STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 27, 2010
v	No. 290618 Macomb Circuit Court
XAVIER DEMARK CHASE, Defendant-Appellant.	LC No. 2008-001046-FC

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree, premeditated murder, MCL 750.316, two counts of possessing a firearm during the commission of felony (felony-firearm), MCL 750.227b, and one count of possessing a firearm by a person convicted of a felony (felon in possession), MCL 750.224f. This case stems from the shooting deaths of Terry Buchanan and Rema Reed on November 4, 2007 in Warren, Michigan. Because the prosecution presented evidence sufficient for a rational trier of fact to find defendant guilty beyond a reasonable doubt, and, because the trial court did not abuse its discretion in admitting the crime scene photographs or the challenged statements, we affirm.

Defendant first argues that the testimony given by the witnesses did not provide sufficient evidence for a rational jury to conclude that defendant murdered Terry Buchanan and Rema Reed. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "[A] court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Nevertheless, "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. All conflicts in the evidence must be resolved in favor of the prosecution." *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007) (internal citations omitted).

First-degree murder is murder that "is perpetrated by means of poison, lying in wait, or other wilful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate" an enumerated felony. *People v Garcia (After Remand)*, 203 Mich App 420, 424; 513 NW2d 425 (1994). The prosecution must prove "that the defendant intentionally

killed the victim and that the act of killing was premeditated and deliberate." *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). "Some time span between the initial homicidal intent and the ultimate killing is necessary to establish premeditation and deliberation. However, the time required need only be long enough to allow the defendant to take a second look." *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008) (internal citations and quotations omitted).

"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. Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. Proof of motive is not essential." *Abraham*, 234 Mich App at 656-657 (internal citations omitted). In considering the third factor, the facts and circumstances of the killing, the trier of fact may consider "the type of weapon used and the location of the wounds inflicted." *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993).

Although defendant argues only that the prosecution failed to prove that he was the shooter, the evidence in this case is more than sufficient to show that defendant committed the murders and acted with premeditation and deliberation. Shooting two people in a residential area at 9:30 a.m. on a Sunday morning ensured that there would be a multitude of witnesses to both the murders and defendant's attempted escape. First, the prosecution presented two witnesses who saw the suspect before the murders. Sometime early on the morning of November 4, 2007, Debra Leigh Berger, age 11, and her father walked down Continental Street in Warren to the corner store. Berger observed a man crouching underneath an overhang at Washington Elementary School. She said he was wearing a dark green jacket, dark shoes, and had brownish red hair. Martin Rivard also walked down Continental sometime between 8:00 and 8:30 a.m. and observed the same person crouched under the overhang, wearing dark clothing, including a hooded sweatshirt.

Two additional witnesses observed the shooting. Their testimony provided details regarding the circumstances of the murder itself, which tend to show premeditation and deliberation. Shawn Marie Baker lived on Continental next to Reed's apartment building. She heard the first gunshot, and when she got up and looked out the window, she saw Buchanan lying on the ground "with a hole in his shoulder." She said that he was wearing a green shirt and blue jeans, which is confirmed by the crime scene photographs. She then witnessed a man in a Michael Myers mask, from the movie "Halloween," stand over Buchanan and shoot him in the head. Baker then saw the shooter walk around toward the garage and fire two more shots, but could not see at whom he was shooting. Baker stated that the man used a revolver and wore white tennis shoes, black sweats, and a light-colored shirt.

Reed's next-door neighbor, MaryAnn Shearer, added that the shooter approached Reed's vehicle with his arm extended and fired a shot through the window. Reed tried to cover her face with her hands, but slumped over. Shearer then stepped away from the window at the request of the 911 operator but she heard a second shot. Shearer stated that the shooter wore a sweat suit, a dark coat, dark pants, white shoes, and a red mask or hood. She described his face as "chalky white." That the shooter took the time to don a mask and shoot two people in vital areas shows premeditation and deliberation. Moreover, the fact that defendant admitted that he parked his car

three blocks away and walked to Reed's apartment infers the passage of some period of time before the actual shootings.

