STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK MONROE POSEY,

Defendant-Appellant.

UNPUBLISHED
July 3, 2007

No. 270379
Wayne Circuit Court
LC No. 06-000378-01

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced him to life imprisonment for the first-degree murder conviction, three to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I Sufficiency of Evidence

On appeal, defendant argues that the prosecution presented insufficient evidence to find him guilty of killing the victim or of using a firearm during the commission of that offense.[1] We disagree. This Court reviews claims of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[2] *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

To establish first-degree murder, the prosecution must show that the defendant intended to murder the victim and the killing was accompanied by premeditation and deliberation. *People v Tanner*, 255 Mich App 369; 660 NW2d 746 (2003), rev'd on other grounds 469 Mich 437

[1] Defendant does not contest his conviction of felon in possession of a firearm.

[2] In doing so, we do not consider the improperly admitted testimony of the victim's statements discussed in Section II of this opinion.

(2003). Premeditation and deliberation can be established through "(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). Premeditation and deliberation, for purposes of a first-degree murder conviction, require "sufficient time to take a second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The elements of felony-firearm, MCL 750.227b, are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

Defendant contends that he was not the person who shot the victim and the prosecution did not present sufficient evidence to establish beyond a reasonable doubt his identity as the killer. Defendant relies on Tiffany Berry's trial testimony that she saw three black men walk past the victim's car before the shooting, and that she did not see defendant with a weapon. However, she also testified at trial that defendant was the only person she saw standing outside of the victim's vehicle when the victim was shot.

Defendant also stresses that Berry's trial testimony, while similar to the statement she initially gave to police, conflicted with the second statement she gave to police and with her testimony at the preliminary examination that defendant shot the victim. Indeed, the record reflects that when she gave police the second statement she said she did not tell the truth in her first statement because she was afraid of defendant. At trial, she did not explain why her version of events had changed back to the initial version she gave to police. Regardless, however, this Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Thus, assuming that the jury chose to believe Berry's version of events that defendant killed the victim, the evidence establishes that defendant was the killer.

Further, Parks-Campbell testified that she witnessed almost daily bickering between defendant and the victim over drugs and money. The parties' contentious relationship before the victim's murder is evidence of defendant's premeditation and deliberation. *Abraham, supra*, at 656. At one point, Parks-Campbell heard defendant say that he would kill whoever it was that stole his drugs. One who states an intention to act is more likely to have acted in conformance with that intention. *Brownridge, supra* at 305. On the night of the murder, Berry heard defendant tell the victim that yet another sack of his drugs had come up missing. We find that the ongoing arguments, combined with defendant's statement that he would kill whoever stole his drugs, would establish defendant's premeditated intent to kill.

Here, the prosecution also presented evidence that, on the night of the murder, the victim called Meco Blanton and told Blanton to tell defendant to come out of the house to talk to him. Defendant left the house, and shortly thereafter, Blanton heard gunshots. Blanton testified that defendant told him two black males in hoodies had come up to the Blazer and started shooting. Blanton testified that defendant said he ran away before the victim was shot because he saw that the two men had guns. However, when questioned by police, defendant claimed that one of the men came up to him from behind the Blazer and reached under him and shot the victim. Defendant told police that he ran toward Monarch Street and that he saw the three men run

toward Queen Street, but Blanton testified that defendant indicated that the perpetrators ran toward Monarch Street. Defendant described the three men but did not say that they were wearing black hoodies, which contradicted what he told Blanton. Defendant's conduct after the murder involving contradictory versions of the events he gave to police and Blanton is a factor pointing to his guilt. *Abraham, supra* at 656. Viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence for a rational trier of fact to find defendant guilty beyond a reasonable doubt of first-degree murder, felon in possession of a firearm, and felony-firearm.

II Hearsay Statements

Defendant also argues on appeal that three statements made by the victim were improperly admitted under MRE 803(3), which prejudiced defendant and denied him a fair trial. On appeal, the prosecution concedes that the trial court improperly admitted the victim's three statements. We agree that the victim's statements were improperly admitted.

This Court reviews preserved evidentiary issues for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, this Court reviews a decision whether to admit evidence based on a preliminary question of law or constitutional provision de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003); *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006).

The state-of-mind exception to the hearsay rule, MRE 803(3), provides that the following is not excluded by the hearsay rule:

> Then Existing Mental, Emotional, or Physical Condition. 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.

When a statement is spontaneous and describes a condition or emotion presently existing at the time it is made, the statement is considered reliable. *People v Moorer*, 262 Mich App 64, 68-69; 683 NW2d 736 (2004). Typical statements used to prove a declarant's state of mind include "statements of intent to make a certain place the declarant's home offered to establish domicile," statements of mental suffering offered to prove damages, statements of ill will by the defendant toward a the victim to show malice in criminal cases, and statements by a the victim that he or she was afraid of the defendant to prove lack of consent to intercourse or to rebut a self-defense theory. *People v White*, 401 Mich 482, 504-505; 257 NW2d 912 (1977), overruled on other grounds *People v Koonce*, 466 Mich 515 (2002); McCormick, § 274 p 270, 270 n 20.

"Forward-looking statements of the intention [of the declarant] are admitted while backward-looking statements of memory or belief are excluded because the former do not present the classic hearsay dangers of memory and narration." McCormick, § 276, p 279. For example, the statement, "Dr. Shepard has poisoned me" was inadmissible as a statement of the

declarant's belief of a past act of the defendant. *Shepard v United States*, 290 US 96; 54 S Ct 22; 78 L Ed 196 (1933). Statements of a victim regarding belief of future actions of a defendant are also inadmissible. *Moorer, supra* at 73; McCormick, § 274, p 266. On the other hand, statements describing the intention and plans of a declarant are admissible under MRE 803(3), assuming relevancy. *People v Fisher*, 449 Mich 441, 450-451; 537 NW2d 577 (1995).

The statements at issue here are: (1) a statement by the victim to his wife after a confrontations with defendant that, "This is why I bring you around. If anything happens to me you get [them];" (2) the victim's statement to his wife after showing her certain addresses that if anything happened to him, "these people did it;" and (3) the victim's statement to his sister that, "[t]hings are getting ugly over on Tacoma Street. I want to get out of the business. I'm fearful. Things are not going well with [defendant.] Each of these statements by the victim plainly pertain to his belief that defendant, in the future, would kill him. Accordingly, the statements were inadmissible under MRE 803(3).

Although the court erred by admitting the victim's statements, reversal is not required. "Evidentiary error will not merit reversal unless it involves a substantial right and, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative." *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003) (citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999)). Given the properly admitted evidence, defendant cannot show that any error was outcome determinative.

The prejudice of the improper statements to defendant is that the "jury would accept [the victim's] statement[s] as somehow reflecting on defendant's state of mind rather than [the victim's], i.e., as a true indication of the defendant's intentions, actions or culpability." *White, supra* at 505. However, the prosecution presented testimony relating to defendant's intentions, actions or culpability that is cumulative to the improperly admitted statements. Specifically, there was testimony that defendant would often complain to the victim that bags of crack cocaine were missing, and that defendant did not want to pay the victim his cut for the drugs sold out of the house. Parks-Campbell testified that about one month before the victim was killed, Parks-Campbell, the victim and defendant were sitting in the drug house and defendant was "ranting and raving" that he was missing a sack of drugs. According to Parks-Campbell, defendant said, "Whenever I find out who took my sack I'm going to kill them." Here, statements relating the victim's belief that defendant may have intended him harm are cumulative to properly admitted evidence showing growing animosity and distrust between defendant and the victim. The properly admitted evidence permits the jury to infer that the relationship between the victim and defendant was becoming increasingly hostile and dangerous. Accordingly, defendant has not shown that admitting the victim's statements was outcome determinative.

Defendant also argues that that the admission of the victim's statements violates his Confrontation Clause rights. Confrontation Clause violations may occur where testimonial statements of unavailable witnesses are admitted at trial but the defendant had no prior opportunity to cross-examine the witnesses. *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). However, in the instant case, the victim's statements were not

testimonial. Rather, the statements were informal, made between the victim and his girlfriend and the victim and his sister. Thus, defendant's right to confrontation was not violated.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood