

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL RALPH GEORGE,

Defendant-Appellant.

UNPUBLISHED

May 21, 2013

No. 307879

Macomb Circuit Court

LC No. 2007-004766-FC

Before: BORRELLO, P.J., and K.F. KELLY and MURRAY, JJ.

PER CURIAM.

Following a trial in 2011, a jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), insurance fraud, MCL 500.4511(1), false pretenses over \$100, MCL 750.218, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life in prison for the murder conviction and concurrent prison terms of one to five years for the false pretenses conviction, and one to four years for the insurance fraud conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant was convicted of murdering his wife, Barbara George, who was shot in the head on July 13, 1990, in the Clinton Township comic book store, Comics Book World, which defendant and the decedent owned. Defendant also was convicted of obtaining more than \$100 by false pretenses and insurance fraud for submitting a false property loss claim and obtaining life insurance benefits on account of the decedent's death. The prosecution's theory was that defendant killed the decedent to end an unhappy marriage and because he was involved in an extramarital relationship with another woman, Renee Kotula. Defendant presented an alibi defense and theorized that the decedent was killed during an attempted robbery. Defendant also attacked the adequacy of the police investigation. Defendant was previously convicted of the same offenses in 2008, but the trial court granted defendant's motion for a new trial and this Court affirmed that decision based upon newly discovered evidence. *People v George*, unpublished opinion per curiam of the Court of Appeals, issued May 4, 2010 (Docket No. 288032) lv den 488 Mich 877 (2010) ("*George I*").

The evidence at defendant's second trial indicated that the decedent was shot in the head at close range. Her body was discovered in the back room of the comic book store shortly after 6:00 p.m. on Friday, July 13, 1990. Information obtained from various friends, employees, and

store customers who saw or spoke to the decedent on the day of the offense established that she was shot within a narrow timeframe close to 6:00 p.m. There were no eyewitnesses to the shooting, no one saw defendant at or near the store at the time of the shooting, and no physical evidence linked defendant to the homicide. The 1990 police investigation did not lead to any charges for the crime. The officer-in-charge of the 1990 investigation was satisfied with defendant's alibi that he had left the store at approximately 4:30 p.m. to take his children to his mother's home in Hazel Park, and remained there until well after the decedent had been shot. Defendant's mother, Janet George, corroborated defendant's alibi.

The police reopened the investigation in 2007. In the 2007 investigation, officers reexamined the prior evidence and determined that one witness, Michael Renaud, was able to place defendant in the comic book store near the time of the shooting. Renaud informed the police that he called the store on July 13, 1990, and was certain that he spoke to defendant, who seemed in a hurry to end the telephone call. Renaud initially told the police that he spoke to defendant at the store at 6:00 p.m., but quickly revised his time estimate to sometime between 5:15 and 5:45 p.m., and later claimed that the time of his call was most likely between 5:15 and 5:30 p.m.

In addition to presenting evidence of the events on the day of the offense, the prosecution presented evidence that defendant was unhappy with his marriage and dissatisfied with his relationship with the decedent. Evidence was presented that defendant had complained to others that the decedent was unattractive and overweight, and told others that he had stayed with her only for the sake of their two young daughters. The prosecution also presented evidence that, at the time of the offense, defendant was involved in an extramarital relationship with Renee Kotula, whom defendant later married in 1992. After the offense, defendant collected \$125,000 in death benefits on the decedent's life insurance policy, and he filed a property insurance claim for 77 comic books that he claimed were stolen during the offense, for a total insurance benefit of \$12,604.