Several additional witnesses testified to defendant's actions after the murder, i.e., he fled the scene, discarded items he was carrying, and resisted arrest. Defendant, in fact, admitted to being at the scene, not calling for help, and fleeing because he was scared of the police. Evidence of flight supports "an inference of 'consciousness of guilt' and the term 'flight' includes such actions as fleeing the scene of the crime." *Unger*, 278 Mich App at 226 (citation omitted). One witness, Charles Bowers heard four gunshots and then saw a man in a dark-colored jogging suit and a Halloween mask running down Continental toward Hoover. Although Bowers told police that the suspect was a white male, he believed this to be true because the individual's hands were white. Bonnie Jean Berezowsky did not see or hear the shooting, but she observed a person walking down Hoover wearing dark clothes, a mask, white gloves, and a backpack. Cathy Carter lived behind the scene of the shooting and heard four gunshots and "scuffling" in the leaves. Later, while driving to the corner store, she saw a man in a Michael Myers "Halloween" mask. The man was wearing dark clothing, white gym shoes, and carrying a backpack.

Several officers from the Warren Police Department testified that they pursued a suspect in the area of the crime scene who matched the witness descriptions. The police identified the suspect as defendant. Defendant's appearance was more or less consistent with the description given by the witnesses: he was wearing white long underwear beneath navy blue pants, a black knee brace, white Nike athletic shoes, and a dark-colored bandana. The police recovered a jacket from an area on Hoover where witnesses saw defendant, and it contained defendant's keys.

Finally, there was an abundance of physical evidence linking defendant to crime. Officer Derrick Scott located defendant's vehicle a few blocks from the crime scene. Officer James Schwab observed defendant with a fanny pack, which was later recovered, along with a holster. The fanny pack contained identification belonging to Buchanan. Officers Jesse Lapham and his partner found a backpack, which both Berezowksy and Carter saw the suspect carry. Inside the backpack was a Michael Myers "Halloween" mask, upon which forensic examiners discovered defendant's DNA. Moreover, defendant admitted that the mask belonged to him. The backpack also contained a handgun loaded with five spent shell casings and one unfired cartridge, as well as two pair of white cotton gloves. DNA from the blood on one of the white gloves, the mask, and one of defendant's shoes matched Buchanan.

As will be discussed below, Samona Walker's testimony provided details about the love triangle between defendant, Reed, and Buchanan, and constituted evidence of motive, the prior relationship between the parties, and defendant's actions before the shooting. Walker explained that Reed, even though she still communicated with defendant and saw him from time to time, was afraid of defendant, and expressed her fear on many occasions. Reed was so scared, in fact, that Walker's former boyfriend often walked Reed to her apartment or car and made sure she got safely inside. He also walked with her to pay the rent. Further, Walker overheard defendant threaten to kill Reed the month before the shooting because he was angry about Reed's relationship with Buchanan. On another occasion, Walker overheard the sounds of a physical confrontation between defendant and Reed and then witnessed Reed upset and crying. In addition, there was "bad blood" between defendant and Buchanan. Defendant himself testified that he got into a heated verbal exchange with Buchanan, although he said it was because

Buchanan "got physical" with Reed in his presence. Thus, the ample eyewitness testimony, physical evidence, DNA evidence, and proof of motive, was more than sufficient for a reasonable jury to find that defendant committed two counts of first-degree murder.

Finally, as we mentioned above, defendant only argues that he was not the shooter. However, he was also charged and convicted of one count of felon-in-possession. "Under MCL 750.224f, a person who has been convicted of a felony may not 'possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm' unless certain conditions are met." *People v Dupree*, 284 Mich App 89, 102; 771 NW2d 470 (2009). "[T]he statute exempts persons who have had their felonies expunged or set aside or who have been pardoned . . . ." *Id*., citing MCL 750.224f(4). In addition, defendant was charged and convicted of two counts of felony-firearm. "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Defendant stipulated that he had been previously convicted of a specified felony and was not legally entitled to possess or use a gun on November 4, 2007. The cause of death of both Buchanan and Reed was multiple gunshot wounds, and therefore, since there is sufficient evidence to show that defendant committed the murders, there is sufficient evidence to show that he was guilty beyond a reasonable doubt of the felony-firearm charges and felon in possession charges.

Defendant next argues that because he did not challenge the fact that Reed and Buchanan were shot, the trial court improperly admitted Exhibits 29, 30, and 31, which are graphic and gruesome photographs and their sole purpose was to inflame the jury. "A decision whether to admit photographs is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 217.

"Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403. Photographs may . . . be used to corroborate a witness' testimony, and gruesomeness alone need not cause exclusion." *Gayheart*, 285 Mich App at 227 (internal citations and punctuation omitted). Indeed, "[t]he danger MRE 403 seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself." *People v Watson*, 245 Mich App 572, 581; 629 NW2d 411 (2001), quoting *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). In addition, photographs are not "excludable simply because they are cumulative of a witness's oral testimony." *Gayheart*, 285 Mich App at 227.

Despite the fact that defendant does not challenge the cause of death, "[t]he prosecution is required to prove each element of a charged offense regardless of whether the defendant specifically disputes or offers to stipulate any of the elements," and photographs can be helpful to meet this burden. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 544; 775 NW2d 857 (2009). Further, defendant's intent is at issue because it is an essential element of premeditated murder. *Gayheart*, 285 Mich App at 227. Photographs can help prove defendant's intent to kill by illustrating the nature and extent of the victim's injuries. *Id*. They can also help explain and corroborate a witness's testimony concerning a victim's cause of death. *Id*. "The jury is not required to depend solely on the testimony of experts, but is entitled to view the severity and vastness of the injuries for itself." *Id*.

Exhibit 29 is a close up shot of the injury to the back of Buchanan's head as he laid facedown in the driveway, with a small pool of blood underneath his face. Exhibit 30 is a wider shot showing Buchanan's entire body as well as the head wound and a larger pool of blood. Exhibit 31 is a more distant shot (taken from an estimated 15 to 20 feet away) of Buchanan lying in the driveway and the surrounding scene. No blood is visible.

The contested photographs corroborated the testimony of Baker, Officer Showers, and Dr. Daniel Spitz. Baker stated that she heard a gun shot and then saw a man in a Michael Myers "Halloween" mask stand over Buchanan, who was already lying on the ground "with a hole in his right shoulder," and shoot him a second time. Officer Showers similarly testified that, when he arrived on the scene of the shooting, he found a black male lying face down in the driveway with a gunshot to the back of the head. The photos also help illustrate Dr. Spitz's testimony that a chest wound perforated the aorta and led to a "terminal collapse," that is, an unprotected fall. The shot to the back right side of Buchanan's head pierced the skull and injured his brain, and was likely fired from two feet away or closer, because there was gunpowder around the entrance wound. The photographs help illustrate the testimony that defendant fired two shots to vital areas of Buchanan's body – one while defendant was already lying helpless on the ground – and this is relevant to the issues of intent to kill, premeditation, and deliberation. Therefore, the trial court did not abuse its discretion in admitting the photographs. Even if defendant could show that admitting the photographs was error, any error would be harmless because their admission could not possibly have affected the jury's verdict in light of the overwhelming evidence of defendant's guilt properly introduced at trial. *People v Holly*, 129 Mich App 405, 416-417; 341 NW2d 823 (1983).

Defendant next argues that Walker's testimony amounted to an attack on defendant's character and did not fall under any of the permissible categories in MRE 404(b). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo. Otherwise, we review for abuse of discretion a trial court's decision to admit evidence." *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007) (internal citation omitted). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 217. "A trial court's decision on a close evidentiary decision does not amount to an abuse of discretion." *People v Geno*, 261 Mich App 624, 632; 683 NW2d 687 (2004).

Although defendant argues that Walker's testimony as a whole is inadmissible pursuant to MRE 404(b), he is actually objecting to specific statements made by defendant and others and "a prior statement does not constitute a prior bad act coming under MRE 404(b) because it is just that, a prior statement and not a prior bad act." *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989). "Hearsay is a 'statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *People v Yost*, 278 Mich App 341, 363; 749 NW2d 753 (2008), quoting MRE 801(c). Hearsay is generally inadmissible. MRE 802.

Defendant first contests Walker's statement, upon seeing Reed's body loaded onto a stretcher, that she knew defendant would kill Reed. This statement was introduced in both Officer Matthew Nichols's testimony and Walker's testimony. The trial court admitted the statement pursuant to MRE 803(2), that provides that an excited utterance, a "statement relating

to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," is not excluded by the hearsay rule. "The rule allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the 'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.'" *People v McLaughlin*, 258 Mich App 635, 659; 672 NW2d 860 (2003), quoting *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). "The pertinent inquiry is not whether there has been time for the declarant to fabricate a statement, but whether the declarant is so overwhelmed that she lacks the capacity to fabricate." *Id*. at 659-660.

Officer Nichols testified before Walker did and his testimony shows that Walker was overwhelmed. As he explained, Walker came "barreling out of the side door" of the apartment building upon seeing Reed loaded onto a stretcher. Walker "was so upset she was shaking, screaming, crying, visibly shaking." According to Officer Nichols, Walker screamed things "like, oh my god, Rema. That bastard Xavier, I knew he would do that. He finally got her. She made statements to that effect." Walker confirmed her statements when she took the stand, although her testimony contained fewer details. She stated that, upon seeing that Reed had been shot, her immediate impression was that "he killed her." She added that she was "in shock" at the time. Thus, the trial court did not abuse its discretion in admitting this testimony pursuant to MRE 803(2).

Defendant next contests the admission of Reed's statements that she was afraid of defendant. Asked to describe Reed's emotional state when she talked about defendant, Walker stated, "she was scared of him." When asked how many times Reed told Walker that she was scared of defendant, Walker responded, "all the time," and she explained that Reed was afraid of defendant "just because of the stuff that he did to her." As noted by the prosecutor, Walker's observations of Reed's emotional state when she spoke of defendant are not statements. "A statement is an oral or written assertion, or nonverbal conduct intended as an assertion." *People v Breeding*, 284 Mich App 471, 487-488; 772 NW2d 810 (2009), citing MRE 801(a). Therefore, such observations are not addressed by the hearsay rules. MRE 801(c); MRE 802. On the other hand, regarding Reed's own statements that she was afraid of defendant, "[u]nder traditional hearsay rules, a statement offered into evidence to demonstrate a person's state of mind is not hearsay." *Breeding*, 284 Mich App at 488.

Pursuant to MRE 803(3), the hearsay rule does not exclude:

> A statement of the declarant's then existing *state of mind, emotion*, sensation, or physical condition (such as intent, plan, motive, design, *mental feeling*, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. [Emphasis added.]

Thus,

> Statements of mental, emotional, and physical condition, offered to prove the truth of the statements, have generally been recognized as an exception to the hearsay rule because special reliability is provided by the spontaneous quality of the declarations when the declaration describes a condition presently existing at

> the time of the statement. "The special assurance of reliability for statements of present state of mind rests upon their spontaneity and resulting probable sincerity." [*People v Moorer*, 262 Mich App 64, 68-69; 683 NW2d 736 (2004), quoting 2 McCormick, Evidence (5th ed), Spontaneous Statements, § 274, p 217 (internal citation omitted).]

Therefore, the trial court did not abuse its discretion in admitting Reed's statement that she was afraid of defendant. *People v Ortiz*, 249 Mich App 297, 307-310; 642 NW2d 417 (2001).

Defendant next contests the admission of his statement wherein he threatened to kill Reed. Walker testified that in October 2007 defendant placed a call to Reed while Reed was in Walker's apartment. Reed put the call on speakerphone and Walker heard defendant threaten Reed and say that he was going to kill her. Defendant was angry that Reed was with Buchanan and he had made similar threats in the past. This testimony was proper, however, because "[a]dmissions by a party are specifically excluded from hearsay and, thus, are admissible as both impeachment and substantive evidence under MRE 801(d)(2)," and this applies as well to a criminal defendant's out of court statement. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002); see also *People v Kowalak (On Remand)*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996). Accordingly, the trial court in the case at bar did not abuse its discretion in admitting defendant's statement made in the overheard telephone conversation.

Finally, defendant contests Walker's testimony that she overheard a physical confrontation between Reed and defendant, after which Reed appeared at Walker's door, "upset, crying, scared." However, as we discussed above, Walker's personal observations of Reed crying and in a state of fear are not out of court statements and not subject to the hearsay rule. Again, "[a] statement is an oral or written assertion, or nonverbal conduct intended as an assertion." *Breeding*, 284 Mich App at 487-488, citing MRE 801(a). Even if it could be construed that the part of Walker's testimony wherein she indicated that she overheard a physical confrontation is improper hearsay evidence (even though a confrontation is not a statement), the error is harmless if it did not prejudice the defendant. *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998). Because of the overwhelming evidence of defendant's guilt, as discussed above, testimony that Walker overheard a physical confrontation would not have been outcome determinative.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher