STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 9, 2013
v	No. 307600 Saginaw Circuit Court
RODNEY ALTON SLAYTON, Defendant-Appellant.	LC No. 10-034893-FC

Before: FORT HOOD, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(a). The trial court sentenced defendant as a fourth habitual offender to life imprisonment without parole. Defendant appeals as of right. We affirm.

Defendant's conviction arose out of the 1992 murder of a Saginaw woman. The police investigated the murder, but closed their investigation after a few years without resolving the crime. Several years later, a "Cold Case" police unit identified defendant as a suspect through the Combined Offender DNA Index System ("CODIS"). At the time, defendant was on parole for an unrelated conviction. Defendant's parole was rescinded based on the CODIS information.

Defendant's wife approached police and agreed to wear a wire to tape a conversation between herself and defendant. She then visited defendant in prison, wearing the wire. The police recorded their conversation, during which defendant made several incriminating statements.

At defendant's trial on the murder charge, the prosecutor played an audiotape of the recorded conversation and gave the jurors transcripts of the recording. In addition, the prosecutor presented evidence that established that defendant's DNA was consistent with DNA found in the victim's body. Further, defendant's ex-wife testified that on the date of the murder, defendant came home and told her that he had just killed someone. Other relatives testified that defendant had told them he had murdered someone.

On appeal, defendant first argues that his Fifth and Sixth Amendment rights were violated when the police questioned him during a buccal swab collection and when his wife recorded the conversation. We disagree.

The Fifth Amendment of the United States Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself." US Const, Am V; *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The *Miranda* principles safeguard citizens against the coercion that can occur when a citizen is suddenly engulfed in a police-dominated environment. See *Howes v Fields*, 565 US ___, ___; 132 S Ct 1181; 182 L Ed 2d 17 (2012). *Miranda* warnings are required when the police have taken an individual into custody. *Id*., 565 US at ___; 132 S Ct at 1189. "'Custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Id.*

In contrast, the Sixth Amendment guarantees that "[i]n criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." US Const, Am VI. The Fifth and Sixth Amendment rights to counsel are separate and distinct. The Fifth Amendment right is implicated in *Miranda* situations. *People v Williams*, 244 Mich App 533, 539; 624 NW2d 575 (2001). The Sixth Amendment right attaches after adversarial proceedings have been commenced. *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994).

In this case, the police questioning during the buccal swab collection did not violate defendant's Fifth Amendment rights. Defendant was incarcerated at the time of the swab as a result of the parole rescission. Furthermore, defendant acknowledged that he knew his rights and that he could have invoked them to stop the questioning. He also acknowledged that he could have left the interview room had he asked to do so. Under these circumstances, *Miranda* warnings were not necessary. See *People v Roberts*, 292 Mich App 492, 504-505; 808 NW2d 290 (2011).

Similarly, the recording of defendant's conversation with his wife did not constitute a Fifth Amendment violation. In *Illinois v Perkins*, 496 US 292; 110 S Ct 2394; 110 L E2d 243 (1990), the Supreme Court explained that a conversation between a suspect and an undercover police agent does not implicate *Miranda*. *Id.* at 296. In *Perkins*, an undercover agent posed as an inmate and recorded a conversation with the defendant. *Id.* at 294-295. The Supreme Court determined that the coercive environment present in a traditional police interrogation was not present, and that, accordingly, *Miranda* warnings were not necessary. *Id.* at 296. "Coercion is determined from the perspective of the suspect." *Id.* (citation omitted). Likewise, in *People v Fox (After Remand)*, 232 Mich App 541; 591 NW2d 384 (1998), an inmate was wired and recorded a conversation with the defendant. *Id.* at 546. The defendant argued that his Fifth Amendment rights were violated when he was not given *Miranda* warnings. *Id.* at 552. However this Court determined, based on *Perkins*, that the coercive environment of a custodial interrogation was not present between two inmates talking, even if one of the inmates was acting as a police agent. *Id.* at 553-553. The same reasoning is applicable in this case; the circumstances of defendant's conversation with his wife did not require *Miranda* warnings.

Correspondingly, defendant has not shown that the buccal swab interview or the conversation with his wife violated his Sixth Amendment rights. Defendant had not been formally charged in this case during the buccal swab, nor had he been charged when his wife recorded their conversation. Because adversarial proceedings against defendant had not yet commenced, defendant's Sixth Amendment right to counsel had not attached. Cf. *Anderson (After Remand)*, 446 Mich at 402.

Next, defendant argues that the recording of his conversation with his wife violated MCL 750.39c, as well as Prison Work Rules 13 and 54. Defendant did not preserve this issue by raising it in the trial court; we review the issue for plain error affecting a substantial right. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To avoid forfeiture for plain error, the defendant carries the burden of proving: (1) there was an error, (2) the error was clear or obvious, and (3) the error affected defendant's substantial rights. *Carines*, 460 Mich at 763. Reversal is warranted only if the error seriously affected the integrity of the judicial system or resulted in the conviction of an actually innocent person. *Id.* at 763-764.

MCL 750.539c is part of Michigan's eavesdropping statutes. It provides in pertinent part that "[a]ny person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties . . . is guilty of a felony." However, our Supreme Court held in *People v Collins*, 438 Mich 8, 11; 475 NW2d 684 (1991), that police recording of a conversation with the consent of one participant does not violate either the United States or Michigan Constitutions. *Id.* at 11, 40. Moreover, in *Lewis v LeGrow*, 258 Mich App 175, 185; 670 NW2d 675 (2003), the Court analyzed MCL 750.539c and concluded that "a participant in a private conversation may record it without 'eavesdropping' because the conversation is not the 'discourse of others.'" Under *Collins* and *LeGrow*, defendant's consent was not needed to record the conversation, because his wife consented to the recording.

Michigan Department of Corrections ("MDOC") work rule 54 prohibits recording of conversations without consent of all parties being recorded, except under certain circumstances. MDOC Employee Handbook, p 37 (2006). One of the exceptions allows recordings made "with prior approval of the Regional Prison Administrator . . . or Central Office Administrator . . . ." *Id*., Rule 54(B). Work rule 13 indicates that "[a]ll employees shall be familiar with, enforce, and follow all Department rules, regulations, policies, and procedures." *Id.* at p 20. In this case, the recording of the conversation did not violate any prison work rules. An officer testified that "we had to get the okay from the prison, you know, to let them know what we were doing . . . ." The officer's testimony indicates that prison officials authorized the recording; therefore, defendant has failed to demonstrate a plain error warranting reversal with regard to the recording. *Carines*, 460 Mich at 763.

Next, defendant argues that the trial court violated his due process rights by allowing a witness to state that she assumed defendant was guilty. We review for abuse of discretion the trial court's decision to admit evidence. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). Generally, only relevant evidence is admissible. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable. MRE 401. However, relevant evidence will be excluded if the probative value is substantially outweighed by the prejudicial effect. MRE 403; *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Because all evidence tends to be prejudicial to the opposing party, only evidence that is unfairly prejudicial will be excluded. *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010). Evidence tends to be unfairly prejudicial when it is marginally probative and there is a danger that the jury will give the evidence undue weight. *Id.* The determination of whether the probative value substantially outweighs prejudicial effect is generally best left to the trial court's contemporaneous assessment. *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009).

MRE 701 indicates that lay opinion or inference is permissible when the opinion or inference is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 704 allows opinion or inference testimony on the ultimate issue that is to be decided by the jury. In a criminal case, however, a witness may not express an opinion on the defendant's guilt or innocence. *People v Moreno*, 112 Mich App 631, 635; 317 NW2d 201 (1981). The defendant's guilt or innocence is an issue that is solely the responsibility of the jury to decide. *People v Suchy*, 143 Mich App 136, 149; 371 NW2d 502 (1985).

When defendant's ex-wife was testifying, the follow exchange occurred:

> *Q.* And—now, as—did you—what was your reaction to this once [defendant] had proved to you that he had murdered this person?
>
> MR. O'FARRELL: Objection to that form of the question, Judge.
>
> MR. FEHRMAN: I guess I don't even understand the objection.
>
> THE COURT: You're asking her present sense impression?
>
> MR. O'FARRELL: Well, it calls for a conclusion, his conclusion that she's concluded that's he's proven that he killed this lady. That's an improper question.
>
> THE COURT: No, I don't think that's what's being asked. I think you're asking her—her to explain how he—how he appeared or—
>
> MR. FEHRMAN: What I'm asking for is what did she do afterwards. What—what action did she take, and I can follow it up.
>
> THE COURT: No, that's fine, go ahead. I'm going to allow it.
>
> *Q.* Were you convinced that he had murdered this person?
>
> *A.* Yeah, by what he had told me and I was sitting in urine, and he's went to jail quite a few times for spouse abuse.
>
> THE COURT: I don't want you to get into any of that. I'm going to ask the jury to disregard that at this point.

Defendant argues that the trial judge essentially directed a verdict because the jury was unduly influenced by the trial judge's position. Defendant further argues that the question assumed that defendant was guilty and the trial judge's decision to allow the line of questioning was improper. While a witness may not express an opinion on the defendant's guilt or innocence, *Moreno*, 112 Mich App at 635, here the prosecutor clarified that he was not attempting to get an opinion on defendant's guilt or innocence, but was attempting to ascertain what defendant's ex-wife did after defendant told her he killed someone. She did not go to the police, and the prosecutor was attempting to have her explain this to the jury. Although the

prosecutor asked what she did after defendant proved he had killed someone, this question was based on the testimony that defendant told her he had killed someone and then drove her by the crime scene. The trial judge did not err in overruling the objection. Defendant's ex-wife was not commenting about defendant's actual guilt or innocence, but was discussing why she did not go to the police.

Defendant next argues that his trial counsel was ineffective for failing to move for a mistrial or to object to the comment by defendant's ex-wife that defendant had "went to jail quite a few times for spouse abuse." Both the United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1 § 20. Generally, effective assistance is presumed, and the defendant carries the burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). When raising a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below professional norms, and that but for counsel's ineffectiveness, the ultimate result would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). In addition, the defendant must show that the proceedings were fundamentally unfair or unreliable because of counsel's ineffectiveness. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). But counsel is not required to make frivolous or meritless motions or objections. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

Although defense counsel did not object to the comment, the trial court stopped the witness and told the jury to disregard the comment. After closing argument, the trial judge instructed the jury that they were to pay attention to all instructions that had been given, including instructions given throughout the trial. The trial judge also gave the following instruction to the jury: "At times during the trial, I've excluded evidence that was offered or stricken testimony that was heard. Do not consider those things in deciding the case. Make your decision only on the evidence that I let in and nothing else." Defense counsel was not ineffective because the trial court cured any prejudice caused by the comment with its instructions. Jury instructions are presumptively curative, and jurors are presumed to follow their instructions. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). Counsel's objection and/or a motion for mistrial would have been futile because the trial court took corrective steps, and counsel cannot be ineffective for failing to make futile objections.

Finally, defendant argues that the prosecutor failed to present sufficient evidence that the homicide was premeditated and deliberated. We disagree. This Court reviews sufficiency of the evidence issues de novo, examining the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that every essential element was proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010).

The prosecutor has the burden to produce evidence that demonstrates guilt beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). Generally, circumstantial evidence and the reasonable inferences that can be drawn from that evidence can amount to sufficient evidence. *Carines*, 460 Mich at 757. What inferences can be drawn from the evidence and the weight given to those inferences are left to the jury. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The jury is also responsible for determining questions of credibility. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98

(2009). When reviewing whether there was sufficient evidence, this Court "is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To establish first-degree premeditated murder, the prosecutor must prove beyond a reasonable doubt that the defendant (1) intentionally killed the victim, and (2) the killing was both premeditated and deliberate. *People v Abraham*, 234 Mich App 640, 656; NW2d 736 (1999). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id.* (internal quotation marks and citation omitted). Both premeditation and deliberation can be established through circumstantial evidence and the reasonable inferences arising from that evidence. *Id.* Evidence of the following factors can be used to establish premeditation and deliberation: "(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." *Id.* (internal quotation marks and citations omitted). In the case of strangulation, evidence of strangulation can be used as evidence that there was an opportunity for a second look. *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999). In addition, evidence of defensive wounds on the victim can also be circumstantial evidence of premeditation. *Id.*

Here, the prosecutor presented sufficient evidence for the jury to determine that the murder was both premeditated and deliberated. The victim was strangled to death. There was testimony indicating that the victim would have lost consciousness and that the killer would have had to continue applying pressure to her throat for death to result. Given the testimony regarding the time between unconsciousness and death, the jury could reasonably conclude that defendant had enough time to consider his actions. Moreover, after the homicide, defendant told his ex-wife and his relatives that he had killed someone. Additionally, the testimony indicated that defendant was more than willing to show his ex-wife the crime scene to prove he had killed someone. Based on the evidence presented, it was reasonable for the jury to infer that defendant had the opportunity to consider his actions.

Affirmed.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell