STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 25, 2012
v	No. 303025 Oakland Circuit Court
ELLERY TERRENCE BENNETT, Defendant-Appellant.	LC No. 2010-233589-FC

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), in connection with the stabbing death of his wife. He appeals by right. We affirm.

We first address defendant's argument that the evidence was insufficient to support his conviction of first-degree premeditated murder. A challenge to the sufficiency of the evidence is reviewed de novo on appeal. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). This Court must review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The trier of fact determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of first-degree premeditated murder are: "(1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). "Premeditation and deliberation characterize a thought process undisturbed by hot blood." *People v Conklin*, 118 Mich App 90, 93; 324 NW2d 537 (1982). That is, the defendant must have "had sufficient time to think about his actions before the commission of the crime and evaluate the consequences and alternatives." *People v Wells*, 87 Mich App 402, 409; 274 NW2d 797 (1978). "[T]he minimum time necessary to exercise this process is incapable of

exact determination." *People v Glover*, 154 Mich App 22, 28; 397 NW2d 199 (1986), overruled in part on other grounds by *People v Hawthorne*, 474 Mich 174, 180 n 3 (2006). It "may be merely seconds, or minutes, or hours, or more, dependent on the totality of the circumstances surrounding the killing." *Conklin*, 118 Mich App at 93. "Premeditation can be established from reasonable inferences drawn entirely from circumstantial evidence." *Wells*, 87 Mich App at 409. It may also be established from such factors as "(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 Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

Defendant's conviction arises from what was an apparent murder and suicide attempt involving defendant and his wife Lisa. Defendant admittedly killed Lisa, who died from multiple stab wounds. Evidence was presented that defendant left apparent suicide notes and tried to kill himself. When he did not die, he went to Beaumont Hospital for treatment of his wounds.

The prosecution presented evidence of a motive to kill Lisa, which is probative of premeditation and deliberation. *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988). The evidence showed that defendant believed that Lisa was seeing other men and that Lisa had threatened to leave defendant and take their daughter with her. Approximately a week before Lisa was killed, she filed a complaint for divorce and requested sole legal and physical custody of their daughter. Financial difficulties limited defendant's ability to hire an attorney to contest the divorce and custody action. The evidence also showed that defendant admittedly wrote several letters allegedly after Lisa was killed.[1] In the letters, defendant admitted that Lisa's conduct and threats to leave him made him "furious" and engendered "hatred for Lisa." Defendant told Detective Gruenwald that "he couldn't live with" such a situation and, in other letters, defendant stated that there was "[n]o way" he would let that happen. In his apparent suicide notes, defendant stated that he hated Lisa for threatening to separate him from his daughter, that he could not let that happen, and that he had let Lisa get the better of him. Defendant also referred to Lisa's death as a "choice" he had made. He further stated that Lisa's interest in other men "caused the final result," thereby supporting an inference that he intentionally killed Lisa because of her infidelity.

Most indicative of defendant's intent is a letter defendant wrote to a business associate. In that letter, defendant stated that his associate was one of two people that defendant "couldn't stand." Defendant admitted that the second person he was referring to in the letter was Lisa. In the letter, defendant told the associate, "You avoided meeting me, which saved your life . . . . I was able to get one, my goal was to get both of you," thus indicating that defendant had set a goal of killing Lisa and intended to kill his associate as well. Evidence was presented that defendant had attempted to meet with the associate on the evening before Lisa's death, but was

[1] Defendant testified that he wrote the letters after the stabbing. However, defendant discarded the computer on which he wrote the letters, and this computer was never recovered.

not successful. Detective Gruenwald testified that defendant stated that he had intended to kill the associate that evening if they had met.

Defendant also made conflicting statements, which are evidence of consciousness of guilt. *People v Cowell*, 44 Mich App 623, 625; 205 NW2d 600 (1973). Defendant initially told the police that he struck Lisa while they were both standing by the bed and she fell onto the bed. After an evidence technician testified that such a scenario was unlikely, defendant changed his story to coincide with the physical evidence and testified that he and Lisa were both on the bed when he stabbed her. Defendant admittedly tried to commit suicide by cutting himself after he stabbed Lisa, which is further evidence of consciousness of guilt. *United States v Cody*, 498 F3d 582, 591-592 (CA 6, 2007). The evidence showed that defendant had cuts to his neck, chest, and wrist, and that defendant told some hospital personnel and a police officer that his injuries were self-inflicted. However, he also used the cuts to his chest to create an issue of self-defense by claiming that Lisa had stabbed him in the chest. Moreover, he testified that she stabbed him so hard that he could feel the knife blade "hit the bone," but a treating physician described the chest wounds as "superficial." Evidence that defendant attempted to create a false defense, like other false exculpatory statements, also supported an inference of consciousness of guilt. *People v Dandron*, 70 Mich App 439, 442-443; 245 NW2d 782 (1976).

The foregoing evidence, taken together, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant intentionally killed Lisa with premeditation and deliberation.

Defendant also suggests that the jury's verdict is against the great weight of the evidence, but he did not preserve this argument by raising it in a motion for a new trial. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Therefore, our review of this issue is limited to plain error affecting defendant's substantial rights. *Id.* "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* at 218-219. In light of the evidence of defendant's admitted hatred for Lisa, his motive to kill her because of infidelity, his desire to prevent his separation from his daughter, his letters evidencing a premeditated intent to kill Lisa, his inconsistent statements to the police, and the physical evidence that contradicted defendant's claim of self-defense, the jury's verdict is not against the great weight of the evidence. Thus, defendant has failed to demonstrate a plain error affecting his substantial rights.

We next address defendant's argument that the trial court improperly allowed Sylvia Wasson to offer hearsay testimony that, shortly before Lisa's death, Lisa told Wasson that defendant had threatened to kill her. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion occurs when the court selects an outcome that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). "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." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

Assuming without deciding that Lisa's statement to Wasson that defendant had threatened to kill her should not have been admitted, we find no basis for relief because it is clear that the statement was not outcome determinative. A preserved nonconstitutional error in the admission of evidence is presumed to be harmless. The error justifies reversal only if it is more probable than not that it determined the outcome of the case. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). An error is not outcome determinative unless it undermines the reliability of the verdict in light of the untainted evidence. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

First, Wasson's testimony was cumulative evidence because defendant's mother-in-law testified that Lisa told her the same thing. That a hearsay statement is cumulative "is an indicator that the error was not highly prejudicial, particularly in the presence of other corroborating evidence." *People v Gursky*, 486 Mich 596, 623; 786 NW2d 579 (2010). Second, there was substantial other corroborating evidence of defendant's motive and intent to kill Lisa. In defendant's letter to his business associate, defendant stated that the associate was one of two people that he "couldn't stand." Defendant admitted that the second person he was referring to in the letter was Lisa. There was evidence that defendant attempted to meet with his associate on the night Lisa was killed, but was not successful. Defendant stated in his letter, "You avoided meeting me, which saved your life . . . . I was able to get one, my goal was to get both of you." This statement indicates that defendant intended to kill his associate just as he had killed Lisa. In another letter left by defendant, defendant stated that Lisa's interest in other men "caused the final result," an indication that he intentionally killed her because of her infidelity. In a letter to his daughter, defendant stated that he was "very sorry for the choice I made." In a letter to some friends, defendant stated that he hated Lisa for threatening to separate him from his daughter, that he could not let that happen, that he had let Lisa get the better of him, and that he made a poor "choice." These various statements indicate that defendant made a deliberate decision to kill Lisa.

Additionally, evidence contradicted defendant's claim that he acted in self-defense. Defendant told Officer St. Germaine that all of his injuries were self-inflicted. Defendant told Officer Fisher that Lisa had attacked him while they were standing by the bed, that he was able to get the knife away from her and stabbed her, and that she fell onto the bed. After Officer Fedoronko testified that such a scenario was unlikely given the absence of evidence of arterial spurting on the floor or wall, defendant changed his story to coincide with the physical evidence, testifying that he and Lisa were both on the bed when he stabbed her.

In light of the foregoing evidence, any error in the admission of Lisa's statement that defendant had threatened to kill her was not outcome determinative. *Lukity*, 460 Mich at 495-496. The statement does not undermine the reliability of the verdict in light of the untainted evidence that defendant committed a premeditated killing.

Next, we address defendant's claim that the prosecutor improperly appealed to the jury's sympathy for the victim during opening statement and closing argument. To preserve a claim of prosecutorial misconduct, the defendant must make "a timely, contemporaneous objection and request for a curative instruction." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant did not object to the prosecutor's remarks during closing argument, leaving that issue unpreserved. We review unpreserved claims of prosecutorial misconduct for plain

error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003). Although defendant did object to the prosecutor's remark during opening statement, he did not request a curative instruction or any other form of relief. To the extent that this issue could nevertheless be considered preserved, we review the record de novo to determine whether defendant was denied a fair and impartial trial. *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003).

"The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976) (KELLY, J., concurring), aff'd sub nom *People v Tilley*, 405 Mich 38 (1979). During closing argument, the prosecutor may argue the evidence and all reasonable inferences therefrom as it relates to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). He may not inject "unfounded or prejudicial innuendo into the proceedings." *People v George*, 130 Mich App 174, 180; 342 NW2d 908 (1983). Specifically, the "prosecutor may not appeal to the jury to sympathize with the victim." *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008). Such arguments are improper where they invite the jurors to suspend their power of judgment and decide the case based on their sympathy for the victim. *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994). Opening statements and closing arguments are not evidence, *People v Bailey*, 451 Mich 657, 681; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996), and the prejudicial effect of most inappropriate prosecutorial statements can be cured by a cautionary instruction, *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009), such as an instruction that counsel's arguments are not evidence. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

In his opening statement, the prosecutor discussed the elements of the offense. He then turned to a summary of the evidence, beginning with an introduction to the victim. He stated:

> Lisa Bennett. You have met the defendant, Ellery Bennett. He's here in the courtroom. Lisa Bennett cannot be here to meet you in person. Lisa Bennett will not see her children grow up. Lisa Bennett will not enjoy the things that we all look forward to in life.

These statements are factually accurate. But the fact that Lisa had been deprived of her life and the joys it could have brought her had no bearing on whether defendant intentionally killed her or acted with premeditation and deliberation, and thus improperly appealed to the jury's sympathy. However, these were but two statements uttered during a lengthy opening statement, at the beginning of a five-day trial. Given their brief and isolated nature, they "did not likely deflect the jury's attention from the evidence presented in this case." *Unger*, 278 Mich App at 237. Further, the trial court gave preliminary and final instructions that opening statements and closing arguments are not evidence, that the case is to be decided only on the evidence, and that the jury must not let its decision be influenced by sympathy. The trial court's instructions were sufficient to protect defendant's right to a fair trial. Accordingly, the prosecutor's remarks during opening statement do not require reversal.

The prosecutor began his closing argument by thanking the jurors for their service. He stated:

> The first thing I would like to say to you is the first thing I said to you when you were seated as the jury, and that's to thank you for doing your service. On behalf of Lisa Bennett's family and friends that are in the courtroom and have been here during trial, I would like to thank you for doing your duty.

There is nothing in this simple expression of appreciation for the jurors' time and attention to suggest that the prosecutor was trying to persuade the jury to decide this case based on something other than the evidence that was presented in court. Thus, this brief statement was not plain error. Even if it could be viewed as an improper appeal to sympathy for the victim and her family, the trial court's instructions were sufficient to ameliorate any prejudicial effect and protect defendant's substantial rights.

Defendant's final issue is that his right to a public trial was violated when some of his relatives were excluded from the courtroom during jury voir dire. Defendant did not assert his right to a public trial in the trial court or otherwise object to any closure of the courtroom. Accordingly, this issue is unpreserved and, therefore, is reviewed for plain error affecting defendant's substantial rights. *People v Vaughn,* ___ Mich ___; ___ NW2d ___ (Docket No. 142627, decided July 9, 2012), slip op at 20-21; *Carines,* 460 Mich at 763-764.

A criminal defendant has a constitutional right to a public trial. US Const, Am VI; Const 1963, art 1, § 20. A public trial is "'one which is not limited or restricted to any particular class of the community, but is open to the free observation of all.'" *People v Greeson,* 230 Mich 124, 147; 203 NW 141 (1925), quoting 8 RCL, § 29, p 75. The Sixth Amendment right to a public trial extends to jury selection. *Presley v Georgia,* 558 US 209; 130 S Ct 721, 724; 175 L Ed 2d 675 (2010). "A defendant's Sixth Amendment right to a public trial is limited, and there are circumstances that allow the closure of a courtroom during any stage of a criminal proceeding[.]" *Vaughn,* ___ Mich ___, slip op at 9. The requirements for total closure are "(1) The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure." *People v Kline,* 197 Mich App 165, 169; 494 NW2d 756 (1992). When there is a partial rather than total closure, "only a substantial, rather than a compelling, reason for the closure is necessary." *Id.* at 170. However, the *Kline* Court opined that the removal of family members should be based on compelling reasons. *Id.* at 171 n 2.

The record shows that during voir dire, neither party requested closure of the courtroom and the court never ordered that the courtroom be closed. Therefore, the record does not establish a plain error. Defendant has attempted to show an error by submitting affidavits from relatives indicating that a sheriff's deputy or another person prohibited them from entering the courtroom during voir dire. Appellate review is limited to the record established by the trial court, and an expansion of the record on appeal is impermissible. *People v Powell,* 235 Mich App 557, 561 n 4; 599 NW2d 4993 (1999). Even if these affidavits are considered, however, defendant has not shown a right to relief. Assuming that improper closure occurred and that the error affected defendant's substantial rights, relief is not warranted unless the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines,* 460 Mich at 763. Defendant does not claim, nor does the record suggest, that defendant is actually innocent. "Because the closure of the

courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties," it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Vaughn,* ___ Mich ___, slip op at 25-26. Therefore, defendant is not entitled to relief on the basis of this unpreserved issue.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Christopher M. Murray