would have used this evidence to show that Roman's connections to Longoria and his family made him a biased witness. But the Confrontation Clause guarantees, "only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defendant might wish.'" *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999), overruled on other grounds in *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006), quoting *United States v Owens*, 484 US 554, 559; 108 S Ct 838; 98 L Ed 2d 951 (1988). Cross-examination "is sufficient" if "the defendant has the opportunity to bring out such matters as the witness' bias . . . ." *Id.*

Here, we are not convinced that defendant did not have the opportunity to pursue the issue of Roman's possible bias as a witness in his cross-examination of Roman at the preliminary examination. Defendant was aware that Roman was also involved in trafficking drugs and was aware that Roman had met with Longoria and Ramirez before they were killed. Defendant was not restricted in his cross-examination of Roman at the preliminary examination and, even without the telephone records, defendant had the opportunity to explore Roman's relationship with Longoria to show Roman's possible bias. Moreover, the telephone records would only have revealed that calls were placed or received, not the substance of any calls. Because defendant had a prior opportunity and similar motive to develop Roman's testimony through cross-examination at the preliminary examination, the admission of Roman's testimony at defendant's trial did not violate defendant's rights under the Confrontation Clause. The trial court did not abuse its discretion in allowing this evidence at defendant's trial.

[1] US Const, Am VI; Const 1963, art 1, § 20.

III

Defendant next argues that the trial court erred by denying his motions for a mistrial. Defendant initially moved for a mistrial after Officer Simpson referred to the fact that defendant was charged with a probation violation when he was arrested for the charged murders. Defendant later moved for a mistrial after the prosecutor's cross-examination of defendant elicited that defendant had a DNA record, implying that defendant had a prison record.

This Court reviews a trial court's denial of a mistrial for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). A mistrial should be granted only where an irregularity is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Id.*

Officer's Simpson's reference to defendant's probationary status was given as part of a nonresponsive answer to an otherwise proper question. An unresponsive, volunteered answer to a proper question is generally not grounds for a mistrial. *People v Griffin*, 235 Mich App 27, 35-36; 597 NW2d 176 (1999); *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Here, the reference was fleeting and the prosecutor did not pursue the subject. More significantly, defense counsel acknowledged in his opening statement that defendant had a prior criminal history, and defendant admitted extensive involvement in drug trafficking. Defendant admitted in his direct examination testimony that he purchased large quantities of marijuana, and sometimes cocaine, and sold the drugs to distributors throughout the state. He also admitted that he began selling marijuana when he was 13 years old, and that he also sold cocaine, "acid," and hallucinogenic mushrooms. Additionally, he admitted that he broke into a school.

Neither the prosecutor's cross-examination of defendant about his DNA record nor the earlier probation reference indicated that defendant committed any offense in addition to those already referenced. Under the circumstances, the fleeting reference to defendant's probationary status and the vague inquiry about defendant having a DNA record were not so prejudicial that they impaired defendant's ability to receive a fair trial. Accordingly, the trial court did not abuse its discretion in denying defendant's motions for a mistrial.

IV

Defendant next argues that the trial court improperly instructed the jury on a lying-in-wait theory of first-degree murder and erroneously instructed the jury regarding the at-home exception to the duty to retreat rule for self-defense. Because defendant did not object to these instructions at trial, we review these issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Under MCL 750.316(1)(a), "[m]urder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing" is first-degree murder. The trial court gave the following jury instruction on a lying-in-wait theory of first-degree murder:

> It is alleged in this case that the killing of [the victim] was done willfully, with premeditation and deliberation, by lying in wait.

> Lying in wait means the defendant hid himself, planning to take another person by surprise.
>
> While lying in wait, the defendant must have intended to kill [the victim].
>
> The lying in wait must have lasted only long enough to show beyond a reasonable doubt that the killing was done willfully, with premeditation and deliberation.

Defendant argues that this instruction was improper because the cottage where the victims were killed was his home. Even if the cottage was defendant's home, however, that did not preclude a lying-in-wait instruction. The prosecution presented evidence that defendant deliberately lured the victims to the cottage location, that he was waiting for them when they arrived, that he used an AK-47 semi-automatic rifle to shoot both victims while they were still in their car, and that he then buried their bodies in a secluded area on the property. Accordingly, the instruction was supported by the evidence and did not constitute plain error.

Defendant also argues that the trial court gave a misleading instruction with respect to the at-home exception to the duty-to-retreat rule in self-defense. The court instructed the jury as follows:

> A person can use deadly force in self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed he needed to use deadly force in self-defense.
>
> However, a person is never required to retreat from a sudden, fierce, and violent attack, nor is he required to retreat from an attacker he reasonably believes is about to use a deadly weapon.
>
> If you find that the O'non [sic] cottage was the defendant's home, then I instruct you that if a person assaulted the defendant in the defendant's own home, the defendant did not have to try to retreat or get away. Under those circumstances, the defendant could stand his ground and resist the attack with as much force as he honestly and reasonably believed necessary at the time to protect himself.

On appeal, defendant correctly observes that a porch is part of a home for purposes of applying the no-retreat rule. *People v Canales*, 243 Mich App 571, 576-577; 624 NW2d 439 (2000). But the trial court's instruction did not suggest otherwise. Rather, there was a factual dispute at trial concerning whether the cottage where the victims were killed was defendant's home, and whether the victims first assaulted defendant. The cottage was owned by defendant's parents and was rented out to tourists. Defendant was permitted to stay there on occasion when it was not being used. The trial court properly instructed the jury that, if it found that the cottage was defendant's home, and that defendant was assaulted while on the premises, defendant did not have a duty to retreat before acting in self-defense. We believe that the instruction accurately conveyed the applicable law as applied to the facts of this case. Thus, defendant has not demonstrated a plain error.

Defendant also argues that defense counsel was ineffective for failing to object to the foregoing jury instructions. In light of our conclusion that defendant has not established any instructional error, however, there is no basis for concluding that counsel was ineffective for failing to object to the instructions. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel is not required to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot