

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 16, 2013

v

ELIJAH DUJAUN KEY,

Defendant-Appellant.

No. 306951
Wayne Circuit Court
LC No. 11-004605-FC

Before: JANSEN, P.J., and CAVANAGH and MARKEY, JJ.

PER CURIAM.

Defendant appeals by right his convictions following a jury trial of second-degree murder, MCL 750.317,¹ murder committed in the perpetration of a felony (felony murder), MCL 750.316(1)(b), first-degree home invasion, MCL 750.110a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 25 to 50 years' imprisonment for second-degree murder, life in prison for felony murder, 2 to 20 years' imprisonment for first-degree home invasion, and two years' imprisonment for felony firearm. We affirm in part, and vacate in part.

First, defendant argues that the trial court erroneously admitted multiple hearsay statements made by Melisa Ann Robinson, the decedent, to witnesses regarding her fear of defendant, threats defendant made to the decedent, and indications that if something were to happen to her, defendant was responsible. We review a trial court's decision regarding admissibility of evidence for an abuse of discretion, but whether a rule of evidence or statute precludes the admission of the evidence is a question of law reviewed de novo. *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004).

The Michigan Rules of Evidence provide an exception to the general rule excluding hearsay, MRE 802, for statements regarding the declarant's "then existing state of mind, emotion, sensation, or physical condition" as follows:

¹ Defendant was charged but acquitted of first-degree premeditated murder. MCL 750.316(1)(a).

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. [MRE 803(3).]

The admission of hearsay to prove past events violates the purpose of MRE 803(3). *Moorer*, 262 Mich App at 73. But statements about the declarant's future intentions or plans are contemplated under MRE 803(3). Also, statements may be admitted as non-hearsay, not to show the truth of the matter asserted, MRE 801(c), but to show an effect on the persons hearing them. See *Moorer*, 262 Mich App at 70-71, discussing *People v Fisher*, 449 Mich 441; 537 NW2d 577 (1995). Further, statements may be admitted to show it more or less likely that the declarant took certain actions. See *People v Coy*, 258 Mich App 1, 13-14; 669 NW2d 831 (2003) (murder victim's statements made it more likely she knew and admitted her killer to her apartment). If evidentiary error occurs, it "...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." *Id.* at 12; see also *Moorer*, 262 Mich App at 74.

The decedent's daughter, Maghan Beck, the decedent's brother, Kevin Robinson, the decedent's niece, LaToya Robinson, and the decedent's neighbor, Markeette House, all testified regarding the decedent's statements to that defendant made threats to her, she feared defendant, and she believed that if anything were to happen to her, defendant would be the person responsible. Defendant argues this testimony was rank hearsay intended to prove the truth of the matters asserted and therefore inadmissible. The prosecution argues that the trial court properly admitted the testimony under MRE 803(3) to show the decedent's then existing fear of defendant, which made it unlikely that the decedent would have granted defendant permission to enter the decedent's home. That is, the prosecutor sought to introduce the evidence as relevant to proving a necessary element of home invasion: a breaking and entry or an entry without permission. MCL 750.110a.

In this case, even if the trial court erred by admitting evidence of the decedent's statements, there was overwhelming evidence of defendant's guilt. Kyle Hess testified that on the evening of April 24, 2011, Easter Sunday, he met defendant. Defendant was with Kyle's cousin, Travis Hess, when Kyle met defendant. Travis and defendant picked up Kyle from Kyle's home in Waterford, Michigan. But according to Travis, Kyle met him and defendant at Travis's apartment in Waterford. The men then drove to defendant's mother's home on Cameron Street in Detroit. When the men arrived at the home, defendant started arguing with decedent on the front porch of the home. Defendant told decedent, "don't talk to us." The decedent then walked to her home next door and said, "you ain't [sic] going to do s...", and then walked inside that home. Defendant then walked inside his mother's home and grabbed a pistol and shotgun. Defendant soon after walked next door to the home into which the decedent had gone. When defendant walked next door, Kyle and Travis were on the front porch of defendant's mother's home. Defendant then went inside the decedent's home with a shotgun. Kyle heard a boom, a shotgun blast. Kyle then saw defendant leave the decedent's home with the shotgun, retrieve a shell casing from inside the gun, and place it in his pocket. According to

Kyle, at some point after he heard the shotgun blast, defendant said without remorse:

I'm done with that bitch, I have been dealing with her for five years. I shot that bitch. She's done.

Later, defendant told Kyle that he shot the decedent in the neck.

When considering Hess's testimony, we cannot conclude that it affirmatively appears more probable than not that error in admitting the decedent's statements regarding threats made by defendant, her fear of defendant, and her belief defendant would be responsible if anything were to happen to her, was outcome determinative. Therefore, reversal is not required. *Moorer*, 262 Mich App at 74.

Second, defendant argues that the prosecution made improper appeals to the jury for sympathy for the decedent. This Court reviews unpreserved claims of prosecutorial misconduct for plain error that affected the defendant's substantial rights. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010). Only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, is reversal warranted. *Id.* at 461.

The prosecution asserted in closing argument that the decedent was a "good person," that her daughters, to whom she spoke frequently, loved her, that she was close to her brother, and that her neighbor, House, liked her. The prosecution also suggested in its rebuttal argument what the decedent would say if she could speak:

[S]he would say why, why? This is not right. I deserve to live, I want to live. I love my family and friends. I have a lot to do. That's what she would say to us. She would say why did you kill me and then she would realize, wait, I know. I know why you killed me. You killed me for the same reason I have been in fear of you for years.

. . . Why did you do it? I take it back Melisa would say. I don't need to ask you why. I know why.

We assume for the purpose of our analysis that the prosecution's statements regarding the decedent's character, familial relationships and friendships, in addition to referencing the decedent's desire and will to live, crossed the line from vigorous advocacy to improperly appealing to the jury to sympathize with the decedent. See *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008). But given the overwhelming evidence of defendant's guilt, we find that these comments were not so inflammatory as to warrant reversal. A timely objection and curative instruction could have remedied any prejudicial effect the prosecutor's comments may have had, so there was no error requiring reversal. *Id.* at 238. Additionally, the trial court instructed the jury that a lawyer's statements and arguments are not evidence. Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *Id.* at 235, 237. Thus, the trial court's instructions cured any error there might have been.

Lastly, defendant argues that the trial court abused its discretion by admitting a photograph of the decedent's shotgun wound into evidence. "The trial court abuses its discretion when its decision is outside the range of principled outcomes." *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012).

In general, all relevant evidence is admissible at trial. MRE 402; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). "Relevant evidence" is "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." MRE 401. This broad definition renders evidence admissible if it is helpful in throwing light on any material point. *Aldrich*, 246 Mich App at 114. But even when evidence is relevant, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. *Id.*; MRE 403.

Based on the foregoing, photographic evidence is generally admissible provided it is relevant, MRE 401; MRE 402, and its relevance not substantially outweighed by unfair prejudice, MRE 403. See *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009). That photographs may be gruesome is not alone reason to exclude them from evidence. *Id.* at 227-228; *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995). "While gruesome photographs should not be admitted solely to garner sympathy from the jury, a photograph that is admissible for some other purpose is not rendered inadmissible because of its gruesome details." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 544; 775 NW2d 857 (2009). Also, the prosecution is required to prove each element of a charged offense regardless of whether the defendant specifically disputes any of the element; patently, photographs may be helpful to meet this burden. *Id.*

Defendant was originally charged with first-degree premeditated murder. "The elements of first-degree 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). While the photograph of the decedent is quite gruesome—it is a close up picture of the entry wound in the back of decedent's neck and the side of her face—to satisfy the elements of the charged crime the prosecution was required to prove that defendant intentionally and deliberately killed the decedent. This is true even though defendant was acquitted of first-degree premeditated murder and convicted of second-degree murder. The photograph was properly admitted as evidence to establish the elements of first-degree murder. *Mesik (On Reconsideration)*, 285 Mich App at 544.

While defendant does not raise an issue regarding double jeopardy on appeal, we note that multiple murder convictions arising from the death of a single victim violate the constitutional protection against multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344, 347 (2000). Therefore, defendant's conviction and sentence for first-degree felony murder is affirmed, but his conviction and sentence for second-degree murder is vacated. See *id.* at 429-430.

We affirm in part, vacate in part, and remand for the issuance of an amended judgment of sentence. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Jane E. Markey