As noted earlier, a jury convicted defendant in 2008 of the same four counts, but the trial court granted defendant's motion for a new trial based on prosecutorial misconduct and newly discovered evidence because the prosecution failed to disclose police tip sheets that suggested another perpetrator. This Court upheld the trial court's decision and remanded the case for a new trial in *George I*. One of the undisclosed tip sheets is relevant to this appeal. This Court summarized that tip sheet in *George I* as follows:

The third tip sheet, dated July 29, 1990, contained information from an identified person, Pat Flannery, with the Wayne County Sheriff's Department, Trustee's Services, who reported that a woman with whom he lived, Rita Prog, had previously been married to a man named Marshall David Prog. Flannery believed that Marshall may have been involved in the victim's death. Flannery stated that the Progs were friends and business acquaintances of defendant and his wife, and that Marshall, who lived in Florida, came to Michigan on July 10 or 11, 1990, asking Rita for \$500. Rita would not give him the money. According to Flannery, Marshall was a drug addict who frequently dealt in sports cards and coins. Flannery claimed Marshall had boasted that (1) he purchased coins with stolen checks, for which he did not get caught; and (2) years earlier he had been

involved in a homicide and “did not tak[e] the rap.” Flannery told the police that Marshall left Michigan on July 18, 1990, to return to Florida and that, despite having arrived in Michigan with nothing, he had a large sum of money with him when he left. This information suggested an alternative suspect who had ties to defendant and his wife, with a motive to commit a robbery. The failure to follow-up on this tip could have further called into question the adequacy of the 1990 police investigation and the credibility and reliability of the evidence that stemmed from it. [*George I*, unpub op at 3.]

The defense strategy at defendant’s second trial consisted of presenting defendant’s alibi defense and attacking the police investigation of the case. Defendant continued to accuse the police of ignoring evidence of other suspects, including Marshal Prog and Joe Calman, the latter of whom was an alleged comic book thief with a prior second-degree murder conviction. Defendant also argued that the police failed to sufficiently investigate leads regarding other suspicious persons, including a man with a black Greek fisherman’s cap, a man driving a beaten-up Monte Carlo, a slightly-built person wearing a false beard and moustache, and a man who tried to sell a box of comic books to three teenagers in a parking lot in Flint after the murder.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence at trial was insufficient to support his convictions. This Court reviews a challenge to the sufficiency of the evidence by viewing the evidence de novo in the “light most favorable to the prosecution in order to determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt.” *People v Levigne*, 297 Mich App 278, 282; 823 NW2d 429 (2012). Circumstantial evidence, and reasonable inferences drawn from the evidence, are satisfactory to prove the elements of a crime. *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012).

The elements of first-degree premeditated murder are that the defendant killed the victim and that the killing was “willful, deliberate, and premeditated[.]” MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). Defendant argues that the evidence was insufficient to establish a jury triable question of his guilt because the jury could not rationally infer from the evidence that he was in or near the store when the decedent was shot just after 6:00 p.m. Accordingly, defendant argues, the evidence was insufficient to establish his identity as the decedent’s killer. Identity is an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt, *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Positive identification by a witness or circumstantial evidence and reasonable inferences arising from it may be sufficient to support a conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

The difficulty we have with this argument is that the prosecution presented testimony from Renaud, who testified that he was certain that he spoke to defendant at the store on the evening of the shooting, but he was uncertain of the exact time of the call. Renaud gave various time estimates for the call, ranging from as early as 5:15 p.m. to as late as 6:00 p.m. Viewed in a

light most favorable to the prosecution, the jury could have inferred from Renaud's testimony and the police testimony that defendant left the comic book store sometime between 4:00 and 4:30 p.m., drove to Hazel Park to drop his children off at his mother's house, and then drove back to the comic book store in a different vehicle, where he parked behind the store and used his keys to enter through the rear entrance. Based on this evidence a reasonable jury could have found that defendant lurked in the back room or behind the store, but briefly came to the front room to answer the telephone while the decedent briefly left to go to Hungry Howie's, and then waited for an opportunity to shoot the decedent in the back room, which occurred at or very close to 6:00 p.m., and then left through the back door and drove back to Hazel Park.

Defendant argues that several weaknesses in the prosecution's case established reasonable doubt about his guilt, but ultimately Renaud's testimony, and the timeline testimony of the other witness, presented questions of fact for the jury to resolve. A jury could have rationally credited Renaud's testimony that he was certain that he spoke to defendant at the store, but determined that Renaud was unsure of the exact time of the call in light of his changing time estimates, and found that the call could have taken place within the window of time during which the decedent was killed. Additionally, the jury was not obligated to give credence to defendant's mother's testimony that defendant arrived at her house shortly after the decedent called sometime between 5:00 and 5:30 p.m., and then went to sleep on the couch. Defendant's mother was not an unbiased witness. Moreover, defendant's mother admitted that she had previously told the police that defendant had left her house at 5:30 p.m. Viewed in a light most favorable to the prosecution, the evidence permitted the jury to reconcile the conflicts in the testimony in a manner that placed defendant at the comic book store during the window of time in which the decedent was killed.

Relying on *People v Fisher*, 193 Mich App 284; 483 NW2d 452 (1992), *People v Gill*, 43 Mich App 598; 204 NW2d 699 (1972), and *People v Gilleyem*, 34 Mich App 393, 396-397; 191 NW2d 96 (1971), defendant argues that evidence of his motive and opportunity to kill the decedent is insufficient to convict him of murder, and that the prosecution was required to present evidence of planning activity to obtain a conviction. Although *Fisher* and *Gilleyem* support defendant's argument that evidence of opportunity and motive, standing alone, are insufficient to prove a defendant's guilt of murder, inasmuch as they are not elements of murder, the prosecution presented additional evidence of defendant's guilt in this case. The evidence placing defendant at the comic book store during the narrow window of time in which the decedent was killed served not only to establish opportunity, but also to show that defendant had fabricated an alibi. Additionally, the prosecution presented evidence that defendant knew before anyone told him that the decedent was injured in the back room of the store, and defendant's suggestion that something might have fallen and hit the decedent in the head reflected his knowledge of where the decedent was found and the general nature of her injury. Moreover, several witnesses testified regarding defendant's unemotional or inappropriate reaction to the decedent's death.

The prosecution also presented evidence that many customers entered and left the store between 5:30 and 6:00 p.m., establishing the likelihood that the killer entered and left the store through the back room. Additionally, defendant was the only known person to have keys for the back door. The evidence also negated the likelihood that the decedent was killed during a robbery because neither the decedent's expensive jewelry nor the cash register money were

taken. Moreover, there was no evidence of a sexual assault, and the evidence suggested that the decedent had no known enemies. A jury properly could consider this body of evidence, combined with the evidence that defendant had both a financial incentive to kill the decedent and a personal motive to kill her to end an unhappy marriage and to allow him to pursue a relationship with Renee Kotula, to find that beyond a reasonable doubt defendant was guilty of murdering the decedent.¹

Finally, defendant argues that he is entitled to relief because the trial court used the wrong legal standard when denying his motion for a directed verdict. We agree with defendant that the trial court erred to the extent that it *initially* articulated an incorrect standard for deciding a motion for a directed verdict. However, the trial court later clarified that defendant's motion for a directed verdict was properly denied even under the correct standard set forth by defense counsel. Moreover, our review of a trial court's decision on a motion for a directed verdict is de novo, *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006), and, as set forth in the preceding analysis, the evidence was sufficient to establish defendant's guilt of first-degree premeditated murder beyond a reasonable doubt. Thus, any error in the trial court's initial statement of the legal standard for reviewing a motion for a directed verdict was harmless.

II. PROSECUTORIAL ERRORS

Defendant next argues that it was improper for the prosecutor to advance the theory during closing argument that he may have had an accomplice during the offense and that the accomplice may have been Renee Kotula, who could have been the false-bearded person observed by one witness outside the comic book store near 6:00 p.m. Defendant argues that the prosecutor's argument was improper because it lacked evidentiary support.

We review this preserved claim of prosecutorial misconduct de novo to determine if defendant was denied a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Claims of prosecutorial misconduct are analyzed on a “case-by-case basis by examining the record and evaluating the remarks in context[.]” *Id.*, quoting *People v Thomas*,

¹ Defendant's reliance on *Gill* is also misplaced. The issue presented in *Gill* was whether the prosecution presented sufficient evidence to prove the necessary elements of premeditation and deliberation. *Gill* involved a killing that “appear[ed] to have been the culmination of an argument and fight between [the defendant] and [the victim].” *Gill*, 43 Mich App at 604. This Court held that the evidence of motive was insufficient to support a charge of first-degree premeditated murder because “there is no evidence either of planning activity or of an opportunity for cool-headed reflection.” *Id.* at 603. Unlike in *Gill*, there was no evidence in this case that the decedent was killed during an apparent heated encounter. The evidence linking defendant to the decedent's death, viewed in conjunction with defendant's fabricated alibi, the manner of the decedent's death—a single gunshot wound to the head fired from close range—and the evidence showing that defendant had both a financial and personal motive to kill the decedent, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to find beyond a reasonable doubt that defendant killed the victim with premeditation and deliberation. See *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003).

260 Mich App 450, 454; 678 NW2d 631 (2004). “Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence.” *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

Although defendant characterizes the prosecutor’s remarks about Kotula acting as an accomplice as asserting facts not in evidence, the prosecutor’s statements were permissible inferences drawn from the evidence. The prosecutor did not merely assert that Kotula was defendant’s accomplice without citing evidence to justify that assertion. Renaud’s testimony that defendant answered the telephone in the store at a time that conflicted with defendant’s alibi raised the question of why defendant would jeopardize that alibi by answering the phone. The prosecutor addressed this question by drawing two inferences from the evidence, first, that defendant, as a businessman, instinctively did not want to disappoint a potential customer, and second, that defendant was expecting a call from an accomplice. Evidence was also presented that a witness had observed a false-bearded person outside the store near the time the decedent was killed. The prosecutor drew permissible inferences from the evidence to attempt to connect that evidence to the crime. The prosecutor inferred that the disguised person could have been defendant’s accomplice and inferred that Kotula would be the person most likely to be an accomplice because of the evidence of her involvement in a relationship with defendant, and because of the witness’s testimony that the disguised person had a feminine figure.

The prosecutor’s argument in this regard is distinguishable from the improper arguments in *Washington v Hofbauer*, 228 F3d 689 (CA 6, 2000), and *People v George*, 130 Mich App 174; 342 NW2d 908 (1983). In *George*, the prosecutor made an unfounded accusation against a witness to directly attack the credibility of that witness’s exculpatory testimony in a trial where identity was a central issue. In *Washington*, the prosecutor made assertions of fact that were not supported by the evidence to bolster the complainant’s credibility. Here, the prosecutor’s argument was based on facts in evidence, and the prosecutor drew inferences from that evidence to attempt to explain why the evidence was not inconsistent with defendant’s guilt. The prosecutor’s argument was based on reasonable inferences drawn from the evidence and, therefore, was not improper. Furthermore, the trial court protected defendant’s rights by instructing that jurors (1) that “you must decide what the facts of this case are[;] [t]hat is your job and no one else’s,” (2) that “you may only consider the evidence that has been properly admitted in this case,” and (3) that “the lawyers’ statements and arguments are not evidence.” Accordingly, defendant was not denied a fair trial.

III. RIGHT OF CONFRONTATION

Defendant argues that the trial court erred by allowing the prosecutor to improperly elicit what defendant characterizes as de facto expert opinion testimony from Lieutenant Keith that defendant was guilty. Defendant also argues that the trial court violated his constitutional right to confront the witnesses against him by not allowing him to question Keith regarding the bases for his elimination of alternate theories and suspects. Although defendant preserved his general claim of evidentiary error with an appropriate objection at trial, he did not raise a Confrontation Clause claim, leaving the constitutional issue unpreserved. *People v Dendel (On Second Remand)*, 289 Mich App 445, 450-451; 797 NW2d 645 (2010).

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *People v Kowalski*, 492 Mich 106, 119; 821 NW2d 14 (2012). "An abuse of discretion results when a circuit court selects an outcome falling outside the range of principled outcomes." *Id.* This Court reviews unpreserved claims of constitutional error for plain error affecting the defendant's substantial rights. *Dendel (On Second Remand)*, 289 Mich App at 451.

After examining Lieutenant Keith's testimony in context, we find no error in its admission. The defense theory at trial was that the offense was committed by another person, possibly Marshal Prog or Joe Calman, and the defense raised either robbery or sexual assault as possible alternative motives for the offense. At trial, the trial court permitted the prosecutor to question Keith regarding his investigation of other possible suspects or other possible motives for the offense. Keith explained what factors led him to eliminate robbery or sexual assault as a motive for the offense, and to eliminate other persons as suspects. Keith's testimony did not constitute improper opinion testimony that defendant was guilty, as his testimony ruled out sexual assault and robbery as motives, and ruling out Calman and Prog as perpetrators, was not based on any specialized knowledge. See MRE 702. Rather, Keith offered his reasons for why he concluded that the crime scene evidence was not consistent with either a robbery or a sexual assault, and his elimination of other persons as suspects. The trial court correctly characterized this testimony as explanations for the officer's decisions, not an opinion regarding defendant's guilt or innocence. Moreover, to the extent that Keith's testimony can be characterized as an opinion regarding alternate motives, it was permissible lay opinion testimony based on Keith's rational observations of the known evidence, and was therefore admissible under MRE 701. Additionally, Keith's testimony did not embrace the "ultimate fact" because ruling out robbery, sexual assault, or other specific suspects did not require an opinion on defendant's guilt or innocence.

We next address whether the trial court violated defendant's constitutional right to confront the witnesses against him by not allowing him to question Keith regarding the bases for his conclusions to exclude alternate motive theories and suspects. The Confrontation Clause, US Const, Am VI, states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" The Michigan Constitution also guarantees this right. Const 1963, art 1, § 20. But "[n]either the Sixth Amendment's Confrontation Clause nor due process confers on a defendant an unlimited right to cross-examine on any subject." *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). "The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). "The scope of cross-examination is within the discretion of the trial court." *Canter*, 197 Mich App at 564.

There was no plain error with respect to the Confrontation Clause regarding Calman. We note that defendant was permitted to present a witness, Petrilli, who testified regarding Calman's alleged propensity to rob comic book stores while armed with a gun. Thus, although defense counsel was not permitted to elicit this information from Keith, the information was nonetheless placed before the jury, which was then free to determine whether the police unfairly focused on defendant instead of pursuing more information about Calman.

The trial court sustained the prosecutor's objections to defendant's attempt to cross-examine Keith regarding the exclusion of Prog as a suspect on hearsay grounds. Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006). Hearsay is generally not admissible except as provided by the rules of evidence. MRE 802. "[A] statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007). "[O]ut-of-court statements are not hearsay if they are offered to explain the reasons for or propriety of a police investigation." *United States v Brooks*, 645 F3d 971, 977 (CA 8, 2011) (quotation marks and citations omitted).

Defendant contends that statements concerning Prog were not being offered to prove the truth of the matters asserted, because defendant intended to use the statements to criticize the thoroughness and fairness of the police investigation. However, Rita Prog's and Pat Flannery's statements in 2008, in which each denied accusing Prog, and each accused the other of falsely accusing Prog, could be used to prove the truth of the matters asserted, i.e., that any previous accusations were indeed false. Consequently, at least some of the statements could be characterized as hearsay. Thus, the decision to exclude the statements was within the possible principled outcomes, and thus not an abuse of discretion.

Defendant asserts that criminal defendants must be given wide latitude in cross-examination of witnesses, especially law enforcement officers, because a defendant's constitutional right to cross-examine witnesses takes precedence over evidentiary rules. However, a defendant's right to cross-examination does not require a trial court to ignore other evidentiary rules. See, e.g., *Canter*, 197 Mich App at 564, and *People v Mechigian*, 168 Mich App 609; 425 NW2d 199 (1988). In this case, Keith's information regarding Marshall Prog was derived from multiple hearsay sources. Pat Flannery originally reported Rita Prog's statements to the police, but he did not claim to have first-hand knowledge of the information. When Keith later spoke to Rita Prog in 2008, she denied having accused Marshall Prog and blamed Flannery for the false accusation. Also in 2008, Flannery recanted his prior accusation on the ground that he had learned about it second-hand from Rita Prog. Hence the statements that Keith received about Prog were based on multiple levels of hearsay, and under these circumstances the trial court's decision to exclude this line of cross-examination was not unreasonable. See *Watson v Greene*, 640 F3d 501 (CA 2, 2011). Accordingly, there was no plain error.

IV. EXCLUDING EVIDENCE OF A SUSPECT'S PRIOR MURDER CONVICTION

Defendant next argues that the trial court erred by precluding him from eliciting evidence that Joe Calman, a proposed alternative suspect, had previously been convicted of murder. The prosecutor objected to this line of inquiry on the ground that defendant was attempting to use a hearsay source, a computerized criminal history (CCH), to establish the prior conviction, and also argued that the evidence was not relevant. In its opinion and order denying defendant's motion for a new trial on this issue, the trial court held that the evidence was properly excluded because it was not relevant. On appeal, defendant argues that Calman's murder conviction was relevant to his theory that the police failed to adequately investigate other possible suspects. Defendant also asserts that he did not intend to introduce the CCH record for a hearsay purpose, because he only sought to ask a police witness whether he had consulted the Law Enforcement

Information Newtork (LEIN) system to determine that Calman had a prior murder conviction, and intended to use the CCH record to refresh the officer's memory if he did not recall. Defendant argues that by precluding cross-examination on this subject, the trial court violated his constitutional right to present a defense.

Although defendant preserved his general claim of evidentiary error by making an appropriate offer of proof at trial, MRE 103(a), he did not argue below that the exclusion of this evidence violated his constitutional right to present a defense. Accordingly, the constitutional issue is not preserved. *Dendel (On Second Remand)*, 289 Mich App at 450-451.

The United States and Michigan Constitutions provide a criminal defendant the right to present a defense. *Hayes*, 421 Mich at 278; US Const Ams VI, XIV; Const 1963, art 1, § 13. However, “[t]he right to present a defense is not absolute or unfettered.” *People v Orlewicz*, 293 Mich App 96, 101; 809 NW2d 194 (2011). “The accused must still comply with ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *Hayes*, 421 Mich at 279, quoting *Chambers*, 410 US at 302.

[A] ‘[c]omputerized criminal history,’ known as CCH, means information which is collected on individuals by criminal justice agencies, which is maintained in LEIN [Law Enforcement Information Network] and NCIC [National Crime Information Center] computer files, and which consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges and any dispositions arising therefrom. [*People v Elkhoja*, 251 Mich App 417, 419-420 n 2; 651 NW2d 408 (2002) vacated in part on other grounds __ Mich __ ; 658 NW2d 153 (2003), quoting 1981 AACCS, R 28.5101(e).]

The present version of Rule 28.5101, 2013 AC, R 28.5101, provides these definitions:

(g) “Criminal justice information” means data (electronic or hard copy) collected by criminal justice agencies that is needed for the performance of their functions as authorized or required by law.

(h) “Criminal justice information systems” (CJIS) means systems provided by a governmental agency or authorized private entity that store and/or disseminate information used for the administration of criminal justice and public safety.

* * *

(j) “Law Enforcement Information Network” (LEIN) is the communication network that supplies information sharing for Michigan criminal justice agencies, the portal that links to and provides access to various state and national databases and the hot files.

The LEIN information system “shall only be used for the administration of criminal justice or public safety purposes[,]” and “shall not be disseminated to an unauthorized agency,

entity, or person.” Rule 25.5208(3) and (4). Disclosure of information from the LEIN is prohibited by statute, see *People v Elkhoja*, __ Mich __ ; 658 NW2d 153 (2003) (reversing in part for reasons stated in the dissenting opinion in *Elkhoja*, 251 Mich App at 451-453 (SAWYER, J, dissenting)).

We agree with the trial court that Calman’s prior murder conviction was not relevant. “Evidence is relevant if it tends to make a ‘fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” *Orlewicz*, 293 Mich App at 102, quoting MRE 401. Calman’s prior murder conviction had no relevance to the purpose for which defendant sought to offer the evidence, i.e., to show that another person committed the homicide, and that the police failed to properly investigate alternate suspects. Defendant’s theory was that Calman was a likely suspect because of his criminal activities dealing with collectables. Calman’s prior murder conviction involved a revenge killing, committed 15 years before the decedent’s homicide. That prior conviction did not make it more probable that Calman killed the decedent during a robbery, or that the police unjustifiably excluded Calman as a suspect. Thus, the trial court did not abuse its discretion in excluding this testimony. Further, the trial court did not prevent defendant from otherwise offering evidence of alternate suspects or from attacking the adequacy of the police investigation. Accordingly, defendant was not denied his constitutional right to present a defense.

V. JURY VERDICT

Defendant’s last claim of error relates to the jury’s verdict on the remaining charges of felony-firearm, insurance fraud, and false pretenses over \$100. When the jury initially returned its verdict finding defendant guilty of first-degree premeditated murder, it failed to return a verdict on the remaining counts because it mistakenly believed that it was not required to do so if it found defendant guilty of first-degree murder. Therefore, the trial court directed the jury to resume deliberations to return a verdict on the remaining counts. Approximately two minutes after the jury was excused to resume deliberations, it returned its verdict finding defendant guilty of the remaining charges.

Defendant now argues that he was effectively denied his right to a jury trial on the charges of felony-firearm, insurance fraud, and false pretenses, because the jury could not have deliberated to decide those counts in only two minutes. Defendant relies on cases in which a trial court was found to have abused its discretion in declaring a mistrial for a deadlocked jury when the jury’s deliberations were unreasonably short in view of the volume of evidence and complexity of the issues. See *United States v Lorenzo*, 570 F2d 294 (CA 9, 1987). Acknowledging that there is no record to document what occurred in the jury room during the two minutes when the jury resumed deliberations, defendant suggests that this Court remand for an evidentiary hearing on this issue. Because defendant did not request any hearing on this issue in the trial court, or otherwise object when the trial court accepted the jury’s verdict on the remaining counts two minutes after the jury resumed deliberations, this issue is not preserved. *People v Benberry*, 24 Mich App 188, 191-192; 180 NW2d 391 (1970). Accordingly, defendant has the burden of demonstrating a plain error that affected his substantial rights. *Dendel (On Second Remand)*, 289 Mich App at 451.

The circumstances of this case do not indicate that the jury convicted defendant of felony-firearm, insurance fraud, and false pretenses without an opportunity to fairly consider the evidence. Factually, the felony-firearm, insurance fraud, and false pretenses charges hinged on whether defendant could be connected to the decedent's murder. The factual basis for the felony-firearm charge was that defendant used a firearm to kill the decedent. The factual basis for the insurance fraud charge was that defendant knowingly made false statements of fact material to an insurance claim, with the intent to defraud an insurer, by applying for life insurance benefits based on the death of an insured who he intentionally killed and by applying for property loss benefits based on a theft of property from defendant's store during the offense in which the decedent was killed. The factual basis for the false pretenses claim was that defendant obtained more than \$100 by providing false information concerning a theft that did not occur. The jury spent two days deliberating the murder charge, and ultimately unanimously determined that defendant murdered the decedent. That determination resolved the principal factual dispute that was central to the remaining charges. Accordingly, we reject defendant's claim that the jury failed to deliberate on the charges of felony-firearm, insurance fraud, and false pretenses.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray