

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 31, 2013

v

KEVIN CORTEZ HOWELL,

Defendant-Appellant.

No. 304322
Wayne Circuit Court
LC No. 10-013293-FC

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a), mutilation of a dead body, MCL 750.160, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant was convicted of killing David Morgan (hereafter the “victim”) after selling cocaine to him in August 2010, and then dismembering his body and placing his body parts in different areas in Detroit. The victim’s head was never located, but his identity was established through fingerprints. Defendant was linked to the killing by statements made to MF, the mother of his child, details of which were corroborated by other prosecution witnesses. Defendant was tried jointly with Aaron Coleman, but the trial court granted Coleman’s motion for a directed verdict at trial.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence of premeditation and deliberation to support his conviction for first-degree murder. We disagree. In reviewing a challenge to the sufficiency of the evidence, we consider “the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt.” *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). It is for the trier of fact to determine what inferences may be fairly drawn from evidence and the weight to be accorded the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

A conviction of first-degree premeditated murder requires proof that “the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate.” *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). “To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem.” *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). While the time necessary to exercise this process is not capable of precise determination, the interval between the initial thought and the ultimate action should be long enough for a reasonable person to subject the nature of his or her response to a second look. *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979). “Premeditation may be established through 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 Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008). While it is not necessary that the prosecution prove a motive for a killing, evidence of motive is always relevant in a murder case. *Id.* at 223.

According to defendant’s statements to MF, the victim purchased crack cocaine from defendant, and defendant directed the victim to a nearby house shortly before defendant went to the house and shot the victim. Defendant also told MF that he killed the victim and dismembered his body because rival drug sellers down the street were making more money than defendant was making. The evidence showed that most of the victim’s body parts were found near houses known for drug use. This evidence supports an inference that defendant killed the victim, dismembered his body, and placed the body parts in strategic locations as part of a plan to discourage drug users from acquiring their drugs from other sellers in the same area. Although defendant argues that it would make little business sense for him to kill one of his own drug customers, it was not necessary that the prosecutor prove that defendant exercised good business judgment in order to establish a motive. A motive is “the inducement for doing some act; it gives birth to a purpose.” *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000), quoting *People v Kuhn*, 232 Mich 310, 312; 205 NW 188 (1925). In any event, the jury could have determined that defendant decided to accept the loss of one customer in exchange for dissuading several other potential customers from going to a rival drug competitor.

MF’s testimony indicates that defendant told her that he directed the victim to a nearby house, which other evidence indicated was an abandoned house, and then shortly afterward defendant went to that house and shot the victim. While this case does not involve evidence that defendant moved the victim, evidence that defendant was involved in directing the victim to a more secluded place, where the victim was then killed, provides additional support for a finding of premeditation. See *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999). In addition, MF’s testimony that defendant told her that he “walked in and he shot the man” supports an inference that defendant had an opportunity to think about his actions as he walked to the house, which provided him with sufficient time to consider his actions. Although the cause of death could not be determined and no evidence of a gunshot wound was detected during the autopsy, the victim’s head was never recovered. The jury could have inferred that defendant shot the victim in the head and hid the head to conceal evidence of a cause of death. “[A] defendant’s attempt to conceal the killing can be used as evidence of premeditation.” *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003).

Evidence was also presented that defendant attempted to prevent MF from testifying. According to MF's testimony, defendant told her in a recorded telephone conversation from jail that she could avoid saying anything by taking the "5th Amendment." A jury may infer consciousness of guilt from a defendant's attempts to conceal involvement in a crime. *People v Kowalski*, 489 Mich 488, 509; 803 NW2d 200 (2011).

Considering all of the circumstances surrounding the killing, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant's act of killing was premeditated and deliberate.

II. EVIDENTIARY ISSUES

Defendant raises three evidentiary issues on appeal. We review a preserved claim of evidentiary error for an abuse of discretion. *Unger*, 278 Mich App at 216. "An abuse of discretion occurs when the court chooses an outcome outside the range of reasonable and principled outcomes." *Id.* at 217. Evidentiary errors are generally nonconstitutional in nature. *People v Blackmon*, 280 Mich App 253, 259; 761 NW2d 172 (2008). A preserved nonconstitutional error does not require reversal unless the defendant establishes that it is "more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). An unpreserved claim of evidentiary error does not warrant appellate relief unless the defendant establishes a plain error affecting his substantial rights, and the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceeding. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

A. NOVEMBER 5, 2010 SHOOTING INCIDENT

Defendant first argues that he was prejudiced by the prosecution's introduction of evidence regarding a separate shooting incident involving his brother and Jermaine Overman on November 5, 2010, which resulted in the death of their friend, Kevin Williams. Defendant argues that this evidence was irrelevant and inadmissible under MRE 401, MRE 403, and MRE 404, and that the improper admission of the evidence violated his right to due process. Because defendant did not object to the evidence on the grounds raised on appeal, the issue is unpreserved and defendant bears the burden of showing a plain error affecting his substantial rights. *Carines*, 460 Mich at 763; *Coy*, 258 Mich App at 12.

MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." It is evidence that "is material (related to any fact that is of consequence to the action) and has probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence)." *Sabin*, 463 Mich at 57. A determination that evidence is inadmissible for one purpose does not preclude its admission for another purpose. *Id.* at 56. But pursuant to MRE 105, a party may request an instruction regarding the limited purpose of the evidence. *Id.*

We find merit to defendant's argument that evidence of his statement regarding his unspecified "history" with the gun used in the November 5, 2010 shooting, in response to questioning about that shooting from his mother, was not relevant to suggest that the gun used in that shooting was the same gun used by defendant to shoot the victim in this case in August 2010. "Evidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense." *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989). In determining whether a defendant is sufficiently connected to a weapon, logic, common experience, and common sense, apart from legal technicalities, should be considered. *People v Murphy (On Remand)*, 282 Mich App 571, 580; 766 NW2d 303 (2009). But there was no evidence of the type of gun used to shoot the victim in this case. While evidence linking defendant to some type of gun when the victim was killed in the latter part of August 2010 would still be of consequence to the determination of this case in light of the evidence of defendant's statement that he shot the victim, the prosecutor failed to present a sufficient foundation to establish this connection. Because defendant's vague admission to his mother in November 2010 that he had a "history" with a particular gun had no tendency to make it more probable than not that he shot the victim, it was not relevant for this purpose.

Nonetheless, "[i]f a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact." *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). In addition, "[i]t is essential that the prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). The credibility of MF's testimony was the primary issue in this case. Defense counsel attacked her credibility by arguing that she was prompted by police threats to fabricate a story about defendant stating that he shot the victim. The prosecutor established that the November 5, 2010 shooting incident involving defendant's brother led defendant's mother to question defendant about the whereabouts of the gun used in that shooting, to obtain information from MF regarding what defendant told her about this case, and to ultimately report what she knew about this case to the police. It was part of the chain of events that led to MF revealing defendant's statements to the police. As a whole, the chain of events was relevant to rebut the defense theory that MF was fabricating her testimony based on police threats. Therefore, defendant has not established that this evidence lacked a relevant purpose under MRE 401.

Relevant evidence may nonetheless be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues. "All relevant evidence will be damaging to some extent." *Murphy*, 282 Mich App at 582. Evidence is unfairly prejudicial where it would be inequitable to allow the proponent to use it or where a probability exists that jurors will weigh evidence, which is minimally damaging in logic, substantially out of proportion to the logically damaging effect. *Id.* Considering that there was no claim that defendant was involved in the shooting of Williams, the jury was not likely to have been confused by the testimony regarding that separate transaction. Under these circumstances, defendant was not unfairly prejudiced by the testimony. Because the evidence was not clearly inadmissible under MRE 403, there was no plain error.

We also reject defendant's argument that the evidence of the November 5, 2010 shooting incident was clearly inadmissible under MRE 404. The evidence was used to explain the chain of events that led to the police questioning of MF. There was no attempt to use the evidence for an improper character purpose under MRE 404(a) or (b)(1).

We similarly reject defendant's claim that the admission of the evidence violated his constitutional right to a fair trial. As previously indicated, evidentiary errors are generally nonconstitutional in nature. *Blackmon*, 280 Mich App at 259. Defendant has failed to establish anything regarding the evidence that implicates a specific constitutional right. Moreover, because this evidentiary claim is unpreserved, the principal issue is whether any error affected defendant's substantial rights. *Carines*, 460 Mich at 763. We have found error only to the extent that the prosecutor used the evidence of defendant's "history" statement to suggest that the gun involved in the November 2010 shooting incident was the same gun used by defendant to shoot the victim in this case. The outcome of this case depended on MF's credibility. Defendant has failed to establish that his vague statement to his mother regarding his "history" with the gun used in the unrelated shooting was probative of MF's credibility. Accordingly, any error was not outcome-determinative and thus did not affect defendant's substantial rights.

Lastly, the record does not support defendant's claim that defense counsel was ineffective for not objecting to the evidence of the November 5, 2010 shooting incident. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). To establish ineffective assistance of counsel, defendant "must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). Considering that the challenged evidence had an admissible purpose as it related to the charges against defendant, defendant has failed to overcome his heavy burden of establishing that counsel's performance fell below an objective standard of reasonableness. *Id.* Counsel need not make futile objections. *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008). Even assuming that defense counsel should have raised some objection to the evidence, defendant has not established a reasonable probability that, but for counsel's alleged error, the result of his trial would have been different. Therefore, defendant's ineffective assistance of counsel claim cannot succeed. *Seals*, 285 Mich App at 17.

B. PRIOR CONSISTENT STATEMENTS

Defendant argues that a new trial is required because of the admission of his mother's testimony concerning statements made to her by MF, which defendant contends were not admissible under the hearsay exception for prior consistent statements in MRE 801(D)(1)(B). We disagree.

Before defendant's mother testified, MF testified that she had told defendant's mother what defendant had told MF, and that this conversation took place before MF spoke to the police. The trial court ruled that defendant's mother could testify regarding what she was told by MF to explain why defendant's mother went to the police and to establish "how this case got rolling really," but the court did not want any detail from defendant's mother with respect to statements that MF claimed were made by defendant concerning Coleman, which were not the subject of

MF's prior testimony. The court also allowed the prosecutor to use leading questions to avoid this danger.

Because defense counsel affirmatively stated on the record that he had no objection to the use of leading questions, any claim on appeal concerning the mode of the prosecutor's questioning was waived. A waiver extinguishes any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). In addition, defendant has not established any basis for disturbing the trial court's decision to allow defendant's mother to testify regarding what she was told by MF, for the purpose of explaining why defendant's mother contacted the police. "Where a witness testifies that a statement was made, rather than about the truth of the statement itself, the testimony is not hearsay." *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993).

While a prosecutor generally may not bolster a witness' testimony by referring to the witness' prior consistent statements, *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987), the record in this case does not indicate that the prosecutor elicited any specific statements by MF to defendant's mother. Defendant's mother merely answered "yes" in response to whether she was told by MF that defendant had admitted that "he was involved or that he did the body parts case."

MRE 801(d)(1)(B) provides that a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Under this rule, the prior consistent statement must be made before the declarant's supposed motive to falsify arose. *People v Mahone*, 294 Mich App 208, 214; 816 NW2d 436 (2011); *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000). Although the trial court in this case was not asked to admit any testimony under MRE 801(d)(1)(B), considering the evidence that MF's statements to defendant's mother were made before MF was questioned by the police, and the defense theory that MF fabricated her trial testimony based on threats against her by the police, defendant has not substantiated his position on appeal that the testimony was inadmissible.

C. SERGEANT FIRCHAU'S TESTIMONY

Defendant argues that the trial court erred in overruling defense counsel's objection to Sergeant Firchau's testimony characterizing 2281 Hale as the "address of the competing drug location of where most of the body parts were found." Although defendant argues that this testimony was inadmissible because it was not based on personal knowledge, and because there was an insufficient basis for Sergeant Firchau to provide opinion testimony regarding the existence of a rival drug house, defendant did not object to the testimony on these grounds at trial. Therefore, this issue is unpreserved. *Coy*, 258 Mich App at 12. Because defendant has not established that any error was outcome-determinative, appellate relief is not warranted. *Carines*, 460 Mich at 763; *Coy*, 258 Mich App at 12.

Although MRE 602 provides that a witness may not testify to a matter unless evidence supports a finding that the witness has personal knowledge of the matter, it is not apparent from the record that the prosecutor offered Sergeant Firchau's testimony to establish 2281 Hale as a drug house at the time relevant to the charges. Rather, examined in context, it is apparent that

Sergeant Firchau's testimony was offered only to identify on a map various addresses that were the subject of testimony provided by other trial witnesses. To the extent that Sergeant Firchau's testimony characterizing 2281 Hale as "the competing drug location" could be considered improper lay opinion testimony without an adequate foundation under MRE 701, cf. *People v Smith*, 425 Mich 98, 112-113; 387 NW2d 814 (1986), it did not affect defendant's substantial rights because it was not outcome determinative. Defendant's reliance on the prosecutor's closing argument to support his claim of prejudice is misplaced. Defendant has not shown that it was Sergeant Firchau's "competing drug location" testimony on which the prosecutor relied to argue to the jury that defendant targeted 2281 Hale with body parts because it was a rival drug house. The existence of a rival drug house down the street was established by MF's testimony, and Sergeant Mackie had previously identified 2281 Hale as a drug house, where body parts were discovered. Accordingly, reversal is not warranted.

III. JOINT TRIAL

Defendant also argues that the trial court's refusal to sever his trial from that of codefendant Coleman, or to at least seat separate juries, deprived him of a fair trial.

The record indicates that the trial court initially granted codefendant Coleman's motion for separate juries, but that the parties later agreed on the first day of trial to a joint trial before a single jury. Defense counsel's affirmative agreement to a joint trial before a single jury constitutes a waiver of this issue. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). A waiver extinguishes any error. *Carter*, 462 Mich at 216. Therefore, we shall limit our review to defendant's claim that defense counsel was ineffective for failing to move for a separate trial or a separate jury.

This Court will not assess counsel's competency with the benefit of hindsight. *Horn*, 279 Mich App at 39. We reject defendant's argument that this case presents a situation where severance would have been mandatory upon request. MCR 6.121(C) provides that "[o]n a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." Severance is mandatory under this rule "only when a defendant provided the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994).

Nothing in the record indicates that defense counsel could have presented a sufficient offer of proof to mandate severance. The fact that Coleman's counsel requested an opportunity to point his finger at defendant did not mandate separate trials. It is natural that defendants tried together will attempt to point their fingers at each other. *Id.* at 349. To mandate severance, defenses must be mutually exclusive or irreconcilable. *Id.* In this case, defendant and Coleman both claimed innocence. Coleman's defense theory was that he was not involved in this matter, regardless of whether the jury believed MF's testimony, and that "it's up to you to believe her testimony or not." The jury was not required to choose between mutually exclusive or irreconcilable defenses.

Because there is no basis in the record for concluding that severance was necessary to protect defendant's substantial rights, counsel's waiver of this issue did not constitute ineffective assistance of counsel. *Seals*, 285 Mich App at 17.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Mark T. Boonstra